IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 40 OF 1995

ORIGINAL CRIMINAL CASE NO. 238 OF 1994
(OF THE DISTRICT COURT OF ILALA DISTRICT AT KIVUKONI
BEFORE MAPUNDA ESQ., RESIDENT MAGISTRATE)

1. MAGANGA EDWARD MWIGA
2. AMBROS KOMBO .....APPELLANT

VERSUS

THE UNITED REPUBLIC.....RESPONDENT

J U D G E M E N T

KALEGEYA, PRM (Ext. Jurisd.)

The Appellants, Maganga s\o Edward Mwiga and Ambrosi s\o Komba (hereinafter referred to as 1st and 2nd Appellant respectivelly) were jointly charged and convicted in count one with Being in Possession of property suspected to have been stolen or unlawfully acquired c\s 312 (1)(b) of the Penal Code and sentenced to 3 years imprisonment each. Aggrieved by this conviction they have preferred this Appeal. As regards the 2nd count in the charge, though the 3rd accused was acquitted and hence not subject of this appeal, as I will have an occassion to comment on the charge sheet as a whole later on I find it proper at this stage to touch him as well. The 3rd accused Katale Mombasa, was alone charged with office breaking and stealing c\s 296 (1) of the Penal Code. The suspected property in count one was said to be a weighing Bridge Computer valued at 45 million (TSHS.) while the 2nd count maintained that Katale had broken into TAZARA offices and stole various properties including the weighing Bridge Machine forming the subject matter of count one.

After hearing the evidence of four witnesses the learned trial Magistrate acquitted Katale on count 2 and convicted Appellants on Count one. The Appellants in their joint memo of Appeal which they adopted in whole during the hearing of their appeal challenged their convictions on 3 grounds - that the trial Magistrate should not have acted on the evidence of a single witness (PW1) without corroboration and cited the case of Tinga Kelele v R (1974) TLR No. 6; that the magistrate should not have relied on the evidence of PW2 and 3 for none testified as having

seen any of the Appellants with the alleged property, and finally that the magistrate did not direct himself properly on whether the arrest was lawful and that the offence was not proved beyond all reasonable doubts. In reply Miss Mkwawa, learned State Attorney for the Republic\Respondent, brushed aside all these claims as baseless in that PW1, a police officer arrested the Appellants in his normal course of duties; that PW2 and 3 came in as witnesses to prove ownership of the weighing Bridge Computer and that the offence was proved beyond doubt as required by the law.

I should start by saying that this is an interesting but unfortunate case as it suffered various uncalled for irregularities right from the time of arrest, investigation, prosecution up to the Courts of law.

While the Appellants' argument that the Court should not have acted on the evidence of PW1 without corroboration is unfounded because this is not the type of a case where corroboration is required as guidedly pronounced in the case of Tinga Kelele which principle concerns offences committed when powers of vision are impaired, the other grounds ie. that the trial magistrate relied on the evidence of PW2 and 3 seem to have substance. In order to appreciate the picture in entirety let me reproduce the charge as presented even at the danger of making this judgement undully long.

2. 1st count for 1st accused and 2nd accused

OFFENCE, SECTION AND LAW

Being in possession of property of having been stolen or unlawfully acquired c\s 312 (1)(b) of the Penal Code (doted emphasis mine).

PARTICULARS OF OFFENCE;

That Maganga Edward Mwiga and Ambrose s\o Komba are jointly and together charged on 16th day of February 1994 at about 16.00 hrs at Kurasini area, within Temeke District Dar es Salaam Region, were found in unlawful possession of weighing Bridge Computer valued at Tshs. 45,000,000/= the property of the said Tanzania Zambia Authority the property which have been stolen (emphasis mine).

2nd Count for 3rd Accused

OFFICE BREAKING AND STEALING C\S 296 (1) OF THE PENAL CODE CAP.16 OF THE LAWS.

PARTICULARS OF THE OFFENCE

That Katale s\o Hamisi Mombasa charged on 18th day of February 1994 at night time at Kurasini Railway Station, Tanzania - Zambia Railway Authority, within Temeke District, Dar es Salaam Region did break and enter into an office and steal weighing

bridge computer, one Air condition and Battery charger valued at Tshs. 50,000,000/= the property of the said Tanzania Zambia Railway Authority".

Now turning to the evidence - PW1 is a police officer who testified that in the course of investigating theft of a weighing Bridge computer belonging to BP Shell he got information from an informer that at Kurasini there were people who had a weighing bridge Computer in their possession. He duly left for the scene in Company of 2 police officers and that (let his own words paint what transpired).

> "On our way we saw a motor vehicle heading to the same place and at a back seat we saw the 1st and 2nd accused holding weighing bridge Computer and we stopped the driver infront and we arrested the accused person namely the 1st and 2nd accused".

Finally this witness said that at the police station the TAZARA people (who turned out to be PW2 and 3) identified it as their stolen weighing Bridge Computer. PW4 was simply handed over a police case file as an investigator. He found Appellants already arrested. That was all the evidence adduced by prosecution. All in all therefore the only evidence linking Appellants with the offence as framed is that of PW1 and the question is whether this evidence proved the offence beyond all reasonable doubts.

