IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 40 of 2023

(C/F Criminal Case No. 292 of 2021 at the District Court of Moshi at Moshi)

THOMAS CASIAN MALLYA..... 1ST APPELLANT

NEMES MUSHI @ KING'ONG'O.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 13.12.2023
Date of Judgment: 12.02.2024

MONGELLA, J.

The appellants herein were the 1st and 4th accused, respectively, in Criminal Case No. 292 of 2021. The two of them together with one Fredrick John Kiria (2nd accused), Ludovick Kimaro @ Jeshi (3rd accused) and Expery Baltazari Mallya @ Bossii (5th accused) were jointly charged with burglary under **section 294 (1) (a) and (2) of the Penal Code** [Cap 16 R.E 2019]; stealing under **section 258 91), (2) (a) and 265 of the Penal Code** and malicious damage to property under **section 326 (1) of the Penal Code**. Alternatively, the 1st, 2nd and 4th accused were charged for possession of gods suspected of being stolen or unlawfully acquired contrary to **section 312 (1) (b) of the Penal Code.**

The particulars of the charges were to the effect that on 10. 01.2020 at night Hours in Kibosho area within Moshi district and Kilimanjaro region, all accused persons broke and entered into the building of one Ronald Joseph Massawe which is used for human dwelling and stole his properties to wit; one television 42 inch make Samsung, worth two million one hundred thousand Tanzanian Shillings (T.shs, 2,100,000/=), three mattresses make Tanfoam 5×6 inches with mattress covers worth Tanzanian Shillings eight hundred and ten thousand (T.shs. 810,000/=), three pillows with their pillow cases worth Tanzanian Shillings sixty thousand (T.shs. 60,000/=), three blankets worth Tanzanian Shillings one hundred eighty thousand (T.shs. 180,000/=), eight plastic chairs with one plastic table worth Tanzanian Shillings two hundred eighty thousand (T.shs. 280,000/=).

Other items were: two water gutters worth Tanzanian Shillings sixty thousand (T.shs. 60,000/=), one six feet water pipe worth Tanzanian Shillings (T.shs. 20,000/=), twenty tile boxes worth Tanzanian Shillings one million one hundred thousand (T.shs. 1,100,000/=), various electrical equipment worth Tanzanian Shillings five hundred and forty thousand (T.shs. 540,000/=), three bed sheets worth Tanzanian Shillings ninety thousand (T.shs. 90,000/=), two plates gas cooker with one gas cylinder make orange worth Tanzanian Shillings two hundred and ten thousand (T.shs. 210,000/=), Bath (bafu) mixer worth Tanzanian Shillings two hundred eighty thousand (T.shs. 280,000/=) and eighty kilograms Gypsum powder worth Tanzanian Shillings one hundred sixty thousand (T.shs. 160,000/=) all valued at

Tanzania shillings five million eight hundred and ninety thousand (T.shs. 5,890,000/=).

It was further alleged after the said breaking and entering, they wilfully and unlawfully destroyed three fitted doors, one fitted grill door and four fitted door locks, all properties valued at Tanzanian Shillings one, million six hundred forty thousand Tanzanian Shillings (T.shs. 1,640,000/=).

The particulars of the charge further provided that; in January 2021at Kibosho area within Moshi district and Kilimanjaro region, the 2nd accused was found in possession of one television 42 inch, six tile boxes, two sacks of Gypsum powder, one automatic voltage regulator, one water pipe, two water gutters, one tower, one main switch cover make tonic and electrical equipment. The 1st appellant was found in possession of one mattress make Tanfoam, one plastic table, five plastic chairs, two pillows and two pieces of mattresses. The 2nd appellant was also found in possession of one gas cylinder make orange and one gas cooker make von; all suspected of being stolen or unlawfully acquired.

The prosecution paraded 8 witnesses: PW1, A/SP Mweshinga; PW2 A/Insp. Victor Muhagama; PW3, E 4932 Sgt. Multo; PW4, Flora Joseph Massawe; PW5, Ronald Joseph Massawe; PW6, Revocatus Mziray; PW7, Maiko Cosmas and PW8, Anthony Joseph Mallya.

Their case was to the effect that, on 10.11.2020, PW4 came back home from the butcher shop whereby she noticed their door been broken down. Inside her children's room she found mattresses and gas cooker missing. PW5 was informed of the incident on 11.11.2020 while at Dar es Salaam. He travelled back to properly evaluate the missing items. He testified to have found all door locks broken, his Samsung TV, 3 mattresses, blue table and chairs, tiles, electricity wire, three blankets, pillows, 1 gas cooker, 1 gas cylinder and bedsheets missing. PW1, the investigator of the case allegedly found the TV with the 2nd accused. He duly tendered the seizure certificate and the TV which were admitted as exhibits P1 and P2, respectively.

PW2, who was involved in arresting some of the accused persons, in presence of PW8 as independent witness, searched the 2nd accused and found him in possession of 6 boxes of tiles, gypsum powder, 2 bags, 1 automatic voltage generator, 2 drainage gutters, 1 tape, 1 electrical wire, tronic cover, I tower and broken tiles. He said that they also found the 2nd appellant in possession of the gas cooker make Von type and Orange gas cylinder. He tendered the seizure certificate and the said items, which were admitted as exhibit P2 and P1, respectively. PW3, in presence of PW6, an independent witness, allegedly seized a 5x6 mattress from one Yusuph. He also seized a mattress, 3 chairs, a table and 2 pillows from one Yasinta, under instruction of the 1st appellant. A certificate of seizure was admitted as exhibit P4 and the items as exhibit P3.

PW7 was an independent witness in part of seizure of items from the 5th accused.

While the case was on going, the 2nd accused jumped bail while the 5th accused was reported to have died. For defence; the 1st accused testified as DW1, the 3rd as DW3. DW4 was one Steven Moshi.

DW1 testified to have been engaged by the 5th accused to help him carry a mattress to his client. DW3 testified that the 2nd accused attempted to sell to him a Samsung TV for 350,000/- which he did not have, a week later he was arrested. DW4 testified that the 2nd accused brought the gas stove to the 5th accused, who was his father, so that he could fix the same. They all denied being involved in the alleged incident.

After hearing both sides, the trial court acquitted the 3rd accused and convicted the 1st appellant, 2nd accused, the 2nd appellant and 5th accused on all offences and sentenced them to serve; 15 years in prison for the 1st offence, 1 year for the 2nd and 2 years for the 3rd offence. Aggrieved, the appellants have preferred this appeal on the following grounds:

1. That, the learned trial magistrate grossly erred both in law and fact in convicting the Appellants on a bad prepared

and composed judgement contrary to the stipulations of section 312 (1) of the C.P.A, Cap 20 R.E 2019.

2. That, the learned trial magistrate grossly erred both in law and fact in failing to note that, all searches which were executed by the prosecution witnesses were illegally and unprocedural (sic) conducted as there were no search warrant sought before executing such searches as they were not emergency searches.

3. That, the learned trial magistrate grossly erred both in law and fact in finding and holding that, the appellants herein were searched and subsequently the alleged stolen articles were seized in their respective homes despite there being no evidence from the prosecution showing and proving the same.

4. That, the learned trial magistrate grossly erred both in law and fact in wrongly invoking the doctrine of recent possession against the appellants.

5. That, the learned trial magistrate grossly erred both in law and fact in using weak, tenuous, contradictory, incredible and wholly unreliable prosecution evidence as basis of the appellant's conviction.

6. That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellants despite the charge being not proved beyond reasonable doubt against the appellants and to the required standard by the law.

In consensus, the parties argued the appeal by written submissions. The appellants were unrepresented while the respondent was represented by Ms. Bertina Tarimo, learned state attorney.

In their submission in chief, the appellants introduced two new grounds which they prayed for the court to include in the 6 grounds they had advanced in their petition of appeal. At this point, I wish first to resolve this situation. It is well settled that parties are bound by their own pleadings and may only amend the same with leave of the court. See, **Barclays Bank T. Ltd. vs. Jacob Muro** (Civil Appeal No. 357 of 2019) [2020] TZCA 1875 (TANZLII). The said grounds are to the effect that:

1. *That, the learned trial Magistrate grossly erred both in law and fact in convicting and sentencing the 1st Appellant in total contravention of section 160B of the penal Code, Cap 16 R.E. 2019.*

2. *That, the trial court erred in law and fact in failing to note that, there was no proof as to whether the 2nd Appellant (4th*

accused at the trial) was indeed the perpetrator of the charged offences.

However, upon going through the grounds, I find the grounds posing legal issues, which under the law can be raised at any stage so long as parties are accorded the chance to deliberate on them. In consideration of the fact that the respondent's counsel addressed the additional grounds in her reply submission and for interest of justice, I shall deliberate on the same.

On the 1st additional ground, the appellants faulted the trial court for sentencing the 1st appellant to imprisonment while he was 17 years old by the time he testified. That, this was almost 2 years and three months after the alleged crime was committed, a fact that was never challenged in the trial court. They had the argument that such sentence was in contravention of the provisions of **section 160 B of the Penal Code**. In that respect, they prayed for this court to amplify the holding in **Zuber Mohamed @ Mkapa vs. Republic** (Criminal Appeal No. 563 of 2020) [2022] TZCA 248 (TANZLII).

On the 2nd ground, they averred that there was a case of mistaken identity since the 2nd appellant was displayed in the charge, judgment and proceedings as Nemes Mushi @ King'ong'o, but in his evidence he was identified as Steven Moshi. They added that the variance was never challenged by the prosecution. In the premises, they held the view that it cannot be certainly stated that Nemes Mushi @ King'ong'o and Steven Moshi are one and same

person. In that regard, they had the stance that the trial court failed to meticulously note that the identity of the 2nd appellant was not established to the hilt to hold that he was found in unlawful possession of stolen goods. They cemented their argument with the case of **Victor Goodluck Munuo vs. Republic** (Criminal Appeal No. 357 of 2019) [2023] TZCA 17389 (TANZLII).

On the 4th ground, they challenged the trial magistrate on the ground that he improperly invoked the doctrine of recent possession since it was never proved beyond reasonable doubt that the appellant had been in possession of the stolen items. They argued that the trial magistrate did rely on the case of **Mwakagenda vs. Republic**, Criminal Appeal No. 94 of 2007 (unreported)and that of **Joseph Inside vs Republic**, Criminal Appeal No. 144 of 2011 (unreported) and listed all elements that were to be established prior to invoking the doctrine of recent possession, but still erred in invoking the same.

They challenged the identification of the alleged stolen items by PW5. They averred that, in the proceedings it was said that the 1st appellant was found in possession of a mattress, 3 chairs, 2 pillows and 1 table while the 2nd appellant was said to have been found in possession of a gas cylinder and stove. They added that PW5 testified that stolen items were a 42'' TV with Golden Copper and grey colour at the back, one blue table, three drainage gutters, 3 mattresses with blue cover, 25x40 Tiles and a Pipe. They averred that the process used by PW5 to identify his items was flawed because

he never went to the police to identify the properties as soon as they were allegedly recovered. They further challenged that the mode of identification of exhibits at the trial court was unprocedural as no foundation was laid before PW5 was shown and subsequently identified the said properties. They supported the stance with the case of **Twalib Omary Juma @ Shida vs. Republic** (Criminal Appeal No. 262 of 2014) [2014] TZCA 183 (TANZLII). He further argued that PW5 did not provide any distinctive marks of the items he alleged had been stolen and recovered while the same was vital given that they are common items that can be owned by anyone.

