

**IN THE DISTRICT MAGISTRATE COURT HELD AT N.A.M.A. NSAWAM ON
20TH APRIL 2023 BEFORE HER WORSHIP SARAH NYARKOA NKANSAH
MAGISTRATE**

CASE NO: B7/80/20

THE REPUBLIC

VRS

FIANKO ISAAC

ACCUSED PERSON: ABSENT.

PROSECUTION: CHIEF MANU HOLDING BRIEF FOR CHIEF INSPECTOR
ASANTE FOR PROSECUTION PRESENT.

JUDGMENT

The Accused Person has been charged with the following offences under the Criminal
& Other Offences Act, 1960 (Act 29):

- a. Unlawful Entry contrary to section 152 of Act 29;
- b. Causing unlawful damage contrary to section 172 of Act 29; and
- c. Stealing contrary to section 124 of Act 29.

The Accused Person pleaded not guilty after the charges had been read out and
explained to him.

FACTS OF THE CASE

The facts of the case as presented by the Prosecution are that on 13th March, 2020, the Complainant woke up to find his 50 inches flat screen TV stolen and his speakers moved from the room to the corridor waiting to be collected. After a while, the Accused Person appeared and in an attempt to steal the speakers, the Complainant chased him. The Accused managed to scale the wall but dropped his mobile phone, a cutter and a bag containing clothes. The Complainant reported the matter to the Police who lured the Accused to come for his phone leading to his arrest. Following the arrest, the Complainant was invited to the station and he easily identified the Accused as the culprit.

THE CASE OF THE PROSECUTION

PW 1, the Complainant, confirmed the facts as presented by the Prosecution.

PW 2 tendered in evidence pictures of the portion of burglar proof cut off, the cutter and the caution statements. PW 2 also repeated the facts presented by the Prosecution and added that the Accused was arrested after luring a taxi driver who called to claim the phone on behalf of the Accused. The Accused later came to the station and was immediately arrested and arraigned before Court.

Thereafter, the Prosecution closed its case.

THE CASE OF THE DEFENCE

The Accused, in his defence, stated that somewhere in March, 2020, he lost his Samsung 10AS phone in Nsawam and attempts to retrieve the phone almost failed as nobody answered after several calls. The Accused continued that, one day a male voice answered his call and agreed to return the phone at a price which he agreed. The

Accused added that he sent a friend to meet the person and collect the phone on his behalf but after a few hours, the friend called to inform Accused of his arrest. The Accused averred that, he later went to the Police Station where he was arrested and charged with the stated offences. The Accused argued that he has no knowledge of the accusations and stated that, he is not guilty of the charges levelled against him by the Police hence prayed the Court to discharge him unconditionally.

The defence thereafter closed its case.

The legal issues to be determined by this Court are:

- i. *whether or not the Accused Person unlawfully entered the room with the intention to commit offence.*
- ii. *Whether or not the Accused Person caused damage to Complainant's property*
- iii. *Whether or not the Accused Person stole the Complainant's items*

In *Republic v. District Magistrate Grade II, Osu; Exparte Yahaya [1984-86] 2 GLR 361-365*, Brobbey J. (as he then was) stated and I quote:

"One of the cardinal principles of criminal law in this country is that when an Accused Person pleads not guilty, his conviction must be based on evidence proved beyond reasonable doubt."

Section 152 of Act 29 defines unlawful entry as follows:

"A person who unlawfully enters a building with the intention of committing a criminal offence in the building commits a second degree felony".

Section 153 of the Criminal and Other Offences Act, 1960 (Act 29) reads as follows:

"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."

For a charge of unlawful entry to be successful, the following ingredients must be present:

- i. There must be entry,*
- ii. The entry must be unlawful, and*
- iii. There must be intention to commit crime.*

In **Kanjarga v. The State [1965] GLR 479-483**, per Ollennu JSC:

"To constitute the offence of unlawful entry, the entry must be made with a purpose or intent to commit a crime. It follows that in addition to proving entry, the Prosecution, to succeed, must prove that intent to commit a crime in the premises existed at the time of entry and was the purpose for the making of the entry."

Section 172 (1)(a) of Act 29 provides as follows:

"A person who intentionally and unlawfully causes damage to any property by any means whatsoever to a value not exceeding GH¢100.00 or without a pecuniary value, commits a misdemeanour."

From the above, the elements of causing unlawful damage are as follows:

- i. That damage was caused.*
- ii. That the damage was caused by the Accused Person.*
- iii. That damage was intentionally and unlawfully caused.*

Section 125 of Act 29 defines stealing as follows:

"A person steals who dishonestly appropriates a thing of which that person is not the owner."

Taylor J (as he then was) in the case of **Lucien v. The Republic [1977] 1 GLR 351-359** laid out the elements in the offence of stealing per holding 2 as follows:

"The only basic ingredients requiring proof in a charge of stealing were that:

- i. the person charged must not be the owner of the thing stolen,*
- ii. he must have appropriated it and;*
- iii. the appropriation must have been dishonest".*

Throughout the trial Accused Person has insisted that, he was not the person who went to Complainant's house to steal. According to Accused Person, although the sim card purportedly retrieved at the crime scene belongs to him; he had earlier lost his phone before the incident and so he was not the person in the possession of the phone that day. It is clear to the Court that, Accused Person seeks to raise the defence of mistaken identity.

Having raised this Defence, the onus remained on the Prosecution to establish the identity of the Accused Person.

Complainant has testified that, he identified Accused Person as the one who came to his house when he met Accused Person at the Police station. However, Accused has contradicted Complainant's evidence by insisting that, Complainant could not identify him until the investigator pointed him out to Complainant.

It is trite learning that, Accused Person does not have to prove his or her innocence, but may present evidence to try and raise reasonable doubt about their guilt.

Section 17 of the Evidence Decree 1975 [NRCD 323] states that;

“The Accused Person may give evidence on his own behalf and call witnesses who may tend to prove his innocence or show reasonable doubt of his guilt, or to mitigate the punishment.”

In the present case Accused Person obviously seeks to raise reasonable doubt by his Defence of mistaken identity. The onus therefore continues to lie on the Prosecution to dispel this doubt that Accused Person seeks to create in the mind of the Court.

Interestingly, the Prosecution did not consider it necessary to lead further evidence to establish the identity of the Accused Person. Prosecution could have simply used the call records of Accused Person to either dispel or substantiate Accused Person’s version. If Accused Person’s sim card had indeed been lost prior to the time of the incidence, the call records would have indicated a change in trend in the numbers that sim card called regularly; and even the duration of those calls could have been analyzed as well. Had the Police gone through this very simple exercise they may have found out that Accused Person’s claim was probable and they would thereby not have put him before the Court at all. Had the exercise also revealed that, there was no change in the call trend of Accused Person throughout the period, Prosecution could have presented this finding to the Court to ground the identity of the Accused Person.

Prosecution had both the phone and the Accused Person, they could have conducted some forensic examinations to either link Accused Person to the phone within the time period the incident happened or to satisfy themselves that Accused Person was actually not in possession as he claimed.

It seems obvious to the Court that, if any investigation was conducted at all then it was an arm-chair investigation. There is so much that Prosecution could have done but they clearly did not put in the needed effort.

The position of the law is that, if the Prosecution fails to lead evidence to establish the identity of the Accused Person and the Accused Person raises a defence of mistaken identity, then the Court must take a special measure and discharge the Accused Person.

The Supreme Court has established this principle in numerous cases, including the case of *Adeomi-Denteh v The Republic* [1972] G.L.R. 99 and *Kwasi Amoako v The Republic* [1984] G.L.R. 24.

In *Adeomi-Denteh v. The Republic* [1972] G.L.R. 99, the Supreme Court of Ghana held that, where Prosecution fails to establish the identity of an Accused Person and the Accused raises a defence of mistaken identity, then the Court must take a special measure and acquit the Accused.

Similarly, in *Kwasi Amoako v The Republic* [1984] G.L.R. 24, the Supreme Court of Ghana reaffirmed its previous ruling and held that the Accused should be acquitted where Prosecution fails to lead evidence to establish the identity of the Accused and the Accused raises a defence of mistaken identity.

The Prosecution bears the burden of proof to establish the guilt of the Accused Person beyond reasonable doubt as per *Sections 11(2) and 13(1) of the Evidence Act, 1975 (NRCD 323)* and also as was stated in the case of *Bruce-Konuah v. The Republic* [1967] GLR 611 – 617, where Amissah J.A. stated thus:

“Barring the well-known exceptions, an Accused is under no obligation to prove his innocence. The burden of proof of the Accused Person’s guilt is on the Prosecution.”

In the case before this Court, the Accused Person has successfully raised a defence of mistaken identity. The Prosecution in the face of this defence has woefully failed to establish the identity of the Accused Person by their evidence. As prescribed by the authorities cited supra, the Accused Person ought to be acquitted and discharged.

In *Dexter Johnson v. The Republic [2011] SCGLR 601*, Dotse JSC had this to say about the standard of proof in criminal matters and I quote:

“Our system of criminal justice is predicated on the principle of the Prosecution, proving the facts in issue against an Accused Person beyond all reasonable doubt. This has been held in several cases to mean that, whenever any doubts exist in the mind of the Court which has the potential to result in a substantial miscarriage of justice, those doubts must be resolved in favour of the Accused Person”.

The learned judge continued and I quote:

“I believe this principle must have informed William Blackstone’s often quoted statement that ‘Better than ten guilty persons escape than one innocent suffer’ which was quoted and relied upon by me in the unanimous decision of this Court in the case of Republic vrs Acquaye alias Abor Yamoah II, ex-parte Essel and Others [2009] SCGLR 749 @ 750”.

I have examined the whole of the evidence adduced at the trial and I find that, the Prosecution has not been able to prove its case beyond reasonable doubt. In the circumstances, the Accused Person herein, **Fianko Isaac** is hereby acquitted and discharged.

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H/W SARAH NYARKOA NKANSAH
MAGISTRATE
20/04/2023.