**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**D.C. CRIMINAL APPEAL NO. 59 OF 2021**

(Originating from Criminal Case No. 138/2020, Nkasi District Court)

(Benedict B. Nkomola, RM)

**ATHANAZI S/O DAUDI ..... APPELLANT**

**VERSUS**

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

23 & 28/02/2022

**JUDGMENT**

**NKWABI, J.:**

The appellant was nicked, charged and convicted before the District Court of Nkasi at Namanyere in Criminal Case No. 138/2020 with two offences. The first one is house breaking contrary to section 294 (1) (a) of the Penal Code Cap. 16 R.E. 2019. He was also charged with stealing contrary to section 265 and 258 (1) of the Penal Code Cap. 16 R.E. 2019.

It was professed that on 9th day of September 2020 at Majengo village within Nkasi District and Rukwa region, the appellant did break into the dwelling house of Amil s/o Mwamlima with intent to commit an offence termed stealing. It was also putative that the appellant after having broken into the dwelling house, did steal one laptop make Dell, a flash disk, 2 kilograms of sugar, one bar of soap, one pair of shoes and cash money at T.shs 20,000.

All the properties so stolen, valued at T.shs 365,500/=, were claimed to belong to Amil Mwamlima.

In the trial court, the prosecution was able to pick up three witnesses and tendered two exhibits thus, exhibit P1 (the items that were allegedly to have been stolen) and exhibit P2 (the chain of custody). After the closure of the prosecution case, the appellant was called upon to enter his defence in which he claimed to have been arrested at the bus stop when he was coming from Katavi at the time he disembarked from Ruchoro bus. The persons who arrested him stole his T.shs 56,000/= and his phone. He indicates that after being searched, he was found in possession of nothing in respect of this case. The trial court, after deliberating on the evidence that was before it, was satisfied with the evidence of the prosecution, found him guilty of the offences he was standing charged before it. Finally, it imposed custodial sentences in respect of both offences.

Bemused by the decision of the trial court, the appellant instituted this appeal to this court with five grounds of appeal, which, however, on my review of the same boil to one ground that *the evidence of PW1, PW2 and PW3 was insufficient to ground a conviction on him.* The appellant is, nevertheless, now invocating this Court to allow the appeal, quash the conviction, set aside the sentences and that he be set free.

When the matter was tabled to me for hearing, the appellant appeared in person, unrepresented while the respondent was dexterously represented by Ms. Marietha Maguta, learned State Attorney. The appellant supplicated his reasons of appeal be adopted as his submissions on the one hand, Ms. Maguta, learned State Attorney, resisted the appeal on the other hand.

Ms. Maguta stated that they support the conviction and sentence of the appellant. She prayed to reply the 2, 3 and 4 grounds together and the rest grounds to argue one after the other.

On the 2nd, 3rd and 4th grounds she ventured that the evidence of PW1 and PW2 said they found the house was opened and that PW1 found the properties stolen. The appellant was chased and arrested with the properties. He is presumed to be the thief, she added.

She further submitted that section 143 of the Evidence Act provides that no particular number of witnesses is required to prove a fact. Section 127 says every witness has to be taken credible unless there are cogent evidence to the contrary. Their witnesses were competent to testify. PW2 witnessed the incidence and arrested the appellant, so the 5th ground of appeal has no substance. The appellant was arrested in possession of the stolen

properties. PW3 found the appellant to be in possession of the stolen properties, Ms. Maguta robustly submitted.

As to the 1st ground of appeal, the prosecution proved beyond reasonable doubt. She referred me to **DPP V. Joachim Komba [1984] 2013.** The one who is found to have in possession of stolen properties then he is a thief or guilty receiver, Ms. Maguta pressed. For the above reasons she supported the conviction and sentence and prayed the appeal to be dismissed.

I have meticulously considered the argument of Ms. Maguta, I am not persuaded that conviction and sentences are to be upheld. This is because, the alleged victim of the offence did not describe the alleged stolen properties when he gave evidence. No other witness described them. PW2 is a mere arrester who did not witness the appellant break into the house and steal. PW2's evidence does not advance the respondent's case. He does not claim to know that the properties belong to the victim.

Further, the evidence on the record suggests that the appellant was not arrested at the scene of offence red handed. It indicates that he was arrested not in the house. Among the three witnesses, no witness testified to the effect that he saw the appellant breaking the house and stealing. Therefore, the evidence that is needed to ground the conviction of the

appellant is one that he was arrested in possession of recently stolen properties. In the circumstances, the doctrine of recent possession was called into play by the respondent.

In his testimony PW1 Amil (the victim of the offence) testified that:

> *"That we went at the place where the accused was arrested. I find the accused person in possession of my properties to wit Laptop, shoes, sugar, flash disk. The accused was arrested and referred at police station – Namanyere. I identified my properties, I can recognize my properties even before this court. I pray to tender then before this court.*
>
> *That is all.*
>
> *Sgd:*
>
> *B. B Nkomola – RM*
>
> *20/10/2020"*

What followed was cross-examination by the appellant.

On his part, PW2 Sebastian had these in testimony:

> *"... I was at office at bus stand. I was informed about the incident. I went to the home of the victim ... We saw the accused person nearby the house the accused attempted to run away. The accused was arrested by villagers ..."*

Then, PW3 MG. 221816 testified that:

*"... I went to Majengo ... The accused by that time was arrested. The accused was found in possession of those properties."*

It is increasingly clear that there is no evidence as to the description of the properties, leave alone how the house of PW1 was broken into. The persons who arrested the appellant did not come to testify. No explanation as to why the persons who arrested the appellant did not come to give evidence. That offended the rule that failure to bring material witnesses, then the Court is entitled to accord adverse inference, see **R v. Gokaldas Kanji and another (1949) EACA 116** where it was stated:

> *No obligation rests upon the prosecution to call every witness whose name appears on the back of the information and although it is the duty of the crown to see that every such witness attends the trial so that any not called by the prosecution are available to the defence nevertheless it is a matter in the discretion of the prosecution to tender such witnesses for cross-examination by the defence and not one that can be claimed by the defence as of right.*

See also **Godson Hemedi V Republic [1993] TLR 241** (CA):

> *According to PW1 he followed the direction taken by the deceased until he reached the police station and on his return*

*home the children told him that they saw the appellant going away from his house. None of these children was called to testify on this point which was of crucial importance in assessing the veracity and accuracy of PW1 as a witness. The question is: why were these children not called? And if they were called can one say that they would necessarily support the claim that the appellant went out of his house so soon after the attack on the deceased?*

The trial magistrate in application of the doctrine of recent possession had these to say:

*Yet, there is another condition whereas this court observed, that the claimant/the victim described his property especially laptop before shown to him so that it can be clear to the eventually tendered;* ***Nassoro Mohamed v. Republic (1967) HCD 446.***

*In yet, another circumstance, the accused person was given opportunity to adduce his defence. However gives no explanation in relation to those items found in his possession, of course the accused person never casts doubt indeed."*

What landed the conviction, to me, seems to be what the Resident Magistrate stated:

*In this aspect, this court found watertight evidence as adduced by PW1, PW2 and PW3. That those properties should be positively identified by the prosecution witness as adduced by PW1 and PW2 that the laptop was identified by the owner, there is positive evidence that even screen server of the laptop appeared. Picture and the name of the victim, that the victim described laptop by inserting his passes ward.*

On the above, the trial magistrate relied on **DPP v. Joachim Komba [1984] TLR 213** where it was held:

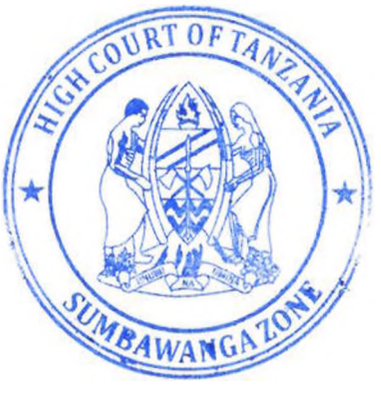
> *"The doctrine of recent possession provides that if a person is found in possession of recently stolen property and given no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."*

However, I am of the firm view that with no description of the stolen properties done by PW1 before the trial court, the screen server of the alleged laptop too not having being displayed before the trial court, therefore, it was not positively proved that exhibit P1 was the property of PW1. Conviction in the circumstances was grounded on very weak evidence contrary to criminal law.

The outcome of the above deliberation, I allow the appeal. I quash conviction of the appellant and set aside both sentences imposed upon him. I order for the immediate release of the appellant from custody unless he is held therein for another lawful cause.

It is so ordered.

**DATED** at **SUMBAWANGA** this 28th day of February, 2022.




**J. F. NKWABI**

**Judge**