IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO 38 OF 2020

(Originating from Criminal Case No. 152 of 2018 in the District Court of Mbulu)

HAJI s/o MUSA.....APPELLANT

VERSUS

THE REPBLIC.....RESPONDENT

JUDGMENT

06/10/2021 & 15/12/2021

GWAE, J

In the District Court of Mbulu at Mbulu (trial court), the appellant, Haji Musa who was the 1st accused together with two other accused persons, namely; Athumani Amani Juma (2nd accused) and Emmanuel Isaya Kilandayi (3rd accused) were charged with three counts.

In the **1st count** Burglary contrary to section 294 (1) (a) (b) and 2 of the Penal Code Cap 16 Revised Edition 2002, **2nd count**, stealing contrary to section 258 (1) and 265 of the Penal Code Cap 16 R.E 2002 and **in 3rd count**, as an alternative charge for the offence of being found in possession

of goods suspected to have been stolen or unlawfully acquired contrary to section 312 (1) (b) of the Penal Code Chapte 16, Revised Edition, 2002.

It was alleged by the prosecution that, on the 26th September 2018 at Nyunguu area within Babati District in Manyara Region, the appellant and his co-accused person did break a house one Victor Alphonce Mushi and did steal two sewing machines from therein. During trial it was the evidence by the prosecution that, the appellant and two others were arrested on the 28th September 2018 at Nyunguu area while in possession of the said two sewing machines. That two persons were arrested and found in possession of two sewing machines and two boxes, they were arrested and the said articles were seized brought to police (PW3).

It was further the evidence of the prosecution that, the victims of the committed offences (PW1 & PW2) were summoned in order to identify the stolen and seized properties however one sewing machine was identified and ultimately tendered and admitted by the trial court (PE1)

In the middle of the hearing of the prosecution case, the third accused upon being reminded the charge against him, pleaded guilty to the charge and he was subsequently convicted and sentenced to serve the term of five

(5) years imprisonment on the 1st count and two years' imprisonment on the 2nd count. The two imposed sentences meted to the were correctly ordered to run concurrently. At the conclusion of the trial, the appellant and the 2nd accused person were also found guilty, convicted and sentence in the same way as the 3rd accused.

Aggrieved by both conviction and sentence by the trial court, the appellant has filed this appeal equipped with a total of 9 grounds of appeal as seen in his petition of appeal.

In the hearing of this appeal before me, the appellant appeared in person unrepresented, whereas the Republic/respondent was represented by Ms. Alice Mtenga, learned State Attorney who supported the appeal.

Arguing his appeal, the appellant told the court that, the prosecution evidence was so contradictory as to the number of suspects alleged to have been found in possession of the alleged stolen sewing machine and that, the dates of arrest are also contradictory. The appellant alleged that, he was arrested on reasons of vagabond and he was not even familiar with other accused persons. He thus urged this court to allow his appeal.

The counsel for the respondent, on the other hand, focusedly supported the appeal and argued that, the doctrine of recent possession was not sufficiently established as there are contradictory pieces of evidence adduced by PW3 and PW4 in respect of the 2nd and 3rd suspects. More so, the search order was not tendered to substantiate the evidence as to the suspects who were found in possession of the properties suspected to be stolen. It was her view that, the prosecution evidence was so doubtful to establish if the appellant was found in possession of the recent stolen properties.

This court has also carefully gone through the proceedings of the trial court and the following irregularity namely; failure to tender a seizure, in my opinion, weakens the prosecution case to have their case proved to the required standard as opposed to the holding of the trial court. Search of anything by police or any other person in authority is governed by the law. In our case, it is criminal Procedure Act, Cap 20 Revised Edition which is applicable. Section 38 (3) of the Criminal Procedure Act (supra) provides as follows: -

> "Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing

shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."

From the wordings of the above provision of the law it is a requirement to issue receipt of the things seized out of the search. The essence of issuing a certificate of seizure was stated in the case of **Seleman Abdallah and Others v. Republic,** Criminal Appeal No. 384 of 2008 (unreported-CAT) which is, to guarantee that, the property seized came from no place other than the one shown in the receipt or the one found in unlawful possession is no other the one searched and found in such possession. Issuance of the certificate of seizure is very important particularly on items seized in connection with the commission of the offence as it will show the place where the item was seized and such certificate will be signed by an independent witness and a searched person (See the decision in the case of **Kassim Salum vs. The Republic,** Criminal Appeal No. 186 of 2018 (Unreported). In the matter at hand, the certificate of seizure was not tendered to prove that, the properties alleged to have been stolen were found in possession of the appellant and his co-accused persons.

It is also evidently clear from the evidence adduced before the trial court that, the conviction of the appellant and his co-accused persons was pegged on the doctrine of recent possession. In **Joseph Mkumbwa & Samson Mwakagenda v. Republic,** Criminal Appeal No. 94 of 2007 (unreported), the Court of Appeal correctly construed the doctrine of recent possession and its application and held:

> "Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved, first, that the property was found with the suspect, second, that the property is positively proved to be the property of the complainant, third, that the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused. 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."

See also **Ally Bakari and Pili Bakari v. Republic** [1992] TLR 10, **James s/o Paul @ Masibuka and Another v. Republic,** Criminal Appeal

No. 61 of 2004 (unreported-CAT) and **also George Edward Komowski v. Repblic.** (1948) 1 TLR 322:

In this instant appeal the prosecution is, inter alia, obliged to positively establish that the retrieved properties are the very ones which were stolen from the complainant and were found in possession of the appellant and his co accused persons. In my opinion, this may only be achieved through a seizure note which would have proved that it was the appellant and his co accused who were found in possession of the stolen goods.

Equally, it is not clear as to how many sewing machines were seized from the appellant and two others, was it one sewing machine as identified by PW1 & PW2 and testified before the trial court or two sewing machines as testified by the PW3? Furthermore, it is questionable or doubtful if the appellant was arrested while together with two other accused persons simply because the PW3, an investigator told the trial court, there were to suspects who were arrested in connection with the offences at hand. Hence, this court finds that the prosecution evidence was so contradictory to the extent that, it goes to the root of the case, the contradiction which, in my view, affects the credibility of the prosecution evidence.

It follows therefore, the doctrine of recent possession was clearly not demonstrated by the prosecution to the required standard. The trial Court should not have invoked it in the absence of proof of possession of the sewing machines by the appellant. Therefore, it was unsafe to sustain the conviction against the appellant.

In the upshot, this appeal is allowed. The trial court's conviction and sentence are quashed and set aside respectively. The appellant should be immediately released from prison forthwith unless he is otherwise lawfully therein.

It is so ordered.

M. R. GWAE
JUDGE
15/12/2021