IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 55 OF 2016

(Originating from Criminal Case No. 24 of 2012, In the District Court of Kilombero, at Ifakara - Before Hon. P. I. KIMICHA, RM)

WILLIAM S/O MSIMANGILA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

JUDGMENT

18th August, 2021 & 14 Sept, 2021

CHABA, J.

The appeal is against the judgement of the District Court of Kilombero, at Ifakara in which the appellant herein was arraigned for two Counts of burglary and stealing, contrary to sections 294 (1) (a) and 265 respectively, both of the Penal Code Chapter 16 of the Revised Edition, 2002; now (Revised Edition, 2019).

The background of the matter is to the effect that on 19th January, 2012 around 03:00 hours (in the night) at Mwaya area in Mang'ula within the Kilombero District in Morogoro Region, the appellant did break and entered into the dwelling house of one Moshey Nganda (PW1) and stole therefrom 12 bags of cement, 4 bags of lime, one 6x6

mattress, one 6x4 mattress, 6 pieces of building iron bar 12 mm, 8 pieces of curtains and bed sheet which its total valued at Tsh. 641,000/=,

When the charge was read over and explained to the appellant / accused person, he pleaded not guilty to the charge. His plea of not guilty paved ways on the side of prosecution to call their key witnesses to adduce their testimonies in support of a charge.

During trial, the respondent paraded two witnesses to prove their case. The first witness is the complainant (PW1), who testified that on the material date, when he was returning back from the other village, he found his house which was under repair, having been broken at the window by using a jack. Upon entered therein, he discovered that the aforementioned items were stolen. Thereafter, he reported the matter at the police station. But one day after the incident, he was phoned by the police officers from the said police station where he was informed that his stolen items were recovered. He went at the police station and managed to identify them. He testified to have identified the three curtains, of which two were his as well as the bed sheet which he was using. The same were tendered and admitted in evidence as Exhibit P1, collectively.

The second and last witness was PW2, the police officer having force No. E. 3539 PC Emmanuel whose testimony is to the effect that; soon upon received complaint from PW1, his colleagues went to conduct search at the residence of the suspect. Thereby, they seized a bicycle and took it to the police station together with other items including the Exhibit P1. When he was cross examined, he said he never knew where

the other suspect was. He also testified that the appellant was arrested in connection to another case.

In defence the appellant fended for himself and went on to testify that he was put under arrest by the police-men while at his home. He said, in the course of being arrested the said police-men did not inform him why they decided to apprehend him. In other words, no reasons were advanced to the accused for his arrest.

After a full trial, the trial court relied on the doctrine of recent possession and found the appellant guilty and thereafter proceeded to sentence him as follows; in respect of the 1st Count; he was sentenced to serve twenty (20) years in jail, and for the 2nd Count; he was sentenced to serve one (1) year imprisonment. The sentences were ordered to concurrently.

Disgruntled with the trial court decision, the appellant preferred the instant appeal armed with six (6) grounds of appeal which for purpose of brevity, could be condensed into the following points of grievances:

1. That, the case was not proved beyond reasonable doubt, and
2. That, there were procedural irregularities committed at the trial court.

When this appeal came up for hearing, the appellant appeared in person, unrepresented, whereas Mr. Ramadhani Kalinga, learned State Attorney entered appearance for the Respondent, Republic.

Upon being given an opportunity to amplify on the grounds of appeal, the appellant opted to reply and offered a right to begin to the respondent (the Republic).

To kick the ball rolling, Mr. Kalinga began by expressing generally his stance at the outset that he was supporting the appeal. He argued that the charge sheet was not proved beyond reasonable doubt. It was further argued that the search was conducted without adhering to the relevant procedural law.

He explicated that, the prosecution side called two witnesses to prove the case of burglary and stealing. He contended that at page 11 of the trial court proceedings the evidence of PW1 revealed that there were stolen properties and he managed to identify three curtains at the police station. The learned State Attorney vehemently insisted that, such piece of evidence offered by PW1 did not offer sufficient explanations as to how he managed to identify those curtains from others.

He further articulated that, PW1 said he managed to identify the appellant while at police station, but there is no sufficient evidence to elaborate how he managed to identify the appellant taking into account that the offence was committed during the night. He emphasized that the evidence was insufficient to ground the appellant's conviction.

In respect of the offence of stealing, Mr. Kalinga accentuated that the offence was not established. He emphasized that the case was not proved beyond reasonable doubt. To cement on the aspect of stealing, he invited this court to make reference to the case of **Omary Iddi Mbezi v. Republic,** Criminal Appeal No. 214 of 2017 CAT, Dar es

Salaam (unreported). He then concluded by pleading to the court to quash the conviction and set aside the sentences so imposed against the appellant.

In his brief rejoinder, the appellant did not have much to say other than supporting the respondent's oral submission and prayed for the court to consider his appeal.

I have dispassionately considered the grounds of appeal and oral submissions advanced by the two sides in light of the trial court proceedings and judgment of the court. Having so done, the central issue for determination by this court is whether or not this appeal is meritorious.

As indicated above, I have examined the records of the original case file and at this juncture, I am convinced to enlighten the following:

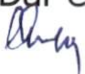
One; I have noticed that there was a material irregularity committed by the trial court which of course infringed the appellant's right to a fair trial. The Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA) which is an Act to provide for the procedure to be followed in the investigation of crimes and the conduct of criminal trials and for other related purposes, its aim among others is to ensures *equality before the law* when the *rights and duties of any person are being determined by the court.*

The Act contains many provisions that guarantees a fair trial or hearing in conformity with the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, of 1977 (as amended

from time to time). For the purpose of this appeal, however, section 231 (1) of the CPA is the most relevant. The provision read:

> *"Section 231 (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 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 were the accused person does not wish to exercise any of those rights......"*** [Emphases added].

The expression **"shall"** has been used in the wording of the aforesaid provisions of the law which from its contextual viewpoint it confers mandatory function which is to be performed as far as the interpretation enshrined under **section 53 (2) of the Interpretation of Laws Act [Cap. 1 R.E. 2019]** is concerned. This section does not only guarantee to an accused person a right to be heard, but also imposes a duty on the trial court to inform him or her fully of this right. (See: **Alex John v. Republic**, Criminal Appeal No. 129 of 2006, CAT, Dar es Salaam (unreported)).



From the records as it stands, nothing of this kind has been transpired. It is apparent on records that after the trial the court ruled out that the appellant had a case to answer, then it proceeded to hear the defence case without informing the appellant of his rights embodied under the provisions of section 231 (1) of the CPA. The appellant was, therefore, denied his right to defend himself. In short, he was denied a fair trial. For this reason alone, I would allow this appeal.

Under normal circumstances, I would have ordered a re-trial. However, it is settled law that a re-trial should not be ordered unless the appellate court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result. (See: **Pascal Clement Branganza v. R** [1957] EA. 152 (C.A) and **Shiv Kumar v. R** [1957] EA 469 (C.A)) among others.

I further had an opportunity to objectively scrutinize the entire prosecution evidence. I have learnt that the only piece of evidence used to implicate the appellant with the two offences of burglary and stealing, was the Exhibit P1 which are curtains owned by the complainant (PW1), purported to have been found under possession of the appellant. It was the **doctrine of recent possession** that was relied upon to find the appellant guilty. However, the question that arises here is, basing on the evidence given by the prosecution witnesses before the trial court, did the same successfully proved the commission of the two offences in reliance to the doctrine of recent possession?

Admittedly, the law on the doctrine of recent possession is settled and further it is a rule of evidence. It operates on the basis that unexplained possession by an accused person of the fruits of a crime

recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft, but also for any other offence however serious. (See; **Mwita Wambura v. R** [1992] TLR 118; and **Ally Bakari v. R**, Criminal Appeal No. 47 of 1991 (both unreported)).

