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

**IN THE SUB-REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPEAL NO. 34 OF 2023**

*(Originating from Criminal Case No. 12/2022 of the Mbulu District Court at Mbulu)*

**ONESMO S/O BONIFACE..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*11th & 31st July, 2023*

***Kahyoza, J.:***

**Onesmo S/O Boniface** (the appellant) and **Joseph S/O Jovita** appeared before Mbulu District Court at Mbulu charged jointly in the first count on burglary, contrary to section 294 (1)(a) and (2) of **the Penal Code**, [Cap 16 R.E 2019 now 2022] (the Penal Code) and three counts of theft, in the second, third and fourth counts, contrary to section(s) 258(1) and 265 of **the Penal Code.**

**Onesmo S/O Boniface** was also charged with an offence of being in possession of property suspected to have been stolen or unlawfully acquired, contrary to section 312(1)(a) & (b) of **the Penal Code** in the fifth count. **Onesmo S/O Boniface** and **Joseph S/O Jovita** pleaded not guilty to the charges against them.

After the trial, the trial court convicted **the appellant** with the offences in the second, third, fourth and fifth counts. The court sentenced the appellant to serve a custodial sentence of four years for each offence in the second, third and fourth counts, and for the offence in the fifth court, to serve a term of three years. Lucky for **Joseph S/O Jovita,** the trial court acquitted him.

Aggrieved, **Onesmo Boniface** appealed, raising seven grounds of complaint. However, before hearing had commenced, Mr. Raymond Kim, the appellant's advocate, abandoned the fourth ground of appeal and amended the third ground of appeal. The remaining grounds of appeal raised six issues, thus-

1. Was it proper for the arresting officer to investigate?
2. Was the court's failure to re-conduct a preliminary hearing after charges were amended to add the second accused fatal?
3. Were the offences of theft and possession of stolen property proved beyond reasonable doubts?
4. Did the court err to convict the appellant with the offence of theft after the prosecution failed to prove the offence of burglary?
5. Was the court justified not to accord weight to the appellant's defence of *alibi*?
6. Was the chain of custody in respect Mobile handset broken?

The prosecution alleged that, on 25.01.2022 at about 20:00 hrs, Nicodemus Paulo Erro **(Pw1)**, Tumaini Ibrahim Rashid **(Pw2),** and Silvester Nicodem Duye (**Pw3**), locked their room and left for a study in a

nearby room, leaving behind their personal belongings inside. On 26.01.2023, at around 01:00 hrs, in the midst of study, Silvester Nicodem Duye (**Pw3**), noticed that the door to their room was open and the lights were on. He notified his comrades and they went to their rooms, only to find that a laptop computer -make Lenovo, a mobile handset-make Infinix and a mobile handset-make Tecno were nowhere to be found. On the morning hours, they reported the incident to the police. And also, they informed some mobile phone technicians to be aware of whoever contacts them in relation to the stolen mobile phones.

At 10:00 hrs on the same date, Ernest Ezekiel Darabe, (**Pw4**) informed them he had received one mobile phone make Infinix to crack the password and clean data. Ernest Ezekiel Darabe, (**Pw4**) took the mobile handset to Paskali Antony Tluway, (**Pw5**) for a technical assistance. Then, police officers were involved and the appellant was identified. They notified F 1683 Sgt Walii, (**Pw6**) who took part to arrest and interrogate the appellant. F 1683 Sgt Walii, (**Pw6**) deposed that the appellant admitted have received a stolen mobile phone from Joseph Jovitha. G 6788 D/Cpl Rickson, (**Pw7**) arrested the appellant and seized the mobile handset phone.

Nicodemus Paulo Erro **(Pw1)** identified the mobile handset as his stolen property. A mobile handset-make Infinix, a sketch map, certificate of seizure form, Joseph Jovita's caution statement, a certificate of seizure of

the mobile phone were tendered and admitted as **exhibits P1, P2, P3, P4** and **P5** respectively.

On the defence part, Onesmo Boniface Siima, (**Dw1**) testified on oath that police arrested him at his home place on date he could not specify. They searched his room and asked him if he knew Joseph. He denied to know him. He told the trial court that, the prosecution did not call any witness to testify that he saw him giving the mobile handset to Ernest Ezekiel Darabe, (**Pw4**) or breaking the house to steal.

Joseph Jovita Edward, (**Dw2**) denied to commit the offence. He deposed that police arrested him on 3.3.2022 at 18:00 hrs at Daudi Mnadani. They told him that he sold a mobile phone to Boniface. He deposed that Boniphase testified that he did not know him.

**Was it proper for the arresting police officer to investigate?**

The appellant complained that the trial court erred to convict him as F 1683 Sgt Walii, (**Pw6**) and G 6788 D/Cpl Rickson, (**Pw7**) arrested the appellant, investigated and testified. To support the complaint, Mr. Raymond Kim, appellant's advocate, submitted that it was unprocedural for a police officer to arrest a suspect, investigate and testify.

Mr. Kapela, State Attorney, for the respondent, replied that the complaint was baseless as the appellant's advocate neither cited any contravened law nor depicted how his client was prejudiced.

The first ground of appeal will not detain me as it is a complaint on procedural irregularity for two reasons; **one**, the appellant's advocate did not mention the law which has been offended; and **two**, he did not point out how the alleged irregularity has affected his client, the appellant. I had a cursory review on trial records and do not see how the appellant was prejudiced.

It is settled that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice. See the case of **Flano Alphonce Masalu @ Singu and 4 Others v. R.,** Criminal Appeal No 366/ 2018 (CAT- unreported) where the Court of Appeal stated that-

> *"However, in our earlier decision in **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported), where we confronted an identical irregularity, we emphasized **that in every procedural irregularity the crucial question is whether it has occasioned a miscarriage of justice**. We, then, reasoned that:*
>
> *"In Richard Mebolokini v, R. [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA"*

In addition, following the amendment of section 58 of the CPA by clause 15 of the **Written Laws** (Miscellaneous Amendments) Act, Act No. 2011, by inserting new subsections (4), (5) and (6) immediately after subsection (3), F 1683 Sgt Walii, (**Pw6**) and G 6788 D/Cpl Rickson, (**Pw7**), as police officers were competent to arrest, investigate and record the cautioned statements of the appellant and his co-accused person. Section 58(4) of the CPA stipulates-

> *"(4) Subject to the provisions of paragraph (c) of section 53, a* ***police officer investigating an offence for the purpose of ascertaining whether the person under restraint has committed an offence may record a statement*** *of that person and shall - ..."* (Emphasis added)

I find the first ground of appeal has no merit. It is hereby dismissed.

**Was the court's failure to re-conduct a preliminary hearing after charges were amended to add the second accused fatal?**

The appellant submitted that the trial court erred to convict him without conducting the preliminary hearing. The appellant's advocate submitted that when the second accused person was joined in the proceedings the trial court did not bother to conduct preliminary hearing as section 192 of **CPA** requires. He concluded that the proceedings were therefore, defective and deserved to be quashed.

The respondent's state attorney refuted the contention and argued that failure to conduct a preliminary hearing after joining the second

accused did not affect the appellant anyhow. He concluded that, it is now settled that that failure to conduct preliminary hearing is not fatal. To buttress his argument, he cited the case of **Bernard Masumbuko Shio and Another V. R**, Criminal Appeal No. 213/2007.

It is true, and the record bears testimony that the trial court did not conduct preliminary hearing after the prosecution joined the second accused to the trial. However, the trial court had conducted the preliminary hearing before the prosecution joined the second accused person the proceedings. The purpose of preliminary hearing is to speed up trials as observed in **MT. 7479 Sgt. Benjamin Holela V. R.** [1992] TLR 121. It is mandatory to conduct the preliminary hearing but when the case proceeds to conclusion without conducting it, it is not fatal as its purpose is overtaken by events. It would be ridiculous to quash the proceedings and order a re-trial because the preliminary hearing was not conducted, whose purpose was to speed up trial, when the trial has been concluded whether speedily or delayed. I see nothing wrong with the appellant's conviction for the trial court's failure to conduct a preliminary hearing after the second accused was joined in the trial. After all the appellant was convicted after full trial. It is settled that the preliminary hearing does not constitute an integral part of the trial. See the decision of the Court of Appeal in **Shabani Saidi Likubu V. Republic**, Criminal Appeal No.228 of 2020 (unreported).

In the end, I find no merit in the second ground of the appeal and dismissed it.

**Were the offences of theft and possession of stolen property proved beyond reasonable doubts?**

The appellant complained that trial court convicted him without the prosecution proving the elements of the offence of theft and being found in possession of stolen property. Mr. Raymond Kim, the appellant's advocate, argued that the prosecution evidence failed to establish that the accused person took a cellular handset and converted it as provided under section 258 of **the Penal Code**. Also, that the cellular handset was found in the possession of the technician, hence, conviction for the offence of being found in possession of stolen item cannot be obtained.

On the other side, Mr. Kapera submitted that the trial court at page 6 of the judgment discussed the ingredients of theft and that the circumstances under which the cellular handset was seized proved that the appellant had the intent to steal and applying the doctrine of recent possession, the appellant was a thief. Citing the case of **Ackley Paul and Another v. R**, Criminal Appeal No. 110/2008.

I scrutinized the proceedings and found indeed, that, the trial court discussed the elements of offences. At page 9 of the impugned judgment, the court had this to say-

*"the process of taking the mobile phone to the phone technician for reading password and flashing the phone without having the claim of right satisfy that the property was about to be converted fraudulently...The prosecution evidence satisfied this court that the phone alleged to have been stolen belongs to PW1 and this implies that 1st accused person had no claim of right over the property"*

In so far as the offence of theft was concerned, the prosecution managed to prove all elements of the offence of theft. Also, the trial court was of the opinion that the prosecution proved the offence of being found in possession of property suspected to have been stolen. However, I find it worthwhile to comment that it was not proper for the trial court to convict the appellant on both offences due to; **one**, the two offences are minor and cognate offences; **two**, the doctrine of recent possession does not allow it. The Court of Appeal had the following to say in **Twaha Elias Mwandugu v. Republic**, Criminal Appeal No. 80 of 1995, CAT (unreported) it was held:-

*"a man who is in possession of stolen goods soon after the theft is either the thief **or** has received the goods knowing them to be stolen, ..."*

It goes without saying, that once a court has convicted an accused person with the offence of theft it cannot convict him with the offence of being in possession of property suspected to have been stolen or unlawfully obtained. I partly allow the third ground of appeal in that the

trial court erred to convict the appellant with the offence of being in possession of stolen property or unlawfully obtained. However, I find ample evidence to prove that the appellant stole mobile handset.

The prosecution evidence depicted that the appellant was recently found in possession with stolen item. The handset, Exh. P1., was stolen at night and during the day the appellant took the phone to Ernest Ezekiel Darabe, (**Pw4**) for cracking the password. I had no reason not to discredit Ernest Ezekiel Darabe, (**Pw4**. It is trite law that a witness must be trusted unless, there is a cogent reason to question his credibility. The **Goodluck Kyando v. R.,** [2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016 (unreported) the Court of Appeal stated that-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

Ernest Ezekiel Darabe, (**Pw4**) was trustworthy. Had Ernest Ezekiel Darabe, (**Pw4**) been involved in the commission of the offence he would not have reported to the complaint after the handset, Exh. P1 was taken to him.

Since, the appellant was found with handset, Exh. P1, the recently stolen item and he did not offer explanation how he came across it, it was proper for the trial court to convict him with the offence of theft. I uphold the conviction.

**Did the court err to convict the appellant with the offence of theft after the prosecution failed to prove the offence of burglary?**

The appellant complained that after the trial court found that the prosecution did not prove the offence of burglary, it erred to convict him with the offence of theft. Mr. Raymond Kim, the appellant's argued strongly that, since there was no proof of the offence of burglary, the offence of theft must have collapse as well.

The respondent's state attorney, replied that the two offences are distinct. Failure to prove the offence of burglary does not lead to failure to prove the offence of theft.

Indisputably, the two offences are related but not one in the same thing. Burglary is a specific intent crime that requires the person to knowingly enter or remain unlawfully in a building at night with the intent to commit a crime therein. The intent must arise at the time of the unlawful entry or at the time the person decides to unlawfully remain. I will give an example, if a person unlawfully enters a building with the intent only to trespass in the building and, while doing so, a subsequent opportunity arises to steal something, the theft will not turn the trespass into a burglary. Whereas stealing is taking or converting anything capable of being stolen fraudulently with an intent to permanently deprive the owner of the thing of it. Thus, a person may commit the offence of burglary without committing the offence of theft and the opposite is true.

In the present case, there is evidence that Nicodemus Paulo Erro **(Pw1)** left his mobile handset in the room and when he came back he found the same stolen. The appellant was later within less than 12 hours found in possession of stolen item without any reasonable explanation. The trial magistrate found that the prosecution did not prove that the appellant broke into the house or that the house was broken into. With due respect to the trial magistrate, she must have overlooked constructive breaking into the house. A person who entered a house at night via a window and stole therefrom and a person who pool fished items at night were both convicted with the offence of burglary.

The above, apart, having found that the appellant was guilty of stealing after he was found with mobile handset recently stolen from the house at night, the trial magistrate ought to have convicted him with the offence of burglary. I am fortified in my reasoning with the decision of the Court of Appeal in **Mussa Ramadhan Kayumba Vs Republic,** Criminal Appeal No. 487 of 2017 CAT Dodoma (unreported) where it was held that **the proof of being found with stolen item, suffices to be a conviction ground against a person found with it not only for burglary or breaking but murder as well**. The Position of the Court of Appeal in **Mussa Ramadhan Kayumba Vs Republic,** (supra) was a position in **Rex versus Bakari** (1949) 16 E.A.C.A. 8 the Court of Appeal of Eastern Africa at that time, had this to say on recent possession-

*"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."*

I find that the trial court erred not to convict the appellant with the offence of burglary. It ought to convict him with that offence as charged.

**Was the court justified not to accord weight to the appellant's defence of *alibi*?**

The appellant complained in the petition of appeal and his advocate submitted that the trial court failed to consider the defence of *alibi*. That since his client is ignorant of the law, then the trial court ought to have given his defence of *alibi* weight.

The State Attorney who appeared for the respondent, resisted the contention submitting that the ignorance of the law is never a defence.

Section 194 (4), (5) and (6) of the CPA provides: -

*"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.*

*(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish case for the prosecution is closed.*

*(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section,* ***the court may in***

***its discretion, accord no weight of any kind to the defence."***

*(Emphasis is added)*

I share the same view with the state attorney that the fact that the appellant was a layperson is not a ground to misapply the provisions of section 194(4) and (5) of the CPA. An accused person who wishes to raise the defence of *alibi* must give a notice. If he fails to issue a notice the court is justified to consider whether to give the defence weight or not. The trial court chose not to give the defence any weight. It was justified in the circumstances of the case. The prosecution tendered ample evidence that the appellant was arrested when he went to Ernest Ezekiel Darabe, (**Pw4**) to pick the handset he gave him for repair.

In addition, the appellant did not cross-examine Nicodemus Paulo Erro **(Pw1)** and Ernest Ezekiel Darabe, (**Pw4**) regarding the place of his arrest. They alleged that the appellant was arrested when he went to collect his mobile handset. Failure to cross-examine implies acceptance of the alleged fact. I agree with the trial magistrate that the appellant's defence of *alibi* was an afterthought and it carried no weight. I therefore, dismiss the sixth ground of appeal.

**Was the chain of custody in respect Mobile handset broken?**

The appellant stated in the petition of appeal and his advocate submitted that the prosecution failed to link the appellant with the stolen mobile phone handset since it was found in the hands of the technician. He

added that since the appellant was not issued with a receipt, there was no proof that it was the appellant who took the item to the technician, Ernest Ezekiel Darabe, (**Pw4**).

The state attorney stated Ernest Ezekiel Darabe, (**Pw4**) testified clearly at page 19 of the typed proceedings, that he knew well the appellant as his long-time client.

I have already stated that the prosecution proved that the appellant was found in possession of the stolen item and I was answering the issue whether the offence of theft was proved or not. I repeat as already stated that Ernest Ezekiel Darabe, (**Pw4**) was a credible witness. He gave an account of how he got the mobile handset and how he led to the appellant's arrest. There was no breaking of the chain of custody. The appellant was constructive found in possession of the stolen item as he is the one who took the stolen item to the technician, Ernest Ezekiel Darabe, (**Pw4**) knowingly that it was stolen or unlawfully acquired. The appellant knew that because he requested Ernest Ezekiel Darabe, (**Pw4**) to crack the password and flash it. There is no merit in the last ground of appeal. I dismiss it.

In the end, I find the appeal without merit, save that I quash the appellant's conviction with the offence of being found in possession of stolen property c/s 312(1)(a) of the Penal Code for reasons given. I also

find the appellant guilty with the offence of burglary c/s 294(1)(a) and (2) of the **Penal code** of which he was acquitted.

As to the sentence, I uphold the sentence of four years' imprisonment for the offence of theft in the third and fourth courts and set aside the sentence of three years for offence of unlawful possession of stolen property in the fifth count. The appellant being the first offender, I impose a sentence of four years' imprisonment for the offence of burglary c/s 294(1)(a) and (2) of the **Penal code.** The sentences shall run concurrently and from the date of the appellant's conviction.

I order accordingly.

**Dated** at Babati, this 31st day of July, 2023.

**J.R. Kahyoza**
**JUDGE**

**Court:** Judgment delivered in the presence of the appellant and Mr. Kapera, state attorney for the Republic. B/C Miss Fatina (RMA) present. Right of further appeal explained

**J.R. Kahyoza**
**JUDGE**
**31/07/2023**