

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL CASE NO. 52 OF 2020

(Originating from Criminal Case No. 7 of 2020 Urambo District Court)

BONIPHACE REMIGIUS @ SEBASTIANAPPELLANT

VERSUS

REPUBLICRESPONDENT

JUDGMENT

Date: 09/08/2021 & 24/9/2021

BAHATI,J.:

The appellant **BONIPHACE REMIGIUS @ SEBASTIAN** was charged before the District Court of Urambo at Tabora for two offences namely housebreaking with intent to commit an offence contrary to section 294 (1) (a) of the Penal Code, Cap. 16 [R.E 2019], stealing contrary to section 258 and 265 of the Penal Code, Cap. 16 [R.E.2019] and sentenced to serve a custodial sentence of fourteen (14) and seven (7) years in jail respectively.

Aggrieved with the decision of the District Court, now he appealing against the conviction and sentence, on the following grounds namely:-

- 1. That, the case for the prosecution was not proved against the appellant beyond reasonable doubt.*

2. That, the learned trial magistrate erred in law to impute against the appellant, the doctrine of recent possession without regard to the following:-

- i. PW1, Zainab Marando did not describe and positively identify the properties allegedly stolen from her and impounded from the appellant both at the pre-trial stage.
- ii. PW1 did not establish ownership of the properties allegedly stolen from her and found in the room of the appellant.
- iii. There was a reasonable rival claim, from the appellant in his defence, that the properties found in his room belong to him upon which the doctrine need not be imposed even though the learned trial magistrate

And that the conditions precedent for invocation of the doctrine of recent possession needs to be met cumulatively and not in the alternative. See also the cases of **George Edward Komowski vs Republic [1948] 1 TLR 322** and **DPP vs. Joachim Komba [1984] 1 TLR 213**.

3. That, there is doubt on the properties found in the room of the appellant because the certificate of seizure allegedly prepared

after the search in the room of the appellant on 09/01/2020 was tendered by PW4 H. 6061 DC YUSUPH as exhibit P3 while in criminal Case No. 6/2020 in which the appellant stood trial, jointly and together with another before the same trial magistrate, the same witness (testifying as PW1 in CC 6/2020) tendered exhibit P5 (the certificate of seizure) in respect of the same search and that no evidence was forthcoming from the persecution that two certificates of seizure were prepared for the same search bearing in mind that exhibit P3 is not a certified copy of exhibit P5 in CC 06/2020.

- 4. That, the learned trial magistrate erred in law to convict and sentence the appellant without evaluating, analyzing, and considering the defence evidence of the appellant and accord the same any weight.*
- 5. The alleged cautioned statement of the appellant (exhibit P4) was made upon expiry of the time prescribed by sections 50 and 51 of the Criminal Procedure Act, Cap. 20 [R.E 2019] and that the same was wrongly admitted into evidence.*
- 6. That, there was a break in the chain of custody of the alleged stolen properties namely red scale and black cell phone make TECNO Y3 at the time PW1 tendered the same as exhibit P1 and P2.*

The appellant prayed to this court to allow this appeal, quash the conviction, set aside the sentence, and order for the appellant's release from prison custody.

The particulars laid in the charge was to the effect that on the 5th day of January, 2020 during day time at Masaki Street within Urambo District, the accused person entered into the house of Zainabu Marando and stole three crates of beer worth TZS 108,000/= two crates of soda worth TZS 20,000/, one bicycle make "mtumba" worth TZS 150,000/= one scale TZS 100,000/= and one cell phone make Tecno Y3 worth TZS 60,000 amounting to TZS 438,000/= the properties of Zainabu Marando and on the third account it is alleged that the first accused person Boniphace unlawfully received one scale valued TZS,100,000 from the second accused person while knowing that the same was stolen.

The appellant gave his defence after the trial court determined the matter, at the end of the trial the District Court of Urambo was fully convinced that the prosecution had proved its case beyond reasonable doubt and convicted the first accused on housebreaking contrary to section 294(1)a and stealing contrary to section 258 and 265 of the Penal Code, Cap. 16[R.E 2019] whereas the second accused, Renatus Reuben @Masama Akudo was acquitted.

During the hearing of this appeal, the appellant appeared in person, while Ms. Jaines Kihwelo, learned State Attorney appeared for the Republic.

The appellant in his submission urged this court to adopt the memorandum of appeal and additional grounds of appeal. Submitting on the grounds of appeal, the appellant stated that he was arrested at the bar and was sent to the police. He was then informed that he was charged for stealing and it was during the evening when they went to his place for searching and found a television, computer subwoofer, and deck.

On the 2nd ground of appeal, he submitted that the properties belonged to him and he did not recognize those properties tendered in court. His properties were reserved at the police.

On the 3rd ground, he submitted that the police tendered two certificates of seizure which was not proper.

