

IN THE HIGH COURT OF TANZANIA

AT MTWARA.

ECONOMIC CRIMINAL APPEAL NO. 1-OF-2005

ORIGINAL NEWALA DISTRICT ECONOMIC

CRIMINAL CASE NO. 3/2003

BEFORE: S.H.O. Khoja ESQ D/MAGISTRATE

SUBIRA MOHAMED - - - - - APPELLANT

VERSUS

THE REPUBLIC - - - - - RESPONDENT

JUDGEMENT

The appellant Subira Mohamed @ Mama Labii was on 3rd May 2005 by Newala District Court in Mtwara Region, on a charge of Theft: contrary to section 326 (6A) of the Penal code as amended by Act No. 12 of 1998 read together with paragraph 2C(1) 2(e) of the first schedule of Economic and organized Crime control Act (Amendment of the first schedule Order Government Notice No. 65 of 1998 and section 59 of the Economic and organized Crime control Act 1984.

It was alleged in the particulars of offence that Subira Mohamed @ Mama Labii, Maurus Athumani Mrope, Policarp Christopher @ Gweta and Joseph Joseph on or about 18th July, 2003 at Miyuyu village within Newala District in Mtwara Region did jointly and together steal 120 pieces of water pipes valued at Tshs.18,047,720/= the property of Newala District Council.

Five witnesses gave evidence for the prosecution. PW1 Athumani Senkondo is an electrical technician employed by the Ministry of water and stationed at Makonde Water Supply. PW1 deposed that on 22/8/2003 at about 16 hours, he was instructed by the District Water engineer to accompany a Police investigation Officer to Bar es salaam where some water pipes stolen were found in possession of some suspects. PW1 accompanied PW5 C.7731 D/Cpl Joseph to Dar es salaam where they reached on 25/8/2003 and reported at Msimbati Police station.

According to PW5, it was the second accused Maurus Athumani Mrope who had led them to railways Gerezani area where they got 120 plastic water pipes of different sizes.

PW2 Mussa Mawazo, is Miyuyu villager who deposed that on 18/7/2003 at about 22.30 hours he was in the village participating in initiation or boys circumcision ceremonies. Rumours had been ripe in the village that a motor-vehicle was coming in the village for the purpose of stealing water pipes. Some.

Villagers had taken strategic positions to prevent the lorry from ferrying the water pipes. This precaution had been taken by PW3 Rashidi Likwata, the village Executive Officer, who deposed that he put six people to guard the road to Nandimba.

At about 23 hours, a lorry passed towards the village.

The village vigilants placed logs along the road to block its return. They climbed on top of nearby trees torches in their hands and whistles at the ready. At about 23.45 hours, PW2 and PW3 saw the lorry returning loaded with water pipes. They flashed their torches and blew their whistles. The lorry made a manoeuvre swaying on the left, and sped away avoiding the logs laid along the road.

PW4 Hamisi Mussa Mrope, testified that the lorry belonged to him. It was an Isuzu lorry with registration number TZP.7890 which was driven by second accused at the trial Maurus Athumani Mrope, and assisted by third accused policarp Christoper @ Gweta, and the fourth accused Joseph Joseph. According to PW4 it was the appellant who had hired the lorry on 17/7/2003 at about 16.00 hours when he was at his Mwena shop.

The appellant had told him that she had some goods at Miyuyu village which he needed to transport to Dar es salaam.

They agreed at Shs.300,000/= freight charges. One Zambia was present at the contractual negotiations.

The appellant paid Shs.150,000/= to PW4 and she paid the balance to the driver after reaching Dar es salaam. PW4 deposed that the appellant was his sister in law, having married to her young sister, with whom they are now divorced.

The second accused at the trial admitted driving the lorry after being informed that the lorry had been hired by the appellant and one Raymond Mzambia.

They loaded plastic pipes at Miyuyu village, before driving to Dar es salaam via Ndanda.

It was the appellant who was producing documents at road blocks along the way.

The second accused delivered the pipes at a place shown by Raymond and the appellant.

The appellant told the trial court in defence that on 18/7/2003 he was in Dar es salaam having left Ndanda on 10/7/2003 when she returned home, she was told that she had been involved in the theft. She told may be it was her young sister who had been incriminated.

DW5 Sofia Mohamed is the young sister of the appellant, and divorcee of FW4, she deposed that at one time on 18/7/2003 she had trouble in ferrying her maize, and at Miyuyu village where she found a barrier after suspecting her that she was carrying Water pipes. However she has a quarrel with her former husband who is FW4 over matrimonial properties.

Indeed this case presents an assortment of difficulties right from the charge sheet to the judgement.

I have examined the charge. I cannot pretend that section 326(6A) of the penal creates the offence of Theft.

The offence of Theft is created by section 258(1) of the penal code, and defined as follows-"Any person who fraudulently and without claim of right takes any thing capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing."

On the other hand section 326(6A) creates punishment for malicious injuries to property, if the property in question is used or intended to be used for the ~~xxx~~ purpose of providing necessary service, the offender is guilty of an offence."

Thus also creates the offence of Malicious Injuries to property. It does not create the offence of Theft. It is true that sometimes commission of the offence of Theft can entail Malicious Injuries to property, but that is incidental.

Paragraph 20(1) 2(b) of the First schedule to Economic Organized Crime control Act, creates an offence to A person who disrupts, damages, hinders or interferes with property which is used or is intended to be used for the purpose of providing a necessary service.

Looking at the procedure adopted by the learned trial District Magistrate in conducting preliminary hearing under section 192 of the Criminal procedure Act 1985.

~~The procedure laid down~~ under Government Notice Number 192 of 1/7/1988 was not adhered to, hence the probative value of the exercise was doubtful.

Coming to the evidence on which the appellant was convicted, the evidence by the second accused, third accused at the trial were the evidence of co-accused persons. Therefore, like the evidence of an accomplice the trial court had to warn itself, or look for corroboration before basing the evidence for conviction.

The evidence of PW4 Hamisi Mussa Mrope which could have supplied the needed corroborating evidence is also wanting, in that it was his lorry which was used in the theft, and there was incontroverted claim that PW4 had divorced the youngsister of the appellant who is DW5 Sogia Mohamed.

The latter claims the existence of a dispute over matrimonial assets with PW4.

Under the above circumstances the evidence of PW4 also needs corroboration. In law an evidence which requires corroboration cannot corroborate another evidence which requires corroboration.

On the other hand no official from any of the various road barriers were called to give evidence, that it was the appellant who had the documents for the water pipes consignment.

The appellant had raised a defence of Alibi in her defence. It is true that the appellant had not given the notice of Alibi as required under section 194 (4) and (5) of the Criminal procedure Act 1985.

However the trial court was enjoined to have considered the defence, may in its discretion, accord no weight of any kind to the defence.

As observed earlier the charge, and the evidence the conviction and sentence were confusing and wanting to the extent that even the respondent republic was urging this court to invoke section 388 of the Criminal procedure Act, 1985 to cure the inadequancies.

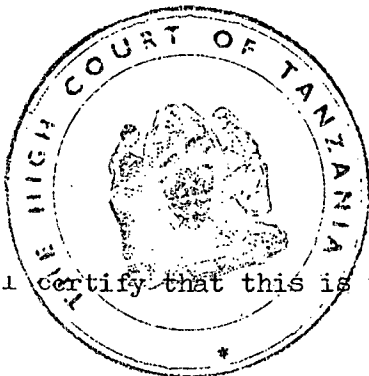
I hold that there was a failure of justice, and justice militates that an order for retrial not to be made, other wise the prosecution shall fill in the lacunae.

I therefore have nothing but to quash the conviction of the appellant, and set aside the sentence of five years imprisonment imposed on her.

It is further ordered that the appellant shall be released forthwith from prison unless held therein on other lawful charges.

Appeal allowed.

Order accordingly.



S.B. Lukelelwa

Judge

16/12/2005.

I certify that this is the true copy of the Original.

S.H. Karamela

DISTRICT REGISTRAR

MTWARA.