IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 582 OF 2019

ASHIRAKA NAMAHALA MILIAS..... ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwembe, J.)

dated 24th day of June, 2019
in
DC Criminal Appeal No. 162 of 2018

JUDGMENT OF THE COURT

2nd & 8th June, 2021.

KITUSI, J.A.:

The District Court of Nanyumbu district in Mtwara region convicted the appellant with housebreaking under section 294 (1) (a) of the Penal Code [Cap. 16, R.E 2002] in the first count, and stealing under sections 258 (2) and 265 of the same code, in the second count. It was alleged that the appellant unlawfully broke into the house of one Chaka Said Chaka with intent to commit an offence therein, and that having gained entry into that house, he stole from it a subwoofer, a solar battery, a flash and money cash Tshs. 1,000,000/=, all belonging to the said Chaka Said

Chaka. He was sentenced to 4 years and 2 years in jail respectively. He unsuccessfully appealed to the High Court, hence this second appeal.

The prosecution led evidence to prove that the appellant, and no other, committed the offences charged. There was no dispute that Chaka Said Chaka (PW2) and one Baba Neema were co-tenants in the house of Binti Mombo, who was the appellant's grandmother. There was also no dispute that PW2's room was broken into and some properties were stolen from it. According to the record the appellant was living in the same house.

PW2 left home in the morning of the fateful day after his wife who was a trader, had left earlier. PW2 had locked the door to his bedroom at the time of leaving, but later he received a call from Baba Neema informing him that the door to his room was open. He hurried back home and indeed found the door open, with the padlock he had used to lock it, broken. PW2 entered into the room and discovered that money cash amounting to shs. 1,000,000/= and other things had been stolen. Those items were a solar battery, one subwoofer with two speakers, one flash and a DVD player.

Baba Neema told PW2 that he had seen the appellant dealing with the door to his room but had taken no particular interest believing that he was repairing it, him being the landlady's grandson. Little did he know

that the appellant was picking the lock, for shortly later, he saw him riding a motorcycle carrying those stolen items away from the house.

PW2 reported the matter at police station naming the appellant as the prime suspect, then left. Later at around 01.00 am when the appellant returned home, at the very house PW2 and Baba Neema lived, they arrested him although he did not at that time, have the stolen items with him. They turned him over to the police.

On the next day, the police informed PW2 that the appellant had confessed to them that he broke into the house and stole and had, in fact, disclosed where he had pawned the stolen items. That was DC Raphael's story at the trial. DC Raphael (PW5) testified that when proceeding to the appellant's residence with the view of conducting a search, he came out clear and led the police to the house of Swedi Hashimu (PW4), in which the items stolen from PW2 were found. These items were listed down in the seizure certificate (Exh. P3).

On his part, PW4 stated that on the previous day before his arrest, the appellant approached him with a subwoofer which he said he was offering as collateral for a loan of Tshs. 25,000/=. PW4 gave the appellant the money and retained the subwoofer which he described as black, with two small speakers. On the next day, the appellant took policemen to PW4's house and they conducted a searched in his presence resulting into

the finding of the subwoofer which PW4 had retained as a collateral for the loan he extended to the appellant the previous day. A seizure certificate was prepared and it was signed by PW5 and PW2 who identified the said subwoofer by a special mark. The appellant signed it too.

In defence, the appellant denied committing the offence and made an account of how on the material day he was out riding a bodaboda and did not get back home until at 01:00 am. However, he said, it was a surprise to him that PW2 arrested him just on arrival. According to the appellant, the whole thing is a fabrication by PW2 who was five months in arrears of rent at his grandmother's house. The same appellant however, conceded when cross-examined, that his brother had intended to settle the matter with PW2 if the latter had not demanded payment of Tshs. 150,000/= for it, which was considered to be too much.

The trial court found the appellant guilty, first on the basis of the fact that he freely confessed to have committed the offences, and secondly on the evidence of PW4 whose account implicating the appellant with the offences, was not challenged by him by way of cross examinations. On first appeal, after considering the issue raised by the appellant regarding discrepancies as to the time of committing the offence, and after concluding that the discrepancies were too minor to warrant interference with the trial court's decision, the High Court

dismissed the appeal. On the basis of the doctrine of recent possession, it confirmed the finding of the trial court that the appellant was guilty.

The doctrine of recent possession was the respondent's trump card before us on this second appeal, as we shall see later.

The appellant raised four grounds of appeal for us to consider. He appeared in person and therefore being a lay person, he did not offer much in oral submissions. He only wondered why PW4 in whose possession the stolen item was found, was turned into a witness instead of being the prime suspect. He also submitted that he did not sign the seizure certificate, so he moved us not to rely on it. In general, he prayed that we go by the grounds in the memorandum of appeal and find them sufficient to make us allow the appeal.

The respondent Republic was represented by Mr. Abdulrahaman Msham, learned Senior State Attorney and Ms. Caroline Matemu, learned State Attorney. It was Ms. Matemu who argued the appeal, beginning with ground 2.

Ground 2 raises three issues, two of them being in relation to the appellant's cautioned statement. First, it is alleged that after admission into evidence, the statement was not read over or that the appellant failed to challenge it because the trial court referred to it as "record of interview". Second, that the statement was recorded outside the

prescribed time of four hours. On these complaints, Ms. Matemu submitted that the statement was read over and despite the trial magistrate referring to it as a 'record of interview', the appellant understood what it was and challenged it by raising an objection that resulted into a trial within a trial being conducted. She added that the Marginal Note to section 57 of the Criminal Procedure Act, (The CPA) under which the statement was recorded, reads; "Record of Interview". On the complaint that the statement was recorded outside the basic four hours prescribed by the law, the learned State Attorney submitted that the statement was recorded within 3.57 hours of the appellant's arrival at the police station.

With respect, we agree with Ms. Matemu's submissions in relation to the two complaints. The evidence on record shows that the appellant was put under restraint at 01.00 hours and that his statement was recorded from 04.57 hours, barely 3 minutes before the expiration of the statutory time. Secondly, the fact that the learned trial Magistrate referred to the statement as "record of interview" did not, in our view, change the cautioned statement into something else. It was and it is still a cautioned statement because it was recorded in accordance with section 57 of the CPA and it does not become anything less merely because the trial Magistrate referred to it by another name.

Still on ground 2 of appeal, there is also a complaint that the certificate of seizure was not signed by an independent witness. Ms. Matemu quickly conceded to this complaint and added that, after all, it was not read over after admission. She submitted that it should be expunged from the record. Ms. Matemu is correct and we instantly agree with her, because the law is settled that a certificate of seizure must be signed by an independent witness and also that for a documentary exhibit to form part of the evidence, it has to be read over after admission, obviously to enable the accused know its contents. On the latter principle, see the case of **Robinson Mwanjisi & Others v. Republic** [2003] T.L.R 218 and **Steven Salvatory v. Republic**, Criminal Appeal No. 275 of 2018 (unreported). For the reasons we have shown, our conclusion is that ground 2 has no merit, except for the errors regarding the seizure certificate. We accordingly expunge from the record the seizure certificate as prayed by the learned State Attorney.

In ground 3, the appellant faults the trial court for not specifying the provision under which the conviction was entered against him. Ms. Matemu submitted to counter this complaint despite appreciating first, that section 312 (2) of the CPA requires the trial Magistrate to specify the provision under which a conviction is entered. She submitted that in this case the learned trial Magistrate indicated that he was convicting the

appellant as charged, which she said, was sufficient cure of the omission because the charge had earlier been read over and explained to the appellant.

We see sense in the submissions made by the learned State Attorney on this point, so we agree with her again. To us, this is more an issue of mere semantics than substance, so it would not tip the scales this or the other way. This is one of the cases in which we are justified in holding that a conviction against the appellant was entered for the offence he had been charged with, which the appellant was too well aware of. We are doing what we did in **Imani Charles Chimamngo v. Republic** Criminal Appeal No. 382 of 2016 (unreported), where the Court had to conclude that under the prevailing circumstances conviction must be taken to have been properly entered.

