

TANZANIA / JUDGMENT

19770208 TZHC Dar es Salaam

COURT
TZHCDECIDED
8 February 1977

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IN HIGH COURT OF TANZANIA AT ARUSHA HI1 COURT CRIMINAL APPEAL NO. 297 OF 1975 C.F." COURT CRIMINAL APPEAL NO. 298 OF 1975 ORIGINAL CRIMINAL CASE NO. 67 OF 1975 OF THE DISTRICT COURT OF HADENI DISTRICTAT HANDENI Before J.M.B. NFUKO Esq., District Magistrate OMARI RAMADHAN.I ..ppe. A n s OMARI HAS SAN versus

- THE REPUBLIC ,. Respondent CHARGE: Storebreaking and Stealing c/s 96(1) and 265 of the Penal Code. J U D G M E N T BIRON, J. - The two appellants who were charged together with two other men who were acquitted, were = convicted of storebreaking and stealing and they were each sentenced to imprisonment for three years. They are now appealing and their appeals are consolidated. The two appellants were memberb of ihe Kwamagoma Ujamaa village. On the 21st April, last year a bag of maize was found missing from the s - o'e of the Ujarnaa village. Two girls, one whose age is given ar ten years, that of her companion is not given, as it E.thould have been., were found too young to be sworn, and tley ave• their evidence unsworn. .. /2 2 - They both testified that, during the morning of the 21 st April, when most of the villagers were away, they saw the two appellants enter the village store, and come out carrying a bag of maize. When it was discovered that the store had been broken into, the padlock of the door having being broken, and a bag of maize missing, the two girl witnesses reported what they had seen. The villagers searched the houses of the two appellants, in the house of one they found a quarter of a kilo of maize, which the particular appellant said he had been given by the other appellant, in whose house were found four kilos of maize, and he is recorded as saying that the maize had been sold to him by one Juma Rashid. However, a witness Athuman Ibrahim (P.w,.1) testified that Juma Rashid denied having sold any maize to either of the appellants. Both appellants when given the opportunity of making their defence, elected to remain silent, but one of them called a witness, who testified that on the 21st April, he saw one of the appellants buying flour from Jurna Rashid, for which he paid shs. 10/.' The learned magistrate in his judgment cited two cases of this court to the effect that a court should satisfy itself before taking the evidence of children of tender years that they understand the duty of speaking the truth. And it is apparent that he conducted a voir dire examination of the two children, and was satisfied that they understood the duty of telling the truth. I, -3-- It is remarked that it is always advisable that a magistrate should set out the voir dire examinatiOn, so that a reviewing tribunal can also judge whether the witness understood the duty of' telling the:.

truth. The magistrate appears to have overlooked the provisions of the Evidence Act 19.67 section 127(2) of which reads:-

- 127(a) Where in any criminal cause or matter any child of tender years called as a witness does not, in the opinion of the court, understand the nature of an oath, his evidence may be received, though not given upon oath or affirmation, if in the opinion of the court, to be recorded in the proceedings, he is possessed of sufficient intelligence to justify the reception of his evidence, and understands the duty of speaking the truth. Provided that where evidence received by virtue of this subsection is given On behalf of the prosecutioi, the accused hall not be liable to be convicted unless such evidence is corroborated by some other material evidence in support thereof implicating the accused.." The magistrate found corroboration in the evidence of the witness who stated that he found the store having been broken into and a bag of m a ize missing. This, it Is pointed out with respect, does not in the least constitute corroboration, as for any item of evidence to constitute corroboration it must be such as to connect the accused with the offence he is charged with. The fact that the store was broken Into and a bag of maize missing, does not in the least implicate either of the two appellants in thm ofeae they were charged with. • 1:
- -..... - •-
-- — . 4- There is, however, corroboration in the evidence that some maize was found in the house of each of the two appellants. There is also the evidence of the Ward Secretary, who testified that when the two appellants were brought before him and he questioned them, they admitted having broken into the store and taken a bag of maize therefrom, giving as their excuse 'hunger'. However, lam not altogether certain whether such evidence is really admissible, as I do not know the powers of a Ward Secretary as to .0 whether he has power of arrest, and so is equated to a police officer, so that any confession made to him is inadmissibled However,, even without the evidence of the Ward Secretary, I am satisfied on my evaluation of evidence as was the learned magistrate, that the evidence is sufficient to establish the guilt of the two appellants. Nor in their petitions of appeal which are identical, have the appellants raised any new matter which has not been dealt with by the trial court or by myself. With regard to the sentence imposed on each of the appellants, it is the minimum prescribed in the Ninimum Sentences Act 1972, the offence being a scheduled one under the said Act. The two appeals are accordingly dismissed. Delivered in court at Dar es Salaam this 8th day of February, 1 977. (PHILIP B'IRON) JUDGE 8thFebruary1 fl

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