IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 133 OF 2020

MARWA CHACHA @ROBARE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from Judgment of the Resident Magistrates' Court of Musoma (Extended Jurisdiction) at Musoma)

(Ng'umbu, RM Ext. Juris.)

dated the 7th day of October 2019
in
Criminal Appeal No. 23 of 2019

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JUDGMENT OF THE COURT

31st May & 9th June, 2022

KOROSSO, J.A.:

This is the second appeal. Marwa Chacha @Robare, the appellant (then, the 1st accused) was arraigned in the District Court of Serengeti District at Mugumu along with two others, Matiko Deusi @Makire and Patrick Chacha @Keraryo (then, the 2nd and 3rd accused and not subject of this appeal) on two counts namely: First count, Burglary contrary to section 294(2) of the Penal Code, Cap 16 R.E 2002, now 2019 and in the second count, Stealing contrary to section 258 (1) and (2) of the Penal Code.

The particulars in the first count, are that; the appellant, Matiko Deus @ Makire and Patrick Chacha @Keraryo on 12/06/2018 at 03.00 hours, at Bomani area, Mugumu Township, within Serengeti District, Mara Region jointly and together did break into and enter the house of Samwel Mwita with intent to commit the offence of stealing. For the second count, it was alleged that on the same date, time, and place upon breaking into the house of Samwel Mwita jointly and together did steal one flat screen 28 inch make Zec valued at Tshs. 800,000/=, one flat screen 24 inch made Sunda valued at Tshs. 450,000/-, 9 pairs of shoes valued at Tshs. 230,000/=, 3 electric irons valued at Tshs. 120,000/=, one DVD player Zec valued at Tshs. 45,000/= and one DVD players made Sundar valued at Tshs. 45,000/= all items being the property of Samwel Mwita and valued at Tshs. 1,690,000/=.

The background leading to the current appeal as gathered from the prosecution witnesses is that Samwel Mwita Chacha (PW1) who resided in the Bomani area, Mugumu Township, on 12/06/2018 woke up from sleep around 03.00 hours only to discover that there was a break-in at his house and that various items with their value as listed in the charge sheet offence particulars had been stolen. PW1 reported the incident to the Hamlet Chairman and subsequently, to the Mugumu Police Station. On 21/06/2018, PW1 was directed to go to the police station where he was

shown some items and he managed to identify a flat-screen TV Sundar make and a pair of sandals, which were tendered and admitted into evidence during the trial as exhibit P1.

According to G7930 DC Erasmus (PW3), a police officer, whilst investigating, they received a tip from an informer which led them to arrest the then 2nd and 3rd accused persons on 18/6/2016. During their interrogation, the appellant's name came up as also a participant in the commission of the charged offences. Subsequently, the appellant was arrested, and his house was searched. In the search, various items suspected to be stolen were retrieved including some items allegedly stolen from PW1's house, and identified by PW1 as his, when called at the police station.

On the part of the appellant, he denied the charges contending that on 19/06/2018 about 15.00 hours while chilling at home, the police arrived and informed him that he was suspected of theft and proceeded to search his house. In the search, 16 pairs of pieces of African fabrics (*vitenge*), 6 plastic chairs, 2 mattresses, 4 pairs of shoes, 1 machete, and solar power 10 watts were retrieved, seized, and taken to the police station. The appellant categorically refuted that in the search of his house flat TV screens were seized. He complained of the beating inflicted on him

by the police officers when forcing him to confess to having taken part in the alleged theft.

After the conduct of a full trial, the appellant and the 2nd accused were found guilty, convicted, and sentenced to seven years and three-years imprisonment on the first and second counts respectively with sentences to run concurrently. The 3rd accused was found not guilty and acquitted. Aggrieved, the appellant appealed, and the first appeal was allowed partially, in that the conviction was upheld, however, in the first count the sentence of seven years was substituted to five years while the sentence in the second count was left undisturbed. The sentences were to run concurrently. The substitution of the sentence in the first count was for reason that the trial magistrate's-imposed sentence exceeded its jurisdiction as provided under section 170 of the Criminal Procedure Act, Cap 20 R.E 2002, now 2019 (the CPA).

Still dissatisfied, the appellant has appealed to this Court and on 20/3/2020 lodged a memorandum of appeal predicated on four grounds that amount to three grievances faulting the trial and first appellate courts: **One**, invoking the doctrine of recent possession in absence of the complainant's proof of ownership of the stolen property. **Two**, failure to consider that the chain of custody of exhibit P1 was not established, and

three, convicting the appellant despite failure by the prosecution side to prove their case to the standard required.

At the hearing of this appeal, the appellant appeared in person fending for himself while the respondent Republic was represented by Mr. Roosebert Nimrod and Ms. Agma Haule, both learned State Attorneys.

When the appellant was invited to address us on his appeal, he preferred to let the learned State Attorneys respond first and he retained the right to rejoin where necessary.

Mr. Nimrod took the lead to submit and informed the Court that the respondent Republic was supporting the appeal and opposing the conviction and sentence meted to the appellant. He contended that the prosecution failed to prove the charges against the appellant to the standard required. In essence the concession by the learned State Attorney was on grievance number one contending that application of the doctrine of recent possession was introduced by the first appellate court while foregoing to determine the appellant's grounds of appeal before it. He thus implored us to invoke our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) and nullify the judgment of the first appellate court for failure to consider the grounds of appeal presented before it. He urged the Court to be guided by the holding

in the case of **Simon Edison @Makundi Vs Republic**, Criminal Appeal No. 5 of 2017 (unreported) which finding itself in a similar situation, nullified the judgment and then considered two options as the way forward. That is, whether to remit the record to the High Court for it to compose a fresh judgment or in the alternative, whether to step into the shoes of the High Court and determine the appeal. The Court held:

> *"We have considered those options and we are settled that the latter option appears to be an appropriate one. This is so because we have found the prosecution evidence materially wanting. That means we shall step into the shoes of the first appellate court to do what it ought to have done."*

He submitted that the Court then proceeded to consider the evidence on record before it in the determination of the said appeal. It was thus his prayer that under the circumstances, since the evidence against the appellant was weak to sustain the conviction of the appellants on the offence charged, the Court should step into the shoes of the first appellate court. In so doing, he urged the Court to find that the items alleged to have been stolen from PW1 and found in the appellant's house at the search as testified by PW1 and PW 3 that is, 24-inch TV sunda make and sandals collectively admitted as exhibit P1 and the seizure order exhibit P2 were not proved that they belonged to PW1.

The learned State Attorney contended that PW1's evidence failed to show that he had described any details of the stolen TV or provided receipts to prove his ownership. He maintained that while exhibit P2 showed that the TV seized at the appellant's house was sunda make 24", the evidence of PW1 stated that what was stolen from his house was a 21inch sunda make. According to Mr. Nimrod, the other anomaly was the fact that there was no evidence of where the TV seized from the appellant's house was stored thereafter and how it reached the court during the trial, the argument being that the chain of custody of the seized items was not established by evidence.

Mr. Nimrod argued further that since the prosecution failed to prove that the TV seized from the appellant was the one stolen from PW1, clearly there was nothing left to sustain a conviction against the appellant. He thus prayed for the Court to quash the conviction and set aside the sentence, allow the appeal, and set free the appellant.

In rejoinder, the appellant expressed his support for the submissions by the learned State Attorney and reiterated his prayer that his grounds of appeal be considered, appeal allowed, and that he be set free to join his family.

We have diligently scrutinized the record of appeal, and submissions before us and cited authorities from the appellant and the respondent Republic sides, and find it pertinent to start by addressing the issue raised by the learned State Attorney on whether the first appellate court failed to address all the grounds of appeal raised by the appellant in that court.

Worth noting is that the appellant, aggrieved by the decision of the trial court appealed to the High Court by way of a petition of appeal premised on five grounds of appeal as shown on page 59 of the record of appeal. On 11/9/2019, the Judge in Charge High Court of Tanzania, Musoma acting under section 45(2) of the Magistrate's Court Act, Cap 11 R.E 2002, transferred the hearing and determination of the appeal to Hon. W. S. Ng'umbu, RM with extended Jurisdiction.

