IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN ITHE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 29 OF 2020

(*Originating from Crim. Case No. 29 of 2018, District Court of Longido*)

BARAKA JOSEPHAT.....APPELLANT

VERSUS

THE D.P.P.....RESPONDENT

JUDGMENT

13/05/2020 & 17/06/2020

GWAE, J

The appellant was charged in the District Court of Longido at Longido (hereinafter to be referred to as "the trial court") with two counts; one is Burglary contrary to section 294 (1) (2) of the Penal Code [Cap 16 Revised Edition 2002] and the second count was stealing contrary to section 265 of the Penal Code (supra).

Following the appellant's denial of the offences leveled against him, the prosecution brought a total of four (4) witnesses and tendered three (3) exhibits namely; a cautioned statement (PE1), a certificate of seizure (PE2) and a wooden bed (PE3). The appellant on the other hand was the sole witness whose defence was based on the defence of alibi.

After a full trial, the appellant was found guilty of the offences he stood charged with and he was consequently convicted and sentenced to serve five (5) years imprisonment on each count and the sentences were ordered to run concurrently. Dissatisfied by the decision of the trial court, the appellant has lodged this appeal comprised of three (3) grounds of appeal namely;

1. That, the trial Magistrate failed miserably to look at the whole evidence so as to ascertain whether there as evidence against the accused person/appellant adduced by the prosecution to warrant the conviction of the appellant
2. That, the trial Magistrate erroneously admitted Exh P1 and P2 as the same were not read over in court.
3. That, the trial Magistrate erred in law and in fact in convicting and sentencing the appellant herein basing on cautioned statement.

When this appeal came for hearing, the appellant appeared in person unrepresented whilst the respondent was represented by **Miss. Adelaide Kasala,** the learned Senior State Attorney

The appellant wholly adopted his grounds of appeal as contained in his petition of appeal whereas Miss Kasala supported the appellant's appeal to the extent only on ground No. 2 and 3 and stated that in the 2nd ground it is revealed as complained that the appellant's cautioned statement was admitted without being read over. According to the learned counsel for the

DPP, the appellant was vividly denied to know what was contained in the exhibit P1. Consequently, Miss Kasala prayed for the exhibit P1 to be expunged from the record and further stated that the respondent is therefore left with the evidence of recent possession after the cautioned statement having been expunged from the record.

On the part of prosecution evidence of recent possession against the appellant, Miss Kasala submitted that the evidence adduced before the trial court of recent possession was credible and therefore, the appellant was rightly found guilty of burglary and theft since the appellant had failed to explain as how he came into such possession. She cemented that, the prosecution evidence adduced by PW2, the victim is to the effect that the appellant was found in possession of a bed with brown colour. She supported her argument by citing the case of **Juma Marwa v. R** Criminal Appeal No. 71 of 2001 (Unreported). She went on arguing that the appellant had failed to explain how he came in possession of the bed, she then argued that the appellant must therefore be a thief or guilty receiver. She thus prayed that this appeal be entirely dismissed.

The appellant, in his short rejoinder, stated that he was not found in possession of the bed (P3) adding that, the case against him was nothing but a fabrication. He thus prayed this court to be pleased to release him from prison forthwith.

As to the **2nd** and **3rd** ground of appeal, as correctly and legally alleged and conceded by the appellant and respondent's representative respectively. These grounds of appeal are meritorious. After a careful

analysis of the totality of the evidence on record and the petition of appeal filed by the appellant, and submissions by both parties, I am inclined to agree with the learned State Attorney. The procedures were not followed by the trial court as plainly depicted at page 13 of the typed proceedings that the trial magistrate only admitted the exhibit and after that admission it was not read before the trial court. The same applies to PE2 (a certificate of seizure) which was also received and admitted without being read over before the trial court.

It was therefore certainly wrong for the trial court to omit causing the contents of the cautioned statement (PE1) and as well as a certificate of seizure (PE2) to be read over during trial. That is a fatal irregularity capable of justifying this court to expunge the said exhibits as I hereby do (Seein **Ntobangi Kelya and another v. the Republic**, Criminal Appeal No. 234 of 2015 found at https://tanzlii. Org/tz. Judgment PDF, where the Court of Appeal observed that, it was wrong for the trial court to receive the cautioned statement as evidence without ordering the same be read over.

It is a principal of law that, in a fair in a criminal proceeding, an accused person is entitled to know the contents of any document tendered and received as exhibit to enable him marshal a proper defence wherever they contain any information adversely affecting him. This position was judicially demonstrated in **Robinson Mwanjisi & 3 others v. Republic,** Criminal Appeal No. 154 of 1994, (2003) TLR No. 218 where was held

> "Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the court to be seen not to have been influenced by the same"

That being the case and as already submitted by the State Attorney I am of the same view that, the consequence of such omission is to expunge the said exhibits that is exhibit P1 and P2 from the records, this has been the practice of this court and The Court of appeal of Tanzania when faced with the same situation. In the case of **Bashiri s/o John v. Republic,** Criminal appeal No. 486 of 2016 (unreported) the same issue was raised and this court had these to say;

> "The CAT agrees with the appellant to expunge PF3 from record as it was improperly acted on for having not been read out after its admission as exhibit. After being expunged from record it becomes not worth being considered."

That being done, I shall now revert to the **first** ground of appeal. It is undoubtedly that, on the material date the appellant was apprehended ready handed by PW 2 carrying a bed (P3) which PW2 unmistakenly identified it to be his property. The record reveals that when PW2 was on his way back home he met the appellant carrying a bed and after interrogating him, the appellant told him that he was sent by someone to take it to Eworendeke area. PW2 took the appellant to his house and he eventually found that, the store had been broken and a bed, wheelbarrow

and exhale of Toyota Noah were missing from therein. This piece of evidence is credibly corroborated by that of PW1 who was called by PW2 immediately after the incidence and in his evidence he stated that upon arrival at the scene of crime he found the appellant together with the stolen bed. PW3 G 7312 D/C FRED further testified that on the material date he was the CID's shift officer, while at his station, three people went thereat by a Noah and brought the appellant with the bed. PW2 who was complainant opened a complaint with NGA/IR/88/18 against the appellant.

Moreover when the exhibit P3 (the stolen bed) was tendered in court by PW4, E 9243 D/CPL Nicholas, the appellant did not object its admissibility which impliedly amounted to an admission.

At this juncture I am of the view that the prosecution's evidence sufficiently established beyond reasonable doubt that the house was broken and that the appellant was found in possession of the stolen bed. The question that follows is that, was the conviction properly grounded on the doctrine of recent possession by the trial Magistrate? As submitted by Miss Kasala, I am of the same view that a court may legitimately presume that a man in possession of stolen goods, soon after the theft, may be implicated for an offence of theft or even murder on the doctrine of recent possession. The law on the subject matter is well settled and, in the unreported Criminal Appeal No. 56 of 1992 - **Mwita Wambura vs. The Republic**, the Court of Appeal of Tanzania laid down four prerequisites for the invocation of the doctrine, these are;

"1.The stolen property must be found with the suspect;

2. The stolen property must be positively identified to be that of the complainant;

3. The property must be recently stolen from the complainant and;

4. The property must constitute the subject of the charge."

In the matter at hand the appellant was apprehended and caught red handed while on transit from the scene of crime, carrying the stolen bed, shortly after it was noted that the house of PW2 was broken where the stolen bed was kept and the stolen bed was identified by the complainant (PW2). Within that short span of time, the stolen bed could not have changed hands neither the appellant had not explained how he came in the possession if the bed recently stolen from PW2, so the doctrine of recent possession was correctly invoked by the trial magistrate. The Court of Appeal of Tanzania In the case of **Kadumu Gurube v. Republic,** Criminal Appeal No 183 of 2015 had the following to say;

> "It is elementary that a court may presume that a man in of stolen goods, soon after the theft, may be implicated for theft on the doctrine of recent possession."

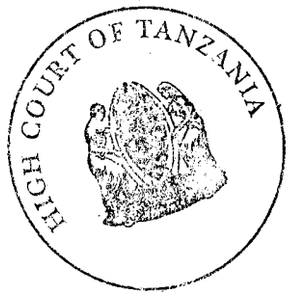
As far as the doctrine of recent possession is concerned unless the person who is found in possession of the property recently stolen gives reasonable explanations as to how he had come by the said properties the court may legitimately presume that he is a thief or a guilty receiver. See the case of **Juma Marwa v. Republic,** Criminal. Appeal No. 71/2001.

The appellant in his defence relied on the defence of alibi that, on the material date and time he was at Buguruni-Namanga drinking alcohol and denied to have been apprehended at the scene of crime. This piece of evidence however does not exonerate him from committing the offences with which he stood charged. I am alive of the position that where an accused person puts forward a defence of alibi, he does not thereby assume the burden of proving such alibi but it is sufficient if such alibi introduces reasonable doubt in the prosecution case. See the case of **Rashid Ally v. Republic** [1987] TLR 97. This is not the case in our present matter as the prosecution evidence is satisfactorily credible to the effect that the appellant was found in possession of the bed by the owner of the same, the bed, he was instantly apprehended by the victim assisted by the PW1. The bed was identified by the owner where he was arrested (PW2), the appellant was sent to police station immediately after arrest more so the appellant did not claim ownership.

According to the nature of the offences against the appellant and circumstances thereof, I find the sentences of five years jail in each count meted to the appellant are of higher side or excessive as the appellant is the first **offender** as observed by the learned trial magistrate and without undue regard to the period spent by him that is since 19th March 2018 while in prison custody to the date when he was correctly convicted and sentenced that is on 14/11/2018. I therefore think the sentences of two (2) years jail in each count would meet the ends of justice in this particular case as I hereby do.

That being said, this appeal is dismissed for lack of merit save to the imposed sentences. As the appellant had vividly spent about **eight (8)** months in prison custody before his conviction and taking into account that he has served his sentences for more than a year and a half (1 ½), I hereby order his immediate release from prison unless he is justifiably held therein for different lawful cause.

It is ordered.



M.R.GWAE
JUDGE
17/06/2020