**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO 58 OF 2022**

*(Originating from the Court of Resident Magistrate of Mbeya at Mbeya in Criminal Case No. 79 of 2020)*

Between

**GIFT BRITON MWAKASUNGA**
**ALEX SEBETO MALANDU** ] **.....APPELLANTS**

**VERSUS**

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

**JUDGMENT**

*Date of last order: 6th July, 2022*

*Date of judgment: 16th August, 2022*

**NGUNYALE, J.**

The appellants were arraigned in Criminal Case No. 79 of 2020 in the Court of Resident Magistrate of Mbeya with two counts breaking into the house contrary to section 296 (a) stealing contrary to section 258 and 265 both of the penal code cap 16 R: E 2002 now 2022. It was alleged that on 28th day of February, 2020 the appellant did break and inter into the office and while in the office they did steal one television make boss, 4

four cameras, two computers, one subwoofer make hometheatre, one nicon lens, external had disk, 11B speed light made godox, one watch, and one small table the property of Jeremia Mwangake. They both denied the charge. the prosecution called five witnesses Jememia Joseph Mwangake (PW1), F.3132 D/CPL Beda (PW2), Ee.8959 D/SPL Hassan (PW3), Henry Jubeck Mkorea (PW4) and ASP Boniface Lwambano (PW5). They also tendered four exhibits properties stolen exhibit P1, cautioned statement of the appellants exhibit P2, sketch map exhibit P3 and certificate of seizure exhibit P4. The appellant defended themselves, called no witness in support of their evidence.

Briefly it was the prosecution case that on 28th February, 2020 PW1 at around 23:00hrs PW1 closed his office which he operates as a studio, in the morning at 07:00 hrs when he went to open, he found the gate opened, upon entering inside he found the roof cut and some items as listed in the charge sheet stolen. He reported the matter to police. On 03/03/2020 PW2, PW3 and PW5 were told by the informer that the suspects of theft at Isanga was at Ilemi, they went there and set a trap whereby the first appellant was arrested. He led them to his room where various items listed in exhibit P4 was seized. Upon interrogation the first appellant admitted to the offence. Sometimes on 13/3/2020 the second

appellant was arrested and upon interrogation he also confessed to the offence. During inquiry cautioned statements were admitted as exhibit P2 collectively.

In defence the appellant denied each and every piece of evidence of the prosecution. Upon full trial the appellants were found guilty and consequently sentenced to five years imprisonment in each count, the sentence was to run concurrently.

Aggrieved, the appellants filed their petition of appeal to this court containing six grounds;

1. *That the trial court erred by convicting the appellant without considering that the judgment was invalid contrary to section 311 of CPA cap 20 R: E 2019;*
2. *That the trial Magistrate erred in law point by convicting the appellants regarding that pw2 (police officer) was incompetent;*
3. *That the trial Magistrate erred in convicting the appellants without notice that the charge was defective;*
4. *That the trial Magistrate failed to analyse the entire evidence of the prosecution side;*
5. *That the provision of section 210 (3) of CPA cap 20 R: 2019 were not complied after pw1 finished to give his testimony;*
6. *That the trial Magistrate erred in law and fact by convicting and sentencing the appellants while the prosecution failed to prove the charge against the appellants.*

When the appeal was called on for hearing the appellants appeared in person whereas the respondent Republic was represented by Ms. Zena

James learned State Attorney. The appellants opted State Attorney to start and could make rejoinder later.

Ms. Zena submitted grounds of appeal in sequence. On first ground she submitted that section 312 of the CPA was complied with as it met the standard of judgment. Regarding reliance on evidence of PW2 she stated that he was reliable and PW2's evidence was correctly relied by the Magistrate.

On charge being defective Ms Zena submitted that the provision and particulars of the offence was proper and that in case there was any defect it was curable under section 388 of the CPA. On complaint that evidence was not analysed she submitted that evidence of both sides was analysed. Alternatively, she implored this court being the first appellate to re-evaluate.

On whether section of 210 (3) of CPA in regard to evidence of PW1 was complied. Ms Zena admitted that the Magistrate did not record at the end that section 210(3) had been complied but the appellants were not prejudiced.

On whether the charge was proved to the standard required, Ms Zena submitted that evidence of PW1 proved that his office had been broke in and various properties which was found in possession of the first appellant

stolen. She added that the properties were identified with special marks. He cited the case of **Chacha Mwita & 2 Others v Republic**, Criminal Appeal No. 302 of 2013 and **Seleman Hassan v Republic,** Criminal Appeal No. 364 of 2008 to support the argument on doctrine of recent possession.

During rejoinder the first appellant submitted that judgment was delivered after ninety days hence a nullity. He added that PW2 being the investigator was not supposed to record their cautioned statements.

On defective charge he submitted that items listed in the charge are different from those mentioned in evidence. On evaluation of evidence, he submitted that inquiry ended without findings of the statement. On compliance with section 210 (3) of the CPA he said evidence was not read. On prove of case he said that it was not proved as items was not identified. The second appellant had similar rejoinder, hence no need of repetition.

I have considered submission for and against the grounds of appeal from both parties. The appellants' first complaint is that judgment was not delivered within ninety days as required. During submission State Attorney stated the judgment complied with section 312 of the Criminal Procedure Act [cap 20 R: E 2022]. I have gone through the proceedings and found

that the judgment was delivered within ninety days as required by the law. The other issue is whether it complied with the requirement of section 312(1) of the CPA. The said section provides for contents of the judgments, it reads;

> *Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or Magistrate in the language of the court and* ***shall contain the point or points for determination, the decision thereon and the reasons for the decision,*** *and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.*

Of course, there is no hard and fast rule on the manner judgments are to be written. What is important is for all judgments to meet threshold requirement prescribed under section 312 of the CPA, that is facts of the case, point for determination, the decision thereon and reasons for the decision. See the case of **Hamisi Rajabu Dibagula v Republic** [2004] TLR 181.

In the case of **Lutter Symphorian Nelson v Attorney General and Ibrahim Said Msabaha** [2000] TRL 419, has an opportunity to lay foundation on what a judgment should contain. It stated;

> *A judgment must convey some indication the judge or Magistrate has applied his mind to the evidence on the record. Though it may be reduced*

*to a minimum it must show that no material portion of the evidence laid before the court has been ignored.*

The court further cited with approval the decision in the case of **Amirali Ismail v Regina** 1 T.L.R 370 where Abernethy, J., made some observations on the requirements of judgment, he said;

*A good judgment is dear, systematic and straightforward. Every judgment should state the facts of the case, establishing each fact by reference to the particular evidence by which it is supported; and it should give sufficiently and plainly the reasons which justify the finding. It should state sufficient particulars to enable a Court of Appeal to know what facts are found and how.*

In the present appeal the Magistrate summarized evidence of both parties and framed points for determination. Then she reproduced sections creating the offences and made reference to what elements must be proved. Thereafter he made the following which I have taken trouble to quote;

*According to the prosecution evidence, there is no dispute that the two offences were committed. The question is who committed.*

*The prosecutions' case reveal that accused persons stole the listed items. The said items were taken from the house of the first accused. The said items were tendered and identified in court by the complainant. I find the offence of house breaking into the building and stealing were proved beyond reasonable doubts against both accused persons. Each accused is found guilty of both counts. I therefore convict the first and second accused person for breaking into the building c/s 296 (a) and stealing c/s 258 and 265 of the penal code cap. 16 R:E. 2019.*

From the above script it is clear that evidence of both parties was not evaluated by making reference. The Magistrate did not determine the framed points separately and make reference to specific piece of evidence in answering the issue. Moreover, there is no reason for the decision she reached. More importantly the defence evidence was not considered.

Having observed that this court being the first appellate court is enjoined to step into the shoes of the trial court by re-evaluating evidence and make decision if the prosecution proved the charge to the standard required by the law. See the case of **Seleman Nassoro Mpeli v Republic** Criminal Appeal No. 3 of 2018 where it was stated;

> *As earlier on pointed out, the judgment of the trial court did not adequately comply with the provisions of section 312 (1) of the CPA in that the said judgment did not contain the points for determination, and the reasons for holding him guilty leading to his conviction. Fortunately, however, the first appellate court rectified the mistake. It weighed and freshly evaluated the evidence on record, and satisfied itself that it established beyond doubt the appellant's commission of the offence he was charged with. Thus, because the error was rectified, this ground is devoid of merit and is accordingly dismissed'*

Above said this appeal will be disposed based on two grounds

i. Whether non-compliance with section 210(3) of the CPA is fatal

ii. Whether the prosecution proved the charge beyond reasonable doubts.

Staring with non- compliance with section 210 of the CPA, as rightly conceded by State Attorney, there is no indication that evidence of PW1 was read over to him after completing recording, however the infraction is not fatal and can be remedied under section 388 of the CPA. This assertion is based on the fact that although the appellant is the one who raised the concern but he has not challenged the sanctity of the record nor demonstrated how he was prejudiced. In addition to the above, reading the provision between the lines, it is evident that the provision is essentially meant to take care of the witnesses whose evidence is being recorded and not the appellant. Therefore, the ground has no merits.

In dealing with the second issue, I will start with the offence of house breaking. Without mincing words, it was not proved. The important ingredient of time was not mention in the charge and evidence. PW1 stated that he closed the doors of his office at 23:00hrs and in the morning at 07:00hrs he found the gate and roof opened. In essence evidence of PW1 tends to establish offence of burglary of which is not the case here. Therefore, the charge on first court was defective for failure to disclose the important ingredient of time when the offence of house breaking was committed.

On the second count of stealing, there is no dispute that the property mentioned by PW1 was stolen from his office, in fact all ingredients of the offence under section 258 of the Penal Code was proved by the prosecution. The complaint by the appellant is that properties were not conclusively identified. Upon scrutinising the charge, exhibit P4 and evidence of PW1, I join hands with the appellants that properties were not positively identified. In invoking doctrine of recent possession threads laid in the case of **Joseph Mkumbwa** & **Samson Mwakagenda v Republic,** CAT, Criminal Appeal No. 94 of 2007 (unreported) have to be cumulatively met. The court said;

> *'Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine 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 of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements....'*

In the present appeal, the properties listed in the charge are one television make boss, four cameras, two computers, one subwoofer make hometheater, one nicon lens, external had disk, 11B speed light made

godox, one watch, and one small table. During evidence PW1 stated that he identified his properties at police station which are one tv made boss, one subwoofer, one printer Epson L805, two cameras, one monitor screen made dell, one keyboard made dell, one mobile phone Tecno W3, a box of drown with items inside and table of shoes. Exhibit P4, certificate of seizure show that the properties found to the first appellant's home are tv flat screen black made boss 55 inches, radio subwoofer made hometack, one remote made simsung, motorcycle made T-better and one Tecno mobile smart life.

The properties identified by PW1 at police are not those which were seized from the first appellant and mentioned in the charge. Based on this indifference the doctrine of recent possession cannot be invoked against the appellants for obvious reason that properties retrieved from the first appellant were not those tendered in evidence and which formed the subject of the charge.

Another evidence which tends to connect the appellants with the offences were their cautioned statement exhibit P2 collectively in which it was said they confessed to the offence. The procedures in admitting exhibit P2 was flawed in that it was not actually admitted into evidence. When PW2 wanted to tender it, objection was raised and rightly the Magistrate

conducted inquiry, in her ruling overruled objection and admitted them as exhibit P2 collectively. When the main case resumed PW2 was not led to tender the statement rather he read the statements as if it had already been admitted. Guidance on admitting cautioned statement was stated in the case of **Seleman Abdallah & Two Other v Republic,** Criminal Appeal No. 384 of 2008 (Unreported) Dar es salaam, (CAT) to the effect that;

i. *When an objection is raised as to the voluntariness of the statement intended to be tendered as an exhibit, the trial court must stay the proceedings.*
ii. *The trial court should commence a new trial from where the main proceedings were stayed and call upon the prosecutor to adduce evidence in respect of voluntariness. The witnesses must be sworn or affirmed as mandated by section 198 of the Criminal Procedure Act, Cap 20.*
iii. *Whenever a prosecution witness finishes his evidence the accused or his advocate should be given an opportunity to ask questions.*
iv. *Then the prosecution to re-examine the witness.*
v. *When all witnesses have testified, the prosecution shall close its case.*
vi. *Then the court is to call upon the accused to give his evidence and call witnesses, if any. They should be sworn or affirmed as the prosecution side.*
vii. *Whenever a witness finishes, the prosecution to be given an opportunity to ask questions.*
viii. *The accused or his advocate to be given an opportunity to re examine his witnesses.*

ix. *After all witnesses have testified, the accused or his advocate should close his case.*

x. *Then the ruling to follow.*

xi. ***In case the court finds out that the statement was voluntarily made (after reading the ruling) then the court should resume the proceedings by reminding the witness who was testifying before the proceedings were stayed that he is still on oath and should allow him to tender the statement as an exhibit. Then should accept and mark it as an exhibit. The contents should then be read in court.*** *Emphasize added.*

xii. *In case the court finds out that the statement was not made involuntarily, it should reject it*

In this appeal after ruling on inquiry and resumption of proceedings PW2 was not led to tender cautioned statements of the appellants as such they were not admitted. Consequently, exhibit P2 collectively is expunged for not being part of evidence of the trial court.

After expunging exhibit P2 collectively in the record, the remaining evidence is insufficient to link the appellants with the offence charged. This is for obvious reasons that they were not arrested or identified at the scene of crime. And what lead to their arrest remain a mystery. In view of what I have endeavoured to discuss, the charge against the appellants was not proved by the prosecution beyond reasonable doubts.

I thus find the appeal merited and allow it, consequently I quash the conviction and set aside sentence imposed. I order immediate release of the appellants unless lawful held with another good cause.

DATED at MBEYA this 16th day of August, 2022.


D.P. NGUNYALE

JUDGE