On the 4th ground, the trial magistrate did not analyze the evidence while on the 5th ground, a caution statement was recorded outside the prescribed time. He then prayed for this court to release him.

On her part, the learned State Attorney supported the appeal and submitted that the doctrine of recent possession was not sufficiently proved. She stated that the appellant was found with one of the

mentioned properties. According, to PW1, Zainab Marando that what was stolen was a weigh scale only but PW1, could not explain well the specific identity of the weight scale. To bolster her argument she referred to the case of **George Komoski V R 1948 TLR 322** on the doctrine of recent possession.

She also submitted that on the issue of caution statement under sections 50 and 51 of the Criminal Procedure Act, Cap 20[R.E 2019] the appellant's statement was taken 4 hours beyond after and the prosecution side did not explain the reasons for the delay. She submitted that if the exhibit will be expunged what the court will remain is circumstantial evidence that needs to be corroborated.

Likewise, on the issue of a broken chain of custody. She submitted that PW4, Yusuph explained how he seized the red scale but during the evidence PW1, Zainab Marando tendered the exhibit from police. To substantiate her argument she referred this court in the case of **John Joseph Onenge and others Vs. Republic [1993] TLR 131**.

She accordingly invited this court to discount the appeal and therefore, declined to support the conviction of the appellant.

Having considered the evidence on record, the petition of appeal, and submission by both parties, the issue for consideration is whether the present appeal has merit.

In the course of determining these grounds, I will be guided by the canon of the criminal cases that the onus of proof in criminal cases lies with the prosecution to prove beyond reasonable doubt.

The law provides that a prosecution case must be proved beyond reasonable doubt, to put it simply, is that the prosecution evidence must be so strong as to leave the criminal liability of an accused person. Such evidence must irresistibly point to the accused person and not any other as the one who committed the offence in **Yusuph Abdallah Ally v Republic**, Criminal Appeal No. 300 of 2009, (Unreported).

As pointed out by Ms. Kihwelo in recent possession, a witness must prove the specific mark. It is a settled law that under the doctrine of recent possession if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a guilty receiver.

For the doctrine of recent possession to apply as a basis of conviction, it must be proved, *first*, that the property was found with the suspect, *second*, that, 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

matter of the charge against the accused. In the case of **Mustapha Maulidi Rashidi Vs. The Republic, Criminal Appeal No. 241 of 2014**.

Principles of identification require that there should be positive identification of the stolen items by the identifying witness who is supposed to give peculiar and special marks distinguishing his properties from other similar items. In the case of **Ally Zuberi Mabukusela Vs. Republic, Criminal Appeal No. 242 of 2011** the Court of Appeal held that in all such cases the claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit. The presumption behind the doctrine of recent possession in my considered view has to be applied with great circumspection. As stated no mark was identified of the tendered exhibit. I find it with merit.

Again, the State Attorney submitted on the issue of chain of custody. I fully subscribe with Ms. Kihwelo. The court also in respect of chain of custody is of the view that the chronological documentation and or paper trail, showing the seizure, custody control transfer analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody is stressed to establish that the alleged evidence is related to the alleged crime- rather than, for instance having planted fraudulently to make someone appear guilty. The chain

of custody is required that from one person to another must be documented and that it be provable that nobody else could have accessed it. In the case at hand, unfortunately, this principle in a criminal investigation was not observed and enforced. The said exhibit was taken from police to PW1 without observing the procedures.

On the issue of caution statement, since it did not conform to the laid down principle, from those discrepancies in the prosecution evidence the exhibit P2 is hereby expunged from the record and the remaining will be on the circumstantial evidence which needs corroboration.

All said and done, I am constrained to hold that although the offence took place, it was not proved that the appellant was a part of the criminal. I accordingly allow this appeal in its entirety. The conviction of the appellant and sentence of imprisonment imposed is hereby quashed and set aside. The appellant is to be released forthwith from prison unless otherwise lawfully held. The appellant seized properties to be returned thereof.

Order accordingly.



A handwritten signature in blue ink, appearing to read 'A. A. Bahati'.

A. A. BAHATI

JUDGE

24/9/2021

Date: 24/09/2021

Coram: Hon. N. Mwakatobe, DR

Appellant: Present.

Respondent: John Mkonyi, State Attorney.

B/C Grace Mkemwa, RMA

Court: Judgement is delivered this 24th day of September, 2021 in the presence of appellant in person and Mr. Mkonyi State Attorney for the Respondent.

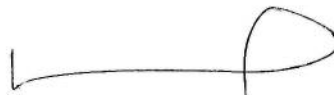


N. MWAKATOBE

DEPUTY REGISTRAR

24/9/2021

Right to appeal is hereby explained.



N. MWAKATOBE

DEPUTY REGISTRAR

24/9/2021