IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 39 OF 2018

BULUNGU NZUNGU..APPELLANT

VERSUS

THE REPUBLIC... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, Shinyanga District Registry at Shinyanga)

(Makani, J.)

dated the 6th day of December, 2017
in
(DC) Criminal Appeal No. 35 of 2017

....

JUDGMENT OF THE COURT

6th & 21st July, 2022

GALEBA, J.A.:

Bulungu Nzungu, the appellant in this appeal along with Issack Charles, Mahona Joseph and Joshua Peter who are not parties to this appeal, (the other suspects), was arraigned before the District Court of Maswa at Maswa in Criminal Case No. 85 of 2016 charged with offences of burglary and theft. He was charged for burglary contrary to section 294 (1) (b) and (2) of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019] (the Penal Code) and theft contrary to sections 258 (1) and 265 of the Penal Code.

In respect of the count of burglary, according to the prosecution, on 16th August 2016 at around midnight, the appellant and the other suspects broke and forced entry into the house of Zengo Mathias with an intention to commit a felony therein. As for the count of theft, the prosecution alleged that on the same day and time at Mwasai Village in Maswa District within Simiyu Region, the appellant and the other suspects stole from the said Zengo Mathias, the following items; one Solar Panel make Chloride, one battery make VBT Voltage 12, six mobile phones, 4 pieces of Wax Print Fabric, one Pit Short, one Red T-Shirt, two Bottles of Body Spray make Kangalo, shoe shine make Kangaroo, TZS. 5,000, one Bag make FS-Tanzania, all properties valued at TZS. 491,000/=. It is not clear exactly at what time did the theft occur, only that when Zengo Mathias woke up to smoke around 3.30 a.m., is when he noted that his house had been broken through the children's room and the above items stolen.

As indicated above, the case was reported at the police and the appellant and the other suspects were tried before the District Court which found appellant guilty of both offences and convicted him accordingly. He was sentenced to twenty (20) years and seven (7) respectively for the offences of burglary and theft respectively. The other suspects were duly acquitted. The appellant however, was

aggrieved whereupon he unsuccessfully appealed to the High Court. His conviction in the trial court was confirmed on his first appeal which was dismissed in its entirety. He was once again aggrieved hence this appeal in which he raised six (6) grounds of appeal to challenge the decision of the first appellate court. Nonetheless, for reasons to feature prominently in a moment or two, we do not intend to discuss the said grounds of appeal.

When this appeal was called on for hearing, the appellant appeared in person without legal representation, whereas the respondent Republic had the services of Ms. Verediana Peter Mlenza, learned Senior State Attorney, assisted by Ms. Edith Tuka and Ms. Rehema Sakafu, both learned State Attorneys.

As the appellant had indicated to us that we adopt his grounds of appeal and permit the respondent's side to react to his grounds, we allowed Ms. Tuka to reply to the grounds of appeal so that the appellant could rejoin, should he would have wished.

At the outset, Ms. Tuka indicated to us that the respondent Republic was in support of the appeal, and the learned State Attorney carefully underscored why would the respondent support the appeal

arising from an appeal in which the very respondent was a winner. She offered two major reasons.

First, she submitted that at page 17 of the record of appeal, Zengo Mathias, PW1 who was the complaint and whose properties were subject of the charge in the trial court did not describe distinct identification of his properties which had been stolen. According to the learned State Attorney, a sweeping statement at page 18 of the record of appeal by PW1 that *"I identified all things to be mine"* was too general a statement, such that the trial court ought to have refused to believe it and rely upon it as if PW1 had proved ownership of the properties. She referred to this Court's decision in the case of **Joseph Maganga Mlezi and Another v. R,** Criminal Appeals No. 536 and 537 of 2015 (unreported), in supporting her position that in such circumstances, it is not enough to give a general description of the stolen goods. Ms. Tuko finally argued that, had the trial court noted that proof of the allegedly stolen items was general it would not have convicted the appellant and the High Court would not have upheld the conviction of the trial court.

Two, Ms. Tuka contended also that the two courts below held the appellant to have stolen the items in the charge sheet because of exhibit P3 which was the cautioned statement. However, she submitted that at

page 30 of the record of appeal, after the exhibit was admitted in evidence, it was not read, as per the procedure of admitting documentary exhibits. In the circumstances, she implored us to expunge that document from the record. With expungement of exhibit P3, there remains no evidence on record upon which the appellant can continue to be held in prison, she concluded.

Based on those two reasons, Ms. Tuka prayed that we quash the conviction and nullify the judgment of the trial court and that of the High Court and set aside the sentence that was imposed upon the appellant.

On his part, the appellant being a layman, had nothing useful to assist us in our determination of this matter, except for a prayer of being released from the rigors of jail.

Our starting premise, is an observation that the evidence in this case is purely circumstantial, because there is no witness who saw the appellant breaking the house at night or stealing the items mentioned in the second count. Because of that the case was entirely based on the doctrine of recent possession. In law for that doctrine to be relied upon in order to achieve a valid conviction, four conditions must be fulfilled as it was stated in the case of **Mkubwa Mwakagenda v. R,** Criminal

Appeal No. 94 of 2007 (unreported). The conditions can be gathered from the following observation of the Court in that case, that:

> *"For the doctrine of recent possession to apply as a basis of a conviction, it must be proved, **first,** that the property was found with the suspect, **second,** the property is positively proved to be the property of the complainant, **third,** that the property was recently stolen from the complainant and **lastly,** that the stolen thing constitutes the subject of the charge against the accused..."*

To agree or disagree with the learned Senior Stated Attorney we will carefully analyse the evidence of the PW1 who had a duty to prove that the items subject of the case were indeed his, in order to find out whether the prosecution discharged obligation placed on them by the third condition for the doctrine of recent possession to apply in the case at hand. It is key to remark that for our purposes, it is only PW's evidence which is necessary to be discussed in order to find out whether it was proved that the goods recovered actually belonged to him. This is so, because he was the goods' owner who is deemed to know their identity.

The substance of PW's evidence detailing how he found out that his house had been broken is contained pages 17 to 18 of the record of appeal, where he stated as follows:

> *"On 16/08/2016 at 03.00 hours I found my properties stolen. I woke up in order to smoke. There I found my properties stolen. I then started to inspect my house. I came to find that my house had been broken through my children room. I came to note that my two bags of clothes,* ***six mobile phones make Chinese Nokia,*** *on Panel Solar Energy 20 watts, one motor cycle battery and Tshs. 5,000/= cash money. There I started to phone Sungusungu Commander one Dogan Sanane. We also raised alarm...After two days we got information that it was Bulugu Nzungu who had stole my properties. He was traced and found at Masanwa Village by Jibla Jilung and his companieon. There Bulungu Nzungu was brought to VEO's office at Masawa where he confessed to have been stolen my properties.* ***He was also found with two mobile phones which were identified to be those stolen from my home.*** *He even said that he kept other properties at Ngudu Village to the house of Mande. He said to have kept those properties there. We followed those properties there at Ngudu Village. Those properties were obtained. They were then brought to Mwakuji Village,* ***those***

properties were identified. They were pieces of wrap commonly known as Wax, shoe poiish Kiwi, one beit and one solar panel. I identified all things to be mine. I can identify those things if shown to me."

[Emphasis added]

That is the manner the stolen properties were identified, meaning also that, that is the evidence that was seeking to prove identity of the stolen items and also the fact that the goods were the complaint's, or PW's. After the above evidence, then the trial court made the following order, at page 18 to 19, admitting the properties:

"COURT: One solar panel Chloride make 20 watts, one motor cycle battery make VBT 12 voltage, two bottles of body spay, one tin of shoe polish make Kangaroo, one shorts, one red T-shirt, four piece of wraps show to PW1 and identified the same. ***Also two phones, one red in colour and one black make TECKNO identified two."***

[Emphasis added]

The above quotation from the evidence of the complainant who also testified as PW1 and also the observation of the trial court reveals the following:

One, although the stolen mobile telephone handsets were Chinese Nokia according to the evidence of PW1, the complainant at page 18 of the record of appeal, the phones with which the appellant was found with and which were tendered as exhibit P1 at page 22, were make, TECHNO. That was irregular because according to the complaint, the stolen telephone were Make Chinese Nokia, thus it was unlawful for the court to have accept TECHNO telephone handsets. In respect of the admitted TECHNO telephone handsets, there was neither evidence that such phones were stolen, nor that they belonged to the complainant. Other than those telephones, make TECHNO, there is no other item that the appellant was arrested with.

