IN THE HIGH COURT OF TANZANIA

MUSOMA SUB - REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 61 OF 2023

(Originating from Criminal Case Number 298 of 2021 of the District Court of Tarime at Tarime)

VITALIS SINDANO ..... 1ST APPELLANT

PETER GERALD PATRICK ..... 2ND APPELLANT

EMMANUEL MUSSA ..... 3RD APPELLANT

EDSON HAMIS LUSANDA ..... 4TH APPELLANT

WILKLIF SAMWEL OLIENCH @ KENZO ..... 5TH APPELLANT

TWALIB DAMAS ABDALLAH @ HAMZA ..... 6TH APPELLANT

CHAINA THOMAS MAHEMBA ..... 7TH APPELLANT

PATRICK BOMANI RAGUMO ..... 8TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

6th December, 2023 & 6 February, 2024

The above-named appellants were charged with the offence of breaking and entering into the building and commit an offence therein contrary to section 296(a) of the Penal Code, Cap 16 R.E 2019 (the Penal Code) as 1st count and stealing contrary to section 258 (1) and 265 of the Penal Code

as second count. The 1st and 2nd appellants were charged in alternative on 3rd and 4th count respectively of having possession of goods suspected of having being stolen or unlawfully acquired contrary to section 312 (b) of the Penal Code.

As charged, all of them were sentenced to serve five (5) years imprisonment on the offence of 1st count and five (5) years imprisonment on the offence of 2nd count and further they were ordered to compensate the victim, AGNES MWITA CHACHA @ Mama Leah (PW13) a total value of the stolen properties after deducting the value of goods recovered in exhibits; and forfeiture and sale of one motor vehicle.

Aggrieved by the said conviction and sentence, appellants preferred this appeal. Initially they filed five (5) grounds of appeal. When the matter was scheduled for necessary order before hearing, 2nd and 6th appellants engaged another advocate who prayed for additional grounds of appeal, prayer which was granted and filed ten (10) additional grounds. So, in total this appeal has 15 grounds;

1. ***That,*** *the Trial Magistrate erred in fact by wrongly convicting the Appellant on basis of prosecution evidence which was not corroborated and fully fabricated with serious doubts.*

2. ***That,*** *the Trial Magistrate erred in law by convicting the Appellant on wrongly established chain of custody and paper trail of chronological transaction of prosecution exhibits which did not prove their case beyond reasonable doubt.*
3. ***That,*** *the Trial Magistrate erred in law and fact, by hearing a case where preliminary hearing on matters that are in dispute and charge sheet (amended) were not fully proved or corroborated by prosecution beyond reasonable doubt.*
4. ***That,*** *the trial court erred in fact by convicting the Appellants on the most weakest evidence, as no direct or circumstantial evidential burden that was proved, hence reaching a verdict that is marred with irregularities, leading to a miscarriage of justice.*
5. ***That,*** *the trial Magistrate erred in fact by turning himself to be a prosecution witnesses by adding matters which were not pleaded by prosecution witnesses, somehow showing biasness reaching unfair verdict.*

Addition grounds reads;

1. *That the trial court erred in law and fact in convicting and sentencing the Appellants basing on inconsistent, incoherent and contradictory evidence/testimony of the Prosecution side which did not reconcile itself, the Charge Sheet, Preliminary hearing and the prosecution case as a whole.*
2. *That, the trial court erred in law and fact for not considering the*

degree of lateness of the crime report by the victim (PW 13, Mama Leah) to the Police Station and immediate necessary action thereafter, and in not considering the degree of lateness in charging the appellants, both creating serious doubts on the guiltiness of the appellants and denial of a fair trial.

3. *That, the trial Court erred in law and fact in convicting and sentencing the appellants basing on evidence derived from self-investigation done by the victim (PW13) herself.*

4. *That, the trial Court erred in law and fact for not drawing adverse inference on the prosecution side for failure to bring material witnesses and physical, documentary and electronic evidences that were claimed to have been present at the scene of the crime and recorded at the Police Station.*

5. *That, the trial Court erred in law and fact in convicting and sentencing the Appellants basing on the Caution Statements and allegedly confession made at the Police Station while the same were not from the Appellants and were improperly and illegally procured.*

6. *That, the trial Court erred in law and fact in convicting and sentencing the appellants for the breaking into a building, committing an offence and steal properties including Exhibit PE3, PE4, PE5, PE6, and PE7 while the victim (Mama Leah) did not prove the ownership of the purported stolen properties from her shop.*

7. *That, the trial Court erred in law and fact in ordering the Appellants*

to compensate the victim (Mama Leah) for the alleged stolen properties while there was no clear justification as to the ownership of the same properties and the exact number of properties alleged to be stolen/loss.

8. *That, the trial Court erred in law and fact in Ordering the forfeiture and sale of Exhibit PE8, a car Toyota RAUM without following the procedures and against the law.*

9. *That, the trial court erred in law and in fact in convicting and sentencing the Appellants while there was no direct evidence against them, and the trial Court disregarded doubts raised/rose by Appellants and their defence as a whole.*

10. *That, the trial Court erred in law and fact in convicting and sentencing the Appellants while the prosecution side did not prove the case/all offences as against the appellants beyond all reasonable doubts.*

At the hearing of this appeal, all appellants were represented by Mr. Onyango Otieno and Mr. Emmanuel Ally represent jointly with Otieno the 6th and 8th appellants, both representatives are learned advocates. On the other side the respondent, Republic was represented by Mr. Anesius Kainunura, Senior State Attorney and Yesse Temba, learned State Attorney. Both parties had a depth submissions on the grounds of this appeal, I shall

summaries the submissions by parties and provide my analysis thereunder for each ground just as directed in **Firmon Mlowe vs Republic,** Criminal Appeal No. 504 of 2020. This being the first appeal, this court has mandate and I shall re-evaluate evidence and asses coherent of witnesses. All this comfort is found from the decision in **Kaimu Said vs Republic**, Criminal Appeal No. 391 of 2019, **Siza Patrice vs Republic**, Criminal Appeal No. 19 of 2010 (both unreported), **The Registered Trustees of Joy in The Harvest vs Hamza K. Sungura,** Civil Appeal No. 149 of 2017, CAT at Tabora (Unreported) and **Mwita Cornel Philimon @ Gaucho vs Republic**, Criminal Appeal 306 of 2020 (Nov 2023).

Starting with 3rd ground of appeal as was the starting point by the counsel for the appellants, about preliminary hearing and amended charge sheet. Mr. Otieno submitted that at page 195 of the trial court proceedings (the proceedings) prosecution prayed to amend charge sheet and immediately thereafter at page 197 they closed their case. It was his submission that section 234 (1) (2) (3) & (4) of Criminal Procedure Act, Cap 20 R. E. 2022 (Cap 20), the provision is clear that upon amending information the prosecution is ought to recall witnesses. It was his submission that so far

as witnesses were not called to be cross examined over the issue raised in new charge, the testimony has no evidential value in respect of the new charge and what proceeded after the amendment of charge make entire proceedings nullity.

It was his further submission that even if the plea has been recorded after the amendment of the charge, it was mandatory for the court to call witnesses to testify on new things introduced in charge sheet. To boost his argument, he supplied the decision in **Ntigahela Elias vs Republic,** Criminal Appeal No. 150 of 2017 CAT while seated at Tabora and **Omari Juma Lwambo vs Republic,** Criminal Appeal No. 59 of 2019 at Dar es salaam that the whole proceedings should be declared nullity including sentence uttered to appellants as it originates from nullity proceedings. Counsel refrained from praying for retrial as prosecution will take advantage to correct their case and cited the case of **Ngalaba Luguga @ Ndalawa vs Republic (Criminal Appeal 66 of 2019) [2022] TZCA 435 (18 July 2022).**

Responding on the 3rd ground, Mr. Kainunura referred this court at page 189 and 195 of the proceedings where it was recorded that State Attorney

asked to amend charge sheet in order to insert words 'electricity wire' as it was already submitted and parties were cross examined on that issue. He said, the section referred by the counsel compel accused to plead over the new charge and was complied. Another requirement over the said section is when accused demand witness to be called and noted that the trial court record is silent on that. State Attorney submitted further that the issue was clearly elaborated during the prayer by State Attorney that evidence was adduced concerning electricity wire but it was not featured in charge sheet and prayed this court to find the ground is baseless.

The base of this ground is traced from section 234 of Cap 20, for easy of reference I find it necessary to reproduce it thus;

> *234.-(1) Where at any stage of a trial, it appears to the court that the charge is defective,..... and all amendments made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*
>
> *(2) Subject to subsection (1), where a charge is altered under that subsection-*
>
> > *(a) the* ***court shall thereupon call upon the accused person to plead to the altered charge;***

(b) ***the accused may demand that the witnesses or any of them be recalled and give their evidence*** *afresh or be further cross-examined by the accused or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and*

(c) the court ***may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed,*** *any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.*

From the cited provision of law, it is mandatory procedure for the court to order the plea of accused after the charge was amended. Reading the trial court proceedings at page 195, I find State Attorney while submitting her prayer to amend the charge, prayer was granted and record show the amended charge sheet was read over to accused persons and all pleaded to the charge.

Mr. Otieno complained that prosecution did not recall witnesses after the amended charge was read to accused persons. This court find that was not mandatory as wordings of section 234(2) (c) used the word '*may*'.

Furthermore, the same provision which allow prosecution to re-call witnesses also direct accused to demand recall of witnesses for cross examination. Accused and their counsel did not utilize this option and I don't find the need to fault prosecution. Mr Otieno said there was a new thing which was introduced in charge sheet which necessitated recall of witnesses. For easy of reference let us have a look on State Attorney's prayer about charge sheet during trial as picked at page 195 of the proceedings;

> *'Your honor, I noted that in the content of the charge sheet, we skipped to insert electricity wire worth 26,710,000/= **the witnesses already testified and cross examined before this court** about the said skipped electricity wires. We pray to amend charge sheet.'*

The prayer by State Attorney is that the issue was testified and cross examined. In **Omari Juma Lwambo vs Republic** (supra) the prosecution substituted the charge, they changed the suspect and the date when the offence was committed and the amended charge was not read over to the accused for him to plead neither were there any explanation on why prosecution amend charge sheet. To the contrary, in the case at hand, while praying to amend charge, State Attorney explained the reason for amendment. Further in **Ntigahela Elias vs Republic** (supra) the charge

was amended to different offence from burglary and wounding to attempt armed robbery. Three witnesses who testified over previous offence of burglary were not called to testify over the new offence of attempt armed robbery. The situation in that case is deferent from the case at hand as the offence was retained serve for the item of wire and its value and witnesses testified over the same. I find the two precedents as supplied by the counsel for the appellants are distinguishable to the extent as analysed above. This ground of appeal is less of merit.

Mr. Otieno then submitted on the 2nd ground of appeal about the chain of custody. He adduced that, items which were seized by police must be in clear chain of custody as directed by CAT in **Paul Maduka & Others vs Republic**, Criminal Appeal No. 110 of 2007. He complained that Exh PE3, PE4 and PE 8 which were seized items from the 1st, 2nd and 6th appellants were illegally procured as PW10 was asked to be independent witness but actually he was not independent as he was a brother of the victim (mama Lea) and he nodded while in trial during cross examination. He submitted that the question who qualify to be independent witness is answered in the cerebrated case of **DPP vs Musa Hatibu Sembe**, Criminal Appeal No. 130 of 2021 CAT at Tanga that witness should actually be independent. He

complained that police went to 1st appellant home and failed to get a ten-cell leader neither neighbors and decided to call PW10 who walked from far away to be independent witness leaving neighbors in street.

To him, PW10 did not qualify to be independent witness and he found exhibits were cooked. He informed this court that then defence counsel objected the tendering as prosecution failed to explain the storage. To substantiate his arguments, he submitted that PW13 informed the trial court that her iron sheet has a yellow spray as a mark but Exh PE 3 and Exh PE4 does not indicate yellow color as said by owner. He insisted that the chronological paper trail was missing.

While on the same ground Mr. Otieno further submitted that Exh PE 8 which is a motor vehicle and Exh PE 9 which is a certificate of seizure were wrongly procured as there were no independent person who witnessed the seizure as there were only two policemen contrary to what was ruled in **DPP vs Musa Hatibu Sembe** (supra). He informed this court that he is aware with relaxation of the principle established in **Paulo Maduka & Others vs. Republic** (supra) as was in **Marwa Kitene Marwa vs Republic,** Criminal Appeal No. 124 of 2022 (HC Musoma) where it cited the case of **Deus Josias Kilala @ Deo vs Republic,** Criminal Appeal 191

of 2018 CAT at Dar es salam that in items which have permanent mark and which are not easily tempered the principle may be relaxed but not iron sheet, simtank and gypsum boards.

While responding to issues raised by counsel for appellants under this ground, Mr. Kainunura nodded that the principle in **Paulo Maduka's case** was relaxed and documentation are not always required depending on the circumstances where tempering is not possible. He refered this court to page 99 of the proceedings record shows that all seized properties were at Tarime Police station and trial court visited police station. To him, the nature of the items was not easily tempered as it includes car, gypsum and simtank.

About independent witness, he submitted that at page 164 of the proceedings PW10 informed the court that he was asked by police to go to the house of the 1st accused and nowhere in record he said he was relative of PW13 and accused did not object that during hearing. He further submitted that the seizure was made under S. 38 of Cap 20 where the issue of independent witness is not requirement of the law. He said, even if PW10 was a relative, still under the law he cannot be disqualified as witness as per **Mustapha Ramadhani Kihiyo vs Republic** (2006) TLR,

323 where evidence of relative is credible. He challenged the submission that there is possibility that items were planted by prosecution to be an afterthought and it should not be regarded so far as counsel for appellants failed to cross examine during trial so he cannot raise that issue at the appellate stage and support his submission with the findings in **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010. About the yellow mark which was not featured in certificate of seizure, State Attorney submitted that PW13 who was the victim identified her properties by yellow mark. He prayed this court to find this ground has no merit and dismiss it.

I wish to start with the issue of objecting exhibits during trial. I find State Attorney Mr. Kainunura mislead this court when he submitted the exhibits were not objected neither appellant cross-examined witness. While reading proceedings specifically from page 101 to 113 I find when PW6 prayed to tender Exh PE3, PE 4, PE5, PE6, PE7 and Toyota Raum vehicle with registration number T 395, defence counsel objected, the 1st accused objected and it is only the 4th and 5th accused who did not object. The inquiry was conducted and trial court overruled the objection. The objection was based under section 38(3) of the CPA and chain of custody.

Exhibit PE3 and PE4 were items collected from 1st appellant and it is on record the seizure was witnessed by PW10 and the 1st appellant signed to prove that the same were seized from his home. When objecting its tendering, the 1st appellant said the items belongs to Regoryo primary school. I have read exh PE13 which is certificate of seizure of 7 iron sheets *Simba dumu* make there is no other qualification neither indication of any colour. There is also 137 pieces of iron sheet seized. I have read the charge sheet, it just mentioned 1322 iron sheets were stolen without specification neither qualification and the charge sheet has no **pieces of iron sheet**. That is to say, police seized 7 *simba dumu* iron sheets in the house of 1st appellants without any color. According to prosecution, victim identified 7 iron sheets with yellow color/mark (page 184). What I gathered is that, the items seized from the 1st appellant house is different from what was identified by the victim and tendered in court.

The referred **case of Paulo Maduka** provides how seized items can be handled and stored. Exh PE6 is gypsum boards and was said to be found in the house of 2nd appellant. Exh PE6 is silent on unique features of the said gypsum boards to distinguish it from other gypsum boards in Tarime or in the world. Records are silent on movement and storage from seizure up to

the hearing date. It is undisputed that court saw where items were kept but the issue, I find is how the items were received and how were stored. So far as there are many gypsum boards in Tarime how could one believe that the seized gypsum from 2nd appellant is the same tendered in court and are the same which were missing in the victim's shop?

I find these items are not unique save for the vehicle which have registration number and chassis number though prosecution relied on registration number only which its in number plate and easily to be removed/changed. How many Toyota Raum are there at Tarime, what specific mark does the seized vehicle had in exclusion of others. It must be known that uniqueness of vehicle is from chassis number and not number plate which is easily to be tempered with. How did the prosecution prove that the seized vehicle is actually used to transport the items from the shop without recording its chassis number. I am aware the issue of chassis number was not submitted by appellants but it is among the issue to prove that the seized items were actually used to commit crime. This being the court of justice and the court of record, it is incumbent to make sure that the law is complied with. See **Adinardi Iddy Salim & Another vs Republic (Criminal Appeal 298 of 2018) [2022] TZCA**

9 (11 February 2022). It is true that the principle in **Paulo Maduka** has been relaxed in **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015 that, where the circumstances may reasonably show the absence of several threats, the court can safely receive such evidence despite the fact that the chain of custody may have been broken.

In the case at hand, it is difficulty to establish that Tayota Raum which was seized by PW6 is the one used to carry items from the shop as the number plate is easily to be changed/tempered with. Further, it was not proved by prosecution that the victim is selling **pieces of iron sheets** and was not proved that all items in the said shop has yellow mark or was there a proof that only iron sheets in her shop is marked with yellow spray? These questions have no answers and I find identification of items was not proper. See **Chamungo Richard @ Kipingu vs Republic (Criminal Appeal 56 of 2022) [2022] TZCA 255 (9 May 2022).**

The 2nd addition ground of appeal was about lateness in reporting the crime by the victim and delay in charging appellants. Mr. Emanuel submitted that from the testimony adduced during trial, PW5, PW11 and PW3 reported the incidences of suspicious movement to the victim including stealing. Further PW11 said he informed Saada (PW2) of the

stealing at the shop as featured at page 169 of the proceedings. He further submitted that one of the drivers (PW5) said he reported the incident of theft to the victim as it was recorded at 68 of the proceedings. It was his submission that testimony of prosecution shows the victim had a knowledge of what was going on in her shop. He paused a question as to why after being informed she did not take any step including to report the matter to police till 27/6/2021 when she said she found the shop was broken and waited again for 10 days without report the matter to police that there was stealing in her shop. Counsel wonders how did the victim maintained and hold the stealing of more than 200 million shillings without report to police. To him, the delay creates doubts as the delay to report the incident gave victim time to create images which she paused to police as an institution and the entire Public.

In response, Mr. Kainunura's submission was very brief that victim has to conduct stock taking before she reports the matter to relevant authority.

There is no dispute that State Attorney nodded that the matter was reported ten (10) days after the incidence which took place 26/07/2023. Reading testimony of the victim, she explained that she was looking for thieves before she reports the matter to police, but later on she said she

was taking a stock to know what was missing. (pages 182 and 186 of proceedings). She was trying to elaborate two different things in her testimony. It really not clears what was she really doing in 10 days. Further, counsel for appellants submitted that victim knew what was going on before June, 2021 as his employees PW3 and PW5 reported to her that items were taken from the shop without sale receipt and the victim decided to keep quiet. In her testimony the victim said nothing about prior information. What I got from prosecution is that, the victim was aware of what was going on but she decided to keep quite that's why even the said breaking of the shop which occurred on 26/07/2021 was not reported on time. Court of Appeal in **Laurent S/O Rajabu vs The Republic** Criminal Appeal No. 270 of 2012 said;

> *'We think, three months is a very long time to remain without being charged. Such a delay in charging the appellant not within reasonable time is a serious and fatal omission on the part of the prosecution's case leading to watering-down the credence of their case. For that reason, we agree with Mr. Hashim Ngole that such a delay in charging the accused (appellant) creates doubt to the credence of prosecution's case.'*

In the above cited case, the appellant was arrested on 01/11/2009 and was charged and appear for the first time in court on 16/02/2010. Appellant was in police custody for all the time and there was no explanation for such delay. In the case at hand, victim delayed to report for ten days saying she was looking for thieves/taking stock of the items in two shops just as Mr. Kainunura submitted. The two contradicting explanation on delay create doubt on the prosecution side.

That being not enough, at page 182 the victim informed the trial court she knew names of people who steal in her shop and reported the matter to police on 07/07/2021 and mentioned suspects to PW6 who was investigator, that was July 2021. That means investigator and victim new suspects of the crime as the victim said they were her employees. Two of them decided to keep quite until 14/08/2021 at 10:00 am when victim informed investigator that 1st appellant (then 1st accused) was in her shop that's when he was arrested.

The point I convey here is that, victim informed to PW6 that 1st appellant was among the suspect and working in her shop since 07/07/2021. PW6 knew that the 1st appellant was working in victim's shop and decided not to arrest him till the day he decided to do so. There is no elaboration as to

why the 1st appellant was not arrested the moment the victim reported the matter to police. This goes together with the delay to report the matter to police too has no explanation, because if it was true that victim was looking for thieves prior to report the matter, by the time she reported the incidence to police she knew her suspects but prosecution decided not to act promptly. This court finds the delay in reporting the crime has no justification as was in **Laurent S/O Rajabu vs The Republic (supra).** I find the ground has merit.

On the 3rd addition ground which was about self/ private investigation done by the victim, counsel for appellants submitted that when she was informed the shop was broken on 27/6/2021 she conducted stock taking of the shop and found properties worth 198 million were stolen. Counsel said this is clear that PW 13 conducted her own investigation before she reported the matter to police but the case was not investigated, according to him the investigation was supposed to be done by police. He adduced that the action by the victim create doubt if what was done and presented to court was correct because she was at liberty to decide what to report as stolen items because she did not involve any other person in stock taking. He alleged that this creates doubt as to whether what she reported to

police was correct or actually occurred as the victim became the judge of her own case.

State Attorney had a short submission that the victim started stock taking after she established what was stolen then report to police. He prayed this ground to be found with less merit.

I have read the testimony of PW6 and PW7 who are police officers. PW6 is the investigator of the crime and in his testimony, he did not mention the stolen items neither its value though he said he visited the scene of crime three times. During cross examination at page 116 of the proceedings he mentioned the value of the said stolen items but he failed to mention the value of recovered items. He did participate in seizure of the items which he doesn't know its value but he knows the value of missing item while he did not cross check items in the shop neither participate in stock taking. That is to say, investigator doesn't know how the figure Tsh. 277,378,000/= was arrived and that is the danger of allowing the complained investigation done by the victim. The proceedings are silent on whether investigator cross checked the missing items from the shop. I find Prosecution relied on the victim self-investigation and inventory/audit done by the victim to establish the amount that was the actual stealing which

occurred on unknown dates. From my analysis, the crime was not properly investigated.

The 4th ground in addition grounds of appeal is about adverse inference, there are some issues which the counsel for appellants prayed this court to draw adverse. One; he said the witness who were mentioned but prosecution did not parade them in court under fear they could affect their testimony. Two; he submitted that there is also evidence which was not tendered in court including the padlock which was said was broken and allow the appellants to enter into the shop. He raised a concern that if prosecution managed to take safe in court which was inside the shop, if they managed to move the court up to the police station to witnesses iron sheets seized, failure to bring padlock at the court means there is an issue and he prayed this court to draw adverse inference on it as to whether there was a padlock broken.

Third; Mr. Emmanuel submitted that prosecution said CCTV camera were disabled and the victim failed to know exactly time when the crime took place. He said none of the witnesses tendered the camera or the whole system to prove that cameras were in the shop and wonders why didn't the prosecution move the court to the shop of the victim to see disconnected

CCTV system. He said failure to bring camera as an exhibit creates doubts that camera might be working properly and the footage might show different things. He prayed this court to draw adverse inference and the doubts to benefit appellants.

On this ground State Attorney submitted that witnesses said the padlock was broken and the door was broken they find there was no need to bring the padlock in court as to break the door does not necessitate to break the padlock. After all, he said, accused did not cross examine witnesses about the padlock and it should be regarded as an afterthought. Further he elaborated that the CCTV cameras were disconnected and the system record nothing so they saw no need to tender the whole system during trial.

Before analysing what was submitted by the State Attorney, I have to draw attention that the appellants herein were charged and convicted of the offence of, among other, breaking into the building and commit an offence therein. Prosecution side had the duty to explain how the door was broken and or in what condition the padlock was after the crime in order to prove breaking but that was not the case. PW1, PW2 and PW13 provided different story about the padlock and the door. To clear that, as raised by

the counsel for appellants, the padlock could be tendered or trial court ought to have been moved to the scene of crime so as to see how the door and padlock were damaged during the breaking on that particular day. That was not done and so this court is on suspicious on what real happened on that day considering PW1 and PW2 and PW13 provided contradicted information as we shall see in coming grounds. Unanswered question is was there any breaking?

Another area where counsel for appellants prayed this court to draw adverse inference is on detention register. Mr. Emmanuel submitted that appellants retract confession saying they were recorded out of prescribed time. To him, the only evidence which could confirm that statement was recorded within time is detention register which shows movement of all detainee from arrest and record the statement. Counsel said, to remove this doubt the prosecution ought to tender detention register as an exhibit and failure to tender it creates doubts as to what time the suspect arrived at the police station. He prayed this court to draw adverse inference as caution statement was based on the conviction by the trial court.

Replying on detention register State Attorney was of the opinion that it was not important to be tendered so far as the trial Magistrate recorded submission and ruled out about the objection, to him the law was adhered.

At this point I wish to put it clear that appellants feel to be aggrieved by the decision of the trial court that why they have stepped at this level. It was and is the duty of the Respondent herein to explain why they support what was done during trial instead of repeating what was done. 5th appellant complained statement were recorded out of prescribed time although he was transported from Kahama to Tarime, I find it was for the Republic to prove the time he was surrendered at Tarime Police Station, but from file, the record only show the time they started to recording. However, in **Chacha Jeremiah Murimi & Others vs Republic (Criminal Appeal 551 of 2015) [2019] TZCA 52 (4 April 2019)** directed that the issue of time in which statement was recorded, depend on circumstances of the case does not and could not in any way prejudice contents of statement. See also Ngasa Sita @mabundu vs Republic (Criminal Appeal 254 of 2017) [2021] TZCA 367 (12 August 2021).

Another area which appellants pray this court to draw adverse inference is failure by prosecution to parade Magabe Maiko as a witness because he

was mentioned by PW2 in her testimony to be the security officers at the victim's shop. Counsel insisted that Magabe was potential witness as he was a security guide at the victim's shop, he could inform the trial court as to what real transpired during the day which it was said the shop was broken and stealing took place. He mentions other witnesses not called by prosecution were owners of the car which PW3 and PW5 drove. He complained that appellants were denied the right to hear them and cross examine and pray this court to draw adverse inference.

Addressing the security issue, Mr. Kainunura submitted that the issue was clarified by PW9 who was the security guide and testified what happened on the day. He said PW9 appeared instead of Magabe and explained that he (PW9) always left at 06:00 a.m. but on material date he left at 05:00 a.m. and handled the shop to 4th appellant. About the owners of vehicles, he was of the submission that they had nothing to prove as evidence of PW3 and PW5 who were drivers explain incidents and prayed this ground to be dismissed.

I have read the testimony of PW9 at page 162 of the proceedings, he informed the trial court that he was on duty on material day and around 05:00 a.m. when he completed his duty, he handled the shop to 4th

appellant and everything was in good condition. Conversely my perusal of the record has discerned that PW9 was on duty and managed to explain the condition of the shop at the time he log-off and entitled to credence. For that matter, this court finds there is no need to draw adverse inference against other people who were said to be guards as the one who was on duty was among witnesses. The same applies to owners of vehicles as there was no dispute of employment then I can't draw adverse inference.

Another complain by counsel for the appellants is failure to tender the receipt of ownership of all items claimed to be stolen at the shop owned by the victim (PW13). This is similar to additional ground no. 6 about proof of ownership of the stolen properties. Mr. Emanuel submitted that the law requires any business man who buy things should have receipt and that includes the victim. He said in order to prove that she owned those things the victim was supposed to have and prosecution were mandated to tender receipt and serial number and or batch number of every property. Failure to tender the said receipts he prayed this court to draw adverse inference to prosecution that properties did not exist and the victim failed to prove beyond reasonable doubts that she owned those properties. This being the criminal case, he prayed the doubt to benefit appellants as was in

Chamungo Richard @ Kipingu vs Republic, Criminal Appeal No. 56 of 2022 CAT at Tanga.

It was his further submission that the identification of properties which was done by victim, PW4, PW6, PW7 and PW8 was very weak to amount that the properties were owned by the victim in the case like this which its punishment is imprisonment. He complained about the yellow mark in iron sheets; to him a yellow mark can be put by any person anyhow. He explained that, properties like iron sheet, Simtank, Gypsum always has batch number and or serial number to differentiate one item and another of the same type.

Mr. Kainunura responded that there was no dispute on the ownership of properties as that the victim was the owner of hardware shop and therefore there was no need to disprove that properties belonged to her so far she testified over that and it was not disputed during trial. About identification, State Attorney submitted that victim managed to identify her properties as they had yellow mark and nobody resisted that there was yellow mark. To him the identification was correct and prayed the same to be maintained while insisting that iron sheets has no serial number.

Submission by learned minds made me repeatedly read the amended charge sheet which was filed on 24/05/2021. Appellants were charged for breaking, entering and stealing. As per charge sheet, items alleged to be stolen was said to belong to the victim who testified during trial as PW13. Apart from oral testimony that she owned the shop and in that shop she sales building material (hardware store), she did not tender any exhibit to prove not only that items belong to her but she actually owns hardware store. There was no business license neither Tax clearance certificate tendered by prosecution. What gathered by this court is TIN Number which was mentioned by the victim. A reasonable person may ask was she really a business person as a TIN number is owned by every citizen in our country.

Counsel for appellants complained that there was no proof of existence of the said stolen items. I have read the testimony of all prosecution witnesses none of them tendered exhibit to prove the listed items in the charge sheet belong to the victim serve for Exh PE16 which mention items claimed to be missing in the shop, there is no procedures of receiving items were elaborated to show the items were actually received in the shop store. As per section 258(1) there is no doubt that items listed in the

charge sheet are capable of being stolen, the issue is whether the mentioned items in the charge sheet belong to AGNES D/O MWITA CHACHA, the victim. This question was not answered by prosecution. I have read Exh PE16 and found the auditor only elaborated how sales was done and more.

Further, I have read the Exh PE 11, it mentions one simtank, five gypsum board and 149 iron sheets, all items have no specification. There is no further clarification of condition neither mark on those items, serial number or batch number. If at all the victim confirmed during trial that her items had yellow mark as per page 184 and 192 of the proceedings, then, taking it as a sample, the items seized from the 2nd appellant does not belong to the victim because exh PE 11 is silent on the yellow mark. For easy of understand let me reproduce what the victim testified in court about her stolen items at page 184 of the proceedings;

> *'...Then police officers told me that, Peter was arrested with 149 simba dumu iron sheets, five (5) gypsum board, one simtank black in color of 5000ltr. I was thereafter called at Tarime Police Station to identify those properties, then I identified them as they were with my mark of yellow at their sides and bottom part. Then I got back to my shop.'*

I find items were not properly identified and prosecution failed to prove that the seized items belong to the victim. A bare allegation by the victim claiming ownership of the items which are subject of theft is not sufficient, particularly when it involves the identity of common articles. See **Chamungo Richard @ Kipingu vs Republic** (supra).

Submitting on the 5th additional ground about caution statement Mr. Emmanuel said all cautioned statements (exhibit PE1, PE2, PE13 and PE14) were objected as accused explained about torture and confession was retracted. He reminds this court the danger of relying on retracted confession as was decided in the case of **Tuwamoi vs Uganda,** (1967) EA 84.

Counsel submitted further that the caution statement contradicts with other prosecution testimony. For instance, he submitted that when Moi (PW11) said he saw 6th and 8th appellants went with car at the victim's shop and collected some items, the caution statement of the 5th accused said he was given the car by the 6th appellant and he used the said car more than three times. For him, there is inconsistence, incoherent on the prosecution instead of it being collaborated it contradicts. He was of the opinion that the trial court erred to rule out that the caution statements

incriminate appellants and prayed caution statement (Exhibit PE1, PE2, PE13 and PE14) to be expunged from the record of the trial court as were procured unprocedural. If caution statements will be expunged, he said, the prosecution case will lack legs to stand on.

In response, State Attorney reiterate his prior submission where he explains the inquiry was conducted and the trial court admitted exhibit and used the same to convict appellants. He said it was not true that the trial court did not consider all important things and prayed caution statement to be maintained as they collaborated with other evidence.

At this juncture I wish to put it clear that under section 110 and 112 of the Evidence Act, Cap 6, it is the duty of a person who allege to prove his/her allegation against the other.

It is prosecution side who paraded the accused, now appellants at the trial court and charge them with the offence as previously narrated. Basing on the cited provisions of law, it is the prosecution who were supposed to prove each allegation against appellants. This being the criminal case, the standard required by law is proof beyond a reasonable doubt. See **Mohamed Haruna @ Mtupeni & Another vs Republic**, Criminal Appeal

No. 25 of 2007 and **DPP vs Bahati John Mahenge & 2 Others** Criminal Appeal No. 03 of 2015 CAT.

Prosecution alleged that some stolen items were carried in a vehicle, Toyota Raum. On one side, prosecution evidence revealed that the said vehicle was driven by 6th and 8th appellants and collected items and disappeared while on another side the prosecution evidence revealed that the said vehicle was used to carry items and driven by 5th appellant. The issue here which need to be proved is who drive the vehicle which is said to be used to transport stolen items on that particular day. Was it 5th or 6th appellant? a reasonable person may ask if the driver of the vehicle is not identified, was the said vehicle used to transport the said items? where they said items transported? and was there stealing anyway? I find Prosecution failed to prove how the claimed stolen items were moved from the shop. With due respect, this court finds no collaboration of the caution statement with other evidence on the transportation of the said stolen items. There are some questions which were not answered by prosecution testimony.

Ground number 7 and 8 is about compensation by appellants and forfeiture of the vehicle. Mr. Emmanuel was of the submission that if the victim failed

to prove ownership of the properties, then she was not supposed to be compensated by appellants and the trial court errored on that as it was not well explained how the said vehicle was used. If it was not proved, he said, the forfeiture order was not correct and even the sale. Re-citing paragraph in the judgment, he complained of orders by the trial court on 6(vi) and (vii) on compensation, forfeiture and sale of the vehicle. To him, the forfeitured property becomes the property of the Government and not otherwise. Citing section 9 of the Proceeds of Crime Act, Cap 256, he said there are procedures to be followed including the Republic to apply for it. He concluded that so far as the offence was not proved beyond reason doubt then the car should be returned to the owner.

Responding on the issue of compensation, forfeiture and sale; State Attorney submitted that the trial court confirmed the properties belonged to the victim that's why it ordered compensation as per S. 348 (1) Cap 20 where courts are allowed to order compensation. He further averts that the order for sale was correctly made under S. 351 (1) (a) as the law allow the trial court to order anything after forfeiture. Explaining further about the vehicle he said the motor vehicle was used to carry items and therefore it was an instrument for committing crime and not the proceed of crime.

Combined additional grounds 7 and 8 that the offence was not proved to the required standard will be analysed perpendicular with combined grounds 1, 4 and 5 of appeal in the coming paragraphs.

Counsel for the appellants complained that defence was not considered by trial Magistrate and he disregarded even doubts raised by DW9 and DW10 on pieces of iron sheets that were school property on ground no.9 of additional grounds. He said the duty of the defence is to create doubts which has to be proved by prosecution. Basing on findings in the case of **Abel Masikiti** (Supra) he said failure to consider defence is fatal and prayed this court to find the conviction was vitiated by many factors. He further complained of PW11 who was a witness but to him PW11 was supposed to be an accused as testified by PW3 and PW5 as there was no clarification by prosecution on this.

To balance this, Mr. Kainunura was of the submission that the trial Magistrate analysed defence as featured at page 53 up to 60 of the judgment and found the defence does not create any doubts. He maintained that PW11 was witness just like other witness and it was upon the prosecution to decide who has to be charged. He explained further that

participation of PW11 in this saga was like a porter and therefore, a witness.

I have read the whole judgment specifically on defence by appellants and found the defence was analysed starting at page 45 of the judgment contrary from what was submitted by counsel for appellants. While I subscribe to the legal position in the cited case of **Abel Masikiti** (supra), I find the defence was analysed although it was not the duty of appellant to prove their innocence. See **Joseph John Makune vs. Republic** [1986] TLR 44 at page 49.

In the 10th ground of appeal in addition list the counsel for appellants was claiming that the offence was not proved beyond reasonable doubt specifically on the doctrine of recent possession which was the base of conviction at the trial court. Basing on the case of **Stephen Paulo and Another vs Republic,** Criminal Appeal No. 455 of 2016 which introduced elements to prove the doctrine cited, he said the elements has to be proved cumulatively. It was his submission that the second element was not proved to the satisfactory that the victim failed to provide serial number neither batch number and there were no receipts tendered to justify she bought the said items. Further, counsel complained over the

third condition that the offence was claimed to be committed between January, 2018 and July 2021, that is almost four years and to him the properties cannot be said to be recently stolen and the trial court errored to convict appellants basing on the doctrine of recent possession. He was of the position that prosecution has failed to prove commission of the offence beyond all reasonable doubts during trial. He prayed for the appeal to be found with merit, conviction, judgment and order of the trial court be set aside, the vehicle to be returned to the owner and he prayed for any other reliefs from this court.

On this ground Mr. Kainunura maintained that properties were seized from appellants. Counting from 27/06/2021 when the alleged breaking and stealing took place to the date the properties were seized which was August 2021, he finds that was recent. Clarifying on that, he said that iron sheet and gypsum board cannot be changed easily and request this court to read page 41 of the judgment which explained how recent stealing was. He further submitted that PW13 proved that those properties belong to her and were recently stolen from her shop and insisted that the stealing was done in various dates as testified by prosecution witnesses. He finally prayed the appeal to be found of less merit and be dismissed.

It is trite that the doctrine of recent possession has four elements to be proved and all of them should be proved cumulatively. See **Stephen Paul and Another** (supra), **Mkubwa Mwakagenda vs Republic**, Criminal Appeal no. 94 of 2007 and **Rashidi Omary Kibwetabweta vs Republic,** criminal appeal no. 254 of 2016.

In **Stephen Paul and Another** (supra) for instance, the court expunged the exhibit which was the receipts and maintained that after the rejection of the said receipt which was tendered to prove ownership of the subject matter, the ownership cannot be said to have been proved. The issue in the current case is whether the second condition of the doctrine has been satisfied. In my considered view the answer is negative. The reason is (a said previous) prosecution did not tender any document to prove that victim once owned the items claimed to be stolen. In **Stephen Paul and Another** (supra) there was a receipt which was expunged, in the case at hand there is none tendered and therefore it cannot be said the ownership was proved.

Further there are contradictions and inconsistent as submitted by counsel for the appellants on the first additional grounds as follows;

First he submitted that PW1, PW2 and PW13 has different story on what happened on material date or what was the situation in the shop. PW1 testified that, back door of the shop was open and cashier office was open and camera wires were disconnected form cameras. On the other side, PW2 testified that she found Edson (4th appellant) with key of the shop who reopened it and when she entered, she found the key of cashier office at the door. Finally, the testimony of PW13 was to the effect that on 27/06/2021 she went to the scene and found the backdoor of the shop was broken and padlock was down. He submitted that PW1 said backdoor was open but PW2 said the backdoor was closed. He complained of the inconsistence of prosecution witnesses and wonder if at all there was a door which was broken. He said all of these are found at page 50-54 and 182 of the proceedings.

Second inconsistence which was submitted by counsel is between PW3, PW5 and PW11 who said he witnessed stealing at the victim's shop. PW3 said in that particular day he went to the shop of the victim and found PW11, 4th and 5th appellants whom they gave him iron sheets and sim tank to take them to 8th appellant and he was paid. Sometime in the year 2021 the same witness was engaged and at the shop he was given iron sheets

by PW11, 1st 4th, and 5th appellants and was instructed to deliver at the home of the 1st appellant. Moreover, PW11 testified that he saw 7th appellant and others stealing items in the shop of the victim and he saw 6th and 8th appellants went to the shop and collect electricity wires. It was his submission that incoherent is found where PW3 and PW5 mentioned PW11 as among the thieves while PW11 mention 6th and 8th as thieves. He asked if there was stealing then, who actually steal.

Third inconsistent is on the date of commission of offence. Page 36 and 42 of proceedings during preliminary hearing (PH), facts read at paragraph 8 that on 20/08/2021 revealed that appellants break the shop of the victim but in charge sheet, testimony, evidence and judgment it was said the offence occurred on 27/06/2021.

Fourth contradiction is on the testimony of PW3 who said the car which he used to carry items is Mitsubish canter but when he was cross examined, he said it was Toyota Hilux (at page 60). He submitted that witness mentioned two different vehicles and therefore his testimony creates doubts if at all he was engaged to carry items from the shop of the victim.

Five; Another contradiction is on caution statement which the trial court based to convict and sentence appellants. He submitted that PE14 mentioned PW11, whom he sold the simtank, but Exh PE2 mentioned 1st, 4th appellants and PW11 that they negotiated deal and sold items to 6th appellant and used the car owned by 6th appellant but PE14 and PE13 did not mention 6th neither 1st appellants. To him that was not possible as the caution statements are contradicting each other.

Six; Exh PE2 is inconsistence with testimony of PW11 to this extent, PW11 said on a certain day the 6th and 8th appellants collected from the victims' shop a huge round of wire with a car, Toyota Raum, the said wire were given to them by 4th appellant, but Exh PE2 is to the effect that 8th appellant negotiated and sold to 6th appellant electronic wires and 5th appellant used car owned by 6th appellant to transport the said wires.

Seven; inconsistence on testimony of PW11 that 6th and 8th appellants went at the shop with a car but Exh PE2 is to the effect that 6th appellant gave his car to 5th appellant and carried those items. He submitted that it is not known what real happened if 6th appellant drove the car or he offered it to 5th appellant to carry those items. It was his submission that all these doubts has to benefit 6th, 8th and other appellants while citing the case of

Wood Mington vs DPP (1993) AC 462 that insisted the offence to be proved beyond reasonable doubt and **Magendo Paul and Another vs Republic,** (1993) TLR 2019 which was decided that evidence must be strong against accused for the case to be proved beyond reasonable doubts.

Mr. Kainunura, responded on the issue of back door that every witness testified what he saw at the scene on that particular day and disputed on existence of contradictions. He further submitted that if this court will find contradictions they must be regarded as minor which does not go to the root of the case as the door was broken. He prayed this court to read the decision of the Court in **Mohamed Said Malula vs Republic** (1995) TLR at 3 that not all discrepancies may cause the prosecution case to flop and **Wallenstain Alvares Santillan vs Republic,** Criminal Appeal No. 68 of 2019 that regardless of inconsistence, the case may stand. He prayed this court to find the contradiction in the present case are minor.

About the contradiction raised by PW3, PW5 and PW11 about the date of crime, he submitted that the crime was committed in diversity dates and each witness explained what he remembered. About contradiction on dates as read in PH and charge sheet he was of the submission that PH is not

part of evidence rather its intention is to accelerate trial but is not part of evidence and he prayed it not to be regarded and prayed the same to be dismissed. Submitting on Mitsubish Canter and Toyota Hilux, he said at page 60 of proceedings PW3 said about the vehicle (Canter) which he driven in the year 2021 but Toyota Hilux was mentioned at page 61 and it was used to distribute items to places of delivery. He said in case it will be found there is contradiction, then should be regarded as minor.

On caution statements which are Exh PE13 and PE 14 he submitted that there is no contradiction as documents recorded what was explained by accused persons. For him the logic is that it was the car which supplied stolen wires and grieved that counsel for appellants concentrated on what was admitted by accused. He said in **Mkami Wankyo vs Republic,** (1990) TLR 46 it was trial court should not concentrate on contradiction rather to what was confessed and prayed this court to do the same as accused persons, now appellants, confessed to break and steal.

It's now my turn to analyse contradictions and inconsistent raised by the counsel, **the second** and **third** contradiction on PW3, PW5 and PW11 on who is the thief and the date of commission of offence as per PH and charge sheet, I find it is upon the prosecution to decide who to be charged

of the offence and the duty of prosecution is to prove the offence as per charge sheet. If the contradiction could be in charge sheet and testimony, then it may be considered. The **Fourth** contradiction on vehicles used to transport goods from the shop I find both Mitsubish Canter and Toyota Hilux were used. Wherefore, I find these contradictions (second, third and fourth) to be minor and cannot cause the prosecution case to flop. See **Mohamed Said Malula vs Republic** (supra) and **Sylivester Stephano vs Republic, Criminal Appeal No. 527 of 2016** [2018] TZCA 306.

However, I join hands with counsel for the appellants on the first, fifth, sixth and seventh contradictions. The case of **Mkami Wankyo vs Republic** (supra) which was supplied by State Attorney are distinguishable as caution statements which are Exh PE2, PE13 and PE14 are contradicting each other for instance, the 6th appellant is not mentioned in two statements but his conviction was based on collaboration of the caution statements. Further, Exh PE2 contradicts with testimony of other witnesses on who drove the motor vehicle which is said to carry stolen items. Further, it was not certain how the door of the shop was found as every witness had her own version of story about the back door. I find these (first, fifth, sixth and seventh) and others are major contradictions as they

go to the root of the case which include breaking and stealing just as submitted by counsel for the appellants. I find the case of **Wallenstain Alvares Santillan vs Republic** (supra) and **Mkami Wankyo vs Republic** (supra) as submitted by State Attorney are not fit in the current situation as the inconsistence goes to the root of the case. In our legal system, major contradictions are decided in favour of accused/appellants**.** See also **Chrizant John vs Republic,** Criminal Appeal No. 313 of 2015, (unreported) and **Sebastian Michael & Another vs DPP,** Criminal Appeal No. 145 of 2018.

Another contradiction which this court finds is the way prosecution found independent witness, while PW7 said independent witness was a passerby as per page 121, later on the same PW10 at page 128 said he was called by police to witness the seizure. Further, PW10 informed the trial court at page 165 that he signed Exh PE13 but actually he did not sign it.

Counsel for appellants joined ground 1, 4 and 5 of appeal which is about proving the case beyond reasonable doubt. It was his submission that prosecution had 13 witnesses to prove what has been alleged but none of witnesses saw the shop being broken. He said they failed to mention who break the shop. Referring PW11 who was a porter at the shop of the victim

he testified that he saw 6th appellant with Toyota Raum and he saw 7th appellant breaking the safe but he did not saw appellants breaking the shop.

He further complained of number of items said to be stolen to be huge which needed a whole day or more to remove from the shop. He gave the example of moving 1000 bags of cement and more than 2000 iron sheets from the shop needs many people and time and it was impossible for people carrying those items not to be seen. To him, PW11 was not an eye witness as what he testified was hearsay. Basing on the case of **Ntigahela Elias** (supra) he prays this court to find what was testified by PW11 is hearsay which is less credible.

It was his further submission that in **Marwa Kitene Marwa vs Republic (supra)** this court cited the case of **Rashidi Omary Kibwetabweta vs Republic,** Criminal Appeal No. 254 of 2016 which had five conditions of the doctrine of recent possession. On the third conditions he said the property must be stolen recently but the substituted charge explained the crime took place on various dates from years 2018 to 2021. Counsel wonders if this case is fit to invoke the doctrine of recent possession. For him the charge was not proved.

About the caution statement he submitted that all caution statement were obtained under inhuman degrading and torture and the trial Magistrate relied on caution statement to convict all appellants. He was of the position that caution statements were procured illegally and it is not possible all four appellants to complain over torture. He further complained of non-consideration of the defence by appellants.

In a different note and in showing the offence was not proved to the required standard, he submitted that the victim testified that she reported the matter to police ten (10) days after the crime. Due to that delay, he was of the opinion that the case was staged as the victim did not explain reasons for such delay. Mr. Otieno finds the victim was empathetic in her testimony but for a serious offence like in this case, the crime was supposed to be reported instantly.

Submitting further on failure to prove the offence beyond reasonable doubt he said at page 187 the victim explained in court that PW11 saw who steal in her shop but to the contrary at page 192 the victim testified goods worth 277,374,000/= were stolen between 2018 to 2021. He complained that prosecution failed to clear doubts as to when the store was broken and there was no sketch map for that effect neither CCTV footage tendered for

events occurred before June 2021. To him the audit report is afterthought and resisted the doctrine of recent possession to be invoked for goods stolen in four years ago.

Mr. Kainunura while responding to the combined grounds 1, 4 and 5 he submitted that, PW3 loaded some items in lorry which were delivered to 8th appellant and he mentioned appellants at page 58. Further, PW5 testified that sometimes in June 2021 he was with 4th and 5th appellants and he loaded shop items in the vehicle and delivered to 2nd appellant and December, 2020 he delivered items to 8th appellant. State Attorney succumbed that PW3 and PW5 witnessed appellants while stealing from the shop of the victim and that is confirmed by the disappearance of 5th appellant who was arrested in Kahama and cited the case of **Pascal Kitigwa vs Republic** (1994) TLR 95. It was his further submission that PW11 at page 168 and 170 of the proceedings he mentioned 1st, 4th, 5th and 7th appellants to be involved in stealing as he saw them breaking safe; and he also saw 6th and 8th appellants taking huge round of electricity wires. To him, PW11 is an eye witness who entitled credence as per **Gooluck Kyando vs Republic,** (2006) TLR 363.

About the date when the stealing took place, State Attorney conceded that it was between the year 2018 and 2021. He clarified that late reporting of the matter was due to the level of business of the victim, he submitted that she had to conduct stock taking so as to know the stolen items before rushing to police. However, he was of the position that so far as appellants did not inquire about delay in reporting the crime during trial then it should be considered as an afterthought.

In proving that the offence was proved to the required standard he submitted that there was evidence of confession which was done to PW6 as revealed at page 72 of proceedings where 3rd appellant mentioned his fellows who participated in stealing, 5th appellant and the 2nd appellants too and further he said inquiry was conducted caution statements were legally procured. So far as appellants admitted the offence, he said the best evidence is of the accused person who free confessed his guilt as was in **Halfan Rajab Mohamed vs Republic,** Criminal Appeal No. 281 of 2020 CAT.

He submitted further that the defence by appellants was considered as picked from page 46-47 of the judgment. He addressed the issue of sketch map of the scene of crime that for him it was not important as it could not

prove breaking neither stealing. On the issue that the offence was not proved via charge sheet he submitted that the charge sheet shows the crime started from the year 2018 up to 2021 and therefore the offence was proved as per charge sheet and there is no need of retrial.

I have analyses the combined grounds of appeal 1, 4 and 5 on proving the offence beyond reasonable doubt together with grounds 7 and 8 of the additional ground of appeal. Starting with the testimony of PW11, during trial he said he saw 7th appellant and other breaking safe and he saw some appellants taking items from the shop in the morning. There is nowhere he said he saw one of the appellants breaking the shop. There is big different from breaking the shop and breaking safe which was inside the shop. Moreso in his testimony PW 11 said the stealing was done on divert dates, if that is so, then it proves nobody break the shop as State Attorney too prove that they had no sketch map as it won't prove breaking neither stealing. I too agree prosecution failed to prove breaking of the shop as there was no eye witness neither circumstance which show the shop was broken. I find the first count breaking into the building was not proved.

It was Mt. Kainunura's submission that stealing took place between the year 2018 and 2021 so it took time for the victim to know what items were

stolen and that's is the cause of delay in reporting the crime. He nodded that the crime was reported to police on 07/07/2021 which is ten says latter. Reading page 186 of the proceedings, victim testified to court that she was looking for thieves before she reported to police. Records show further that up to the date she reports to police station, no suspect was arrested. There is no doubt that the victim was informed in the very morning by PW2 that the shop was broken. This court finds the delay was not normal and it was not the duty of the accused to inquire why victim delayed to report the matter but it was for the prosecution to justify the delay, which was not justified anyhow. See **Laurent s/o Rajabu vs The Republic** (supra), **Mohamed Kiwanga and Another vs Republic,** Criminal Appeal No. 223 of 2019 and **Juma Anthoni vs Republic,** Criminal Appeal 571 of 2020.

About CCTV system, PW2 testified that on the date when the shop was broken, CCTV/camera wires were disconnected and prosecution maintained that nothing was recorded. As analysed elsewhere in this judgment, the CCTV system or camera was not tendered in court to prove it was not working neither investigators testified on this except PW2, a **cashier** who testified that CCTV was disconnected, I am at per with the submission of

the counsel for appellants that; if stealing took place in the year 2018 and the camera was disconnected on 26/06/2021, footage of what happened in previous dates were supposed to be tendered to prove that crime started prior to year 2021 but was not done.

While still on the issue of date of commission of the crime, it was the position of the prosecution that crime occurred since 2018 as second count indicates that between January 2018 and July 2021 appellants stole a list of items. I had ample time to read a case **Jafeth Manyasi @ Manyonyi vs Republic (Criminal Appeal No. 302 of 2020) [2023] TZCA 17812 (9 November 2023)** when the Court of Appeal seated in Musoma had this to say;

> *'Notably, this Court has held time and again that where a date is mentioned in the charge as being the date on which an offence was committed, evidence must be led by the prosecution to prove that the offence charged, was indeed committed on that date .'*

In the case at hand, prosecution failed to prove that the offence was committed in 2018. Further, PW13 failed to mention date when she employed, 1st, 4th, 5th , and 7th appellant as she said at page 182 and 193 that she started to work with them in the year 2021 and she don't

remember the date she employ other appellants. If that is the position, then, the charge cannot be said to be proved beyond reasonable doubt against appellants as it is not known who steal in the victim's shop in the year 2018 as appellants were not employee of the victim by that time.

From the analysis done, as far as the trial Magistrate convict appellants basing on the doctrine of recent possession, I find the doctrine was not properly invoked in the case at hand as elements were not cumulatively met. See **Rashidi Omary Kibwetabweta vs Republic** (supra) and **Yunus Habibu vs Republic**, Criminal Appeal no. 239 of 2017 and **Joseph Mkumbwa and Samson Mwakagenda vs Republic**, Criminal Appeal No. 94 of 2007. In the latter case, the court after insisting on elements it went further and caution the prosecution that;

> *"The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements..."*

In the case at hand, as prior analysed, prosecution failed to prove beyond reasonable doubts that the victim owned stolen properties, that the properties were stolen recently, that the chain of custody was in fact intact. Moreover, failure to report the crime at the earliest time creates doubts.

All said and done, I pinned major and fundamental contradiction and gaps which raises genuine doubt and from the practice of our courts, doubts are to be resolved in favour of the appellants. There is a large family of precedents insisting on the subject which was the development by the court after the decision in **Mkami Wankyo vs Republic,** (1990) TLR 46. Latter development are found in **Enock Kipela vs Republic**, Criminal Appeal No. 150 of 1994; **Mohamed Said Matula vs Republic** [1995] TLR 3, **Laurent s/o Rajabu vs The Republic** (supra) and **Marwa Joseph @ Muhere & Another vs Republic**, Criminal Appeal Case No. 96 of 2021).

Since the appellants' conviction was grounded on the invocation of the doctrine of recent possession which I have held that it was not properly invoked, bearing in mind other legal principles and position of the court on various facts (like the identification and ownership of the properties so claimed, time lapse from occurrence of crime to the day was reported, the duration of four years calculated in the doctrine of recent possession, proof of date of employment to some appellants etc), the appellant's conviction cannot be sustained. I therefore accordingly allow the appeal, quash

appellants conviction and hereby order immediate release from prison unless otherwise lawfully held.

It is so ordered.

Dated at **MUSOMA** this 06th Day of February, 2024.

M. L. KOMBA

JUDGE

Right of Appeal explained.

Judgment Delivered today in chamber in presence of Mr. Yese Temba, State Attorneys representing Republic and Mr. Onyango Otieno and Mr. Emmanuel Ally both learned advocates representing appellants and all appellants were remotely connected from Tarime prison except the 3rd appellant who was connected from Musoma prison.

M. L. KOMBA

JUDGE

6th February, 2024