IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: RAMADHANI, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 160 OF 1994

BETWEEN

SAMSON MZAMANI. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the judgement of the High Court of Tanzania at Dodoma)

(Msoffe, J.)

dated the 13th day of July, 1994

in

Criminal Appeal No. 37 of 1994

J U D G E M E N T

LUBUVA, J.A.:

This is a second appeal, the first one to the High Court was unsuccessful. The facts giving rise to the case may briefly be stated as follows: The prosecution case as established at the trial was that on 9.5.1993, at about 11.00 p.m., the appellant together with others raided the house of the complainant, Shabri Teja (PW.1), firing a shot in order to scare PW.1 and Daudi Shadrack Mwika (PW.2), the watchman. In the process, the house was ransacked and property comprising various items worth shillings 21,161,000/= was stolen. Among the items stolen was a rado lady's wrist watch valued at shillings 180,000/= which was found in the possession of the appellant on 11.5.1993, i.e. two days after the complainant's house was raided. The appellant was arrested and charged in the District Court of Dodoma with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code. At the trial the appellant denied any involvement in the commission of the offence. The learned trial Resident Magistrate

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upon a careful analysis and evaluation of the evidence was satisfied that the appellant was sufficiently identified and connected with the perpetrators of the robbery. The appellant was accordingly convicted of the offence as charged. He was sentenced to a term of imprisonment for thirty years and was further ordered to suffer corporal punishment of twelve strokes. The appellant was aggrieved, he appealed to the High Court where Mseffe, J. dismissed the appeal. Still dissatisfied, the appellant has appealed to this Court.

In this appeal, the appellant was represented by Mr. Ruhumbika, learned advocate. On the other hand, the respondent Republic, was represented by Mr. Kagaigai learned State Attorney. Mr. Ruhumbika had filed a five-point memorandum of appeal. At the hearing of the appeal before us, he argued the grounds of appeal in the order in which they appear in the memorandum. We intend to deal with them seriatim.

In ground one it was Mr. Ruhumbika's complaint that the learned judge on first appeal erred in law in upholding the conviction and sentence of thirty years imprisonment for the offence of armed robbery. According to Mr. Ruhumbika, the appellant was charged with the offence of what he called ordinary robbery under the penal code sections 285 and 286 and not with armed robbery as provided under Act No. 10 of 1989. In that case, Mr. Ruhumbika maintained, even if the offence of robbery with which the appellant was charged was proved satisfactorily, the sentence of thirty years imprisonment imposed against the appellant was not proper in law.

With respect, we think Mr. Ruhumbika is raising a valid legal point in this ground. That is, whether the appellant was properly convicted of the offence of armed robbery when the charge under which he was tried was robbery with violence. However valid though the point

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may be, we think we need not be delayed on this point. As correctly pointed out by Mr. Kagaigai learned State Attorney, from the evidence adduced in court and the particulars of the charge, the offence of armed robbery was amply disclosed. That is, from the evidence it was shown that when the offence was committed, a gun was used as a weapon and thus constituting the offence of armed robbery. On this, the Court has restated its position in a number of cases. For instance, in the case of Joseph V Republic (1995) T.L.R. 278 Criminal Appeal No. 199 of 1994, the appellant was charged with robbery with violence contrary to sections 285 and 286 of the Penal Code. The evidence disclosed that during the commission of the offence a knife was used. He was sentenced to thirty years imprisonment. On appeal to the High Court the issue raised was that the sentence imposed was not proper because the offence did not amount to armed robbery. On further appeal to the Court, the Court inter alia stated:

> Though there is no express and specific definition of what constitutes "armed robbery" it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes "armed robbery" in terms of the law as amended by Act No. 10 of 1989.

Dealing with the fact that Act No. 10 of 1989 does not create any new offence contrary to Mr. Ruhumbika's submission, the Court further held:

> It is common knowledge that the object behind the enactment of the Written Laws (Miscellaneous Amendments) Act No. 10 of 1989 which amends the Minimum Sentences Act, 1972, was inter alia to raise the penalties for offences of robbery with violence or attempt to commit such

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> offences and the use of arms or dangerous or offensive weapons. Otherwise, the basic definition of robbery still remains as provided for under the Penal Code.

In the instant case, the appellant was armed with a gun which is a dangerous or offensive weapon in terms of the provisions of section 286 of the Penal Code. In such a situation, the statutory penalty provided under the amendment effected by Act No. 10 of 1989 is thirty years imprisonment. We are therefore satisfied that the appellant was properly convicted of the offence of armed robbery and the sentence of thirty years imprisonment is the minimum prescribed by law. In the event, this ground of appeal is untenable, it is dismissed.

In the second ground it is stated that the first appellate court erred in law and in fact in sustaining the conviction against the appellant despite inconclusive identification evidence of the appellant since the identification parade was held by the trial court to have been marred by some flaws. Before us, Mr. Ruhumbika cogently submitted to the effect that the learned judge on first appeal should have held that the evidence on the identity of the appellant was vitiated by the irregularities and flaws in the conduct of the identification parade. With the evidence on the identity of the appellant vitiated, Mr. Ruhumbika further submitted, that would result in the acquittal of the appellant as there would be no basis for sustaining the conviction of the appellant. As regards the rules to be followed in an identification parade, he referred the Court to the case of Ssentale V Uganda (1968) E.A. 369. We wish at one to observe here that while the Court of Appeal for East Africa laid down general rules to be applied when conducting an identification parade, we have been unable to find any provision either in the rules set out in the case of Ssentale or under any legislation to the effect that any single irregularity or flaw in conducting the

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identification parade vitiates the whole evidence in identification. To our minds, the effect of such irregularity depends on the circumstances of the case and the nature of the alleged breach of the rule. In the instant case, the crucial issue was the identification of the appellant at the parade. Mr. Ruhumbika's strong point of dissatisfaction was that it was not shown in the evidence how the identifying witnesses (PW.1 and PW.2) identified the appellant. With great respect, we are unable to go along with Mr. Ruhumbika on this point. What was expected of the witnesses at the parade was whether they were able to identify the person or persons they saw taking part in the robbery on 9.5.1993. According to PW.7 and PW.8, the police officers conducting the identification parade on 11.5.1993, the witnesses (PW.1, PW.2) identified the appellant. This is also borne out from the Identification Parade Register Exh. PE.4. After all it was only two days after the robbery incident that the identification parade was held in which case it was still fresh in the memories of the witnesses (PW.1 PW.2) to be able to identify the participant(s) to the robbery upon sight. It is also to be observed that PW.1 and PW.2 had been with the appellant at the gate for a considerable time during the raid in which case PW.1 and PW.2 had ample opportunity to see and recognise the appellant. From the evidence which was accepted at the trial, we are, and as correctly submitted by Mr. Kagaigai learned State Attorney satisfied that the learned judge on first appeal arrived at the correct conclusion that if there were any irregularities in the conduct of the identification parade, such flaws did not vitiate the evidence on the identification of the appellant. This ground also fails.

Ground Three was to the effect that the learned judge on first appeal erred in invoking the doctrine of recent possession because first, there was no conclusive evidence that the watch Exh. P2 was found on the appellant; second, the search was conducted without a

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search warrant and third, that PW.5 had not seen PW.1 with the watch. In elaboration, Mr. Ruhumbika, learned advocate strongly urged that it was necessary for the police conducting the search to have a search warrant in order to ensure that the search was properly conducted. In this case, he contended that as the search was conducted in the process of a police swoop and there were no specific marks of identification on the watch, it was unsafe to invoke the doctrine of recent possession in sustaining the conviction against the appellant. It was even more suspicious he said, if PW.5, a driver with the complainant (PW.1) for 14 years had not seen the complainant with the watch. From the evidence on record particularly that of PW.4 and PW.5, we agree with Mr. Kagaigai, learned State Attorney that the concurrent finding of the two courts below that the appellant was found with a rado lady's wrist watch (Exh. PE.2) in the right hand side pocket of his trousers is well founded. This was two days after the robbery incident at the house of the complainant. It is further borne out from the evidence that the watch had added specific marks which the complainant (PW.1) identified. So, Mr. Ruhumbika's attack on the learned judge's finding that the watch (Exh. PE.2) was found in possession of the appellant and that it was identified by PW.1 is, with respect, baseless.

The fact that the search in the house of the appellant was conducted without a search warrant did not in our view affect the evidentiary value on the identification of the appellant. Depending on the circumstances of the case the police are duty bound to act fast in order not to loose track of the item suspected to have been stolen. For that reason section 42 (b) (i) and (ii) of the Criminal Procedure Code Act, 1985, was enacted in order to take care of such a situation. In this case, it is our view that the police had reasonable grounds to

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believe that the matter was of such urgency / that they had to act fast without a search warrant. There is also the fact that PW.5, the driver of the complainant (PW.1) for 14 years had stated in his evidence that he (PW.5) had not seen PW.1 wearing the watch (Exh. PE.2). This, in our considered opinion was of no consequence. We think this is so, because, having regard to the nature of work that PW.5 was doing viz a driver, as well as the nature of the item i.e. a lady's watch given to him (PW.1) by his mother, it is possible that he (PW.1) did not wear it so often. On the other hand, even if PW.1 was wearing it often, it is equally possible that PW.5 may well have not seen it. In the final event, upon a proper analysis of the evidence, and as the watch Exh. PE.2 found in the possession of the appellant on 11.5.1993 was properly identified by PW.1 as one of the items stolen on 9.5.1995 during the robbery, we agree with Mr. Kagaigai that the doctrine of recent possession was properly invoked. This ground is therefore not sustained.

We will next deal with ground four. In this ground, it is stated that the first appellate court erred in law and in fact in failing to order a hearing de novo of the appellant's case since there are inconsistencies and irregularities in the trial amounting to a failure of justice. At the hearing of the appeal before us, Mr. Ruhumbika, learned counsel raised three points in his submission. One, that because the preliminary hearing resulting in the memorandum of agreed facts on 18.8.1993 was conducted before a different magistrate from the one who proceeded with the trial on 27.9.1993, a trial de novo should have been ordered. Two, that the trial was proceeded without counsel to represent the appellant after the withdrawal of the first counsel from the case. Third, that when the trial proceeded before a different magistrate, the charge was not read over to the appellant and the appellant was not reminded of the charge. When prompted by the court

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as to the law, which provides for the trial to start de novo or the reading over of the charge to the accused whenever the case is proceeded before another magistrate, Mr. Ruhumbika was not ready to furnish such a law.

With regard to the alleged inconsistencies and irregularities in the trial amounting to a failure of justice, we agree with Mr.Kagaigai that these have not been specified. Without any specific identification of the inconsistencies or irregularities in the trial such complaints and criticism against the decision of the courts below remain nothing more than mere assertion without foundation. At any rate, as generally understood, inconsistency means in the case of say, evidence, one witness saying one thing different from the other. Here, nothing of the kind has been shown. So, as it is, it remains a matter of conjecture as to whether the complaint is in regard to unspecified inconsistencies or inadequacy of the evidence. On this, we need say no more. As regards Mr. Ruhumbika's charge that the appellant was not given the opportunity to engage a lawyer to defend him at the trial, needless to say, this is not supported by the evidence on record. On record, it is loudly clear that on 1.9.1993 when Mr. Rweyongeza withdraw from the case, was adjourned till 14.9.1993 to enable the appellant (accused) to look for another lawyer. On 14.9.1993, the case was again adjourned to 27/9/1993 when the trial proceeded before Mr. Msemo, Resident Magistrate. From such evidence, it is clear that the applicant's complaint that he was not afforded the opportunity to engage a lawyer is not tenable. Finally, we are also of the settled view that Mr. Ruhumbika's urge that a trial de novo should have been ordered when the trial proceeded before another magistrate after the preliminary hearing at a time when no evidence had been recorded, is, with respect, without any legal foundation. Neither is there any legal basis for the charge being read over to the accused whenever the case comes up before

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A.S.L. RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(N.A. MWAIKUSILE)
SENIOR DEPUTY REGISTRAR