

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

**CRIMINAL APPEAL NO.64 OF 2022**

*(Originating from Criminal Case No. 88 of 2020 of Shinyanga District Court)*

**DOTTO LAMECK..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of the last Order: 25<sup>th</sup> January, 2023*

*Date of the Judgment: 24<sup>th</sup> February, 2023*

**MASSAM,J:**

This an appeal arising from Criminal case No. 88 of 2020 of Shinyanga District Court where appellant was charged with three counts that On 11/03/2021 he was charged with Burglary contrary to sections 294 (1), Stealing contrary to section 265 and Possession of the Goods to be Stolen or Unlawful Acquired contrary to section 312 (b) of the Penal Code [Cap 16 RE 2019]. The charge was read over and explained to the accused who in respond, he disputed to commit the offence on both counts.

The brief facts leading to this appeal are that on 11/02/2021 the victim Maya Nindwa the owner of a shop at Mwakitolyo Village received a call via his phone from Jumanne George (a village sungusungu) who informed him that there some people who broke his shop and properties therein were stolen. The victim upon received the call he went to the shop and found his shop was broken, he entered into broken shop and found his properties were stolen.

That while the victim still at the scene, the people who gathered there informed him that appellant was arrested at Burigo with commodities suspected to be stolen. The victim and other people went to Burigo Village where they found the appellant being arrested with shop's commodities. Appellant was found with three (3) pieces of cigarettes make Club sport, 2 pieces of Winston, 8 pieces make Embassy, 4 pieces of cigarettes make SM and sports of original all together making the value of Tsh. 1,512,600/= the properties of the victim.

It was established that after being arrested appellant was interrogated, he was confessed to have stolen the properties at Mwakitolyo together with his four fellow persons who were 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> accused persons. Appellant and his fellows were arraigned to court, in due course

of proceedings, the other accused persons were acquitted after the Prosecution side withdrawn charge against them.

To prove the charge, the prosecution side called three witnesses and one exhibit while defense side had one witnesses (the appellant) with no exhibit. The key witnesses for the prosecution were two PW1 and PW2. PW1 in his testimony testified that on 11/02/2021 about 03:00hrs he was called by one Jumanne a Village Sungusungu Commander. He was told that his shop was broken. He said that he went there so that he can see what was going on. After reaching there he found his shop was broken and upon entered the shop he discovered the following items were stolen, Tsh. 5,000,000/= which was kept in the box, cigarette club sports 2 pieces (value Tsh. 2,400,000/=) embassy I piece valued Tsh. 2,080,000/=:, whinstone 1 piece valued 750,000/=:, sports mixer 2pieces valued Tsh. 7350,000/=:and airtime voucher valued Tsh. 50,000/=: . The total of all items valued TZS. 11,050,000/=:

He informed the court that on the next day he went to the shop but he did not find the Sungusungu Commander, but he received a call from one Shaban Hamis who told him that the thief had caught at Buruge having a bag of cigarette with money, he went there and found the items



which alleged to be stolen, he said, he inspected the items and found that those items belongs to him.

Appellant was under arrest, he was asked where did he get the properties, he responded that he took from a shop at Mwakitolyo, and when asked how he managed to steal, he said they bribe the watchmen. He said those items were given to him by the order of the court.

PW2 Shaban Hamis, testified to the effect that on 11/02/2021 at about 5:00hrs he received a call from one Jumanne Joseph informing him that the shop of PW1 was broken, he said he went there and witnessed the gate of the shop was broken a number of items including Tsh. 5,000,000/= were stolen. At about 08:00 while he was at the scene he received a call from one of the sungusungu member of Bulige village who informed him that one thief was caught at the village, they went there and found appellant under arrest caught with cigarettes, small pocket with scrapped money about 129,000/=.

Upon found those items, he said he called the victim who reached and identified his items.

PW3 is a Police officer, he told the court that he received a call from Mwakitolyo telling that at the village there is a breaking and stealing, he

said they went there at Bulige village and found the appellant under arrest caught with cigarettes and money Tsh. 129,000/=. He testified that he searched the appellant and found with those properties. He issued the certificate of seizure. On 08/03/2021 he went to the court where he filled an inventory for the piece of cigarette, while there he signed an order for dispose there after he tendered documents as follows. Certificate of seizure the court admitted it as exhibit P1, the inventory admitted as exhibit P2 and cash money admitted as exhibit P3.

In defense appellant maintained to dispute the allegation that he was involved in the stated offence. He testified that on 11/02/2011 he was arrested at Burigo Bus stand and interrogated where he resides, he said he was searched but nothing was found from him.

After both side closed their case, the trial court determined the matter and found the appellant guilty on both charged counts. He was punished for the following sentences as follows, for the 1<sup>st</sup> count to serve 4 years in jail, 2<sup>nd</sup> count to serve 2 years in jail and the 3<sup>rd</sup> count to serve 6 months. Appellant was aggrieved to be found guilty and the sentence, he lodged his appeal in the following grounds;

- 1. That Goods (like cartons of cigarettes, airtime recharging vouchers) found in possession of the appellant was not tendered before the court of law as exhibit.*
- 2. That the confession alleged by the Police officer in caution statement was obtained by torturing and duress against the appellant while in police interrogation.*
- 3. That the learned trial Magistrate totally erred in law and in facts to misapprehending the nature and quality of the prosecution evidence against appellant which did not prove the charge beyond reasonable doubt.*

When the appeal called for hearing, appellant appeared in person whilst the respondent/Republic, represented by Ms. Glory Ndoni learned State Attorney. In support of his appeal, appellant had very brief but focused to pray the court to admit his grounds of appeal and set him free.

In reply, Ms. Glory opposed the appeal, she replied by starting with the 1<sup>st</sup> ground of appeal that, appellant complained that the court erred in law to consider the evidence testified without consider that prosecution side did not prove their case beyond reasonable doubt, she argued that the



prosecution proved all counts beyond reasonable doubt as they called three witnesses who proved their case.

She went on submitting that PW1 told the court that on 11/02/2021 he found his shop was broken his properties were stolen and they found at Mwakitolyo after he had been told by Sungusungu. PW1 went to Bulige where he found appellant with his properties which he managed to identify them. She submitted that PW1 mentioned his stolen properties to be cigarettes and a bag which had scrap money. Also, appellant confessed to steal money. with thus, she contended that PW1 succeeded to prove the charge against accused person.

She went on submitting that the evidence of PW1 was supported by PW2 that appellant did confess to steal the said properties, she said according to the said evidence of PW1 and PW2 they support the charge before the court against the appellant. She cited the case of **Posolo Wilson vs Mwalyego**, Criminal Appeal No. 613 of 2015, which held that the oral confession which taken to the witness, can be sufficient by itself to find conviction against suspect (see at page 7 para 2) she said the evidence of PW1 and PW2 support the charge nowhere he countered the testimony. Also, when appellant got a chance to cross examine, PW1 failed

to cross examine on that issue that, if he was forced to confess, he would given a chance to cross examine PW2.

Ms. Glory again argued that it is settled law that failure to cross examine meant that he conceded. She referred the court to the case of **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017. On that view she submitted that appellant did fail to cross examine PW1 so it was true appellant connected with the all charges against him.

On this ground she submitted that to support the charge of unlawful possession, the victim said that appellant found with the said properties, the evidence was supported with the evidence of PW3 at page 37-40 that witnesses told the court that he was the one who seized the properties which was found in the scene, also the said properties were ordered to be sold and the inventory was filled. In that point Mis. Glory contended that PW3 did tender certificate of seizure and inventory as exhibits P1 and P2 which was not read out to the court. She prayed to expunge them, but that did not disturbed the evidence of PW3 as the evidence support PW1 evidence also PW2 told the court that it is true that he went to the scene and saw appellant arrested. She cited the case of **Chiganga Mapema vs**



**Republic**, Criminal Appeal No. 252 of 2007, she said in that case shows how doctrine of recent possession practiced.

In 2<sup>nd</sup> ground of appeal, Ms. Glory submitted that confession which taken before police was obtained after been beaten by Policemen, its was not a part of evidence of the prosecution side, no exhibit was tendered as caution statement, she prayed the ground to be disregarded.

In the 1<sup>st</sup> ground of appeal, Ms. Glory submitted that appellant said that the properties which are cigarettes, and vouchers were not tendered before the court as exhibit, she said in this issue of voucher nowhere was mentioned in the proceedings even PW1 in his testimony did not mention it to be among the properties which was found with the appellant and it was not to the list of exhibits but in the issue of cartons of cigarettes were not tendered because PW1 and PW3 said that they were not tendered because they had ordered to be disposed and the inventory was filled. She prayed the court not to consider the ground.

In additional ground No. 1, Ms. Glory submitted to the effect that appellant submitted that there was no evidence which show that, he was the one who break the said shop, so the court erred to convict him as the court knew the truth on her analysis as it was elaborated in page 9

paragraph 2, line 1 and 2 it is true that no evidence was brought to prove that appellant was the one who break the said shop, but the court did concentrate with the appellant oral confession before PW1 and PW2 as how did he got that stolen properties.

In 2<sup>nd</sup> addition ground, she once again submitted that appellant said that the trial court did not consider his defense, on their said she said that it is not true, the trial court considered the appellant defense at page 6 and 7 of the judgment, the trial court did evaluate the evidence at page 9. With thus submission she prayed the court to dismiss the appeal and upheld the trial court decision.

Having gone through the records and judgment of the trial court I have noted something which before I proceed to determine this appeal I need first to address. In my reading the judgment of the lower court I find that after the court found the appellant guilty he was not properly convicted. The judgment which is attached with the memorandum of appeal and which is found in the court record has no proper conviction as found the appellant guilty to the offence charged. The trial court magistrate upon her findings found the appellant guilty to both counts,

proceeded with other steps without convicting the appellant. The trial court's judgment at page 9-10 reads as follows:

*"In upshot therefore I find accused DOTTO S/O LAMECK guilty of all three counts burglary, stealing and possession contrary to the section 294 (1) (a), 265 and 312 (b) of the Penal Code Cap 16 R:E 2019 "*

An instant question is whether such conviction is complied with Sections 235 (1) and 312 (2) of the Criminal Procedure Act [Cap 20 Revised Edition 2002]. These sections are couched in a mandatory language that, if at the end of the trial, the court is satisfied that the accused person/persons are guilty, based on the strength of evidence adduced in court, it must proceed to enter conviction and subsequently sentence the accused

Let me reproduce the said sections, for instance **section 235 (1) of the Criminal Procedure Act** which states as follows:

*"The court, having heard the complainant and the accused person and their witnesses and the evidence, shall convict the accused and pass sentence upon or make an order against him according to law..."*



When the court convicts the accused, magistrates should always apply

**Section 312 (2) of the Criminal Procedure Act** which section read:

*"In the case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted and the punishment to which he is sentenced."*

Those sections in a number of occasions being in functions to prove its mandatory, for instance in the case of **Mohamed vs. The Republic**, Criminal Appeal No.45 of 2015 it was observed that:

*"Although there was a finding that the appellant was guilty was not convicted before he was sentenced. This was itself irregular. Sentence must always be preceded by conviction, whether it is under section 282 (where there is a plea of guilty) or whether it is under section 312 of the CPA (where there has been a trial),"*

Another authority was made to the court in **Amani Fungabikasi Vs Republic**, criminal appeal No 270 of 2008 (unreported) where the court had a similar observation that;-

*"It was imperative upon the trial District Court to comply with the provision of section 235 (1) of the Act by convicting the appellant after the Magistrate was satisfied that the evidence on record established the prosecution case against him beyond reasonable doubt. In the absence of a conviction, it follows that one of the prerequisites of a true judgment in terms of section 312 (2) of the Act was missing. So, since there was no conviction entered in terms of section 235 (1) of the Act, there was no valid judgment upon the High Court could uphold or dismiss."*

Now having seen those authorities which direct how to deal with serious irregularities, the question before me is to determine what should be the best way to deal with this matter in the interest of justice. It is my view that the only way to cure the said irregularities which is incurable will it be justice to remit the file back to the trial court for the said court to enter a proper conviction. With thus I proceed to quash the Judgment and the sentence as they born in contravention of law. I order the remission to the trial court for the trial court to comply with the law. After the law complied, appellant will be at his liberty to lodge another appeal.

It is so ordered.

**DATED** at **SHINYANGA** this 24<sup>th</sup> day of February, 2023.



  
**R.B. Massam**  
**JUDGE**  
**24/02/2023**

**COURT:** Right of appeal explained.