IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA

CRIMINAL APPEAL NO. 11 OF 2022
(*Originating from Criminal Case No.26 of 2020 the District Court of Shinyanga*)

LEONARD ALFRED .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16th May & 17th June 2022
MKWIZU, J:

In the District Court of Shinyanga at Shinyanga , the appellant was charged with and convicted on two counts, house breaking and stealing contrary to sections 294 (1) and 258 and 265 of the Penal Code. The particulars of the offence were to the effect that on 7/1/2020 at Kizumbi area within Shinyanga Municipality, in Shinyanga Region, the appellant did break and enter into the house of one Malaki Charles and stole therein two TV make Aborder 32 1inch valued at 600,000/= and another Sumsung TV valued at 700,000/= all totaling up to 1300,000/= the properties of Malaki Charles.

Before the trial court, the prosecution case was founded on the evidence of three witnesses: PW1 Malaki s/o Charles **(the complainant)**, the street chairman, Muhamedi Mustapha Mgendi **(PW2)** and F7946D/CPL Edson (PW3). The prosecution evidence reveals that on 7/1/2020 the complainant, one Malaki Charles a medical doctor by professional was out for his business. He returned home at around 18.47 hrs and found the padlock of his house broken and two TV make aborder

32 inch and Samsung all valued at 1300,000/= stollen. He immediately reported the incident to the police as well as the area administrative authority.

The appellant and his fellow were sported by the Street chairman (PW2) on 30/1/2020 carrying items believed to have been stollen. He suspected them thieves and locked them in before reporting the matter to the police . Appellant was arrested and confessed to have committed the offence. PW3, a police officer, recorded the appellants cautioned statement (exhibit P3)

At the accused house, his wife, Mariam Gazel admitted having received a TV from his husband, the appellant. The police searched Mariam Gazels house and found one TV make aborder and seized it after filling in a seizure certificate (exhibit P4). The complainant PW1 was on 31/1/2020 managed to identify one of his televisions, make abode 32 inches (exhibit P1) through a cut wire mark and its Code number O4414 at the police station.

The records shows that, appellant jumped bail before the conclusion of the trial, he was thus convicted and sentenced in absentia on 14/7/2021 to five (5)years imprisonment on the first count and three (3)years jail term in the second count, the sentences were ordered to run concurrently. Appellant was later arrested and brought to court on 10/01/2022 and failed to justify his absence. He was then formally informed of the judgment and the sentences and officially began to serve his custodial term after he had failed to validate his absence during trial.

The appellant felt that his conviction and sentence were not justified hence this appeal predicated on six grounds of appeal that:

1. ***That,*** *there was neither search order nor certificate of seizure tendered to the court of law to legalize the prosecution allegation that they searched and seizure stolen properties at the residence of appellant as per section 38 (3) of the Criminal Procedure Act (Cap 20 RE 2019).*
2. ***That,*** *the alleged search conducted to the house of the appellant was contravene section 38, 40 and 41 of the Criminal Procedure Act (Cap 20 RE 2019).*
3. ***That,*** *the confession alleged by Police Officer in a caution statement was obtained by torturing and duress against the appellant while in police interrogation.*
4. ***That,*** *the trial magistrate erred in law and fact to entertain this case as a house breaking and stealing while the whole case was a "Recent possession."*
5. ***That,*** *the key witnesses (the victim's relatives) were not summoned to appear before the court of law testify whether they witnessed the appellant break a house and steal thereto.*
6. ***That,*** *the learned trial magistrate totally erred in law and fact when failed to evaluate in deep the nature and quality of the prosecution evidence against appellant which did not prove the charge beyond reasonable doubt.*

At the hearing of the appeal the appellant appeared in person with no legal representation. The respondent/ Republic was represented by Ms Shani, learned State Attorney. The appellant did not elaborate on his grounds he only urged the Court to consider them and find in his favour.

The learned State Attorney on the other hand opposed the appeal. She argued that the seizure certificate was admitted as exhibit P4, search procedures were all followed by the police and the process did involve the street chairperson and that the cautioned statement was as well admitted after an enquiry and therefore grounds 1,2 and 3 are without merit.

Responding to the fourth ground of appeal the State Attorney said, PW1's house was found broken and the TV stolen. Appellant was associated with the breaking and stealing and that the offence on a recent possession was in respect of the 2nd accused and not the appellant. She was of the view that all the remaining complaints are baseless as the prosecution's witnesses managed to prove the offence to the required standard. She prayed for the dismissal of the appeal.

I have seriously considered the matter. I will begin with the two complaints relating to the alleged procedural transgression. The first and second grounds of appeal are alleging lack of search order or certificate of seizure on the records in total contraventions to sections 38, 40 and 41 of the CPA. There is no doubt that seizure certificate was tendered and admitted in evidence as exhibit P4 as rightly observed by the learned State Attorney. The issues is whether the procedure for search and admission of seizure certificate (exhibit P4) was complied with.

Search and seizure are governed by section 38 to 40 of the CPA, read together with items 2, 17 and 18 of the Police General Order 226. Section 38 of the CPA:

38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence.

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) Where an authority referred to in subsection (1) is issued, the police officer concerned shall, as soon as practicable, report the issue of the authority, the grounds on which it was issued and the result of any search made under it to a magistrate.

(3). Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

And Police General Order No. 226:

> *"Item 17 (b) The services of a local leader or two independent witnesses who should be present throughout the search; should be obtained. This is to ensure that he or they may be in a position to give supporting evidence if anything incriminating is found and to refute allegations that the search was roughly carried out and the property damaged."*
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> *"Item 18: On completion of the search; a search report will be made out at the scene, giving details of all articles seized, a copy of which shall be handed to the occupier."*

The above provisions read collectively prescribes a proper procedure for search including the need for the issuance of a search warrant to a police officer or any other person so authorized before such officer executes a search except on an emergency search conducted under section 42 of the CPA. And in case of any recovery on any item during the said search the officer conducting search is required to comply with the requirements of section 38(30 of the CPA. See for instance the decision in **Maluqus Chiboni @ Silvester Chiboni and Another v. Republic**, Criminal Appeal No. 8 of 2011

I have revisited the evidence on the records. Two things are notable. The position/ designation of the police officer who supervised the search is not disclosed in the record. Exhibit P4, the seizure certificate was tendered in court by PW3, informing the court that it was prepared by his colleague CPL Musa without more. The prosecution choice not to summon the named PCL Musa as a witness was without explanation

There is no search warrant tendered in court, and therefore uncertain whether the named officer was an officer in charge of a police station or had a written authority to conduct search issued to him by the officer in charge of a police station or by the court. The seizure certificate (Exhibit P4) tendered was irregular without search warrant for it was illegally obtained. The only remedy available is to expunge exhibit P4 out of the records. This makes the television in question, (Exhibit P1) entry on the court records legally untraceable liable to be expunged out of the records as well. I am on this supported by the decision **of Mbaruku Hamisi and Four Others vs Republic**, Consolidated Criminal Appeals Nos, 141, 143 and 145 of 2016 and 391 of 2018 (Unreported) where the Court found the procedure of obtaining exhibits PI (a mobile phone make Teckno) and P3 (two blankets) which were seized during a search contravened the provisions of section 38 of the CPA and expunged them from the record.

Even if we were to assume that the recovery of the stollen property valid for it was witnessed by independent witnesses including PW2, still, the prosecution evidence fell far short of establishing on how the TV recovered was described by the owner when he first reported the matter to the police. In **Yohana Paulo Vs. The Republic**, Criminal Appeal No. 281 of 2012 the court said, the victim of theft must give description of his stolen items for him to claim later that the recovered items are those which were stolen from him. This was not the case here. The description given by PW1 came after the seizure of the TV in question and it was after he was called by the police to identify his item at the Police who had all the description of the recovered item. The worry is, how was the identification at the police done without prior description of the stollen

item by the victim of theft and more so because Television is a common item. Worse enough, neither the police officer who recovered the TV during search nor the witnesses of the alleged search was led to identify the said TV. It is therefore indefinite whether exhibit P1 is the same TV stollen from PW1's house and the same one recovered from Mariam Gazel's House. On top of that, there is no evidence adduced to prove that it was the appellant who burgled his way into the complainant's house to commit an offence therein. The evidence against the appellant is therefore weak to ground appellant's conviction.

In fine, I allow the appeal, quash the appellant's conviction, and set aside the sentences. The appellant is to be immediately released from prison unless otherwise held for other lawfully cause.

It is so ordered.

DATED at **Shinyanga** this **17th** day of **JUNE 2022**

E.Y MKWIZU
JUDGE
17/06/2022

COURT: Right of appeal explained

E.Y MKWIZU
JUDGE
17/06/2022