**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPEAL NO. 93 OF 2019**

**(C/f Criminal Case No. 137 of 2017, in the District Court of Longido at Longido)**

**EVANCE S/O PENDAEL.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**25/11/2020 & 17/02/2021**

**GWAE, J**

This appeal emanates from the decision of the District Court of Longido at Longido, in Criminal Case No. 137 of 2017 in which the appellant, Evance s/o Pendael, was charged with and convicted of the offence of Burglary c/s 294 (1) (a) (2) and Stealing c/s 265 of the Penal Code Cap 16 Revised Edition, 2019 respectively. The trial court sentenced him to a prison term of five years on the first count and four years imprisonment on the second count, the sentences were to run concurrently.

Aggrieved by the decision of the trial court, the appellant has filed this appeal consisting of a total of three grounds of appeal reproduced hereunder;

1. That, the learned trial Magistrate erred in law and in fact by committing and sentencing the appellant without considering the principles which have to be taken into account in respect to chain of custody and preservation of the exhibits.
2. That, the learned trial Magistrate erred in law and in fact by finding the appellant guilty by relying on inconsistence and contradictory statements by prosecution witnesses.
3. That, the trial court erred in law and in fact by failing to note that the prosecution did not prove the charge against the appellant on the standard of proof required in criminal cases.

Before going to the gist of this appeal a summary of facts of the case as discerned from the record, is necessary. The same is as follows; That, PW 1 Aziza Swalehe on 04/08/2017 was away to Moshi, oncoming back to his home at Kisongo-Namanga she found the door of her house open, she quickly rushed to her neighbour PW2 Daniel Emmanuel and informed him of the incidence.

That, both came to the house of PW1 and after getting inside PW1 discovered that some of her properties were missing, these were; mattress, TV make MR. UK, Subwoofer deck, remote control and a bag containing various clothes. They then reported the incident at Namanga Police Station on the 12th August 2017. PW1 got information that the appellant was selling a mattress and a

subwoofer, she reported to the Police Station where PW1 along with a police officer (PW4) and another police officer went to the house of the appellant and conducted a search in the presence of PW3 the neighbour of the appellant. In the course of searching the house of the appellant they found two remotes control of the TV and deck which were identified by PW1 as her belongings. The search was further conducted in the appellant's toilet and a TV make MR. UK was found and PW1 was able to identify them as her properties. There after the appellant together with the seized properties were taken to the Police Station at Namanga. The prosecution side closed its case however the appellant did not make his defence

When this appeal came up for hearing, the appellant was not represented while Mr. Ahmed Hatibu, learned State Attorney, represented the respondent, Republic who focusedly supported this appeal by stating that the trial court contravened S. 231 (3) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019.

Basically, Section 231 of the CPA requires a trial court to inform an accused person of his rights before making his defence. The said provision provides as follows: -

> "(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is

charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted, the court shall again explain the substance of the charge to the accused and inform him of his right;

(a) To give evidence whether or not on oath or affirmation, on his own behalf; and

(b) To call witness in his defence,

and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights.

(2) Notwithstanding that an accused person elects to give evidence not on oath or affirmation, he shall be subject to cross examination by the prosecution.

(3) if the accused, after he has been informed in terms of subsection (1), elects to remain silent the court shall be entitled to draw an adverse inference against him and the court as well as the prosecution shall be permitted to comment on the failure by the accused to give evidence.

(4) if the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present, give material

evidence on behalf of the accused person, the court may adjourn the trial and issue process or take other steps to compel attendance of such witnesses"

The relevancy of section 231 of the CPA has been put more clearly in the case of ***Juma Limbu @ Tembo vs. The Republic,*** Criminal Appeal No. 188 of 2006 (unreported), where it was stated as follows: -

"To avoid a miscarriage of justice in conducting trials, it is important for the trial court to be diligent and to ensure without fail, that an accused person is made aware of all his rights at every stage of the proceedings ...."

In the instance case, after the closure of the prosecution case the records show that the trial Magistrate explained to the appellant his right to defend in terms of section 231 and the accused responded that;

"I shall not give evidence"

Thereafter the trial Magistrate proceeded to fix the date of judgment. It is apparent that the trial court contravened section 231 (3) of the CPA for its failure and failure by the prosecution to comment on the failure by the accused person to give evidence. This court is of the view that the omission is a fundamental procedural irregularity which has occasioned injustice to the appellant who had no legal representation. It was important for the court and the prosecution to

comment on the failure of the appellant to give his evidence which would perhaps enlighten him of the consequences of his choice of not giving evidence (See also the case of **Simaiton Patsoni @ Toshi vs. The Republic,** Criminal Appeal No. 167 of 2016 (Unreported-CAT).

It follows therefore the irregularity of non-compliance with section 231(3) of the CPA is legally fatal, hence all the proceedings and the decision thereof after the close of the prosecution's case were null and void. Consequently, the conviction and sentence imposed to the appellant is hereby quashed and set aside.

Considering the fact that the appellant was convicted since 11.04 2018 and considering the period (about three years) spent by him during his service of five years term of imprisonment imposed by the trial court as well as taking into account of time the procedural law that will be complied with if so ordered, I find it prudent and fair to order immediate release of the appellant from prison forthwith.

Consequently, the appellant shall therefore be released from prison as soon as practicable.

It is ordered.


**M.R. GWAE**
**JUDGE**
**17/02/2021**