IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(BUKOBA DISTRICT REGISTRY)

AT BUKOBA

MISC. CRIMINAL APPEAL NO. 08 OF 2021

(Originating from Criminal Case No. 253 of 2019 of the District Court of Biharamulo at Biharamulo)

SHABAN JUMA MJOLA---------- APPELLANT

VERSUS

REPUBLIC----------RESPONDENT

JUDGEMENT

Date of Last Order: 09/03/2022

Date of Judgment: 18/03/2022

A. E. Mwipopo, J.

The appellant namely Shabani Juma @ Mjola was charged in Criminal Case No. 253 of 2019 at Biharamulo District Court for five offences. The first count is for the offence of Burglary contrary to section 294 (1) (a) and (2) of the Penal Code, Cap. 16, R.E. 2002; the second count is for the offence of stealing contrary to section 258 (1) and 265 of the Penal Code, Cap. 16, R.E. 2002; the third count is for the offence of retaining stolen property contrary to section 311 of the Penal Code, Cap. 16, R.E. 2002; the fourth count is for the offence of having in

possession property suspected of having been stolen or unlawfully acquired contrary to section 312 (1) and 300 of the Penal Code, Cap. 16, R.E. 2002; and the fifth count is for the offence of being armed with intent to commit offence contrary to section 298 (c) and 300 of the Penal Code, Cap. 16, R.E. 2002.

It was alleged that the appellant on 17th November, 2019, at night hours at Biharamulo Bus Stand within Biharamulo District in Kagera Region did unlawfully found in possession of instrument of house breaking to wit four pieces of wires, two pieces of iron bar, two mobile phones to wit VIVO make and one SQ make which are suspected of being stolen. The appellant was also on the same day at night hours did break and enter into the house of Roji Commen Varghese with intent to commit the offence therein where he did steal one mobile phone make VIVO valued at Tshs. 660,000/= and one laptop make HP valued at Tshs. 1,500,000/= which all in total are valued Tshs. 2,160,000/= the property of one Roji Commen Varghese. The prosecution called total of 4 witnesses and tendered two exhibits to prove its case and the appellant was found with a case to answer the appellant testified in his defence under oath. The trial Court delivered its judgment 16th November, 2020, where it convicted the appellant for the offence of having in possession property suspected of being stolen or unlawfully acquired contrary to section 312 (1) and 300 of the Penal Code, Cap. 16, R.E. 2002 and sentenced him to serve a term of 3 years imprisonment.

The appellant was aggrieved by the decision of the District Court and filed the present appeal against the decision. In his petition of appeal, the appellant has raised a total of four grounds of appeal as provided hereunder:-

1. *That, the Hon. Magistrate erred in law and fact by holding conviction against the appellant on weak and shaky prosecution evidence which needed to be corroborated according to the circumstances of the case.*
2. *That, the Hon. Magistrate erred in law and facts to convict the appellant while the certificate of seizure which the Court relied in convicting the appellant was wrongly admitted.*
3. *According to the law, the evidence of PW1, PW2, PW3 and PW4 is not enough to convict the appellant while no other person who saw the appellant breaking and entering into the dwelling house of Roja Commen Varghes.*
4. *That, the trial Court erred in law and fact by convicting the appellant basing in insufficient evidence to prove the offence.*

The appellant later on filed additional petition of appeal containing three grounds of appeal as follows:

1. *That, the Hon. trial Court fatally erred in law and fact to ground appellant's conviction without stating the provision of penal code violated*

as required by section 312 (2) of the Criminal Procedure Act, Cap. 20, R.E. 2019.

2. *That, the Hon. trial Court grossly erred in law and fact to convict the appellant without any witness to explain where, when and how the appellant was found selling the alleged phone in dispute.*
3. *That, the identification of the appellant at the scene of crime was not proved in Court by any prosecution witness whereby all had dock identification which is fatal in law.*

The appellant who appeared in person prayed for the Court to consider all 7 grounds of appeal in the petition of appeal and in the additional petition of appeal. He said that the prosecution evidence was full of doubt and failed to prove the offence against him. Certificate of Seizure which was tendered in court as exhibit was not properly acquired and was not properly tendered. The witnesses who testified as PW1 and PW4 were not credible and not the only witnesses who were available at the scene.

In response, Mr. Amani Kirua, State Attorney appearing for the respondent was against the appeal. He said that the appellant was convicted of the 4th count in the charge sheet. However, the trial Magistrate proceeded as if the appellant was charged for two counts of burglary and stealing while the charge was substituted on 07.01.2020. The error in the Judgment does not prejudice or do

injustice to the appellant and is curable under section 388 of the Criminal Procedure Act.

It was submitted by the counsel that the evidence adduced by the prosecution proved that the appellant was caught with the property which was stolen. The appellant was found with the phone stolen from PW1 who identified his phone. PW3 investigator made follow up and caught the appellant with several phones which he was selling. The appellant failed to unlock those phone as result P3 arrested him. PW1 later on identified his phone among the phones which were caught in the possession of the Appellant. The said phone was unlocked by facial recognition and PW1 unlocked it by using his face. The said Exhibit was properly seized and property tendered in court. The testimony of PW2 proved that the phones were caught in the possession of the appellant and certificate of seizure was filed which the appellant signed.

The Counsel said that the testimony of all prosecution witnesses proved the offence against the appellant and the trial court rightly convicted the appellant in the alternative offence according to the Law. He said that the testimony of PW1 proved that his laptop and mobile phone were stolen and he reported the incident to the police. The police caught the appellant with the phone and he failed to give explanation of his possession of the phone. Also the appellant failed to unlock it. PW1 recognized the phone as the one which was stolen and he was able to unlock

it. This evidence proved without doubt that the appellant was caught with the stolen item resetting after the incident. The Court of Appeal had the same position in the case of **Selemani Mussa @ Vitus and Another v. Republic**, Criminal Appeal No. 7 of 2019 CAT at Mbeya, (unreported). The prosecution evidence proved all the elements for the doctrine of the recent possession to be applicable as it was held in the above cited case.

On the issue of identification of the appellant in the scene of crime, the counsel said that there was no need to conduct identification parade as PW1 did not see the person who did steal his properties. The appellant was connected through the doctrine of recent possession as result there was no need for identification parade.

From the submissions, the Court is invited to determine whether or not the present appeal has merits.

The trial Court in its decision convicted the appellant for the offence of being in possession of stolen property and found that other offences the appellant was charged with were not proved. For that reason, the Court will determine the grounds of appeal in relation to the offence of being found in possession of the stolen property which the appellant was convicted with.

The appellant alleged that the trial Court erred to convict the appellant without stating the provision of penal code violated. However, the said allegation

information from informer that there is somebody selling VIVO mobile phone at Biharamulo bus stand.

PW3 pretended to be a buyer and asked the appellant to unlock the phone but the appellant failed to unlock it. PW3 arrested the appellant and took him to police station together with the mobile phone. PW1 was called to identify his stolen phone which he did. Then, PW2 filed in certificate of seizure which was tendered as Exhibit P1 despite objection by the appellant. PW4 who is investigator of the case testified that he interrogated the appellant who admitted to steal the said mobile phone. PW4 tendered the mobile phone and other items found in possession of the appellant at the time of arrest as exhibit P2. There was no contradiction whatsoever in the evidence of prosecution. This evidence by the prosecution proved that the appellant was found in possession of the stolen mobile phone which he was selling.

In reaching its decision the trial Court relied on the evidence of PW3 who testified to have arrested the appellant selling stolen properties to wit mobile phone make VIVO which is the property of PW1 stolen in his house. The trial Court was satisfied that the said phone is the property of PW1 as the appellant failed to provide explanation on how he came into possession of the said stolen phone and the Court applied the doctrine of recent possession. Thus, the trial Court rightly applied the doctrine of recent possession as it was stated in the case of **Selemani**

The Judgment was delivered today, this 18.03.2022 in chamber under the seal of this court in the presence of the Appellant and in absence of the Respondent. Right of Appeal explained.

A. E. Mwipopo

Judge

11.03.2022