Two, although the items stolen and recovered were allegedly the properties of PW1, there was no evidence showing that indeed any such item was the property of that witness. What is on record is a bare statement throughout that the PW1 identified the properties but there it is nothing on record showing how did that witness identify the properties as his. Identification of the recovered items ought to have specifically be proved by referring to specific and peculiar marks on the items in question. PW1 had a duty to prove that the items recovered and presented in court were distinctly and specifically his and no one else's. His evidence ought to have been able to eliminate all possibilities,

real and potential, that the properties might not have been his. The properties having been normal trade items, there was no demonstration of any unique features or marks on such items, to assist PW1 in specifically identifying them as his. There was therefore no credible evidence to proving that the goods recovered had any relation with the complaint to the exclusion of the whole world.

Clearly, with the above shortfalls, particularly that of failure to positively prove ownership of the recovered properties to have been owned by the complainant, the doctrine of recent possession was improperly invoked in view of the principles in **Mkubwa Mwakagenda** (supra).

The next point for our attention in terms of consideration is Ms. Mlenza's contention that, the doctrine of recent possession aside, both the trial and the first appellate court used the cautioned statement to seal their belief that the appellant was a criminal. However, as properly submitted by Ms. Mlenza, the said caution statement at page 30 of the record of appeal, after it was cleared for admission and having been admitted, the document was not read to the appellant during the trial, at page 30 of the record of appeal as submitted by the learned Senior State Attorney. It is now a well-established principle in the Law of Evidence as applicable in trial of cases, both civil and criminal, that

generally once a document is admitted in evidence after clearance by the person against whom it is tendered, it must be read over to that person. That has been the position of this Court in many cases including, **Robinson Mwanjisi and Three Others v. R,** [2003] TLR 218, **Mwinyi Jamal Kitalamba @ Igonzi and Four Others v. R,** [2020] T.L.R. 508 and **Huang Qin and Xu Fujie v. R,** Criminal Appeal No. 173 of 2018 (unreported). For instance, in **Mwinyi Jamal Kitalamba** (supra) at page 509, this Court observed that:

> *"(iii) Failure to read the exhibit after being admitted, the omission is fatal as it contravenes the fair right of an accused person to know the content of the evidence tendered and admitted against him. It was wrong and prejudicial."*

As the cautioned statement in this case was not read over to the appellant at the trial, the same was no evidence at all and we hereby expunge it from the record as prayed by Ms. Mlenza.

Finally, we agree with the learned Senior State Attorney that the case against the appellant was not proved beyond reasonable doubt as required in criminal cases.

In the circumstances, under the provisions of section 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2019], the judgments of the two

courts below are hereby nullified, the conviction is quashed and the respective sentences of twenty (20) and seven (7) years are hereby set aside. This appeal is hereby allowed with an order that the appellant be released from prison and set to liberty unless, he is held in custody for any other lawful cause not related to the matter giving rise to this appeal.

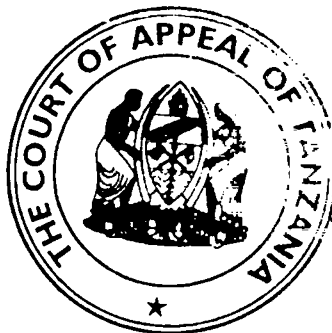
DATED at **SHINYANGA** this 21st day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 21st day of July, 2022 in the presence of Mr. Bulungu Nzungu, the Appellant in person and Ms. Caroline Mushi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



W. S. NG'HUMBU
***For:* DEPUTY REGISTRAR**
COURT OF APPEAL