Having gone through the judgment by Hon. Ng'umbu, RM Ext. J., we differ with the observation made by the learned State Attorney that he failed to consider and determine the grounds of appeal before him. We are convinced that having gone through the grounds of appeal before him and observed that most of the grounds faulted the trial magistrate for believing the prosecution evidence which neither established ownership of the alleged stolen TV by PW1 nor that the contents of exhibit P1 were seized at the appellant's house. The first appellate court thus decided that

the grounds of appeal before it can be conveniently and more appropriately resolved upon considering them in unison rather than discussing them separately and that all the appeal grounds culminated into one pertinent issue. Whether the doctrine of recent possession was applicable against the appellant to prove his guilt and sustain the conviction and sentence meted by the trial court.

It is basically a practice that has been applied in various cases. (See **Samwel Japhet Kahaya Vs Republic**, Criminal Appeal No. 40 of 2017, **Herode Lucas and Another Vs Republic**, Criminal Appeal No. 407 of 2016, **Richard Lionga @Simageni Vs. Republic**, Criminal Appeal No. 14 of 2020 and **The Registered Trustees of Joy in the Harvest Vs Hamza K. Sungura**, Civil Appeal no. 149 of 2017 (All unreported)).

Indeed, the decision by the first appellate court to collapse the appeal grounds into one issue is not an abstention of duty since, thereafter, it proceeded to analyze the evidence on whether the prosecution did prove all the ingredients of recent possession. Subsequently, applied its discretion, invoked the doctrine of recent possession, and dismissed the appeal, while partially allowing it by substituting a new sentence in the second count as stated earlier on.

Therefore, we find that the first appellate court did determine the grounds of appeal before it.

It is apposite at this juncture to proceed to address the grounds of appeal before us, which in essence boil down to one complaint, whether the prosecution proved its case to the standard required. In the first count, the appellant was charged with Burglary contrary to section 294 of the Penal Code. We reproduce the relevant provisions hereunder:

"*Section 294.-(1) Any person who-*

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it, is guilty of housebreaking and is liable to imprisonment for fourteen years.

Section 294(2)- Where an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years."

Section 258(1) of the Penal Code illustrates the essential ingredients of stealing as:

> *"person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing."*

Hence, an offence of burglary is committed when there is breaking and entering into any building, tent, or vessel used as a human dwelling and takes place at night with intent to commit an offence. Stealing is actuated when anything capable of being stolen is taken fraudulently and without a claim of right. The question is whether the prosecution did prove that the appellant committed the offences charged. Whilst the trial court and first appellate court found that the offences charged were proved against the appellant, the learned State Attorney supported the appellant's claim that the prosecution failed to prove the offences charged to the standard required. We are inclined to agree with the learned State Attorney and the appellant.

In upholding the conviction and sentence meted by the trial court, the first appellate court was satisfied that burglary was committed in the house of PW1 and various items were stolen as specified in the charge sheet including a flat-screen TV make Sunder. It also found that some of the stolen items were found with the appellant and was contented that

the conditions to invoke the doctrine of recent possession were met. The first appellate court held that:

> "*Since as herein before found that TV flat screen Make sunder was among the items found at the appellant's home and since there was no dispute as to ownership between PW1 and the appellant over the TV that would require PW1 to give a detailed description of the item to establish that it exclusively belonged to him, PW1 sufficiently identified the item.*"

The first appellate court rejected the appellant's explanation that he was not found with the TV, finding this assertion not to be a reasonable explanation in the circumstances where there was evidence that the item was seized from his house. The appellant's denial which was the same denial produced by the appellant before PW2 and PW3 led the first appellate court to find that the appellant failed to provide a reasonable explanation of his possession of the disputed flat-screen TV and hence application of the doctrine of recent possession as against him. The first appellate court then proceeded to do the same and uphold the conviction and sentence against the appellant.

In the instant case, PW1 stated that his house was broken into at night and various items as mentioned in the charge sheet subject of this

appeal were stolen. The questions for our deliberation are one, whether the appellant broke into PW1's house with the intent to steal and subsequently stole the items detailed in the charge sheet, and two, whether items claimed to have been seized from PW1's house include those stolen from PW1's house.

Indeed, there was no eyewitness to the break-in or stealing of various items from PW1's house. Therefore, proof of burglary is dependent on proof that the items seized are the same as the ones alleged to have been stolen bearing in mind the nature of the items. There is ample evidence that there were some items seized from the appellant's house, and the appellant does not dispute this, however, he denies claims that a flat-screen TV was also one of the items seized therefrom. Accordingly, it was proper for the first appellate court to consider the application of the doctrine of recent possession in the determination of the appeal before it. The issue to consider is whether the doctrine was correctly applied.

In the case of **Mustapha Darajani Vs Republic**, Criminal Appeal no 242 of 2008, (Unreported) the Court held;

> "*For the doctrine of recent possession to apply, it must be established; Firstly, that the property was found with the suspect or there should be a nexus*

between the property stolen and the person found in possession of the property; secondly, the property is positively the property of the complainant; thirdly, that the property was recently stolen from the complainant; and lastly, the stolen property in possession of the accused must have a reference to the charge laid against him."

Applying the above position to the instant appeal, on the first point, according to PW1 what was stolen from his house was a TV make Sunda 21 inch and on 21/6/2018 and that when he was called to identify his stolen properties at the appellant's house, he managed to identify two items, one Television make sunda because it was manual and sandals. Suffice to say PW1 tendered TV make sunda 21-inch and sandal shoes (exhibit P1). PW2 stated that at the search of the appellant's house apart from other things also one TV flat screen was seized. PW3 testified similarly to PW2 on what was seized in the appellant's house during the search and was the one who filled the search order (exhibit P2) and expounded that it was a flat-screen 24 inch television which is also what is found in the search order (Exhibit P2) on page 44 of the record of appeal. The particulars of the second count in the charge sheet at page 1 of the record of appeal, state that one of the stolen items was one flat screen 24 inch make sundar.

Taking into account the fact that the evidence of PW1 and PW3 as well as exhibit P2 contradict in respect to the size of the alleged stolen TV sunda make, PW1 stated it was 21inch, PW3 and exhibit P2 reveals it was 24 inch similar to the charge sheet, it is clear that the first and second conditions expounded in the excerpt above have not been fulfilled and the doubt should benefit the appellant.

Similarly, the 4th condition is also not established since the charge sheet and the description of the stolen TV flat screen by PW1 are also different. On the sandals, the evidence of PW1 did not provide any particulars on his sandals prior to the search at the appellant's house to remove doubts that the seized sandals did indeed belong to PW1 and were stolen on a material day.

The fact that flat screen TVs and sandals are items that can change hands very quickly adds weight to our finding that there was no evidence to establish all the conditions for invocation of the doctrine of recent possession. We are of the view that with due respect, had the first appellate court carefully considered the evidence it would have found that the circumstances did not warrant invocation of the doctrine. We thus find all the appellant's grievances to have merit.

For the foregoing, we agree with both the appellant and the learned State Attorney that the case for the prosecution was not proven to the required standard.

In the event, we allow the appeal, quash the conviction and set aside the sentence and all the consequential orders. We further order for the appellant's immediate release from custody unless he is held otherwise for another lawful purpose.

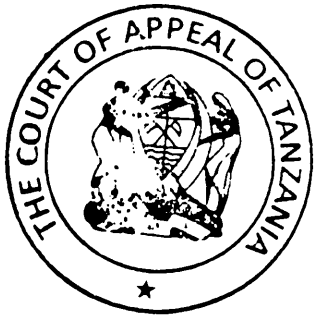
DATED at **MUSOMA** this 8th day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 9th day of June, 2022 in the presence of the Appellant in person and Mr. Tawabu Yahaya Issa, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL