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

**CRIMINAL APPEAL NO. 91 OF 2021**
(*Originating from Criminal Case No.01 of 2021 the District Court of Shinyanga*)

**RICHARD KISENA .....APPELLANT**

**JOSHUA JOHN MAKARA@ MASHOTO.....APPELLANT**

**VERSUS**

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

## JUDGMENT

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

In the District Court of Shinyanga at Shinyanga , appellants were jointly charged with and convicted on two counts, House breaking and stealing contrary to sections 294 (1) (a) and (b) and 258 and 265 of the Penal Code. The particulars of the offence were to the effect that on 21/12/2020 night hours at Kibaga area within Shinyanga Municipality, in Shinyanga Region, the appellants broke and entered the house of one DEBORA MAGILIGIMBA and stole therein one television make LG valued at 1500,000/=; Azam Decoder with serio No. 64417000222 valued at Tsh 140,000; one Remote Sony type; one Remote Azam; Rice cooker, and one Hot Pot Topaz all total valued at Tsh. 1700,000

And on the third count, second appellant was alone charged for being in possession of goods suspected to be stollen or unlawfully acquired contrary to section 312 (b) of the penal code( Cap 16 RE 2019) where the

particulars of the charge was specific that, on 21/12/2020 at Ngokolo area within Shinyanga Municipality in Shinyanga Region, second appellant was was found in possession of one TV make LG valued at 1500,000/=; Azam Decoder with serio No. 64417000222 valued at Tsh 140,000; Three Remote make LG, Sony and Azam respectively all total valued at Tsh. 1640,000 the properties of DEBORA MAGILIGIMBA.

And another person EMMANUEL S/O YONA's not subject of this appeal was charged for unlawful possession of a Rice cooker make Lyons and one Hot Pot make Topaz valued at 360,000 the property of Debora Magiligimba.

The trial court heard and recorded evidence from a total of six prosecution witnesses. Briefly the prosecution case was as follows: The complainant the RPC, Shinyanga Region had on 20/12/2020 travelled to Ushetu and Kahama on Official duty and could not managed to return home. At 6.00hrs of 21/12/2020 she received a call from her daughter, PW2 informing her of the house breaking and stealing incident mentioning to her the stollen items from her the house. She instructed PW2 to report the matter to the police. The information was conveyed to the police. Investigation was mounted leading to the arrest of the appellants who confessed to the commission of the offence before the police and their cautioned statement were recorded by PW3 and PW5 and were admitted in court as exhibit P2 and P5.

The police officer, D/SGT Erick (PW4) assisted by PW6 the street chairman did conduct search into the 2nd accused house where the properties namely TV make LG, three remotes make sonny, LG and Azam, Azam Decoder with its card in it were recovered. They prepared a seizure

certificate which was signed by the accused and other witnesses including PW6. 1st accused directed the police to the EMMANUEL S/O YONA's grocery where they had left other items and the police managed to recover the hotpot and Rice cooker from the then third accused person.

After that recovery, the complainant was informed and visited the police station on the same date at around 17.00hrs of the same date, where she identified all the properties as her stollen properties.

1st appellant's defence was a general denial of the accusations against him. While admitting having recorded a cautioned statement on 21/12/2020 before a police officer called Eliot, he denied having voluntarily signed the statement. Like the 1st appellant, second appellant admitted having been arrested on the material date, conveyed to the police where his statement was recorded and signed it by fixing his thumb print after he had told the police that he is illiterate, knowing not how to read and write.

The third accused EMMANUEL S/O YONA's evidence was on how the 1st appellant Richard Kisena left the hotpot and rice cooker to his employee after he had eaten food from his grocery without paying. He refuted knowledge that the said items were stolen and the story on how the good came about his office was conveyed to him by his employee.

At the conclusion of the trial, the third accused EMMANUEL S/O YONA's was acquitted. The trial court found that the prosecution's evidence had proved the offences against the appellants beyond reasonable doubt. It proceeded to convict the appellants for burglary and stealing contrary to sections 294 (1) (a) and (b) and sections 258 and 265 of the penal code.

Second appellant was in addition to the above, convicted under section 312 (2) of the penal code. The sentence of 20 yeas jail term was imposed to both appellants on the first count, 4 years imprisonment on the second count and 2nd appellant was again sentenced in the third count to 4 years jail term. The sentences were however ordered to run concurrently.

Following the above conviction and sentence, the appellants filed this appeal with a total of six grounds of appeal revolving around three main complaints namely that (***i)the accused's cautioned statements were obtained by torture and duress; (ii)triai court failed to properly evaluate the evidence and (iii) that the prosecution case was not proved beyond reasonable doubts***.

At the hearing, all appellants were in person without legal representation. They had nothing to say except placing their reliance on their grounds of appeal. The respondent/ Republic was represented by Ms Shani the learned State Attorney.

In her submissions, Ms. Shani, the learned State Attorney, opposed the appeal. She argued grounds 1,2,3,4 and 6 together stating that offence against the appellant was proved beyond reasonable doubts. Making reference to section 293 of the CPC prescribing the breaking in to include opening the closed door, Mr Shani urged the court to find the appellants complaint on lack of the evidence of the broken doors to have no merit because according to her PW2's evidence was clear that she left to sleep while doors closed and found them open in the morning with the itemised items stollen which according to the state attorney were properly identified during trial.

Regarding the complaint that the charges against the appellants were actuated by malice, the learned State Attorney urged the court to find it baseless. And that the 1st appellants cautioned statement was admitted after a proper inquiry while the 2nd appellants cautioned statement was admitted without objection rendering the 5th ground of appeal baseless. She lastly played for the dismissal of the appeal

Having considered the evidence on the records, grounds of appeal and parties' submissions, I find the crucial issue as to whether the offences against the appellant were proved to the required standards. This issue will be answered along with the determination of the three complaints raised by the appellants. And this being the first appeal, this court will, guided by the decision of **Siza Patrice V. R,** Cr. Appeal No 19/2010, re-evaluate the entire evidence before concluding whether the conviction entered against the appellant is deserving or not.

There is no eyewitness in this case who saw the appellants breaking into PW1's house and stealing therefrom. The appellant's conviction is grounded on the evidence of PW2, complainants' daughter, appellant's cautioned statements, the evidence of the search by Pw4 and Pw6 which led to the recovery of the stollen items from the 2nd appellants residency and third accused few hours after the alleged burglary (the doctrine of recent possession) and the identification of the stollen items by PW1 and PW2.

In their first ground of appeal, appellants allege lack of evidence proving house breaking. Their contention is that there is no single witness testified that the house was broken pointing to specific place like doors,

windows, and the like. Section 294 prescribes burglary as a house breaking and entering any building, tent or vessel used as a human dwelling at a statutory night-time with intent to commit an offence therein. And Night or night-time" is defined by section 5 of the Penal Code to mean the period, between seven o'clock in the evening, and six o'clock in the morning.

It is evident from the records that the house breaking and stealing offences were committed between 00.00 hrs and 6.00 hrs. PW2 told the court that she last closed the doors at 00.00hrs of 21/12/2020 and found the back doors open in the morning with the itemized properties in the charge sheet namely television make LG; Azam Decoder; one Remote Sony type; one Remote Azam; Rice cooker, and one Hot Pot Topaz stollen. This was also supported by PW1's evidence who learnt of the incident at 6.00hrs from Pw2. This is nothing but burglary.

As explained above, PW2 was categorical that she, on working up in the morning found the back door open. Despite the facts that there is no single evidence adduced as to the breakage of the door on its plain meaning, the truth is, the opening of the door is as rightly submitted by the learned State Attorney, a breaking in the house as defined by section 293 of the penal code which states:

> *293.-(1) A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting, or by any other means whatever, any door, window, shutter, cellar flap or other thing, intended to close or cover an opening in a building, or an opening giving*

*passage from one part of a building to another, is deemed to break the building.*

Thus, the opening by unlocking of the doors is a house breaking. This ground is unfounded.

The appellants complaint in ground five of the appeal is that the cautioned statements were obtained by torture and duress. I have deeply examined this piece of evidence. In their cautioned statement, both appellants confessed to have committed the offence. They voluntarily informed the police how each participated on the commission of the offence, and they led the police to where they had hidden the stollen items. It is then same statements that led to the recovery of the stollen items at the 2nd appellants house and 3rd accused.

All the appellants did not deny making their statement before the police. The only objection to the admission of the 1st appellant cautioned statement was that the statement was recorded in the absence of a justice of the peace and /or his relative. I find, as rightly decided by the trial magistrate, the objection was without a refraction or retraction statement challenging the voluntariness of the 1st appellant in giving the statement. There was no allegation of torture both during cross examination and even during the defence. And 1st appellant categorically admitted during cross examination at page 24 of the trial court proceedings that he recorded his statement before the police.

The objection to the admission of the 2nd appellant's cautioned statement is recorded at page 41 of the proceedings thus:

*"I object it as I told the court that I do not know how to read and write."*

This wasn't a denial by the appellant giving the recorded statement. This ground is being brough here as an afterthought.

The evidence on the doctrine of recent possession also supported the prosecution's case. This doctrine provides that 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 to apply as a basis of conviction prosecution needs to establish four main things ***first***, that the property was found with the suspect, ***second***, 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 of the charge against the accused. See the decision in **Mkubwa Mwakagenda v R**, Criminal Appeal No. 94 of 2007 CAT (unreported),

PW4 and Pw6's evidence is clear that the search on the 2nd appellant's residency led to the recovery of the items namely TV, Remotes and decoder were recovered and well identified by PW1 and PW2. Second appellant's signature on exhibit P3, seizure certificate signifies his presence during the search but denied ownership of the said items and gave no ex-planation on how the stollen properties came on his hands.

The recovery of the stolen items was also supported by the third accused person plus the seizure s certificate Exhibit P4. Third accused's defence was categorical that the hotpots and rice cooker found in his house were

brought to him by the 1st appellant as a bond after he had eaten without paying for the food. And this evidence remained unchallenged by the appellants during both cross examination as well as their defence. First appellant also did deny ownership of the recovered items and gave no plausible explanation on how he came into possession of the Hot pot and the Rice cooker he left at the third accused's grocery.

The evidence indicated that PW1 and PW2 managed during trial to identify the exhibits, as the properties stollen from the Pw1's house. And having no claim of ownership from any other person even from the persons from whom the properties were found after the incident, then I find nothing to fault the trial court's decision.

All the above combined gives one conclusion that the appellants are responsible for both house breaking and stealing. The third count against the 2nd appellant was also proved to the required standards.

In the event, the appeal is dismissed in its entirety.

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