The presumption behind that doctrine has to be applied with great circumspection. On this, the holding in **Ally Bakari and Pili Bakari v. R.** (1992) TLR. 10 is instructive. In that case, the Court of Appeal held:

> *"...... the presumption of guilt can only arise where* ***there is cogent proof that the stolen thing possessed by the accused is the one that was stolen*** *... and no doubt, it is the prosecution who assumes the burden of proof...."* [Emphasis supplied].

It should be noted that, to prove that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged could be guaranteed by evidence on a proper account of the chain of custody of the stolen thing found in possession of the accused person.

As gleaned from the court records in the course of trial, PW1 and PW2 maintained that the appellant was found with the three curtains (Exhibit P1) among other items or properties. In his testimonial account, PW1 did not assert any details describing the stolen items like mentioning a mark or marks of which could discern them from other curtains, so as to prove ownership over the three curtains which were allegedly found in possession of the appellant.

It is a settled principle of law that descriptions of special marks to any property allegedly stolen should always be given first by the alleged owner before being shown and allowed to be tendered as an exhibit. (See: **Mustafa Darajani v. R**., Criminal Appeal No. 242 of 2008 (unreported) and **Nassor Mohamed v. R.,** (1967) HCD 446). It has also been held that before an exhibit is tendered in court, the chain of seizure and custody must be established. (See: **Hemed Athuman Silaju v. R;** Criminal Appeal No. 120 of 2006 (unreported).

As regards to the evidence adduced by PW2, he told the trial court that he was not the one who found the two items in possession of the appellant, but rather other police officers. His testimony relied on the words uttered by his colleagues, which in the eyes of the law, is purely hearsay evidence and cannot prove an existence of the fact(s) under the circumstance of this case. In the court record, there is no evidence which were given to prove that the prosecution Exhibit P1 was found while under possession of the appellant. This piece of evidence creates uncertainties.

Again, the unveiled unsatisfactory feature is compounded by the fact that the chain of custody of the items allegedly found in the possession of the appellant was not established. Our Apex Court in **Paulo Maduka and Another v. R**; Criminal Appeal No. 110 of 2007 (unreported), underscored the importance of establishing a proper chain of custody of exhibits and held that there should be:

> *"A 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 to establish that the alleged evidence is in fact related to the alleged crime ..."

To establish the same, the police officers who conducted search, were required to invoke the provisions of section 38 of the CPA to issue a seizure certificate and comply with the procedure thereof. However, nothing had been tendered to indicate how the said Exhibit P1 was procured from the appellant to the police officers. There is a conspicuous absence of a proper account of the chain of custody, from which, I am convinced that, there are still doubts as to whether the items tendered in court were prior found from the appellant and procured by the police officers. In addition, considering the fact that the evidence is silent on whether there was an independent witness to expound on it, I am still completely unsettled to resolve the pertinent doubt in favour of the respondent, but rather for the appellant. From the view point, the doctrine of recent possession was not proved within the realm of standards and was wrongly applied to warrant conviction of the appellant.

In the upshot, I am satisfied that the prosecution failed to prove their case against the appellant on the standards required in criminal law. Consequently, I allow this appeal. The conviction entered and the sentences passed by the trial court in respect of the two counts of burglary and stealing contrary to sections 294 (1) (a) and 265, both of the Penal Code [Cap. 16 R.E. 2002]; now (Revised Edition, 2019) are quashed and set aside. I thus order the immediate release of the appellant from prison custody unless he is otherwise lawfully held.

Order accordingly.

DATED at **DAR ES SALAAM** this 14th day of September, 2021

M. J. CHABA,

JUDGE

14/09/2021

Right of Appeal to the parties fully explained.

M. J. CHABA,

JUDGE

14/09/2021

Court: Judgement delivered at my hand and Seal of this Court in Chamber's today on the 14th day of September, 2021 in the presence of the appellant who appeared in person and Mr. Ramadhani Kalinga, learned State Attorney who entered appearance for the Respondent/ Republic.

M. J. CHABA

JUDGE

14/09/2021

Rights of the parties have been explained.

M. J. CHABA

JUDGE

14/09/2021