

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

HIGH COURT CRIMINAL APPEAL NO. 54 OF 2021

(Original Criminal Case No. 88 of 2020 of the District Court of Kwimba District at
Ngudu)

PETER KAPAMA APPELLANT

versus

THE REPUBLIC RESPONDENT

JUDGMENT

28th June & 8th July, 2021

RUMANYIKA, J.:

With respect to the charges of receiving stolen property or unlawfully obtained C/s 311 of the Penal Code Cap 16 RE. 2019 (the Code), Peter Kapama @ Sylvester (the appellant) preferred the instant appeal against conviction and a custodial sentence of four (4) years, according to records passed on 29/3/2021. The particulars of offence were that on 17/7/2020 at about 16:15 hours at Maligisu village, Kwimba district, the appellant was found in possession of one hand set make TECNO W3 valued at shs 200,000/= (the hand set) property of Kwimba district council. The grounds of appeal were; **(i)** prosecution exhibits were improperly admitted in

evidence **(ii)** the charges were defective **(iii)** the prosecution case was not beyond reasonable doubts proved.

When the appeal was, by way of audio teleconference called on 28/6/2021 for hearing, the appellant appeared in person and Ms. Lilian Meli learned state attorney appeared for the Republic respondent. I heard them through mobile numbers 0737877746 and 0717418929 respectively.

Initially, the appellant had nothing to add to his memorandum of appeal but in his rejoinder he submitted that not only with lapse of some months he was not liable, but also, with regard to make and type of the hand set the complainant and investigations officer told different stories. Was it TECNO Y3 or TECNO W3?

Ms. L. Meli learned state attorney submitted that they supported the conviction and sentence for the following reasons; **(1)** Save for the appellant's cautioned statement (Exhibit "P1"), upon whose admission its contents were not read out in court, it was liable to be expunged from the records much as the other exhibits were, without objection therefore properly admitted in evidence **(2)** that the appellant was properly charged and convicted and, if at all the latter did not state any defects in the charge sheet **(3)** that the prosecution case was beyond reasonable doubts

proved the appellant having had readily admitted possession of the hand set and, not only the did not bring the vendor in court but also he didn't in any way whatsoever prove that he purchased it from the alleged Felister. That is all.

The evidence on record reads thus:-

Pw1 Malimi Bunango stated that following the incident and now invited by police on 17/7/2020 at 3:30 pm from the appellant's shop he on search he witnessed seizure of the hand set.

Pw2 G. 7198 DC Christopher stated that he took up the matter on 26/6/2021 at about 16:00 hours through cybercrime system having had traced and also in presence of the local Maligisu village Executive officer they found the appellant in possession of the hand set then in writing the latter confessed before Ngudu police (copy of the cautioned statement-exh. "P1").

Pw3 Paulin Biato stated that since 2015 he was the WEO Ngudu and he used the hand set since 2018 to collect government revenues until on 26/6/2020 when it was noted missing, he reported it to police and shortly it was discovered at Maligisu village.

Pw4 E. 9766 DC James stated that just as the incident was reported to him on 15/7/2020, shortly, but following a search the appellant was found in possession of the hand set on 17/7/2020 (copy of the certificate of seizure and the hand set make TECNO Y3, IMEI No. 357213088720741/3572130887220758 admitted as exhibits "p2" and "P3") respectively.

Pw5 Wilia Kabuya IT officer of Ngudu stated that he was the one who previously in his capacity and ordinary course of business issued the hand set to Pw2 for the purposes. That is it.

The appellant (the sole defence witness) stated that indeed on 17/7/2020 he was found in possession of the hand set which one he purchased it in 2019 from one Felister Kasongo. That is it.

Rightly so in my opinion set forth by the learned resident magistrate, the issues for determination were; **(a)** whether the appellant unlawfully possessed the hand set **(b)** whether the doctrine of recent possession was applicable **(c)** whether the prosecution case was proved beyond reasonable doubts.

It appears beyond reasonable doubts convinced, the trial learned resident magistrate held that the appellant was found in possession of the hand set but though duty bound, the latter neither brought the vendor in

court nor produce copy of the respective sale agreement or state the price, one therefore failed to prove the allegations much as the possession was proved and the hand set, subject of the charges it was proven property of the complainant recently stolen from the latter (cases of **Ramadhan Ayoub v. R**, Criminal Appeal No. 122 of 2004 and **Mkubwa Mwakagenda v. R**, Criminal Appeal No 94 of 2017 (CA) both unreported.

With all undeniable facts, the issue is no longer whether the appellant he was, say two (2) months later found in possession of the hand set but rather whether he possessed it unlawfully. The answer is no for four main reasons; **(a)** at least with expiry of two months, also given its nature, possibilities of the apparently easily and fast moving item having had changed several hands it would not have been ruled out. Quietly though invoked by the learned resident magistrate, with greatest respect the doctrine of recent possession it was neither here nor there **(b)** with respect to the hand set in a way the appellant may have had his evidence not supported by the purported vendor who did not appear in court in the first place yes, but given the said lapse of, and relatively long time, it sounds to me that wrongly though, on that one the trial court sort of shifted the burden of proof to the appellant **(c)** with respect to the hand

set, the appellant did not produce copy of the sale agreement or state the sale price yes, but it was common knowledge that due to lack of tax paying education even formal businessmen had been tirelessly sensitized by TRA. What about the appellant! **(d)** if for the interest of justice the combination of **(a)** – **(c)** above brought the same results so much the better. It could not therefore not 100% certainly said that from the start the appellant had knowledge, therefore, against him proof of unlawful possession.

With respect to exhibit "P1" ground one succeeds. Ground 2 and 3 are dismissed and allowed respectively.

The appeal is allowed in its entirety. The conviction and sentence are quashed and set aside respectively.

Right of appeal explained.



S.M. RUMANYIKA
JUDGE

05/07/2021

The judgment delivered under my hand and seal of the court in chambers this 8/7/2021 in the absence of the parties.




S.M. RUMANYIKA

JUDGE

08/07/2021