In addition, they argued that the trial magistrate erroneously shifted the burden of proof to the 2nd appellant while he only had the burden to raise reasonable doubt and not to prove his innocence. That, the 2nd appellant vividly told the trial court how the stolen items reached his home whereby he said that they were brought to his father to be repaired. He claimed to have testified that, if his father had not died in July, 2022, he would have brought him to court to testify on the same, but astonishingly, the trial magistrate did not acknowledge that his father, the 5th accused had demised. He argued that it was not his burden to prove that his father had demised but that of the prosecution. He cemented his argument with the case of **Woodmington vs. DPP** [1935] AC 462.

They finalized their submission by praying that the appeal be allowed, their conviction quashed and sentences set aside and they be set at liberty.

In reply, Ms. Tarimo commenced her submissions by addressing the 6th ground of appeal. She admitted that the stolen items had not been properly identified by PW5. That, PW2 testified to have found the accused persons in possession of a Television, mattress, building material, pillows, blanket, tiles, chokaa, drainage gutter, gas and cooker, 2 blankets and 1 pillow and alleged that the complainant had told him that the television is Samsung, silver in colour. She said that PW2 testified that the 2nd accused was found in possession of 6 boxes of tiles, gypsum powder, two bags, one automatic voltage generator, two drainage gutters, one tape, electric wire, tronic cover, one tower and broken tiles and the 4th accused was found with one gas cooker and gas cylinder make Orange gas. She added that PW4 testified the stolen properties to be mattress and gas cooker. That, PW5 testified that the stolen properties were: TV make Samsung 42' golden copper and grey at the black, 3 mattresses with blue cover, blue table and chairs, tiles, electric wires, three blankets, 3 pillows, 1 gas cooker, 1 gas cylinder, drainage gutters and bedsheets.

She added that, on the other hand, the charge stated about eight plastic chairs, but the same was not testified upon. That, instead, PW5 generalized things. She further submitted that the charge also mentioned various electrical equipment which had been listed, but

PW5 who was owner and thus in better position to know what was stolen from his house did not mention them. That, PW5 testified that one of the missing properties was an electric wire while PW2 testified of an electric wire and a cable and PW8 on electric pipe. In addition, she contended that the charge also read that there were 20 boxes of tiles, but PW5 identified 25x40 tiles. Emphasizing the importance of identification of stolen items, she cited the case of **Immanuel Adam vs. Republic** (Criminal Appeal No. 577 of 2019) [2023] TZCA 17679 (TANZLII).

In respect of her observation as above, Ms. Tarimo was of view that the offence of burglary had not been established as there had not been a prior description of the stolen properties that somehow led to the arrest of the accused persons. That, no witness testified on what led to the arrest of the suspects and how they were arrested leading the same to be doubtful. In that regard, she conceded to the appellants' contention that the case was not proved beyond reasonable doubt.

On the 1st additional ground, she averred that in the charge, the 1st appellant was identified as being 18 years old and during preliminary hearing he accepted his name alone. That, in the proceedings the 1st appellant testified that he was 17 years old, but the prosecution never cross examined him on his age and that amounted to acceptance of the same. She supported her argument with the case of **Nyerere Nyague vs. Republic** (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (TANZLII). She thus agreed

that given that the 1st appellant was 17 years, he was not to be given an imprisonment sentence as he was a child according to **section 4 of the Law of the Child Act** [Cap 13 RE 2019] and according to **section 160 B of the Penal Code and section 119 (1) of the Law of the Child Act**. She supported the appellants' argument that the sentence imposed occasioned miscarriage of justice and the cited decision in the case of **Zuberi Mohamed Mkapa** (supra).

As to the 2nd additional ground, she averred that, in the proceedings the 2nd appellant who was the 4th accused never testified as DW4. She said that, however his name read as Steven Moshi and he defended himself as the 4th accused. With regard to the 2nd appellant, she contended that he never defended himself in court, but was convicted and sentenced to 15 years imprisonment, which infringed his right to be heard. She supported her argument with the case of **Mbeya Rukwa Autoparts and Transport Limited vs. Jestina Mwakyoma** [2003] T.L.R 253.

After considering the submissions of both parties, the grounds of appeal and the trial court record, I prefer to deliberate first on the 6th ground of appeal which seems to accommodate the 3rd, 4th and 5th grounds of appeal. These were in fact the only grounds addressed by the appellant.

As evident, the case against all accused persons was founded on circumstantial evidence based on the said accused persons being found in possession of items deemed to have been stolen from

PW5's house. In that regard, the trial magistrate invoked the doctrine of recent possession and thus convicted the appellants and the 2nd and 5th accused person who had allegedly been found in possession of the stolen items.

It is well settled that the doctrine of recent possession can only be invoked when the necessary conditions are met, which are; the property must be found with the accused; the property must be positively identified to be of the complainant; the property must be recently stolen from the complainant and the property must relate to one stated on the charge. These conditions were well elaborated in the case of **Daniel Matiku vs. Republic** (Criminal Appeal 450 of 2016) [2019] TZCA 462 (TANZLII) Whereby the Court of Appeal stated:

> "The doctrine of recent possession refers to possession of recently stolen property. It is part of the principles of circumstantial evidence which applies to offences of handling stolen goods and is relevant to proving *mens rea* of the offence. See- **Makoye Samwel @ Kashinje vs. Republic**, Criminal Appeal No. 32 of 2014 (unreported) which was relied on the case of **Mwita Wambura vs. Republic**, Criminal Appeal No. 56 of 1992 (unreported) where the Court emphasised: **One,** the stolen property must be found with the suspect; **two,** the stolen property must be positively identified to be that of the complainant; **three,** the property must be recently stolen; and **four**, the property stolen must constitute the subject of the charge. In this regard, the presumption

> underlying the doctrine has to be applied with great caution and it is the prosecution which bears the burden of proof as the presumption of guilt can only arise where there is cogent proof that the item was actually stolen during the commission of the offence charged. See- the case of **Ally Bakari and Pili Bakari vs. Republic** [1992] TLR 10."

See also; **Joseph Mkumbwa & Another vs. Republic** (Criminal Appeal 94 of 2007) [2011] TZCA 118; **Issa s/o James vs. Republic** (Criminal Appeal 110 of 2020) [2021] TZCA 655; **Augustino Mgimba vs. Republic** (Criminal Appeal 436 of 2019) [2021] TZCA 497 and; **Ntuluwambula s/o Ukenyenge @ Abbas s/o Charles vs. Republic** (Criminal Appeal No. 341 of 2021) [2023] TZCA 17877 (all from TANZLII).

PW1, the investigator of the case, testified that he found the 2nd accused and the 2nd appellant already arrested for breaking and stealing at the house of one Ronald Massawe. He said that they interrogated the 2nd accused who disclosed that the gas cooker von type (stove) and cylinder were sold to the 2nd appellant and found in his house. That, the 2nd appellant disclosed that the 3rd accused sold the same to him. PW3 testified that he interrogated the 1st appellant who disclosed to have kept stolen a mattress at one Yusuph's house whereby they found the 5X6 mattress which they seized. They also found another mattress, three chairs, 1 table and 2 pillows in one Yasinta's house. These were collectively admitted as exhibit P3.

PW4 who allegedly learned of the said incident testified that she came from her butcher shop on 10.11.2020 and found no mattress and gas cooker inside the children's room. She added that later her children arrested the accused persons. PW5, testified that he was informed of the incident on 11.11.2020 while at Dar es salaam and when he came, he found all door locks broken. He also found his Samsing TV, 3 mattresses, blue table and chairs, electricity wire, 3 blankets, 3 pillows, 1 gas cooker, 1 cylinder and bed sheets stolen. He identified the already admitted items averring that the 42" TV which was golden copper and grey colour at the back, one blue table, drainage gutters, 3 mattresses with blue cover, tiles 25x40 and a pipe were his. PW6, the village chairman at Mkwasinde, witnessed the search of one Yusuph's house on 31.01.2021 who he alleged had ran away. PW7, the chairman of Umbwe village was only involved in search of the 5th accused's house while PW8, a ten-cell leader, was involved in the search of the 2nd accused's house.

It is well settled that in cases of theft, the victim should well give the description of the stolen items prior to their recovery. In **Twalib Omary Juma @ Shida vs. Republic** (supra) the Court of Appeal expounded that the description ought to be first given by the alleged owner of the stolen items. The Court stated:

> "As matters stand, we take it that PW4 disclosed the distinctive marks on Exh. P3 and Exh. P4 when he was testifying in court, and after the same exhibits had been tendered by PW2 and admitted in evidence. A description of special marks to any property allegedly

> stolen should always be given first by the alleged owner before being shown and allowed to be tendered as an exhibit."

See also; **Immanuel Adam vs. Republic**(supra); **Leonard Mathias Makani and Another vs. Republic** (Criminal Appeal 579 of 2017) [2023] TZCA 182 (TANZLII).

In this case, the alleged stolen items were tendered by PW1, PW2 and PW3. The victim testified as PW5 while the items had already been admitted by the trial court. He barely described the items, even if he had offered such description, it would hold less value given that he had not given such description prior to their recovery. The prior description was given by PW2 and PW3, but the same was lacking. PW2 only described the gas cylinder to be of orange colour. She did not state the size of the supplying company. PW3 only stated the mattress found to be 5x6 and blue in colour and blue table and chairs. PW1, PW2 and PW3 did not give an account on how they could identify the said items as belonging to PW5. Further, PW1 testified that PW5 only went to identify his TV at the Police station. This testimony shows that there was no initial description given prior to the recovery of the said items nor were the other allegedly seized items identified by PW5. Addressing a similar circumstance, the Court of Appeal in **Yohana Paulo vs. Republic** (Criminal Appeal 281 of 2012) [2019] TZCA 189 (TANZLII) stated:

> "Comes the evidence of PW1. It may not have been easy or even necessary for PW1 to prove ownership of exhibits P1, P2, P3 and P4. We think what was important was for him to prove that he was in possession of those items before the same were stolen, and this would have been achieved by giving description of those items. There is, however, no evidence from a police officer or even PW1 himself that he provided some description of the stolen items before the same had been recovered. We take this to be a curious omission that renders PW1's evidence less plausible. We have, in many cases, held that a victim of theft must have given a description of his stolen items for him to claim later that the recovered items are those which were stolen from him."

In the foregoing, clearly, the description of the alleged stolen items was lacking. There was no evidence proving that the said items seized from the 2nd appellant belonged to PW5. There had not been an initial description of the items found at the 2nd appellant's house or those allegedly found at Yusuph and Yasinta's houses. In fact, the items being found in Yusph and Yasinta's houses was contrary to the condition that the stolen items must be found in possession of the accused. At this point the said Yasinta and Yusuph should have been called to accredit the allegations of PW3 that the 1st appellant had led them to the alleged stolen items in their respective homes. So, while the items listed in the charge were also found in the alleged places, there was no way of proving that the same belonged to the PW5.

Further, considering the time frame from the date the items were stolen which was 10.11.2020 to January 2021 when the items were allegedly found, two months had lapsed. With the length of time and the nature of the said items and the fact that the initial description and proper identification was at flaws, I find that it was not appropriate to invoke the doctrine of recent possession.

Having found the doctrine of recent possession was improperly invoked, the offence of being found in possession of items believed to have been unlawfully obtained, malicious damage to property, stealing and burglary cannot stand. I also find that there is no any other link connecting the appellants to the offences with which they were charged. In the foregoing, the prosecution is found to have failed to discharge its burden to prove the case beyond reasonable doubt as required by the law. As this alone suffices to dispose this appeal, I find no need to address other issues or the additional grounds of appeal.

The appeal is therefore found with merit leading me to quash the conviction against the appellants and set aside the sentence against them. I hereby order for their immediate release from prison custody, unless held for some other lawful cause.

Dated and delivered at Moshi on this 12th day of February 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA