

TANZANIA / JUDGMENT

simon mapunda vs republic

2005 tzhc 129 28 october 2005

COURT
TZHCDECIDED
28 October 2005

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1 IN THE HIGH COURT OF TANZANIA AT PAR ES SALAAM CRIMINAL APPEAL NO. 24 OF 2005
(Originating from Cr. Case No. 220 of 2003 of Kiiombero District Court, P.M.Mabu!a,DM) SIMON
MAPUNDA..... APPELLANT VERSUS REPUBLIC..... RESPONDENT

JUDGMENT

SHANGWA, J.: The Appellant Simon Mapunda was charged in the District Court of Kiiombero with the offence of Breaking into a building i.e store and committing an offence c/s 296 (1) of the Penal Code. He was jointly and together charged with eight other persons. Those persons were acquitted. He was found guilty and convicted of the offence charged. He was sentenced to five years in prison. He started serving his sentence on 7.5.2004. He is now appealing against the conviction and sentence which were imposed on him. During trial, the prosecution alleged that on 16.3.2003, at night time, at Kilombero Sugar Company within Kilombero District, Morogoro Region, the Appellant and eight other persons did break and enter into the store of Kilombero Sugar Company and that after doing so they stole various properties belonging to Kilombero Sugar Company valued at shs. 53,299,539.99 cts. The prosecution called a total of five witnesses. They testified as follows: P.W.1 William Lema told the trial court that he is a Store Manager and that on 17.3.2003, he was informed by one Emmanuel Mitanda that some materials were missing from the store. He said that after being so informed, he went to the store and found that some properties were missing from therein. These are Electrodes, Pipes, Mehtlin and gumboots. He said that no breaking took place and that he reported the matter to the Management. P.W. 2 Humphrey J. Luhanga told the trial court that he is an accountant at Ilovo, and that on 7.5.2003, he made auditing in the store where the properties alleged to have been stolen were being kept, and that he did so in the presence of the Appellant and two other persons who were charged as 8th and 9th accused. He tendered his audit report and it was admitted and marked by the trial court as exhibit P 1. P.W. 3 Justine Herman told the trial Court that the Appellant is one of the store keepers who used to keep the 4 keys of the complainant's store and that on 16.3.2003 he handed them over to the 2nd accused Daniel Ngwero. P.W. 4 Insp. Kamal G. Isangula told the trial Court that he searched the house of the 3rd accused Emmanuel Kaliyata and found him with one staff boot, and that he searched the house of the 4th accused Kudira Ally @ Mkuheti and found him with one pair of gumboot, staff boot, etc, and that he searched the house of the 5th accused

Joseph Ngalimoto and found him with one staff boot and a mobile phone, and that he searched the house of the 6th accused Erick Ngali and found him with the welding Nossel. He tendered the items which were found with the said accused persons and they were admitted by the trial court and marked as exhibit P 4. P.W. 5 E.285 Detective Sergeant Joseph told the trial Court that the Store from where the alleged properties were 5 reported missing was not broken into. He said that the Appellant (7th accused) used to keep the keys of the said store together with the 8th accused Onesmo Hiromini. In his defence, the Appellant told the trial court that on 17.3.2003 when he reported on duty, he noted that some materials were missing from the store and that he informed Emmanuel Mitanda (9th accused) and P.W. 1 William Lema about it. He denied to have committed the offence charged. At page 3 of the typed judgment, the trial District Magistrate P.M. Mabula observed as follows and I quote: "Going on with the evidence there is a proved fact that there properties got stolen from the store which their keys were under the Custody of the Seventh accused. It has been proved that the auditing was conducted in his presence and the loss was proved. He is the responsible person in this case." After so observing, he proceeded to hold that the prosecution side has proved the charge against him and after so holding he convicted him thereof. I have carefully gone through the testimonies of the above mentioned five prosecution witnesses who testified before the trial Court for the purposes of satisfying myself as to whether or not the Appellant committed the offence charged. I must state at once that after doing so, I have not found anything which proves beyond reasonable doubt that he did so. None of the five prosecution witnesses testified to the effect that the complainant's store was broken into by anybody let alone the Appellant. In fact P.W.1 and P.W. 5 said that there was no breaking at the complainant's store. Also, none of the prosecution witnesses testified to the effect that the Appellant was searched and found in possession of any item reported to have been missing from the complainant's store. It appears that in convicting the Appellant of the offence charged, the learned trial District Magistrate P.M. Mabula was influenced by the testimonies of P.W.3 Justine Herman and P.W. 5 E 285 Detective Sergeant Joseph who testified to the effect that the Appellant used to keep the Store's keys. In my opinion, the mere fact that the Appellant was the Store keeper who used to keep the Store's keys from where 8 the complainant's properties were found missing, does not conclusively prove that he is the one who stole them. The learned State Attorney for the Respondent Mr. A.E. Mwipopo did not support his conviction. He remarked that the evidence which was adduced by the prosecution only proves that there was a loss of goods from the complainant's store but does not prove that the Appellant is the one who stole them. I totally agree with his remarks. In criminal matters, a mere suspicion that the accused committed the offence charged cannot form a proper base for his conviction. Before convicting the accused of the offence charged, the trial court must make sure that there is sufficient evidence which proves beyond reasonable doubt that he committed the offence charged. A failure to do so will always lead to a wrong conviction. In this case, the complainant company's properties might have been stolen 9 from its store by persons other than the Appellant holding master keys or duplicate keys. As there is no evidence on record to prove beyond reasonable doubt that the Appellant committed the offence charged, I hereby quash his conviction, set aside the sentence of five years which was imposed on him by the trial District Magistrate and order that he should be set at liberty forthwith unless otherwise he is lawfully detained on another matter. A. SHANGWA

JUDGE 28.10.2005 10 Delivered in Court in the absence of the Appellant and in the presence of Mr A.E. Mwipopo State Attorney for the Respondent. A. SHANGWA JUDGE 28.10.2005

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