IN THE DISTRICT MAGISTRATE COURT, CENTRAL REGION, DIASO, HELD ON THURSDAY 15TH DAY OF DECEMBER, 2022 BEFORE HIS WORSHIP BERNARD DEBRAH BINEY ESQ. -- - MAGISTRATE

COURT CASE NO. 65/2023

THE REPUBLIC

VRS

APPIAH ISHMEAL …. ACCUSED

JUDGMENT

The Prosecution arraigned the accused person before this court on 06/06/22 and charged him with two counts of offences namely, unlawful entry and stealing

In count (1) Unlawful Entry: contrary to section 152 of Act of 1960 (Act 29)

The particulars of that count reads

"APPIAH ISHMEAL: Unemployed; for that you on the 2nd day of June, 2022 at about 4:30 am at Denkyira Domenase in the Central Magisterial District and within the jurisdiction of this court, did unlawfully entered the room of Charles Amankwa to commit crime to wit stealing.

Count 2 recites

Stealing; contrary to section 124 (1) of Act 29 of 1960 as amended by para.4 of NLCD 398/69.

The particulars reads:

APPIAH ISHMEAL: Unemployed: for that you on the 2nd day of June, 2022 at Denkyira Domesae in the Central Magisterial District and within the Jurisdiction of this Court, did steal mobile phone value Ghc 150.00 and cash of GHC 2500.00, the property of Charles Amankwa.

In court on 8/6/22, the accused pleaded not guilty to both counts and accordingly the court granted the accused bail and set the case down for trial after prosecution has filed all the necessary disclosures.

At the trial, the Prosecution filed witness statements and called two witnesses made up of the complainant and the investigator to proof their case against the accused.

The brief fact of the case as presented by the prosecution, is that, Complainant in the case Charles Amankwaa is a farmer staying at Denkyira Abora and accused Appiah Ishmeal age 24 years is unemployed staying Denkyira Domenase. On 02/06/2022 at about 4:30 am complainant assisted his wife Adwoa Nkrumah who is a food vendor to the market. Complainant returned in about fifteen later and saw accused person coming from his room and on seeing the complainant, accused took to his heels and complainant shouted thief, thief and his neighbors assisted him and they arrested the accused and brought him to the Police Station. Accused was searched at the charge office and Ghc 1035.00, three passport pictures of Adwoa Nkrumah the complainant wife and two keys were retrieved from his pocket. During investigations, accused denied knowledge of the offences, after which he was put before court.

According to the testimony of the complainant Charles Amankwa (PW 1), he stated that on 2/06/22 at about 4; 30 am he assisted his wife Adwoa Nkrumah who is a food vendor to carry her food to the market and returned about fifteen minutes later and saw the accused coming from complainant's room but on seeing complainant, accused took to his

heels. Complainant chased accused and shouted thief, thief and neighbors assisted him to arrest the accused in a distance from his house and accused was escorted to Denkyira Dominase Police station. At the Charge Office accused was searched and cash Ghc 1035.00 and three passport pictures of Complainant's wife was found in the pocket of the accused. Complainant kept his money Ghc2, 500.00 under a bag on a table in his room and his mobile phone on his bed.

Detective Inspector Samuel Fofie's (PW2) testimony is not different from PW1 and is just a repetition of what complainant told the court, save the addition of loss of money (GHC2500.00) and phone which complainant himself failed to testify about. PW2 testified as follows, on 2/6/22 at 5:20 am, complainant assisted by others arrested accused and reported that accused his room and stole cash GHC2500.00 and mobile phone value Ghc 150.00, he obtained statement from the complainant and when accused was searched at the charge office, Ghc 1035, three passport pictures of complainant wife were found in his pocket. He obtained investigation caution statement from the accused and he denied any knowledge of the crime.

The brief case of the accused is as follows: on the day in question, he visited his girlfriend whose house is within the vicinity of that of the complainant. His girlfriend sells motorbike parts in a shop opened by her brother for her at taxi rank at Denkyira Dominase. The girlfriend after closing late from the shop did not come home straight but eventually came home around 1:30 am which got him very angry so at about 4:00 am he left the girlfriend's house in an attempt to go to his own house at Abora. On his way to the lorry station through the park he saw four people two of whom he knew as Opare and Obuasi who started shouting thief, thief but because accused didn't know who they were shouting as thief, he decided to go to the Police Station which is closer to seek refuge. At the Police Station he met Madam Sarah a (C.P.A) who enquired about his mission but the people pounced on and started beating him without even allowing him

to speak but because the CPA was alone she could not do anything. The people increased in their number and continued beating him so the CPA started shouting and that was when accused got breathing space and entered the Charge Office. A certain officer came and said because of how he had been beaten he would not accept accused into custody unless he has been taken to hospital for treatment before he will be accepted there, so the complainant took him to hospital. At the hospital, the complainant dipped his hand into his own pocket and took GHC 1050.00 and gave it to a certain patient at the hospital to count it for him. On their return from the hospital to the Police Station, the people started beating him again till a committee chairman intervene and drove accused in his own car back to the Police Station. At the Police Station, Inspector Fofie took the complainant's statement and asked accused of his side which he explained to him and said he was taking him to court on that same day. At Diaso the inspector took accused to the commander who said that the court did not sit so we returned to Dominase. The investigator took accused to hospital again and upon their return the complainant said when accused family people come he will demand Ghc 1500.00 and his hospital expenses but accused said he was innocent so he will not allow anybody to pay that amount of money. That is all what I know about this case.

At the close of the testimonies of all witnesses, the court made the following findings of fact, that accused was not seen in the room of the complainant but rather outside of the room of the complainant. I also find as fact that no mobile phone was found in the possession of the accused. The court further made the following findings of fact, the money allegedly found in the possession of the accused was not Ghc 2500.00, but rather Ghc 1035.00, the key found in the possession of the accused was not for the complainant, and the whereabout of the unnamed phone is unknown, none of the alleged missing items of the complainant was found in the possession of the accused and nobody saw the

accused taking any of the missing items. The accused was arrested and beaten by a mob including the Complainant before taken to the Police Station.

Article 19 (2) (c) of the 1992 Constitution provides "that a person charged with criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty". So the accused in the instant case, having pleaded not guilty, triggered the constitutional provision under Article 19 supra and set in motion the processes by which the court may find the accused guilty or otherwise, with the assistance of the prosecution.

In criminal trials, the burden of proof in the sense of burden of establishing the guilt of the accused is generally on the prosecution. The failure to discharge that burden should lead to the acquittal of the accused. See the case of **Donkor v. The State (1964) GLR 598, SC.**

The Evidence Act, uses the expression the "burden of persuasion and the "burden of producing evidence".

The general principle on the burden of persuasion has been provided under **section 17(2) of the Evidence Act, 1975 (NRCD323)** as follows:

"... the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to the fact" and in criminal cases, this burden of persuasion has been explained in s 15 as follows; "unless it is shifted, the party claiming that a person has committed a crime or wrongdoing has the burden of persuasion of that issue"

The proof required of the prosecution in the instant case, is said to be proof beyond reasonable doubt. The Evidence Act NRCD 323 section 11(2) states;

"In a criminal action, the burden of producing evidence, when it is on the prosecution as to any fact which is essential to guilt, requires the prosecution to produce sufficient

evidence so that on all the evidence a reasonable mind could find the existence of the fact beyond reasonable doubt"

Proof beyond reasonable doubt is further emphasized in NRCD 323, s 22 which reads

"in a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable, and, in the case of a rebuttable presumption, the accused need only raise a reasonable doubt as to the existence of the presumed fact"

It is, however, not every doubt in the case for the prosecution which should lead to the acquittal of an accused person. In the case of **Oteng v The State (1966) GLR 352, the Supreme Court per Ollenu JSC held**

" .. the citizen too is entitled to protection against the State and that our law is that a person accused of a crime is presumed to be innocent until his guilt is proved beyond reasonable doubt as distinct from fanciful doubt"

Having dilated on the fundamentals of our criminal jurisprudence, I now proceed to determine the instant case base on the available evidence on record and application of the relevant laws.

Now, in the case of Logan & Laverick vrs The Republic,[2007-2008], SCGLR 76, the Court held thus: ***" Whatever the evidence that was led by the prosecution in support of the charges should directly concern and be in line with the particulars of the offences given by the prosecution in respect of the charges"***

The question to answer at this stage is whether the prosecution was able to lead such cogent evidence to establish that the accused took from the complainant (PW1), the phone

valued Ghc 150.00 and the cash of Ghc 2,500 as stated in the particulars of the offence in the charge sheet.

What then has the prosecution to establish or prove in these charges of unlawful entry and stealing? **Section 124** (1) of the Criminal and Other Offences Act, 1960 (Act 29) states:

"Whoever steals shall be guilty of a second degree felony".

Section 125 of the same Act 29 of 1960 further defines stealing as;

"A person steals if he dishonestly appropriates a thing of which he is not the owner".

Therefore, for this offence to be properly laid to secure conviction of the accused, the ingredients in the offence to be proved are (1) dishonest appropriation (2) a thing, ie the subject matter of the alleged stealing, or the stolen item and (3) the accused must not be the owner of the thing appropriated or in simple terms, the stolen item.

In the case of **Ampah v. The Republic [1977] 2 GLR 171, CA**, the court identified the elements of stealing as (1) dishonesty; (ii) appropriation; and (iii) property belonging to another person.

Again, in the case of **Adam v the Republic [1992] 2GLR 150-174** the court per **Benin J** held in holding (5):

"In order to succeed on a charge of stealing under sections 125 and 120(1) of Act 29 the prosecution had to prove one of three things: either the person named in the charge sheet was the owner of the subject matter of the charge; or that the accused was not the owner of and had no proprietary interest in the property; or that a third person whether known or unknown owned it and the accused had no interest in the property which the third party, if he became aware of, would approve. In the instant case, although ownership of the cows was in dispute, there was enough evidence on record that the appellant was not

the owner of the cows. Accordingly, the prosecution successfully discharged the burden of proof on them.

Accordingly, applying the ratio in the above authorities in the instant case, the prosecution must prove that the accused herein dishonestly appropriated some property, in this case, Ghc2500.00 and the phone valued Ghc 150.00 of which accused is not the owner or has no proprietary interest in same. This duty or burden imposed on the prosecution by the law, has not been discharged satisfactorily, in other words, the prosecution has not proved that accused has dishonestly appropriated the phone and the Ghc 2,500.00 belonging to the complainant. The reason for this assertion would be found in the following analysis of the evidence adduced.

The prosecution's entire evidence against the accused in this trial was provided by PW1 and PW2 the investigator who tendered the investigation caution statement and the charge statement obtained from the accused when he was arrested, as well as the exhibits ie two keys, 3 passport pictures of the complainant's wife Adwoa Nkrumah and Ghc 1035.00. It is important to note that the accused flatly denied the offences in both his investigation caution statement and the charge statement. Again, one of the two keys that were allegedly found on accused, was able to open accused person's own door and according to the investigator PW2, accused father told him that he bought the key for the accused, and the Police found this explanation satisfactory and convincing and released one of the said keys to accused. Though the prosecution charged accused for stealing an amount of Ghc 2,500.00 and a mobile phone valued at Ghc 150.00, none of these stolen items were tendered in court as exhibits that were found on accused. But the items allegedly found on accused 15 minutes after the alleged act of unlawful entry and stealing of Ghc2, 500.00 were Ghc 1035.00, passport pictures and two keys. The investigation from the police could not establish how the Ghc 2,500.00 which was allegedly stolen by the accused suddenly turned to GHC1, 035.00 and if the accused used part of it at all, what

he used it for, within that short frame of time of 15 minutes at that early morning of 4.30am. The Prosecution additionally failed to disprove the claim of right of the accused that the key they found in his pocket was his own key, because the complainant himself under cross examination could not identify the key as his, and together with the investigator they both admitted that one of the keys belonged to the accused himself.

In any case, accused was never charged for stealing keys and passport pictures so these exhibits tendered as items found in his pocket at the time of his arrest, are not directly and specifically concern to or in line with the particulars of offence under scrutiny in the instant case. See **Logan & 1 or v. The Republic case supra.**

It is again interesting, and I find it difficult to understand why, the prosecution wanted the court to believe that because an amount of GHC 1035.00 was allegedly found on the accused, it is conclusive and should be acceptable proof by the court that it is the complainant's Ghc 2,500.00 that was allegedly missing.

The following cross examination ensued from the PW1's testimony by the accused on 13-10-22 at the end of his evidence in chief;

Q. *Did you take mobile phone from my pocket at the time you allegedly took money from my pocket?*

A. No, I did not see any phone in your pocket.

Q. So the mobile phone in evidence, where did you pick it from?

A. I did not see it your pocket, but when I went to my room and searched for it, I realized that both the phone and the money was not there.

Q. Did the key that was found belonged to you?

A. The key looked like mine so I can't tell whether the key was yours or mine.

Additionally, in his evidence-in-chief which is the witness statement filed on record on 30-06-22, the complainant (PW1) himself, never said anything to the effect that accused has stolen his property, all what he said is that, "he kept his money Ghc 2,500.00 under a bag on a table in his room and his mobile phone on his bed". To the mind of the court, this piece of evidence which was found lacking from the evidence-in-chief of the complainant is quite fatal.

Now PW2, the investigator, whose role in this whole episode was activated by the arrest of the accused by the complainant (PW1) and subsequent report made to the him, portrayed as knowing the case more than the complainant, therefore he rather testified that his investigation disclosed that it was the accused person who went into the complainant's room and stole his money Ghc 2,500.00 and mobile phone value GHC150.00 on his bed. The obvious question that comes to mind is that if PW1 has not complained for the loss of his property, how could PW2, on his own, conduct an investigation to establish and identify accused as having stolen PW1's property?

The Prosecution in the instant case is required to prove the ingredients of the offence of stealing as mentioned supra, but unfortunately for the prosecution, they have not been able provide a scintilla of evidence, either direct or indirect, to proof that the phone valued Ghc 150.00 and the Ghc2, 500.00, which are the properties of the complainant are in the possession of the accused or was stolen by the accused. The Prosecution would have discharged the burden of proof on them to secure conviction of the accused, if they were able to prove beyond reasonable doubt, that even one of these property has been dishonestly appropriated by the accused.

Assuming, without admitting, that the controversial Ghc 1050.00 which was at the centre of this case, was actually found in the pocket of the accused, same cannot be a proof that it is the alleged Ghc 2,500.00 of the complainant because the two are not the same.

Section 152 of the Criminal Code provides:

"***Whoever unlawfully enters any building with the intention of committing crime therein shall be guilty of second degree felony.***"

Section 153 of the same Criminal Code states the following as explanation as to Unlawful Entry.

"***A person unlawfully enters a building if he enters otherwise than in his own right or by the consent of some other person able to give such consent for the purposes for which he enters.***"

From the evidence, PW1 alleged that he saw the accused coming from his room but this allegation was vehemently denied, and the prosecution could have helped the court by getting another witness to corroborate this but there was none.

In the case of COP v ISAAC ANTWI (1961) 1 GLR, THE Supreme Court per KORSAH C.J. held that the prosecution is to establish the guilt of the accused such that any reasonable doubt of innocence of the accused becomes unlikely in the light of the facts and the evidence adduced. The learned Chief Justice expressed himself in the foregoing case thus:

"the fundamental principles underlying the rule of law are that the burden of proof remains throughout the trial on the prosecution and the evidential shift to the accused only if at the end of the case for the prosecution an explanation of the circumstances peculiarly within the knowledge of the accused is called for. THE ACCUSED IS NOT REQUIRED TO PROVE ANYTHING; IF HE CAN MERELY RAISE REASONABLE DOUBT AS TO HIS GUILT, HE MUST BE ACQUITTED"

According to the Prosecution ie PW1 and PW2, exhibit B3 (Ghc1035) which was found in the pocket of the accused when they subjected him to search is the evidence showing

that accused took this money from the room of the complainant. However, accused, in his testimony also said that, complainant took this money from complainant's own pocket and gave it to a patient at the hospital to count it for him, this piece of evidence was not denied by the prosecution. This happened at a time when the police told complainant to take accused to hospital for treatment due to how bad they had beaten the accused before accused would be accepted into their custody and no police officer accompany the complainant and the accused to the hospital. It needs to be stated here, that, there was no police officer at the hospital at this time, however, PW2 under cross examination, testified that he together with the complainant and others took the same money from the pocket of the accused at the charge office because accused was struggling with them. So is it the case that after retrieving the money from the pocket of the accused same was given to the complainant to keep? Accused stated further in his testimony that on their return form hospital, complainant said that if accused family people come he would demand his Ghc 1500.00 and his hospital expenses, and this piece of evidence too was not denied by the prosecution. Therefore, on how complainant alleged loss of money got to Ghc2, 500.00, from Ghc1500.00, the court was not told.

The following excerpts of questions and answers between the accused and the complainant shed more light on the mystery of the alleged lost money:

Q. At the charge office, the money that you searched and took from my pocket GHC1035 and PW1 took me to the hospital, when it was counted, it was Ghc 1050 so how come the money became Ghc 1035?

A. part of the money was used to treat you at the hospital that is why the quantum reduced.

Then on 9-11-22 the accused cross examined PW2 thus*:*

Q. The complainant took money from his own pocket counted the money at the hospital and it was Ghc 1050and he used Ghc to pay my hospital expenses, so which money are you also saying?

A. I don't know anything about the money complainant retrieved from his own pocket.

This immediate answer from PW 2 is the corroboration of the accused testimony to the effect that when the complainant took the money from his pocket at the hospital PW2 was not there.

It is important to state here that, an accused person in a criminal trial such as the instant case, is not under obligation to proof his innocence and as such, can remain silence throughout the trial. See the case of **Moro v. the Republic [1979] 2 GLR 256**

The accused in his testimony stated that Complainant took this money from complainant own pocket for a patient at the hospital to count it for him but strangely, the Prosecution failed to cross examined the accused on this piece of evidence In so doing, Prosecution chose to be silent would be deemed to be their admission to same.

Again, in the case of **Forkuo & Ors v. The Republic [1997-98]1GLR 1-14**, The court of Appeal held dismissing the appeal***: (l) although the principle was that the unchallenged testimony of a witness must be deemed to have been accepted by the adverse party, there was also the rule that uncontradicted evidence was not necessarily conclusive of the fact in issue, unless there was no evidence from the opponent party on the issue. Where, however there was [pg 3] evidence from prosecution witnesses challenging or contradicting the evidence of the defence witness, then the court in evaluating the evidence as a whole was perfectly entitled to reject the testimony of the witness who was not cross-examined, if it was of the view that the unchallenged evidence was inherently weak and improbable. Since in the instant case, there was evidence from the prosecution witnesses, who knew the third appellant well, that he was the person they saw committing the criminal acts charged against him. The trial judge was entitled in those circumstances in disbelieving the alibi evidence and preferring the evidence of the prosecution witnesses. Monte v Botwe [1989-90] 1 GLR 479, CA cited.***

In the instant case, the accused is an illiterate, and the prosecution led by a Detective Chief Inspector who is highly educated and could be credited with some knowledge in criminal trials in court, heard the accused thoroughly on his evidence-in-chief and engaged the accused in lengthy cross examination, yet kept quiet on the issue of the complainant taking from his own pocket to implicate accused.

Accordingly, on the authority of the above, I hold that the prosecution's failure to cross examine accused on his testimony on exhibit B3 would be taken by the court to be their admission of that piece of evidence from accused.

On this issue of the loss of complainant money, due to the inconsistencies and the doubts surrounding same, I find the version of the accused more credible and probable than that of the prosecution and hold that the Ghc 1050 which was reduced by Ghc 15 medical expenses of accused's treatment is complainant's own money which was used to implicate the accused based on their own suspicion and conjectures.

The court made a finding of fact that, the accused was arrested and beaten by a mob all at the instigation of PW1 and the court will like to seize this opportunity and discourage since same can lead to loss of human life vital evidence to fight crime. Despite abundant availability of material witnesses at the scene of the crime, no other witness was provided by the prosecution to corroborate the claims made by the Prosecution witnesses, not even the wife of the PW1 whose passport pictures was allegedly stolen by the Accused and was tendered in evidence as part of exhibit B3.

Therefore, failure of the prosecution to call such material witness (es) to corroborate their case is fatal and must lead to the failure of its case.

In the complainant own statement to the police which is part of the disclosures in exhibit B2, he stated that at the charge office I was asked to search the suspect Ghc1035 three passport pictures of my wife and my two keys were retrieved from the suspect pocket.

This statement was taken on 206/22 when the accused was arrested, then on 20/06/22 the same complainant gave witness statement to police and said that when the accused was searched at the charge office GHC 1035 and three passport pictures of his wife was found in his pocket. Note that there was no mention of the two keys here, but the same complainant under cross examination from the accused on 14-09-2022, said that the money allegedly retrieved from the accused was Ghc1050 but Ghc15.00 was used to treat accused at the hospital hence the reduction in the quantum of the money to Ghc1035.00. The complainant thus admitted and corroborated the version of the accused on his testimony that he brought Ghc1050.00 from his own pocket and used Ghc15.00 to pay for the medical bills of the complainant.

Therefore, on this issue of the loss of complainant GHC2, 500.00, due to the inconsistencies, the controversy and the doubts surrounding same, I am inclined to consider the version of the accused more credible and probable than that of the prosecution and hold that the Ghc 1050 which was reduced by Ghc 15 medical expenses of accused's treatment is complainant's own money which was used to implicate the accused based on their own suspicion.

The court made finding of fact that the accused was arrested and beaten by a mob all at the instigation of PW1, and the court will like to seize this opportunity and discourage that act by the complainant and his likes, since same can lead to loss of human life and vital evidence to fight crime.

The court would like to note here that, the prosecution only produced the complainant and the investigator as their witnesses to prove their case in this trial against the accused, though they claimed that accused was arrested and sent to Police station by a number of people. But the court thinks that due to the denials of the accused right from his arrest, the prosecution could have provided some more material witnesses but this was not done.

In the case of **Adam v The Republic supra**, the court held in holding 6 that:

"In a criminal prosecution a "material witness" was one whose evidence would help the court decide on the ingredients of the charge before it or whose evidence would help remove any doubt that might exist in the prosecution's case, or whose evidence would help displace any reasonably probable defence that the accused might have. Accordingly, a material witness was necessarily a witness for the prosecution and not the defence since the prosecution assumed the burden of proving guilt., However the prosecution could refuse to call a material witness if he would not speak the truth; or his evidence would negative that of the prosecution and strengthen that of the accused; he was a close relative of the accused; or his identity was not sufficiently established to enable the prosecution contact him before the trial, or he could be an accomplice or co-accused; or there were several witnesses who could testify on the point. Since on the prosecution's evidence S was alleged to have given the cows to the appellant, there was no justification why they failed to call him to ascertain, inter alia, his interest in the cows; how he came by them; and whether he gave the cows to the appellant to sell. Since these were material facts which only the evidence of S could have helped the court resolve, the trial court should have found that the prosecution had not proved its case beyond reasonable doubt and consequently found the appellant not guilty"

In the instant case, despite abundant availability of material witnesses at the scene of the crime, no other witness was provided by the prosecution to corroborate the claims made by the PW1, not even the wife of PW1 whose passport pictures were allegedly stolen by the Accused and was tendered in evidence as part of exhibit B3.

Therefore, failure of the prosecution to call such material witness (es) to corroborate their case is fatal and same must lead to the failure of the prosecution's case against the accused.

Consequently, considering the totality of evidence before the court, this court holds that prosecution has failed to discharge the burden of proof of their case against accused beyond reasonable doubt.

Consequently, given the pit falls, suspicions, and the doubts in the testimonies of the prosecution witnesses, this court is of further view that it is dangerous for the court to rely on such testimony to convict the accused. The court therefore, following the tradition such trials will resolved the doubts created in this case to the benefit of the accused herein.

Accordingly, accused person is hereby acquitted and discharged on both counts of unlawful entry and stealing preferred against him by the prosecution.

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Bernard D. Biney esq.

(Magistrate)