

IN THE HIGH COURT OF TANZANIA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL NO. 92 OF 1979
Original Criminal Case No. 201 of 1978
of the District Court of Mtwara District at
M t w a r a

Before A.A.M. Shayo Esq., Resident Magistrate

MOHAMED HASSANI

APPELLANT

VERSUS

THE REPUBLIC

RESPONDENT

CHARGE: 1st Count: Burglary c/s 294 (1) of the Penal
Code Cap 16 of the laws.
2nd Count: Stealing c/s 295 of the Penal Code
Cap. 16 of the laws.

J U D G E M E N T

Mushi J.-

The appellant Mohamed Hassani, was charged with two counts. On the first Count he was charged with burglary c/s 294 (1) and on the second count he was charged with stealing c/s 265 of the Penal Code. He was convicted on both counts and sentenced to five years on the first count and two years on the second count but the sentences were ordered to run concurrently. He is appealing against both such conviction and sentence.

As far as the conviction is concerned, there was more than sufficient evidence to justify the conviction. There was evidence that the complainant's house was broken into. The appellant was found with some clothes which were identified by the complainant to be his. Some witnesses who bought clothes from the appellant also testified and identified the appellant as the person who sold them the clothes which were ultimately identified by the complainant. It was therefore fully established that the appellant was found in possession

possession or had been in possession of the property stolen from the complainant's house sometime after the breaking. The appellant's defence was a complete denial. The first question was whether on the evidence the trial court was justified to invoke the doctrine of recent possession as to find the appellant guilty for burglary. The complainant's house was broken into on 2/6/78 and the appellant sold some clothes to PW.3 - Abdallah Hamidu on 5/7/78 which clothes were identified by the complainant. Also on 7/7/78 the appellant was seized by PW.5 Rajabu Mohamed with some of the stolen articles. With the appellant being found to have been in possession of the stolen articles just two days after the breaking and that he was offering for sale, it could not be held otherwise other than that he was the actual thief. The appellant has not raised anything new in his memorandum of appeal to warrant an interference by this court of that finding. The conviction for both burglary and stealing is upheld. The appeal against conviction on both counts is dismissed.

On the sentence the appellant has claimed that the sentence of five years imprisonment was too high. The appellant has challenged the assertion by the trial court that the value of the property alleged to have been stolen was more than shs. 5000/= to justify the court to act under section 5 (d) of Act No. 1 of 1972 in which case the court would be justified to impose a sentence of five years. The appellant says that there was no evidence to prove that the complainant's property was worth more than shs. 5000/=. The appellant asserts that in the absence of any evidence regarding the value of the property, he was entitled to the minimum sentence of three years. The appellant's contention seems to have some substance. The learned trial magistrate in sentencing the appellant had this to say and I quote:

Sentence

" The accused is a first offender. It is true he has stayed in remand for a long period. However this is a scheduled offence under the Minimum Sentences Act No. 1972. The value of goods stolen exceeds shs. 5000/= I therefore sentence him to a minimum of 5 years for the 1st count and two years for the second count both to run concurrently.

Sgd. A.A. M. Shayo

Resident Magistrate.
18/5/79.

- Order:- (1) Exh. (a) (c) be returned to accused.
- (2) Accused to compensate shs. 10,000/= to complainant after his sentence less the value of the three shirts

Sgd. A.A.M. Shayo

Resident Magistrate"

18/5/79.

Under the Minimum Sentences Act, the value of the property obtained by the offender in the course of the Commission of the offence or the value of advantage obtained under the Prevention of Corruption Act. 1971, is of some importance because it determines the minimum sentence and the amount of compensation to be paid to the victim. The relevant sections of the law are section 5 (d) which read:

5 (a) Where any person is convicted of an offence specified in the First Schedule to this Act. and the Court is satisfied that the value of the property obtained by the offender in the course of the Commission of the offence, or which he attempted to obtain, or in cases falling under section 3 or section 6 of the Prevention of Corruption Act. 1971, the value of the advantage accepted given, solicited offered or promised, exceeds the sum of Five thousand shillings, the court shall sentence such person to imprisonment for a term of not less than Five years. "

and section 7(1) of the same act reads.

" Notwithstanding the provision of section 176 of the Criminal Procedure Code, where a court convicts any person of a scheduled offence other than an offence under the Prevention of Corruption Act, 1971, the court shall, if it is of the opinion that such person has obtained any property as a result of Commission of the offence, and that the owner of the property can be identified, make an order that the person convicted shall pay to the owner of the property compensation equal to the value of the property as assessed by the court. "

The two provisions clearly require the court to properly determine the value of the property or advantage received otherwise it will not have complied with the section which say;

".....and the court is satisfied that the value exceeds the sum of five thousand shilings....."

The court can not satisfy itself out of its own imagination. There must be some evidence on record touching on the subject and subject to cross-examination by those concerned. The mere assertion in the charge sheet that the property alleged to have been stolen is of a certain value is no evidence that is so. Just like the complainant has to adduce evidence to satisfy the Court that the articles mentioned in the charge sheet were actually stolen, so must he also adduce similar evidence regarding its value. The court has to base its decision on the value as stated by the complaint like any other aspect of the evidence. The court should judiciously consider it and make a finding. In most cases, the value is not disputed but that is not an-excuse for the court not to properly examine it and see if it is reasonable in the circumstances because the value is relevant to the Minimum sentence. And as I have already stated above, the proper determination of the value will also enable the court to make a correct order for the compensation which the law require to be:

".....equal to the value of the property as assessed by the Court:-

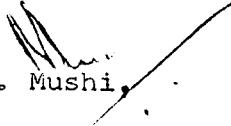
In this appeal as correctly contended by the appellant, there was no evidence on which the learned trial magistrate could have made the finding that the value of stolen property was more than shs. 5000/=. The complainant did not state the value of the property in his evidence. The conclusion arrived at by the trial magistrate that the minimum sentence was five years was therefore not judicial. I am not saying the appellant in this case could not have been sentence to five years or more, but I am saying as long as the five years is based on the value of property as was in this case, then the value must be properly established. The sentence of five years imprisonment imposed on the appellant on the first count is reduced to one of three years to run concurrently with the sentence on the second count.

For similar reasons, the order for compensation cannot stand. Even as it is, it is ambiguous, because the value of the two shirts

which must be reduced from the sum of the shs,10,000/= is not given.

The order for compensation is set aside. It is for the complainant to act under Section 7 (2) of Act No. 1/1972 if he so desires and in compliance with what I have said in this case. To the extent of the variation of sentence and compensation order, the appeal remain otherwise dismissed.

Judgment read in chamber to day 15th April, 1981 before the State Attorney - Mr. Sengwaji.


N.M. Mushi.

Judge, ...

15/4/81