At the outset of this judgement I called this case interesting and unfortunate. To start with the charge sheet, one really wonders whether its author paid it another eye-cast after drafting! Count one is so mixed up and it is surprising that even the trial court went head on tail with the prosecutor's presentation. Once you say that the property is suspected to have been stolen or unlawfully obtained the question of knowing the owner is automatically excluded for if the owner is known then it becomes a different offence altogether. On the other hand the particulars of the offence are at variance with the offence charged. At most the particulars would come closer to an offence, section and law under s. 311 but not 312 Penal Code! It has indeed buffled me that the charge sheet was drafted and presented in the form it is. It is not of insignificance also to note that while Appellants are alleged to have been found in unlawful possession of the TAZARA stolen weighing Bridge machine on 16\2\94, in the same charge it is indicated that the office breakage and theft took place on 18\2\94!

One of the Appellants' complaints against the trial court is that it relied heavily on the evidence of PW3 and 4 when this didn't concern the offence with which they were charged. I think there is substance in their complaint. The trial Court having admitted a defective charge (at least in count one) went on to

rely on wrong principles not applicable to offences under S. 312(1)(b) of Penal Code. As I have stated above the only relevant evidence is that of PW1 but in convicting, the trial court, omnibusly considered other evidence as well. At one stage the trial court stated in the judgement,

> "The prosecution witnesses and the accused had stated in court that it was the 1st time to see each other, and under this circumstance I find no reason why the prosecution witnesses should fabricate evidence against the two accuseds" (emphasis mine). What prosecution witnesses is he referring to apart from PW1!

Not only the above, talking on the weighing bridge machine as referred to by PW1 the trial court had also this say,

> "This piece of evidence was later clarified by PW2 who identified the property as the property of TAZARA and there is another evidence from PW2 and PW3 to the effect that one of the TAZARA offices had been broken into and a weighing Bridge Computer machine had been stolen.

By producing the said weighing Bridge Computer machine in Court, put weight to evidence of PW1, PW2 and PW3": (emphasis mine).

Support on Appellants' cry need not go far than this complete misdirection.

As regards wrong principles of the law, let the trial court speak for itself,

> "The law in this offence is clear. The prosecution side is only required to show the following
>
> a) A police officer must suspect the curprit who has a property that the property is a stolen property.
>
> b) The curprit with the property must be arrested and put into custody.
>
> c) Later, property suspected to have been stolen must be identified by a person who claims to be his property or her property.

As mentioned earlier, the accused persons had been suspected to have stolen property and they were arrested and put under custody and later the same property was identified by PW2. This evidence was not challenged by the accuseds during cross examination nor in their defence"!

He did not end there - in sentencing he said,

"The property found with.... is the property of a special authority and the law has prescribed a minimum sentence under this circumstance I have no alternative but to comply with the law..... accused are jailed for 3 years"!

Glaringly therefore the trial Court acted on wrong principles. Thats not the law. The prerequisites for a conviction under S. 312 of the Penal Code are -

a) Accused should have been detained by a police officer in exercise of his powers under s.25 CPA.

b) Accused should have been in the course of journey, i.e. whether on street, private land or building.

c) Should have in his possession the suspected property upon being detained.

d) From its nature or circumstances the suspected property should reasonably be suspected to have been stolen or unlawfully obtained.

e) The accused should have refused to give an account to the court on how he came by the property or gave an account which was so improbable as to be unreasonable or which was rebutted by the prosecution.

That is the law as far as it concerns property suspected to have been stolen or unlawfully obtained but where the owner of the property is known as is the case here (property of TAZARA) s. 312 cannot apply at all.

"A conviction cannot be maintained under s. 312 Penal Code if the articles in question can be identified as the property of any known person. If the owner is identified, it is no longer a question of suspicion, and the charge should be laid under a section of the Penal code dealing with stealing or possession or receiving stolen property" (Jackson James v. R. (1967) (HCD) 273). The authorities on this are abundant, ie. : Rv Misengi Abdallah {1952} I TLR (R) 107; Mussa s\o Mgonjwa v. R (1968) HDC 108).

On the other hand even if all the above displayed had not tainted the convictions, the evidence of PW1 as quoted in para 9 of this judgement is not free from suspicion - being able to identify the weighing Bridge machine in a moving Vehicle and the Appellants naively holding it as if on display when they knew the same to be stolen property or to have no colour of right over it!

Be that as it may, as detailedly explored above the convictions and ensuing sentences having been found on wrong principles of the law let alone shaky evidence they can't be left to stand and they are accordingly quashed and set aside. Appellants are to be set at liberty unless otherwise lawfully held.

(L. B. Kalegeya)

PRINCIPAL RESIDENT MAGISTRATE WITH
EXTENDED JURISDICTION.

AT DAR ES SALAAM

15TH MAY, 1996

Delivered to day the 5th June 1996 in the presence of MRS MVRUKE, State Attorney for Republic/Respondent and ~~absence~~/presence of Appellant.

(L. B. Kalegeya)
PRINCIPAL RESIDENT MAGISTRATE
WITH EXTENDED JURISDICTION
5/6/96

AT DAR ES SALAAM