In ground 4, the appellant seeks to challenge the two courts below for taking PW2's bare word as proof of his ownership of the subwoofer. Reacting to this, Ms. Matemu submitted that PW2 actually identified the subwoofer by its special mark and the court noted it. The learned High Court Judge who sat on first appeal dealt with this issue, so it only remains for us to consider if his conclusion is or is not sustainable. He took into account PW2's evidence and submissions by the learned State Attorney who argued the appeal for the respondent, and concluded that PW2 had

identified the subwoofer by a special mark. He supported his decision by the case of **James Paul Masibuka & Another v. Republic**, Criminal Appeal No. 61 of 2004 (unreported). We do not see how the learned Judge can be faulted on that finding which is supported by settled law. The position taken by the Judge has been expressed in many of our other decisions such as, in **Ramadhani Hamisi & Joti v. Republic**, Criminal Appeal No. 513 of 2016 (unreported) that identification of a stolen property by the owner by special mark, is sufficient proof of ownership. Therefore, ground 4 has no merit too.

Last for consideration is ground 1 which is general in nature as it seeks to fault the two courts below for convicting him in a case that was not proved beyond reasonable doubt. Here is where Ms. Matemu brought up the doctrine of recent possession and heavily relied on it as we intimated earlier. It should be recalled that the appellant had earlier picked issue with the prosecution's decision to use PW4 as a witness instead of prosecuting him. He submitted that it is PW4 not him, who was found in possession of the stolen subwoofer, so he should have been the one charged.

Ms. Matemu agreed that indeed it is PW4 who was found in possession of the stolen subwoofer but the appellant was in constructive possession of it. She submitted that possession may be actual where a

person is actually found in possession of something, or constructive, where though not in actual possession of the thing, a person has knowledge of where it is and control of it. She cited the cases of **Samwel Marwa @ Ogonga v. Republic,** Criminal Appeal No. 74 of 2013 and; **Simon Ndikulyaka v. Republic,** Criminal Appeal No.234 of 2014 (both unreported). We think Ms. Matemu is correct in principle that, once it is established by evidence that, a person, though not in actual possession of a property, has knowledge and control of where it is, he is taken to be in constructive possession of that property. See also the case of **Moses Charles Deo v. Republic** [1987] T.L.R 134.

In this case there was evidence from PW5 that the appellant confessed and led the police to the house of PW4 where the subwoofer was recovered. PW4 explained to the police how the said subwoofer got there, that it was placed by the appellant as collateral for a loan he took from him. That was PW4's story in court, which the appellant did not contradict. We are satisfied, as were the two courts below, that the evidence that was presented by the prosecution on this aspect, established beyond doubt, that the appellant had knowledge that the subwoofer was at PW4's house and maintained control over it because he allowed it to be there as security for the loan he had obtained. This was sufficient to prove that the appellant was in constructive possession of the

subwoofer. In the circumstances, the doctrine of recent possession was correctly applied so, the first ground of appeal lacks merit.

In the end, and for those reasons, this appeal has no merit, and we dismiss it entirely.

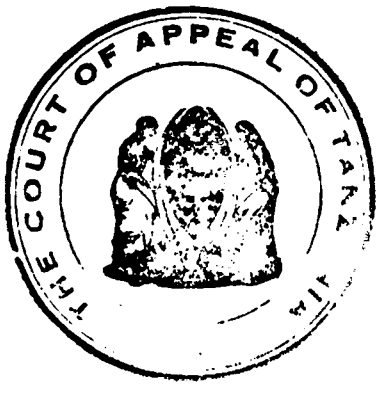
DATED at **MTWARA** this 7th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 7th day of June, 2021 in the presence of the Appellant in person and Mr. Abdulrahaman Msham, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL