Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.130 OF 2006- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J.A., KAJI, J. A., And KIMARO, J. A.	**BAKARI OMARI@ LUPANDE Vs. THE REPUBLIC**- (Appeal from the judgment of the Resident Magistrate's Court E/J at Dodoma- E/J CRIMINAL APPEAL NO. 6 C/F 7 OF 2006-SOMI - PRM E/J)	The evidence which the trial court thought linked the appellant with the commission of the offence was his disobedience on the parking instructions given- It was dangerous for the first appeal court to uphold a conviction on the appellant's misbehavior and not evidence which proved the offence. That misbehavior, could be dealt with in another forum but not in the criminal case in which the appellant was charged. The law is, and this has been repeated in numerous cases of this Court that the prosecution must prove the charge beyond reasonable doubt. conviction of the appellant on the two counts of garage breaking and stealing c/s 296(1) and (2) of the Penal Code cannot be sustained.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUNUO, J.A., KAJI, J. A., And KIMARO, J. A.)

CRIMINAL APPEAL NO.130 OF 2006

BAKARI OMARI@ LUPANDE----------APPELLANT

VERSUS

THE REPUBLIC----------RESPONDENT

(Appeal from the judgment of the Resident Magistrate's Court E/J at Dodoma)

(SOMI - PRM E/J)

dated the 12th February,2006
In
E/J CRIMINAL APPEAL NO. 6 C/F 7 OF 2006

JUDGMENT OF THE COURT

2O & 22 JUNE, 2007

KIMARO,J.A.

The facts of the case are not complicated. In July, 2003 there was a change of District Commissioners at Kongwa District in Dodoma Region. Peniel Olesatabu (DW5) was the outgoing District Commissioner after retirement, and Florence Horombe (PW1) was the incoming District Commissioner to replace the former. On 3rd July 2003 the incoming Dictrict Commissioner traveled from Dar es Salaam to Dodoma in a motor vehicle STJ 2858, driven by the appellant, to resume duties at her new station. The appellant was the driver of the motor vehicle since 1999 and he traveled from Dodoma to Dar es Salaam to collect the incoming District Commissioner. PW1 had two suitcases with assortment of clothes in the motor vehicle and she had traveled with Raphael Horombe,(PW2) her husband.

At Dodoma, where they arrived late in the day, she and her husband lodged at NAM HOTEL leaving the suitcases in the motor vehicle. At the advice of the appellant to PW1 which she accepted, the motor vehicle was supposed to be parked at the Regional Commissioner's parking lot where there was good security, but contrary to the advice which the appellant gave, he parked the motor vehicle at Baduwel garage. Unfortunately, during the night, the windscreen of the motor vehicle, and one of the suitcases were broken and various clothes stolen. It was alleged that the garage was also broken.

On the above background, the appellant and the two watchmen who accepted the motor vehicle for parking at the garage, when the appellant took it there, namely Omary Yusuph @ Kisweswe and Shaban Omary were jointly charged with two counts of garage breaking and stealing c/s 296 of the Penal Code. They were alleged to have broken into the garage and stolen the clothes of PW1 in the first count, and in the second count they were alleged to have broken into the garage and stole fuel and other properties belonging to the owner of the garage, one Musa Mpungusi (DW4). The appellant denied commission of the offence. His defence was that the motor vehicle was defective and he had to remove it from the garage before the repairs were completed, when he traveled to Dar es Salaam to collect PW1. When he returned to Dodoma he thought he

should return the motor vehicle there to allow the repairs be completed and that is the reason he parked at the garage instead of the Regional Commissioner's parking lot.

The appellant was convicted with both counts and was sentenced to five and three year's imprisonment for the first and second counts respectively, but the sentences were ordered to run concurrently. In convicting the appellant the trial court inferred a bad motive from his failure to park the motor vehicle at Regional Commissioner's parking lot as he had advised, and instead parked it at the garage. The trial court accorded no weight to his defence. His appeal to the High Court, which was heard by Somi, PRM E/J after the High Court transferred the same to the Court of Resident Magistrate under section 45 (2) of the Magistrates' Courts Act. Somi, PRM Extended Jurisdiction dismissed the first appeal.

Still aggrieved, the appellant is before the Court with a second appeal and he was represented by Mr. Kuwayawaya, learned counsel. For the respondent Republic, it was Mr. Mwampoma, learned Principal State Attorney who appeared.

As usual, this being a second appeal, the Court rarely interferes with the finding of facts unless there is a misdirection or non-direction (**DPP Vs Jaffari Mfaume Kawawa** [1981 T.L.R 149 at 153)

The appellant filed three grounds of appeal which the learned counsel argued generally. First was the charge sheet. The learned counsel submitted that the charge of garage breaking was not proved as the owner of the garage was not called by the prosecution to prove the charge. Instead, the prosecution called PW1 who testified that it was the motor vehicle which was broken and the assortment of her clothes stolen. In such a situation, Mr. Kuwayawaya argued, the evidence was in variance with the charge sheet. He said the trial court directed itself on wrong issues by capitalizing on the question of the appellant defying directions of PW1 on the place which was agreed for parking the motor vehicle instead of looking at the evidence which was supposed to prove the charge. The first appeal court on the other hand misdirected itself by upholding that position. He was of the view that the trial court looked at personalities instead of the real situation and this was misdirection as the evidence on record was not sufficient to ground the conviction of the appellant.

It was further argued by the learned counsel that the courts below erred in treating the evidence on record as circumstantial. For a circumstantial evidence to form a basis for conviction, the inference must irresistibly point to the guilt of the accused person. He relied on the case of **Hasan Fadhil Vs R** [1994] T.L.R. 89 to support his argument.

Another weakness pointed out by Mr. Kuwayawaya was failure by the first appeal court to take into account the fact that the trial court did not at all consider the defence of the appellant. Citing the cases of **Amir Mohamed Vs R** [1994] T.L.R. 138 and **Husein Idd and another Vs R** 1986[T.L.R. 166, to bolster his argument,
the learned counsel argued that it was wrong to uphold a conviction based on contradictory and inconsistent prosecution evidence that totally ignored the defence of the appellant.

He prayed that the appeal be allowed as the evidence left a lot of doubts which should be resolved in favour of the appellant,

The learned Principal State Attorney for the respondent Republic did not support the conviction. He conceded that the appellant was convicted simply because he defied the parking instructions of his boss (PW1) but argued that defying instructions should not have been the ground for conviction without evidence to prove the offence. Mr. Mwampoma supported the learned counsel for the appellant that the evidence and the charges were in variance and the case against the appellant was not proved.

Although he blamed the appellant for disobeying his boss, a behaviour which was not ideal, his opinion was that disciplinary

measures should have been taken against him, but obviously not a conviction which was not supported by evidence. The learned Principal State Attorney said the position of the law is that the burden of proof lies on the prosecution to prove the charge and it does not shift when an accused person defies instructions of his/her boss. He, too, prayed that the appeal be allowed.

We mentioned before that interference by the Court, of concurrent findings of matters of fact by the courts below is prompted by a misdirection or non-direction in the evidence. See the case of **Jafari Kawawa** supra.

On the evidence which was available before the trial court, we must say that the first appeal court erred in upholding the conviction of the appellant on the two counts of garage breaking and stealing c/s 296(1) and (2) of the Penal Code. As amply demonstrated by Mr. Kuwayawaya, learned counsel for the appellant, the offence of garage breaking was not proved against the appellant. The evidence which the trial court thought linked the appellant with the commission of the offence was his disobedience on the parking instructions given by PW1 on the appellant's advice. But that disobedience did not prove that the garage was broken. PW1, the complainant said it was the motor vehicle which was broken and an assortment of her clothes stolen. The learned counsel for the appellant submitted correctly that the owner was not a prosecution

witness for purposes of proving the garage breaking. He was summoned as a defence witness (DW4).

While we entirely agree with the learned Principal State Attorney that the appellant was to blame for defying the instructions of his boss, it was dangerous for the first appeal court to uphold a conviction on the appellant's misbehavior and not evidence which proved the offence. That misbehavior, could be dealt with in another forum but not in the criminal case in which the appellant was charged. The law is, and this has been repeated in numerous cases of this Court that the prosecution must prove the charge beyond reasonable doubt. In this appeal there was a total failure by the prosecution to prove the offence against the appellant.

The first appeal court failed to see that the trial court had not directed itself to the evidence which was before it. As a result, it upheld the conviction which was not supported by evidence but on externous matters which were irrelevant for purposes of proving the charge. That was a misdirection. Given the misdirection on the part of the first appeal court, we allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison forthwith, unless he is withheld for other lawful cause. It is ordered.

DATED at DODOMA this 22nd day of June, 2007

E.N.MUNUO

JUSTICE OF APPEAL

S, N.KAJI

JUSTICE OF APPEAL

N.P.KIMARO

JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR