

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

**CRIMINAL APPEAL NO. 49 OF 2023**

*(Originating from Criminal case No. 70/2022 of Kahama District Court)*

**HAMIS s/o MZEE alias RAMADHAN ..... APPELLANT**

*VERSUS*

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

**JUDGMENT**

*Date of last order: 25<sup>th</sup> October, 2023*

*Date of Judgment: 31<sup>st</sup> October, 2023*

**MIRINDO, J.:**

When Michael Leonard Mpanduji, a resident of Shunu in Kahama District, woke up in the morning of 5<sup>th</sup> November 2021, he discovered that his house was broken at night and his mobile phone brand of Vivo 630 was among items stolen.

He reported the incident to Kahama Police Station, gave description of his mobile phone and provided its International Mobile Equipment Identity (IMEI) to police officers so as to facilitate investigation. Some months later, police officers informed him that they located the phone at Geita in possession of Ngasa s/o Jichili Nhandi. Ngassa was arrested at Geita holding a mobile phone matching the description given by Michael. Ngassa told police officers that he bought the phone



from Hamisi s/o Mzee alias Ramadhan (the appellant) after being informed by Frank s/o Patric Joseph that Hamisi was selling a mobile phone. Hamisi was arrested and made a cautioned statement to the effect that he broke into the house of Michael Leonard Mpanduji together with Michael s/o Mashauri and that they stole various properties including the mobile phone.

Hamisi along with Frank, Ngassa and Michael s/o Mashauri were subsequently charged before Kahama District Court with two counts of burglary and stealing contrary to the provisions of subsections (1) (a) and (2) of section 294 and subsection (1) of section 258 and section 265 under the Penal Code [Cap. 16 R.E. 2019].

At the trial the prosecution case was built on circumstantial evidence and the confessional statement of Hamisi. The evidence established that Michael Leonard Mpanduji purchased a mobile phone of Vivo brand 630, Hamisi broke into his house and stole the mobile phone of Vivo brand 630. At the conclusion of the trial, the trial magistrate convicted Hamisi of burglary and stealing and sentenced him accordingly. The remainder of the accused persons were acquitted because the case against them was not proved beyond reasonable doubt.

Hamisi was dissatisfied with the decision of the District Court and appealed to this Court. He challenged his conviction on four grounds of appeal which in essence state that the case against him was not proved beyond reasonable doubt. At the hearing of the appeal, Hamisi appeared in person



and adopted his grounds of appeal in the Petition of Appeal. The respondent, represented by Ms. Immaculata Mapunda, learned State Attorney, did not support the appeal. She argued that since the prosecution had proved its case beyond reasonable doubt, the appeal should be dismissed.

Having considered arguments on both sides to this appeal, the main question is whether the prosecution case against Hamisi was proved beyond reasonable doubt.

As already mentioned, one aspect of the prosecution case was circumstantial evidence. In his second ground of appeal, Hamisi complains that there was no direct evidence because no prosecution witness saw him committing burglary and stealing. It is an established principle of the law of evidence that circumstantial evidence, depending on the facts of the case, may be better evidence than that of an eye-witness. The circumstantial evidence is sufficient to ground conviction if the court is satisfied that the facts giving adverse inference to the accused are proved beyond reasonable doubt and that they irresistibly point to the guilt of the accused: **Hilda Innocent vs Republic** (Criminal Appeal 288 of 2019) [2021] TZCA 389 (19 August 2021); **Ally Bakari and another v R** [1992] TLR 10; **Simon Musoke v R** (1958) EA 715.

The prosecution evidence gives rise to a rebuttable presumption of fact under section 122 of the Evidence Act [Cap. 6 R.E. 2022]. One presumption of fact that arises under section 122 is that where a person is found in





possession of stolen goods soon after the theft, the court may draw an inference that such person either stole the property or received the stolen property. This particular presumption, widely referred as the doctrine of recent possession, once drawn may give rise to any charge however penal:

**Twaha Elias Mwandungu v R** [2000] TLR 277 at 287.

It is important to note that Ngassa was the person who was arrested with the mobile phone and it is through him that Hamisi was linked with the offence. The statements offered by Ngassa at Kahama Police Station were inadmissible hearsay. They were not made on oath during the trial as Ngassa absconded from the trial. Frank, who was the second accused person, testified at the trial witnessing Hamisi selling the phone to Ngassa. This was a piece of admissible accomplice evidence that required corroboration as a matter of judicial practice though the court may after warning itself act on uncorroborated accomplice evidence under section 142 of the Evidence Act [Cap. 6 R.E 2022]. This is a point that escaped the attention of the learned trial magistrate.

It is clear that corroborative evidence, in this case, comes from the cautioned statement in the nature of a confession. As was submitted by Ms. Mapunda, this statement was duly admitted at the trial without objection from Hamisi.

Hamisi was identified by Ngassa and Frank as the seller of the mobile phone. After Frank rebutted the presumption of being a person who broke



into the house of the Michael and stole the mobile phone, it was important for Hamisi to offer some explanation as to how he obtained the mobile phone. He did not. The appellant's mere denials did not raise reasonable doubt to the prosecutions' case.

Once the prosecution had proved that the mobile phone was stolen at the time of breaking and entry at night into the house of Michael Leonard Mpanduji, it can properly be inferred that Hamisi not only stole the mobile phone but also broke into the house of Michael.

As correctly argued by Ms Mapunda though there was no direct evidence of burglary and stealing, there was watertight circumstantial evidence in the nature of recent possession that was not rebutted by Hamisi either through cross examination or in his defence. The learned State Attorney relied on the general rule that Hamisi failure to explain incriminating circumstances at the trial left the prosecution evidence unshaken. The presumption does not shift the burden of proof to accused persons but simply requires to raise doubt to the prosecution case.

The third ground of appeal is that neither the police officer who investigated the crime nor Hamisi' neighbours and local leaders were called as prosecution witnesses. In response to this ground of appeal, the learned state attorney, Ms Mapunda, argued that there was no need to call the police officer who investigated the crime, neighbours and other persons because



there was sufficient evidence from the prosecution witnesses called at the trial.

In his last and fourth ground of appeal, Hamisi complains that there were no exhibits tendered at the trial to prove that he stole the mobile phone. As clearly admitted by Ms Mapunda the certificate of seizure was not produced in court but the lack of the certificate was properly covered by oral evidence of other prosecution witnesses. **Abas Kondo Gede v Republic** (Criminal Appeal 472 of 2017) [2020] TZCA 391 (12 August 2020); **Joshua Mlindwa v Republic** (Criminal Appeal 478 of 2015) [2016] TZCA 664 (24 February 2016)

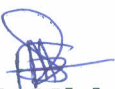
The mobile phone was duly identified and admitted at the trial. Hamisi's cautioned statement is consistent with the fact that he broke into the house of Michael Leonard Mpanduji and stole the mobile phone, and the fact that Frank witnessed Hamisi selling the phone to Ngassa.

For the above reasons, I confirm the conviction and sentence imposed by Kahama District Court and dismiss the appeal.

  
**F. M. Mirindo**  
**Judge**  
**31/10/2023**

**Order:** Judgment delivered 31<sup>st</sup> day of October, 2023, in the Presence of the appellant in person and Mr. Goodluck Saguya, learned State Attorney, for the Respondent. Right of appeal explained.



  
**F. M. Mirindo**  
**Judge**  
**31/10/2023**