IN THE COURT APPEAL OF TANZANIA

AT TANGA

(CORAM: LUANDA, J.A., JUMA, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 109 OF 2015

ALLY MBELWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Msuya, J.)

Dated the 15th day of December, 2014

In

Criminal Appeal No. 21 of 2014

JUDGMENT OF THE COURT

18th & 19th August, 2015

LUANDA, J.A.:

Mr. Materinus Marandu, learned Senior State Attorney who was assisted by Ms Rebecca Msalangi and Ms Shose Naiman, learned State Attorneys for the respondent/Republic supported the appeal lodged by the appellant, and rightly so.

The appellant was charged in the District Court of Handeni with burglary and stealing c/ss 294 (1) (a) and (2) and 258 (1) and 265 of the

Penal Code, Cap. 16 R.E 2002. He was convicted as charged and because it was reported he was a habitual offender, he was sentenced to 7 years and 3 years imprisonment respectively. The sentences were ordered to run consecutively.

Aggrieved, he unsuccessfully appealed in the High Court of Tanzania (Tanga Registry). Still dissatisfied, he has preferred this appeal.

The evidence which is the basis of conviction of the appellant is that of the cautioned statement and the doctrine of recent possession. Briefly the prosecution case was this: When Mwijuma Shabani (PW1) and Amina Shabani (PW2) woke up earlier in the morning of 5/7/2012 they found their door or window (the two were not at one) was broken and a number of properties namely laptop, digital camera, mobile phone, cable and "*other small items*", not disclosed, were stolen. The matter was reported at police.

On 8/7/2012, PW1 was summoned at the Police Station where he met two people, one being the appellant. He was shown a digital camera which he claimed was his property. But he did not show any special mark

to indicate that it was the very camera stolen some few days back. He then tendered it in court as exhibit. Also tendered in court were mobile phone, laptop, two additional digital cameras with cables which these last items were not included in the Charge Sheet. But again PW1 did not give any special marks. Apart from that discrepancy, it is not shown in the prosecution case how and who arrested the appellant. It is also not shown exactly where the exhibits were retrieved and by whom. Under the above circumstances the doctrine of recent possession cannot apply. The doctrine can only be invoked if it is shown through evidence to the satisfaction of the court, inter alia, the place where the alleged stolen property was retrieved, in whose possession was found, the complainant to positively identify the property by special marks as opposed to bare assertion.

In **Alhaji Ayub Msumari and Others V. R.** Criminal Appeal No. 136 of 2009 (unreported) it was held thus:-

> *"...before a court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal Case, ... it must positively*

be proven, ***first,*** *that the property was found with the suspect;* ***secondly,*** *that the property is positively the property of the complainant;* ***thirdly,*** *that the property was stolen from the complainant, and lastly that the property was recently stolen from the complainant.*

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses."

In view of the foregoing, the doctrine of recent possession was improperly invoked.

Next is the cautioned statement. Mr. Marandu said the same was taken beyond the prescribed time of four hours after his arrest though it was admitted without any objection. We agree with Mr. Marandu. The

evidence on record shows that the appellant was arrested on 7/7/2012; whereas his cautioned statement was taken on 9/7/2012 beyond the prescribed time of four hours as is provided for under section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The issue in our view is that the cautioned statement was improperly admitted in evidence notwithstanding to have not been objected by the appellant. The prosecution case has no leg to stand on.

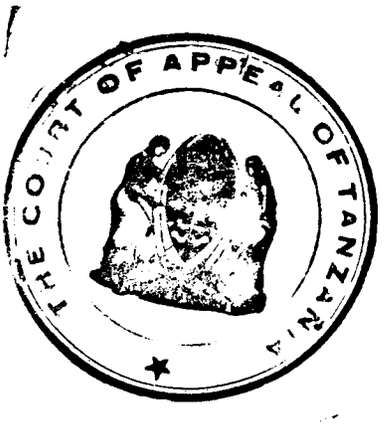
Before we pen off, we wish to comment on the sentence of 7 years imprisonment imposed by the trial District Court. Unfortunately, the High Court did make any comment.

In terms of s. 170(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 and as the offence is not one falling under the minimum sentences the trial Resident Magistrate had no powers to impose a sentence of imprisonment for a period not exceeding five years. By imposing the sentence of 7 years, the trial Resident Magistrate had gone beyond his sentencing powers in legal parlance we call it *ultra vires*. We hope the learned Magistrate will not repeat the same mistake in future.

In fine the appeal is allowed, conviction quashed and sentences set aside. The appellant to be released from prison forthwith unless he is detained in connection with another matter.

DATED at TANGA this 19th day of August, 2015.

B.M. LUANDA
JUSTICE OF APPEAL



I.H. JUMA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL