

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE SUB-REGISTRY OF DAR ES SALAAM)
AT DAR ES SALAAM.**

CRIMINAL APPEAL NO. 183 OF 2023

*(Arising from the Decision of the Resident Magistrate's
Court of Dar es Salaam at Kisutu in Criminal Case No. 252
of 2018)*

GASPER BENEDICT MUSHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 07/05/2024

Date of Judgment: 29/05/2024

A. A. MBAGWA, J.

This is an appeal by the appellant, Gasper Benedict Mushi against the conviction and sentence meted out by the Court of the Resident Magistrate of Dar es Salaam at Kisutu (Hon. M.P. Mrio PRM). The appellant along with six others were jointly arraigned on a charge consisting of four counts namely; conspiracy to commit an offence, shop breaking, stealing, and neglect to prevent the commission of an offence.

However, upon conclusion of the case, the trial court found only the appellant guilty and therefore convicted him of two counts namely, shop breaking contrary to section 296(a) of the Penal Code and stealing



contrary to sections 258 and 265 of the Penal Code. As such, it sentenced the appellant to a prison term of seven (7) and five (5) years respectively. Briefly, the factual background as deciphered from the record may be summarized as follows;

The appellant, Gasper Mushi was employed by the complainant (Firmin Mariwa PW2) as a storekeeper in his company known as Mariwa Hardware Stores. The company's offices were located in the building known as Pentagon Trading Agency which is situated at Kiungani and Swahili Streets at Kariakoo. The appellant's duties included stock verification and distribution of goods. The appellant worked for the complainant's company for a period of five years.

The alleged incident occurred on 21/07/2018. On the fateful day, the complainant's wife (PW1) reported at the office around 7.30 to 8.00hrs. Upon opening the outer door, she learned that the inner door was broken and its padlock was laying on the floor. PW1 was startled as she had all the keys in her custody and she together with her husband (PW2) were the last people to close all doors of the shop on 20/7/2018. In the store, PW1 found the stuff scattered. She also noticed that the items namely, TZS 129,221,300 which were sales collections from 3/7/2018 up to 20/7/2018, printer make HP Desk Jet 2050A with serial number CN23N131 BV, and (DVR) valued at 2,100,000/= had been stolen.



Consequently, PW1 informed the shop owner, namely, Mr. Firmin Mariwa (PW2) who subsequently reported the incident to the police. Thereafter, the investigation was mounted which led to the arrest of the accused.

The appellant was arrested on 29/7/2018 at Moshi and brought back to Dar es Salaam for investigation. Later on, i.e. on 3/08/2018, the appellant was searched at his home in Kivule Majohe and the allegedly stolen printer (exhibit P5) was retrieved from the appellant's home. It was the prosecution's account that since the appellant was found with the stolen property to wit, a printer make Desk Jet 2050A, he was responsible for the shop breaking and stealing.

Conversely, the appellant strongly denied the accusations. He tendered two pieces of documentary evidence i.e. purchase receipt of the printer (exhibit D2) and his work ID Card (D1) respectively. He also paraded the other two witnesses DW2 and DW3 to support his innocence.

As hinted before, the trial court was satisfied that the prosecution case was proved against the appellant and therefore proceeded to convict and sentence him accordingly.

Aggrieved with both conviction and sentence, the appellant knocked on the doors of this court with a petition of appeal containing the following grounds;

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1. *That the trial Court erred in law and fact by conviction and sentence of the appellant by wrongly applying the doctrine of recent position (sic).*
2. *That the trial Court erred in fact and law by convicting and sentencing the appellant while the case was not proved beyond a reasonable doubt.*
3. *That the trial Court erred in law and fact by convicting and sentencing the accused based on the weakness of the defence.*
4. *That the trial Court erred in law and fact by convicting and sentencing the appellant while there was no proof beyond reasonable doubt that the alleged printer belonged to the complainant.*
5. *That the trial Court erred in fact and law by convicting and sentencing the appellant by disregarding evidence of the appellant and his witnesses*
6. *That the trial Court erred in fact and law by convicting and sentencing the appellant while the complainant did not identify or make the said specifications when he reported the incident to the police, he just made dock identification.*
7. *That the trial Court erred in law and fact by the order that the appellant return the money to the complainant while the same was not proved according to the required standard.*
8. *That the trial Court erred in law and fact by conviction and sentence of the accused while shifting the burden of proof to the appellant which is contrary to the principles of criminal law.*
9. *That the trial Court erred in law and fact by conviction and sentence of the appellant when made an improper analysis of the appellant and his witness testimonial evidence which derived a wrong decision.*



10. That the trial Court erred in law and fact by relying on contradictory evidence of the prosecution witnesses hence wrongly convicting the appellant.

On the 1st day of November 2023 when the appeal was called on for hearing, this court, upon an application by the appellant's counsel, ordered the appeal to be disposed of by way of written submissions.

The appellant's written submissions were prepared and filed by Mr. Jebra Kambole assisted by Ms. Maria Mushi, both learned counsel whilst the respondent's submissions were prepared and filed by Mr. Faraji Ngukah, learned State Attorney. I commend both parties for their insightful arguments.

Having appraised the record of appeal, the rival submissions, and the petition of appeal, I have reduced the appellant's complaints into three grounds of appeal namely;

1. That the trial court erred in law and fact to convict and sentence the appellant by wrongly applying the doctrine of recent possession.
2. The prosecution failed to prove their case beyond reasonable doubt.
3. The trial court did not consider the defence evidence, hence the appellant was wrongly convicted and sentenced.

Submitting on the 1st ground of appeal, the appellant's counsel submitted that the doctrine of recent possession was not properly invoked in that the evidence of DW1 and DW3 sufficiently established that the allegedly



stolen printer found at the appellant's house indeed belonged to the appellant. The learned counsel argued that the appellant produced the purchase receipt (exhibit D2) to prove the ownership of the printer but the complainant failed to adduce any evidence to that effect. He insisted that a witness has the right to be believed unless there are reasons to that effect but the trial court erroneously disbelieved the defence evidence without assigning reasons. The appellant's counsel cited the case of **Chiganga Mapesa vs Republic**, criminal appeal No. 252 of 2007(unreported) to support his assertion.

The learned counsel went on that there was no search warrant indicating serial numbers or descriptions that could tell the appellant which printer was actually searched. He further submitted that as the appellant was still in custody and the prosecution had all the information regarding the stolen printer, the act of searching the appellant's premises without producing a search warrant bearing descriptions of the printer was illegal. Mr. Kambole added that the printer which was found in the house of the appellant belonged to the appellant and the police officers seized it illegally but made it look like the same printer which was previously stolen. To bolster his argument on the illegality of a search, Mr. Kambole cited the case of **Shabani Ramadhani Abdala @ Kindamba vs Republic** (Criminal Appeal No.120 of 2021) [2023] TZCA 17352 (22 June 2023).

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Furthermore, the appellant's counsel argued that the prosecution evidence was tainted with discrepancies that raised reasonable doubts that the trial magistrate failed to notice them. He expounded that on page 49 of the typed proceedings, the printer was described as Desk Jet HP 2010A whilst the complainant, on page 54, described it as HP DESK JET 2050A. Yet, on page 71, it was described as DESK JET HP 2015. The appellant's counsel opined that the prosecution evidence provided different descriptions of the same printer. He told the court that the identified discrepancies ought to be resolved in favour of the appellant. On this, he relied on the authority in **Matola Kajuni & three others v. R.**, Consolidated Criminal Appeals Nos. 145 of 2011, 146 of 2011, and 147 of 2011, and **Mustapha Darajani vs Republic**, Criminal Appeal No. 242 of 2015 (unreported).

Submitting in the 2nd ground, Mr. Kambole forcefully argued that the prosecution did not prove their case beyond a reasonable doubt. He lamented that the prosecution claimed that the printer belonged to the complainant but its key witness namely, PW2 failed to mention its specifications when he reported the matter to the police. Conversely, the appellant's counsel argued that the appellant sufficiently proved his ownership of the printer by producing the purchase receipt (exhibit D2) but the trial court discarded his evidence without good reasons.

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Submitting on the 3rd ground, the learned appellant's counsel submitted that, the appellant was convicted based on the defence weakness, particularly on the ground that the appellant failed to parade a person who allegedly sold him the printer in dispute. He argued that the trial magistrate erroneously drew an adverse inference on the appellant. He argued that, in law, an adverse inference is usually drawn against the prosecution and not on the defence as the trial court did in this case.

The appellant's counsel added that the appellant was convicted following his failure to mention the serial numbers of the alleged printer which is a mixture of numbers and letters. The counsel argued that had the trial magistrate properly analysed the evidence, he would have found that claiming the serial numbers of the printer was not conclusive proof of ownership.

Moreover, the appellant's counsel faulted the trial magistrate for his failure to note the discrepancies in the prosecution evidence in respect of the colours of the alleged printer. The appellant's counsel complained that the prosecution witnesses including PW3 stated different colours but the trial magistrate commented nothing about those pitfalls. To the counsel's dismay, the trial magistrate discredited DW3's evidence on the descriptions without stating what were the correct colours of the printer. The appellant's counsel continued that the evidence of DW3 was to the



effect that the printer box (exhibit P3) was left in the complainant's possession when the appellant and his wife moved from the complainant's house to their home at Majohe Kivule. In the counsel's opinion, this piece of evidence sufficiently explained why the printer box came into the complainant's possession.

The appellant's counsel further complained that the trial magistrate failed to appreciate that there was a reasonable explanation from the appellant on how he owned the printer and no reason was assigned for disbelieving the appellant's testimony. As such, he concluded that the trial court did not consider the defence evidence accordingly. He argued that failure to consider the defence is fatal and vitiates the conviction. He supported his position with the case of **Hussein Idd & 11 Another vs. R** (1986) TLR 283.

In conclusion, the appellant's counsel was adamant that the prosecution failed to discharge its duty according to the required standard. As such, he prayed the Court to allow the appeal, quash the conviction, and set aside the sentence thereby setting the appellant free.

In rebuttal, the respondent's counsel was very firm that the conviction was rightly entered. He said that the appellant hinges solely on the doctrine of recent possession which, in his opinion, was sufficiently established. He capitalized that the prosecution evidence was cogent that

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the stolen printer was found in the appellant's house. He submitted further that, PW1 and PW2 testified that the bandits stole the printer, money, and other properties but left behind the printer box. The respondent's counsel added that PW3 managed to identify the stolen printer by tallying the serial numbers on the printer box against the serial numbers on the stolen printer which was recovered from the appellant. He further faulted the appellant for producing a purchase receipt that did not have details such as the serial numbers and colours. In support of his submission, the learned State Attorney cited the case of **Mustapha Maulid Rashid vs Republic**, Criminal Appeal No. 241 of 2014, CAT at Mtwara. He was insistent that the elements of the doctrine of recent possession were all sufficiently proved by the prosecution namely; that the property was found with the suspect, the property was positively proved to be the property of the complainant, the property was recently stolen from the complainant and lastly, the stolen property constitute the subject matter of the charge.

He submitted that on pages 68-88 of the typed proceedings, PW3 tendered in evidence without any objections from the appellant counsel, exhibit P3 (printer Box), exhibit P4 (certificate of seizure), and exhibit P5 (the stolen printer). He clarified that the printer was found in the appellant's possession and therefore the first element of recent possession

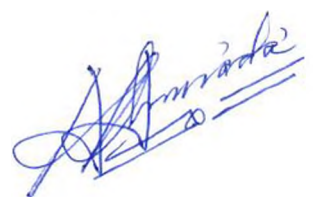


was well proved to the hilt. He went on that on page 54 of the typed proceedings, the complainant adduced sufficient evidence and details on how the printer belonged to PW2. The learned State Attorney said that the serial numbers on the printer namely, CN23N131BV tallied with the numbers appearing on the box.

He continued that the offence took place on the 21st day of July 2018 and the appellant was arrested on the 29th day of July 2018 whereas the stolen printer was retrieved from the appellant on the 3rd day of August 2018 which was hardly two weeks from the date of the incident hence recently stolen.

On the last element, the learned State Attorney submitted that the particulars of the 3rd count precisely showed that there were several properties stolen from the complainant's shop including the printer make HP DESKEJET 2050A - with serial No. CN23N131BV (exhibit P5) thus the printer constituted the subject matter of the charge.

The respondent's counsel said that the appellant claimed that the printer was his property but he tendered the purported purchase receipt which did not contain the serial numbers and failed to call a person who allegedly sold him the printer in dispute. He submitted further that, DW3 failed even to give details on the different colors of the printer owned by his husband,



the appellant. On this, the learned State Attorney cited the case of **Manazo Mandundu and Another v. Republic** [1990] TLR 92.

He insisted that the 1st ground is unmerited and prayed the Court to dismiss it.

Regarding the 2nd ground, the learned State Attorney submitted that all the issues about the doctrine of recent possession had been discussed at length and insisted that the case by the prosecution side was proved beyond reasonable doubt. He argued that failure to object to an exhibit during admission denied him the right to resist it afterward as doing that was tantamount to an afterthought. On this, he relied on the decision in the case of **Seleman Hassan vs The Republic**, Criminal Appeal No. 364 of 2008 (unreported).

The learned State Attorney submitted that the evidence of PW2 on the details of the stolen printer was not challenged hence this impliedly meant that the appellant admitted what was testified by PW2. He added that failure to cross-examine important matters implies admission of the facts. To bolster his submission, he cited the case of **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 CAT Arusha.

Submitting on the 3rd ground, Mr. Nguka had it that, according to the typed proceedings on pages 137 to 167, DW2 and DW4 had nothing to tell the court about the ownership of the subject matter (printer) and



therefore their evidence had nothing to strengthen the appellant's case. He argued that the defence evidence was considered as seen on pages 16 to 18 of the judgment but the trial magistrate was opined that it did not raise reasonable doubts.

In the end, the learned State Attorney humbly beseeched the Court to uphold the conviction and sentence and consequently dismiss the appeal for want of merits.

In rejoinder, counsel for the appellant maintained that the doctrine of recent possession was wrongly invoked in this case and the offences were not proved beyond a reasonable doubt.

I have dispassionately considered the rival submissions by both parties and keenly canvassed the grounds of appeal.

At the outset, I deem it worthwhile to echo the elementary principle in criminal law that the burden of proof lies with the prosecution and the standard is beyond reasonable doubt. See section 114 (1) of the Evidence Act, [Cap. 6 R.E 2022]. The accused is not under obligation to prove his innocence.

This being the first appeal, I took the liberty to reevaluate the evidence in order to determine the appeal on the merits. The law is settled that the first appellate court is enjoined to reassess the evidence and arrive at its



own findings. See **The Registered Trustees of Joy In the Harvest vs Hamza K. Sungura**, Civil Appeal No. 149 of 2017.

Having thoroughly navigated through the record, it is common cause that, the only evidence that implicates the appellant and which was heavily relied on by the trial court to convict the appellant is the printer box (exhibit P3), seizure certificate (exhibit P4), and the printer (Exh. P5) that was retrieved from the appellant's house at Kivule Majohe. The prosecution vehemently claims that the printer (exhibit P5) was among the stolen complainant's properties. On the contrary, the appellant testified that the printer was his lawful property which he purchased in 2017. The appellant stated that prior to shifting to his house at Kivule Majohe, he and his wife (DW3) were staying in the complainant's house at Bahari Beach. As such, when he shifted from the complainant's house, the printer box was inadvertently left at the complainant's house. He produced the purchase receipt (exhibit D2) which did not bear the serial numbers of the said printer. On the adversary, the prosecution insisted that the printer (exhibit P5) was among the stolen properties. The prosecution tendered the printer box (exhibit P3) bearing serial numbers similar to the printer. The prosecution did not tender a purchase receipt nor did it adduce evidence as to when and where the alleged printer was bought from. Indeed, in the circumstances of this case, where the printer



was the only incriminating evidence, it is my considered view that, the prosecution was duty-bound to do more than what it did. The mere production of the printer box was not enough to outweigh the defence evidence which included the purchase receipt (exhibit D2). The prosecution, as I said above, had to prove the ownership through the purchase receipt or at least by telling the court where and when the printer was bought from. Failure to establish the ownership of the printer left a lot to be desired on the prosecution evidence. Put simply, the appellant's explanation of the ownership of the printer is conceivable. Thus, in my opinion, the appellant's defence cast a reasonable doubt on the prosecution's evidence. It is therefore my considered findings that had the trial magistrate properly considered the evidence, he would find that the prosecution evidence was wanting. In that regard, the trial court, indeed, erred in law and fact to convict the appellant based on the doctrine of recent possession.

In the final analysis, I find the appellant's appeal meritorious. In consequence thereof, I hereby quash the conviction and set aside the attendant sentence imposed by the court. I order the immediate release of the appellant unless he is held for other lawful reasons.

It is so ordered.

The right of appeal is explained.



Dated at Dar es Salaam this 29th day of May, 2024.



A.A. Mbagwa
A.A. Mbagwa

JUDGE

29/05/2024