THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

PC CRIMINAL APPEAL NO. 02 OF 2022

(Originating from Sumbawanga Disytrict Court Criminal Appeal No. 22 of 2021, Mtowisa Primary Court Criminal Case No. 59 of 2021)

MATRIDA MWANAWIMA.....APPELLANT

VERSUS

SEBASTIAN NGUVUMALI.....RESPONDENT

JUDGEMENT

Date of Last Order: 16/09/2022

Date of Judgement: 20/10/2022

NDUNGURU, J

The respondent successful sued the appellant in a criminal case No. 59 of 2021 at Mtowisa Primary Court (trial court) for the offence of stealing contrary to section 265 of the Penal Code, RE 2019. The appellant was convicted and sentenced twelve months conditional discharge and ordered to pay the appellant compensation to the tune of Tshs. 5,650,000/=.

It was alleged that on 28th day of May 2021 at 07:00hrs at Mtowisa village particulary at the hamlet of Maduka within Mtowisa division at Sumbawanga District in Rukwa Region, appellant wilful and

unlawful did steal two cartons of cigarette make Whiston sport and SM both valued Tshs. 1,600,000/=, Airtime voucher of Vodacom 2000 valued at Tshs. 2,000,000/=, one small phone make Nokia valued at Tshs. 50,000/= and cash money valued at 2,000,000/= all valued at Tshs. 5,650,000/= the property of Sebastian Nguvumali the act which is termed as contrary to the law.

As hinted above, the appellant was convicted and sentenced.

Aggrieved by such decision, the appellant unsuccessful appealed to the Sumbawanga District Court (the appellate Court). The appellate court upheld the decision of the trial court.

Dissatisfied with the outcome of the decision of the Sumbawanga District Court, the appellant has lodged this appeal with petition of appeal comprised three grounds which are hereunder quoted: -

1. *That the judgement of the appellate court is incurably defective for being dated and delivered on 31/11/2021 the date which does not exist.*
2. *That the appellate court erred in law by upholding the order of the trial court of payment of compensation of Tshs. 5,600,000/= while it lacked jurisdiction to do so.*

3. *That the appellate court erred in law and fact in evaluating the evidence which contain violation of some principles of the law and practice hence reached to a wrong decision.*

During the hearing of this appeal, the appellant was represented by Mr Peter Kamyalile, learned advocate while the respondent appeared in person, unrepresented. The respondent prayed for the appeal be disposed by way of written submission, the learned advocate for the appellant had no objection. Both parties their respective submission as ordered and scheduled by this court.

In support of appeal case, as regards ground one the appellant submitted that **Rule 22 (2)** of the Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules, 2021 G.N NO. 390 published on 14/05/2021, provides that the judgement shall be signed, dated, and pronounced in open court. The judgement subject to this appeal was dated and delivered on 31/11/2021 the date which does not exist, thus he concluded that the judgement does not comply with mandatory requirement of the law

As to the second ground, Mr Kamyalile submitted that it is trite the law that the issue of jurisdiction can be raised at any time even at the

second appeal. He said according to item 5 (1) (b) to the 3rd Schedule to the Magistrate Court Act, Cap 11 RE 2019 provides that

> *"A court may, where the justice of the case so requires, and shall, in any case where any law for the time being in force so requires, make orders-*
>
> *For the payment of compensation not exceeding on hundred thousand shillings or costs for compensation of more than one hundred thousand shillings where it convicts a person of an offence specified in the schedule to the minimum Sentence Act which it has jurisdiction to hear."*

Mr Kamyalile contended that the jurisdiction of Primary Court in awarding the compensation in criminal cases is limited to the amount not exceeding one hundred thousand shillings. Since the offence of theft does not fall under Minimum Sentences Act. The trial court lacked the jurisdiction to award the compensation of Tshs. 5,600,000/=. The appellate court also erred in law to uphold the decision which lacked the jurisdiction.

As to the third ground, Mr kamyalile submitted that it is trite of the law that for the doctrine of recent possession to warrant conviction four elements must be proved, one; the property was found with the

suspect, second; that the property is positively proved to be the property of complainant, third; that the property was recently stolen from the complainant, and fourth; that the stolen thing constitutes the subject of the charge against the accused. He was of the view that there is necessity for this court to look at the relevant evidence and make its own findings of fact since there is misdirection and non-directions on the evidence on the applicability of the doctrine of recent possession, and some principles of the law per case of **Salum Mhando vs Republic** [1993] TLR 170.

Further, Mr kamyalile insisted that the element that the property is positively proved to be property of complainant and that the property was recently stolen from the complainant was not proved. The said mobile phone was not properly identified by the respondent and there was no cogent evidence to prove the ownership of the said mobile phone on the required standard. The respondent just said that the mobile phone belongs to him but he did not tender any receipt or any documentary evidence to verify that he indeed owned the same. He this position of laid down in the case **of Kelvin Project vs The Republic**, Criminal Appeal No. 20 of 2018, CAT DSM.

Mr Kamyalile submitted that the said mobile phone was admitted contrary to the requirement of the law. He cited Rule 11 (2) of the Primary Courts (Evidence) Regulations, 1964 G.N NO. 22 of 1964 which provide that where real evidence is produced, oral evidence must be given to connect the thing produced with the case. He contended that mobile phone was tendered and admitted after the appellant has cross examined the respondent. The appellant was denied the right to cross examine the witness on the said admitted phone.

Lastly, Mr Kamyalile submitted that the amount of Tshs. 5,600,000/= was not proved on the examination in chief the amount given after cross examination hence denied the appellant right to cross examine on the same.

In reply, the respondent submitted as regards the first ground that the judgement of the appellate court is not incurably defective for being dated 31/11/2021 which is just a typographical error as the same is correctly dated 30/11/2021 as the date of judgement just below the date of last order and the concept of slip rule as provided under section 96 of the Civil Procedure Code, Cap 33 cures the same. He referenced the case of **William Getari Kegege vs Equity Bank and Another**, Civil Application No. 24 of 2019 which cited with approval the scope of

the slip rule in the case of **Sebastian Stephen Minja vs Tanzania Harbour Authority**, Civil Application No. 107 of 2000. He also cited the case of **David Giled Tenga vs Andrew Ndaalio**, Misc. Land Application No. 42 of 2020 which observed that pure typographical error can be corrected by the court under section 96 of the code.

As to the second ground, the respondent conceded with the provision cited by the appellant in support of this ground but he said the limitation does not apply to theft offences where the stolen property should be returned to the victim equally as to the tune of property stolen otherwise if the accused is convicted with theft there is no way he can escape the order to compensation the victim. He contended that appellate court was also correct to uphold the order as it was within the jurisdiction of the trial court.

As to the third ground, the respondent submitted that learned counsel for the appellant did not cite any in support of the four unfounded elements of recent possession, thus he misled this court. Further, he submitted that the averment by the appellant that respondent did not tender any receipt or any documentary evidence to verify that he indeed owned the same does not hold water because it was proved beyond reasonable doubt that the respondent owned it.

Lastly, the respondent responded that the amount of Tshs. 5,600,000/= was proved because the appellant stated clearly that he is a businessman who deals with M-Pesa and a wholesaler of different vouchers, so it is no wonder for businessman of his kind to possess the same. Thus, he prayed for the dismissal of the appeal with costs.

Having heard rival submissions from both sides, the petition of appeal, it is now my duty to determine whether the appeal can stand.

Let me first revisit the principles governing criminal litigation. This being also, a second appeal, am aware that it is on very rare and exceptional circumstances the Court will interfere with the findings of fact of the lower courts. See the cases of **Materu Laison and Another vs R. Sospeter** [1988] TLR 102 and **Amratlal Damodar and Another vs H. Jariwalla** [1980] TLR 31. In the case of **Amratlal Damodar and Another vs H. Jariwalla** [supra], the Court of Appeal held that: -

> *"Where there are concurrent findings of fact by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been misapprehension of evidence, a miscarriage of justice or violation of some principles of law or procedure."*

Also, the appellate court may in rare circumstance interfere with the trial court findings or facts. It may do so in instances where trial court has omitted to consider or had misconstrued some evidence, or had acted on wrong principle or had erred in its approach in evaluating the evidence.

In line with above principles, the prosecution is duty bound to prove any case beyond reasonable doubt. See the case of **John Makolobela, Kulwa Makolobela and Eric Juma @ Tanganyika vs Republic** [2002] TLR 296 and the accused person is under no obligation to prove his defence. See **Elias Kigadye and Others vs Republic** [1981] TLR 355, CAT.

I shall determine the appeal in the order the grounds appear.

Starting with the first ground of appeal, it was the appellant contention that the judgement of the appellate court is incurably defective for being dated and delivered on 31/11/2021 the date which does not exist. Mr Kamyalile for the appellant contended that judgement does not comply with mandatory requirement of **Rule 22 (2)** of the Judicature and Application of Laws (Criminal Appeals and Revisions in Proceedings Originating from Primary Courts) Rules 2021 GN No. 390. On the other hand, the respondent contended that the error being

typographical error is cure by slip rule under section 96 of the Civil Procedure Code.

There is no dispute from both parties that the date as appear on the last page of the appellate court of judgement is wrong written. Looking at the trial court's judgement which is subject to this appeal the date instead of being written 30/11/2021 was written 31/11/2021. The respondent argued that this error can be corrected under **section 96** of the Civil Procedure Code, Cap 33 RE 2019, which provide thus: -

> *"Clerical or arithmetical mistakes in judgements, decree, or order, or errors arising therein from any accidental slip or omission may at any time, be corrected by the court either of its own motion or on the application of any parties."*

With due respect to the respondent this provision deals with amendment of an error in a judgement, decree, or order of the court which does not affect the contents of the said judgement, decree or order. Back to the case at hand, what is in issue is the date as appear in the judgement subject to this appeal.

I agree with both parties that as per Judicature and Application of Laws (Criminal Appeals and Revision in Proceedings Originating from

Primary Courts) [supra] it is mandatorily that judgement shall be dated. I had a glance on the copy of judgement attached to this appeal. It is obvious that the error is a mere typographical error which does not go to the roots of the case. I find that the overriding objective principle does apply in the circumstance of this case since its introduction in the Written Laws (Misc. Amendments) (No. 3) Act, 2017) Act No. 8 of 2017) was meant to enable parties and the court to consider substantive justice rather than technicalities. Having so said it is my finding that the error does not render the record of appeal defective with the effect of rendering the appeal incompetent before this court, I order correction of the date to read 30/11/2021. Thus, the first ground is devoid of merit.

The appellant's complaint in the second ground of appeal is that the appellate court erred in law by upholding the order of the trial court of payment of compensation of Tshs. 5,600,000/= while it lacked jurisdiction. It was contention by the appellant that the jurisdiction of the Primary Court in awarding the compensation in criminal cases is limited to the amount not exceeding one hundred thousand shillings. To fortify his position, he cited **item 5 (1) (b)** to the 3rd Schedule to the Magistrate Court Act [supra]. While the respondent contended that primary court has jurisdiction to order compensation in criminal cases.

I respectfully, do agree that as per **item 5 (1) (b)** to the 3rd Schedule to the Magistrate Court Act [supra] the jurisdiction of the primary courts in respect of orders of compensation is limited to the amount not exceeding one hundred thousand shillings only and more than one hundred thousand if it convicts a person of an offence specified in the schedules to the Minimum Sentences Act. I find the order of compensation of Tshs. 5,600,000/= by the trial court is above the jurisdiction of a primary court. The offence which is also the subject of this appeal does not fall under the Minimum Sentences Act as correctly submitted by the learned counsel for the appellant. The trial court having realized the compensation is substantial and above jurisdiction of the primary court could have advised the party to file a separate civil suit against respondent in a court of competent jurisdiction. See the case of **Joseph Chaleani vs Republic** [1987] TLR 107. I find merit in this ground of appeal; therefore, I quash the compensation order by the primary court which was also upheld by the appellate court.

Next for consideration is the third ground of appeal, in which the appellant challenge evaluation of evidence as contain violation of some principles of law and practice.

Let me start with complaint that the mobile phone which is a subject of this charge was not positively identified to be the property of the respondent. The appellant contended that there was no cogent evidence to prove the ownership of the mobile phone as no receipt or any documentary evidence tendered to verify it.

For the doctrine of recent possession to apply it must be established that, **first** that the property was found with the suspect; or there should be a nexus between the property stolen and the person found in possession of the property; **Secondly**, the property is positively the property of the complainant, **thirdly**; the property was recently stolen from complainant; and **lastly**, the stolen property in possession of the accused must have a reference to the charge laid against him. See **Joseph Daudi and Roza Segenge vs Republic**, Criminal Appeal No. 337 of 2007, **James Kisebo @ Mirengo and Yusufu Abdallah @ Fadhili vs Republic**, Criminal Appeal No. 261 of 2006, all unreported

At the trial court the respondent Sebastian Nguvumali testified that on 28/05/2021 he went to his shop and found locks were demolished and upon entering inside he found several items were stolen including mobile phone he uses in money transactions (M-pesa). The respondent

further testified that he reported the matter at the police and the police went on with investigation. He stated that he was informed through phone by a police officer one Salum Said that the suspect was arrested with the phone so he went for identification, where he identified the phone. According to this testimony it is not clear how he was able to identify the phone. Even the testimony of his witness police officer one Salum Said did not explain in his testimony how the respondent was able to identify the phone alleged to have IMEI number 352858059711718. His second witness a police officer one Jackline testified to have searched the appellant and she found the appellant with phone having an IMEI number 352858059711718, but she did not tell the court how the respondent identified such mobile phone.

In the light of the above shortcoming in the evidence of the complainant and his witnesses there was no sufficient identification to prove that the mobile phone was the one that was stolen from the shop at the time it was stolen bearing in mind the standard of proof in criminal cases must always be beyond reasonable doubt. As rightly submitted by the learned counsel for the appellant and the records of appeal show that the respondent did not tender any receipt or any documentary evidence either in court or at the police station that match

the number in the said mobile phone. Even when he was tendering such mobile phone at the trial court as exhibit, he did not give any description on how he identified such mobile phone rather he said it is the actual phone found with the accused. Dealing with similar circumstances like this case, the Court of Appeal in the case of **Joseph Mutua and Another vs Republic**, Criminal Appeal No. 166 of 2011, unreported quoted in the case of **Amani Kikoba vs Republic**, Criminal Appeal No. 293 of 2013, CAT, unreported the Court observed that mobile phones are common items. It held:

> *"In our evaluation of the evidence we do not see a linkage in the case between PW1 and PW2 and the mobile phones. We say so because the evidence on record does not disclose that PW1 and PW2 looked at the mobiles in court in the presence of every body and then matched the numbers in the said phones with the numbers in the receipts. It was not enough for the witnesses to says that the phones bore the numbers appearing in the receipts without more. In the absence of clear evidence to that effect, it was*

possible that the mobile phones that were produced and admitted in evidence were not necessary the same as those which were robbed from PW1 and PW2."

In these circumstances of this case, I do not think that the (complainant) respondent had succeeded in establishing the link/relation between the mobile phone and the appellant. I do not think the respondent has positively identified the mobile phone beyond reasonable doubt; and even greater respect to the first appellate court. The doctrine of recent possession was not properly applied in this case.

I now turn to consider the complaint that the mobile phone was admitted contrary to Rule 12 of the Magistrate Courts (Rule of Evidence in Primary Courts) Regulations GN No. 22 of 1964. The learned advocate for the appellant contended that the mobile phone was tendered and admitted after the appellant has cross examined the respondent, thus the appellant was denied the right to cross examine the witness on the said admitted mobile phone. I have scanned through the record of the proceedings in the trial court as they appear in the record of appeal. Having so done, I find readily in agreeing with the learned counsel for the appellant. The mobile phone was tendered and admitted after the

complainant had already testified both in chief and cross examination. **Rule 12 of the Magistrate Courts** (Rule of Evidence in Primary Courts) Regulations [supra] provides that where real evidence is produced oral evidence must be given to connect the thing produced with the case. Exhibit P1 was tendered and admitted after the evidence contrary to the law and practice relating to admission of exhibits.

For the above reasons, I find the conviction of the appellant is unsafe. I accordingly allow the appeal, quash conviction and set aside the sentence. Unless she is otherwise lawful held, she is to be set free forthwith

It is so ordered.

D. B. NDUNGURU

JUDGE

20.10.2022