

**IN THE COURT OF APPEAL OF TANZANIA  
AT ARUSHA**

**(CORAM: ORIYO, J.A., KAIJAGE, J.A., And MUSSA,J.A. )**

**CRIMINAL APPEAL NO. 279 OF 2011**

**HAJI SHABAN BUKHO .....APPELLANT  
VERSUS  
THE REPUBLIC..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Arusha)**

**(Nyerere, J.)**

**Dated the 30<sup>th</sup> day of September, 2011  
in  
Criminal Appeal No. 34 of 2011**

**JUDGMENT OF THE COURT**

**12<sup>th</sup> & 20<sup>th</sup> June, 2013**

**MUSSA, J. A.:**

In the District Court of Babati , the appellant and another were jointly arraigned and convicted for two counts of burglary and stealing, respectively, contrary to, sections 294(1) and 265 of the Penal Code, Chapter 16 of the laws. The particulars on the first count alleged that on the 28<sup>th</sup> day of November 2010, around 7.30 p.m., at Magira Village, within Babati District, the appellant and his co-accused broke and entered into the dwelling house of a certain Josia Mosses @ Kajila, with intent to

steal therein. As regards the second count, the allegation was that on the same date, time and place, the accused persons stole two bicycles, a radio and a sum of shs.150,000/= in cash all being, properties of Josia Mosses @ Kajila.

Throughout the length and breadth of the trial, the appellant stood as first accused, whereas his co-accused, namely, Selemani Jumanne @ Sele, was second accused. Upon conviction, each was handed down a sentence of four(4) years imprisonment for the first count and two (2) years imprisonment for the second count. On appeal to the High Court, (Nyerere, J;) the second accused was successful but the appellant's conviction and sentence were upheld. The appellant presently seeks to impugn the decision upon a memorandum comprised of five points of grievance. Before we reflect on the points of contention, it is instructive to narrate the factual background giving rise to the arrest, arraignment and subsequent conviction of the appellant.

From a total of four witnesses, the case for the prosecution was that, on the fateful day, Josia Mosses (PW1) arrived home around 7.30 p.m., only to find that the padlock on the door of his dwelling house had been

broken. Upon entry, he realized that the items particularized on the charge sheet were amiss. In the immediate aftermath, PW1 sought the assistance of his neighbors with intent to trace and retrieve the stolen items. Those who joined him were, namely, Omary Saidi (PW2) and Abdallah Juma (PW3). With the aid of a torch, the tracing party followed the tracks of the bicycles that led them to a spot where they saw two standing persons, each one holding a bicycle. Seeing them, the twosome threw away the bicycles and took to their heels. The tracing party chased them in pursuit, whereupon they successfully apprehended one of fleeing persons who turned out to be the appellant. After he was asked to disclose the identity of the other man in flight, the appellant implicated the second accused. PW1 took the bicycles of which he blandly informed the trial court without more, that they were the very ones stolen from his dwelling house. The bicycles, padlock and an iron bar were adduced into evidence by the investigation officer, namely, E.6579 Detective Constable Cosmas and; that concluded the prosecution version.

In reply, the appellant vigorously refuted prosecution accusation, claiming that he was arrested without any justifiable cause and that the charge laid at his door was completely fabricated. In the course of the

appellant's cross-examination, the Public Prosecutor was allowed to adduce into evidence an appellant's previous police statement, allegedly, to impeach his credit under section 164(4) of the Evidence Act. With respect, in terms of section 154, the prosecutor ought to have shown the appellant those parts of the previous statement of which he intended to contradict him before being allowed to tender the statement for impeachment. Nonetheless, as it is quite apparent that the statement was not used in convicting and upholding the conviction by the two courts below, we need not detain ourselves on the impropriety. As already intimated, at the end of the trial, the appellant and his co-accused were convicted. On appeal to the High Court, the conviction was upheld with respect to the appellant alone.

At the hearing before us, the unrepresented appellant fully adopted his lengthy memorandum as well as a supportive written submission. The respondent Republic was represented by Ms. Agnes Hyera who declined to support the conviction. Her disinclination was mainly on account of insufficient evidence of identification of the allegedly stolen bicycles. It should be recalled that in the course of his testimony, PW1 simply made a

blank assurance that the bicycles were his without alluding to any distinctive marks or producing their acquisition receipts. Critical of the approach, the learned State Attorney submitted that it is not enough for the alleged owner of stolen property to give a generalized description of the property. To fortify her submission, Ms. Hyera referred to us the unreported Criminal Appeal No. 12 of 1997- **David Chacha Vs. Republic**. In that case, it was held that it is a trite principle of law that properties suspected to have been stolen should be conclusively identified by a complainant. With respect, we entirely subscribe to the submission of the learned State Attorney.

Consequently, we are satisfied that the conviction of the appellant cannot be sustained. Accordingly, we allow his appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison custody forthwith, unless if he is detained therein for some other lawful cause.

K.K. ORIYO  
**JUSTICE OF APPEAL**

S.S. KAIJAGE  
**JUSTICE OF APPEAL**

K. M. MUSSA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

Malewo, M.A  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**