

**IN THE HIGH COURT OF TANZANIA**  
**AT MTWARA**  
**CRIMINAL APPEAL NO. 26 OF 2011**  
**Original Masasi District Court Cr. Case No.11 of 2010**  
*Before: E.R. Rwehumbiza, Esq; RM*  
**RAJABU CHIBWANA ..... APPELLANT**  
**VERSUS**  
**THE REPUBLIC ..... RESPONDENTS**

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**Date of last order – 3/9/2013**

**Date of Ruling - 6/9/2013**

**JUDGMENT**

**KIBELLA, J.**

The appellant Rajabu Chibwana was charged in the District Court of Masasi with two counts; namely, Burglary and stealing contrary to sections 294 and 265 respectively of the Penal Code [Cap.16 R.E 2002]. The particulars of the offence in both counts alleged that on 20<sup>th</sup> day of January, 2010 at or about 22:00 hours at Mkarakate village within Masasi District in Mtwara Region the appellant did willful and unlawfully break the house of one Said Sandali, and after breaking he entered into that house and stole therefrom various items, such as one beg, different clothes, ukambaa bed with mattress, a pair of shoes, Tigo Line, different document of Chama cha Walimu Tanzania, 25 kgs of Sembe flour, and two bars of soap, all of total valued TShs.88,700/= the property of Saidi s/o Sandali.

The appellant denied the charge. As a matter of routine, a full trial was conducted, and in the end the trial magistrate was satisfied that the evidence placed before him did not prove the offences with which the appellant was charged, but such testimony established a minor cognate offence of receiving property stolen or unlawfully obtained contrary to section 311 of the Penal Code [Cap.16 R.E 2002]. The appellant was therefore convicted of the offence under section 311 of the Code [supra] and sentenced to ten (10) years imprisonment. He was aggrieved by conviction and sentence and filed this appeal.

The facts which led to the conviction of the appellant were that, on 19/1/2010 at around 8 pm night, the complainant Saidi Sandali left his home going to the grocery to have some drinks. He took some hours there. When he [PW.1] went back home he found his window broken, he opened the door and found the back door was also opened, and some of the properties mentioned in the charge sheet were stolen. He reported the matter to the VEO, and on 20/1/2010 the appellant was arrested with the properties alleged stolen from PW.1.

The Village Executive Officer one Hassan [PW.1] admitted in his testimony to have received the report about the incidence from PW.1 on 19/1/2010. He also admitted that the appellant was arrested on 20/1/2010 with the alleged stolen properties. He also added in his testimony that the appellant was arrested with those properties due to the fact that there was another person who had the same matter like that of the victim [PW.1] and therefore during the search they were able to find other things which they suspected to be stolen.

According to the testimony, the person who arrested the appellant was Jafari Ndemanga [militia] [PW.3]. In his testimony he told the trial court that, it was on 20/1/2010 when he was instructed by VEO through a letter to go and arrest the appellant who was suspected of stealing. That while on his way the appellant saw him and decided to escape but they were able to arrest him and found some items inside his house, and some of those properties belonged to PW.1 and the appellant was taken to the VEO's office.

The above facts as gathered from the testimony, were relied by the trial magistrate in convicting the appellant with the offence of receiving stolen property or unlawfully obtained under section 311 of the Code [supra]. He is here in this court protesting his innocence. In his memorandum of appeal, the appellant has filed four (4) grounds of appeal. However, his complaint centres on one major ground that:-

The doctrine of recent possession was improperly invoked by the trial magistrate in convicting the appellant.

In this court, the appellant appeared in person and was not represented. The Respondent, Republic enjoyed the service of Mr. Makasi learned State Attorney. The appellant preferred the learned State Attorney to submit first.

Mr. Makasi at the outset conceded the appeal. He submitted that no witness testified to have seen the appellant committing the offence. That according to the evidence, the appellant was convicted of the offence of

being in possession of stolen property or unlawfully obtained after he was searched at his home and found in possession of the alleged stolen property. However Mr. Makasi was of the further view that, no witness testified to have witnessed when the appellant's home was being searched. Also there was no evidence showing how the victim [PW.4] was able to identify the stolen properties, at police or even before the trial court. He cemented his argument by citing the case of *Rashidi Mohamed v.R [1974] L.R.T.5*. He added that for the doctrine of recent possession to be invoked it must be proved beyond reasonable doubt that the appellant was found in possession of the alleged properties. He viewed that in the present case no oral or documentary evidence proves beyond reasonable doubt that the appellant was searched and found in possession of the stolen properties. On this, he cited the cases of *DPP Vs. Joakimu Komba [1984] T.L.R 214*; and the case of *Jonas Nkize Vs. R [1992] T.L.R 213*, together with the provision of section 110 and 111 of the Evidence Act [Cap.6 R.E 2002]. He finally prayed for the court to resolve those doubts in favour of the appellant.

The issue is whether the appellant was rightly convicted. As rightly submitted by Mr. Makasi the conviction of the appellant was based on the doctrine of recent possession, and that no witness testified to have witnessed the appellant breaking and stealing in PW.1's house. The issue is whether the doctrine of recent possession was properly invoked in the circumstance of this case.

As a matter of law and logic, it is essential for a proper application of the doctrine of recent possession, that the stolen thing in the possession of


the accused must have a reference to the charge laid against the accused, and there must be a cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged and it is the prosecution who assumes the burden of such proof, and the fact that the accused, does claim to be the owner of these properties does not relieve the prosecution of that obligation [see the case of *Ally Bakari and Pili Bakari v.R [1993]T.L.R.10*].

Furthermore in order to prove such possession, there must be an acceptable evidence as to the search of the suspect and the recovery of the alleged stolen property, and the complainant must identify that property conclusively. In our case there is no conclusive evidence as to the search of the appellant, as no witness testified to have witnessed the search and the manner it was conducted. Further, the alleged properties were not conclusively identified by PW.1 so as to relate them with the charge laid against the appellant. The trial Magistrate having found that the testimony before it did not proved the offences with which the appellant was charged, he ought to have discharged the appellant and not to convict him with the offence under section 311 of the Penal Code. I am saying so, because for the offence of being found in possession of stolen property or unlawful obtained under section 311 of the Act to be proved there ought to have been strong evidence as to how the appellant was searched and the recovery of those properties. There is no such testimony in this case.

Having reasoned as above I agree with Mr. Makasi learned-State Attorney that the appellant was improperly convicted. In the result, the

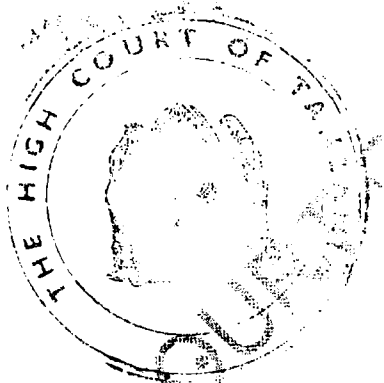
conviction is hereby quashed and the sentence is set aside. It is ordered that he appellatant be released forthwith unless lawful held.




  
R.M. Kibella,  
Judge  
6/9/2013

Order: Judgment delivered in chambers today 6<sup>th</sup> day of September, 2013 in the presence of the appellatant in person as well as in the absence of the Respondent Republic.

Right of Appeal fully explained.



  
R.M. Kibella,  
Judge  
6/9/2013

HIGH COURT