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IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 242 OF 2008.

MUSTAPHA DARAJANI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of
Tanzania at Songea)

(Kaganda, J.)

dated 1st day of September, 2008
in

DC. Criminal Appeal No. 10 of 2008.

VISUAL
IDENTIFICATION
- RECENT PROSECUTION
- DESCRIPTION OF
STOLEN PROPERTY
HOW MADE

JUDGMENT OF THE COURT

14th & 19th March, 2012.

MASSATI, J.A.:

The appellant and another, who appeared as the 1st and 4th accused persons respectively in the trial court, were convicted of two counts of housebreaking and stealing contrary to sections 296 and 265 of the Penal Code (Cap.16 – R.E 2002). They were

sentenced to 10 years imprisonment each. Their joint appeal was dismissed by the High Court (Kaganda, J). The appellant had preferred the present appeal.

The facts as found by the lower courts, are that on the midnight of 6th October, 2006, PW3 Omari Msafiri, who was a watchman in the neighbourhood, heard a bang from some shop in the commercial premises. At that time he was at the backyard; while the noise came from the front; where there was another watchman, who did not testify. When PW3 rushed there, he found three men running away from the scene, carrying with them some things wrapped in sulphate bags. He could not catch them, but was able to identify them and repeated the story to PW1, a police officer who was on patrol before the matter was reported to the police station. By then, the owner of the premises/saloon PW2 MARIAM RASHID had also been notified and was around. According to her, two (2) hair driers, and a 5 band radio cassette went missing from her

saloon, as a direct result of the larcency. On 9/10/2006, PW2 got wind that someone was selling driers. In the company of D/C James (who did not testify) they traced that person to the 4th accused person in the trial, who admitted taking them to one HIDAYA ABDUL (PW4). PW4 admitted that the appellant and his cohort (4th accused) sent three driers to her and pawned them for a loan of T.Shillings 180,000/=. PW6 MOHAMED PONERA confirmed and witnessed the transaction. It was on the basis of this evidence that the appellant was convicted.

In this Court, the appellant appeared in person and unrepresented. Ms Andikalo Msabila, learned Principal State Attorney, appeared for the respondent/Republic.

The appellant has filed a 6-ground memorandum of appeal. In short; in the first, second, and fifth grounds, the appellant is complaining that he was not properly identified; and that therefore the case was not proved beyond reasonable doubt. In the third ground, the complaint was that, the alleged stolen

properties were not properly identified. In the fourth ground, the complaint was that, the appellant was not given opportunity to cross examine PW4. And in the last, sixth ground, the complaint was that, the charge was defective in that, since the offence was committed at night, the correct offence which should have been cited in the statement was burglary, not house breaking. In support of his grounds of appeal the appellant referred to us, the cases of **WAZIRI AMANI v R (1980) TLR.250, ROBSON v R (1986) - RC 40, BHANDARY CANTAMA v R (1964) E.A.606, and CHAMBO RAMADHAN v R (1985) TLR.178**. He therefore urged us to allow the appeal, quash the conviction and set aside the sentence.

On her part, Ms Msabila, urged us to dismiss the appellant's third, fourth and sixth grounds, because; in her view; first; the two driers were sufficiently identified by the owner, PW2; secondly, the record reflects that PW4 was cross-examined by the appellant; and lastly, if there was any defect in the

charge sheet, it was curable under section 388 of the Criminal Procedure Act (Cap.20 – R.E 2002). However, she agreed that the remaining grounds of appeal had merit. According to the learned counsel, the evidence of visual identification was wanting, considering that PW3 was not forthright in his testimony, on the intensity of the light which he claimed enabled him to see the appellant; was not consistent on whether he knew the appellant by name as PW1 claimed, and whether also he even described the special mark at the appellant's neck as PW1 claimed in court. Furthermore, learned counsel went on, it appeared that PW3 was at the backyard, and not in the immediate vicinity of the scene of crime, so it was difficult to tell how far away he saw the thieves, and running away from there, at that. Drawing inspiration from the decision of this Court in **EPSON s/o MICHAEL AND RIZIKI LUSASI v R** Criminal Appeal No.335 of 2007 (unreported) she submitted that the discrepancies on the question of the description of the appellant by name and mark between PW1 and PW3 raises serious doubts

on whether PW3 really identified the appellant. That doubt should be resolved in favour of the appellant, she argued. So, Ms Msabila urged us to allow the appeal on those grounds alone.

We will begin with the two complaints relating to the alleged infraction of procedure. The first is whether, the appellant was given a chance to cross-examine PW4 – the subject of the fourth ground of appeal. And the second, is whether the charge was defective.

The complaint that the appellant was not afforded opportunity to cross-examine PW4 should not detain us. It is amply refuted by the record. The evidence of that witness appears on pages 18 and 19 of the record of appeal. On page 19 it is shown that PW4 was cross-examined by the 1st accused (who is now the appellant) to the following effect:

"XXD by 1st accused: