IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A, LUANDA, J.A And MJASIRI, J.A)

CRIMINAL APPEAL NO. 277 OF 2008

MUSTAFA DARAJANI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Uzia, J)

Dated the 6th day of August, 2008
in
Criminal Appeal No. 15 of 2008

JUDGEMENT OF THE COURT

21 & 27 June, 2011

LUANDA, J.A,

The appellant, MUSTAPHA s/o DARAJANI and three others were charged in the District Court of Songea at Songea with burglary and stealing contrary to sections 294 (1) and 265 of the Penal Code, Cap. 16 R.E. 2002. The appellant and another accused person Hamisi Nampaka who is not appealing, were convicted as charged and each was sentenced to twelve (12) years imprisonment for the offence of burglary and three

(3) years imprisonment for stealing which sentences were ordered to run concurrently. The other two were acquitted.

The appellant was dissatisfied with the finding of the trial Court. He appealed to the High Court where his appeal was dismissed. The High Court, however, reduced the sentences of 12 years and 3 years imprisonment to 7 years and 2 years respectively. Still dissatisfied, the appellant has come to this Court on appeal.

Mr. Josephat Mkizungo, learned State Attorney and Ms Andikalo Msabila, learned Senior State Attorney who appeared for the respondent/Republic did not resist the appeal. Mr Josephat told the Court that they were unable to support the decisions of both lower Courts. We too were astonished by the state and the quality of the evidence on the prosecution side.

Briefly the prosecution case was to this effect:- On 10/10/2006 at unspecified time, the house of Best Mwandesile (PW2) was broken/ burgled and a number of articles namely TV, Deck, Receiver, Remote

Control, Drier and clothes were stolen. The matter was reported to police who visited the scene of crime and found the house to have been broken/ burgled. The police suspected the appellant to be the one who did it because he was an habitual offender of those types of breakages. They traced him.

The appellant was arrested and his house was searched. They took a remote control of a deck make Panasonic as they suspected it might be among the items stolen. The appellant was queried as to how he came to possess the same. The appellant told them that it was his property which was given by Hamis Nampaka (the other convict)

The police took the appellant to various places where the alleged stolen properties were recovered from different people who are said to have received them from the appellant and his colleagues accused persons. Eventually the said properties were tendered in Court as exhibits namely remote control (Exht P1), receiver (Exh P2), deck (Exht P3) drier (Exht P4) and television (Exht P 5). The exhibits were produced by DC Juma (PW1) on 21/3/2007 the date he gave his evidence in Court.

On the same day after PW 1 had finished tendering his evidence, all exhibits were ordered to be returned to the complainant Best Mwandesile (PW2) who by then had yet to testify. PW2 testified on 11/4/2007 in absence of the exhibits. In actual fact the exhibits were not brought to court for identification purposes in the subsequent dates of hearing. PW2 simply informed the trial court that he had identified the exhibits at police !

Mr. Josephat gave two reasons as to why they did not support the conviction. **One,** the properties which were alleged to have been stolen after the breaking of the house were not identified at all. **Two**, the search conducted with the view to recovering the stolen properties was done without search warrants. He referred us to the case of **Patrick Jeremiah V. R** Criminal Appeal No. 34 of 2006 (CAT)

The trial Court was satisfied, basing on the above evidence, that the appellant and the other accused who did not appeal, are the ones who committed the offence.

This is what it said, we reproduce;-

" The second issue is whether there was sufficient evidence to convict the accused persons for the offence charged. According to the evidence of PW1 and PW2 I noted that the 1st Accused person was found in possessions of remote control of the deck make PANASONIC on material day. ***PW 2 had identified it.*** *DW1 had not explained and proved if the remote belonged to him during the defence. The 1st Accused person escorted Police Officer PW1 and PW2 into the premises of the 2nd Accused person. The first and 2nd Accused person pointed out where the stolen properties were hidden. They pointed out the house of PW3 where the deck make " PANASONIC SUPER DRIVE " was seized.* ***PW2 identified it as his property****. PW3 admitted and proved to buy it from the 1st and 2nd Accused persons. The 1st and 2nd Accused persons were further escorted PW1, PW2 into the premises of PW*

4 where the receiver make " GULF BOX" was found. ***PW2 had identified it*** *and PW4 proved that he bought it from one 1st and 2nd Accused persons. On 17th October, 2006 PW1 has seized one drier make EQUATOR under custody of one Jema d/o ? who has not appeared to testify in Court. She has alleged that the 1st accused brought it to her for purpose of selling it. PW2 identified it".*

[Emphasis supplied]

The trial Court then concluded thus, we quote:-

" On the basis of the above evidence I am in opinion that since the 1st and 2nd Accused persons sold the stolen items to PW3 and PW4 I do not have any doubt that they were recent found in possession of the stolen properties of the stolen properties hence they broke and stole the stolen properties".

On appeal to the High Court, the learned Judge did not discuss the issue of identification. The learned judge was satisfied that as the appellant was the one who led the search party to his friends, then the finding of the trial court that the appellant was the one who committed the offence and therefore his conviction was sound in law.

Both lower courts found that the house of PW2 was burgled/broken and a number of articles were stolen. Further, both lower courts found that the appellant and Hamis Nampaka were the ones who committed the offence. The question in this appeal is whether on the available evidence in the record the concurrent findings of fact of the lower courts is supported by evidence.

It is now settled that normally the appellate court will not interfere with the concurrent findings of fact of the lower courts unless it is shown there are misdirections or non directions. **(See DPP V Jaffari Mfaume Kawawa [1981] TRL 149)**

In the instant case, there is no eye witness who witnessed the breakage and the stealing. The prosecution case relied on circumstantial evidence in particular the doctrine of recent possession. Was the doctrine properly invoked?

Simply stated the doctrine of recent possession goes thus:- Where an accused person is found in possession of property recently stolen which property was duly identified by the complainant, then such an accused person is taken to have been either the actual thief or a guilty receiver. And what amounts to " recently" will depend on the nature of the thing stolen whether it passes or changes hands easily.

But before we embark on discussing whether or not the doctrine of recent possession was properly invoked, we find it appropriate at this juncture, to discuss whether the search which resulted into the seizure of the properties alleged to have been identified was conducted in accordance with the law. Indeed, that is the second limb of Mr. Josephat's argument.

It is in the record that the police conducted the search without search warrants. They did not attempt to say why they did that. Under section 38 (1) of the Criminal Procedure Act, Cap. 20 (henceforth the Act) Police officers are empowered to search without search warrant provided it is shown there are reasonable grounds to do so and that the delay may result in the removal or destruction or endanger life or property. Otherwise search warrants must always be issued. Not only that upon completion if any property is seized, a receipt must be issued which must be signed by the occupier or owner of the premises and the witnesses around, if any. That is the gist of section 38 (3) of the CPA which reads:

> *" 38 (3) Where anything is seized in question in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of the thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any".*

In **Selemani Abdallah & others VR** Criminal Appeal no. 384 of 2008 the Court observed:-

> *" The above cited section is couched in mandatory terms. And the whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized come from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that evidence arising from such search is fabricated will to a great extent be minimized".*

And in **Patrick case** cited supra this Court held that failure to comply with the s. 38 (3) of the CPA is a fatal omission.

We would have ended there. Assuming the omission was not fatal, was the doctrine properly invoked?

In order for the doctrine to stick, the prosecution must establish beyond reasonable doubt, inter alia, that the properties recovered were duly identified by PW2. Both lower courts were satisfied that PW2 identified the properties. On the available evidence on record, as we have shown above, we are unable to go along with the lower Courts. The record does not bear them out that PW2 identified the recovered properties in Court where the guilt or otherwise of the appellant was discussed and looked into. We entirely agree with Mr. Josephat that the prosecution failed to prove its case to the standard required.

In fine, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant to be released from prison forthwith unless he is detained in connection with another matter.

Order accordingly.

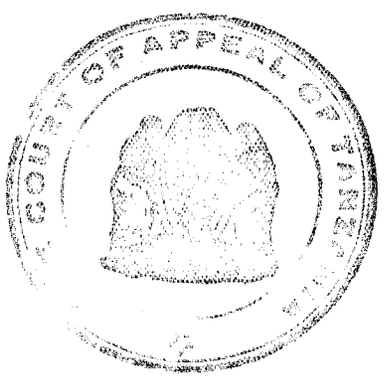
Dated at **Iringa**, this 24th day of June, 2011

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL