

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CRIMINAL APPEAL NO. 83 OF 2000

MUSA OMARI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Dar es Salaam)**

(Chipeta, J.)

dated the 13th day of October, 1997

in

H/C Criminal Appeal No. 21 of 1997

JUDGMENT OF THE COURT

MUNUO, J.A.:

In Ilala District Court Criminal Case No. 374 of 1996, the appellant and four others who were acquitted by the High Court in Criminal Appeal No. 21 of 1997, was convicted of armed robbery c/s 285 and 286 of the Penal Code and sentenced to a term of 30 years imprisonment and 12 strokes corporal punishment. He lost the appeal in the High Court. Hence this second appeal against the conviction and sentence.

Past midnight on the 21st May, 1996, a gang of bandits stormed into the sitting room of PW1 Prosper Siriwa. He said that at that time he was awake, drawing. The bandits cut PW1 with a panga on the

head, nose and arm. He escaped and contacted his neighbours who took him to Buguruni Police Station and to the hospital. When the police got the report, PW2 E 4484 PC Gwakisa rode his bicycle and proceeded to the scene of crime. On the way, he encountered some suspects who fled away but he managed to wrestle and, with the help of the people, captured the appellant who was carrying cushions stolen from the house of the complainant. The appellant was then subsequently arrested and charged with the offence of armed robbery c/s 285 and 286 of the Penal Code.

In his sworn defence, the appellant gave a defence of alibi saying he was at his house but fell into police hands when he went out for a call of nature at about 5.00 a.m. He categorically denied being involved in the armed robbery at the complainant's house.

Upholding the conviction and sentence imposed on the appellant, the learned Judge stated:

--- I carefully perused the evidence on record --- As regards the first accused, the evidence of identification by PW1 and PW3 was strongly corroborated by evidence of PW2. The first accused was arrested in *flagrante delicto* in possession of some of the stolen articles. In the face of such strong evidence, the first accused's defence of alibi was rightly rejected as an afterthought.

Before us, the appellant raised two grounds of appeal contending that his identification was doubtful because he was not identified at the scene of crime so he ought to have been acquitted by the trial court. He further contended that he should not have been convicted on the doctrine of recent possession, but rather of being found in unlawful possession of stolen property. He referred us to a Kenyan case, **Abdallah Chibingo Nyani versus Republic** Criminal Appeal No. 84 of 1997 in which the Court of Appeal of Kenya, in a case of armed robbery, entered a conviction for being found in possession of stolen property. The appellant urged us to do the same in the present case.

Ms Maganga, learned State Attorney, supported the conviction and sentence. She contended that PW1 and PW3 properly identified the appellant when he stormed into the house armed with a machet with which he wounded PW1 on the head, nose and arm. She pointed out that the house was lit so the two eye witness clearly saw the appellant who demanded and extorted fifty thousand shillings after threatening her with the machet he had. Furthermore, the learned State Attorney contended, PW2 No. E.4484 PC Gwakisa, the investigating officer, caught the appellant red handed carrying cushions he had looted from the complainant's house shortly before his encounter with PW2. On the doctrine of recent possession, she submitted, the appellant was rightly convicted of the crime charged. She urged us to dismiss the appeal for want of merit.

The issue is whether the appellant was a party to the armed robbery.

Unlike the learned Judge, we think the evidence of identification is weak because the prosecution witnesses did not specify the type of light which lit the scene of crime: were there kerosene lamps or tube lights or candles? We think it was not enough for PW1 and PW3 to just say there was light. The description of the light was material to determine the issue of whether or not the conditions of identification and visibility were favourable.

We are clear in our minds, however, that the conviction was properly grounded on the doctrine of recent possession because the appellant was apprehended and caught red handed on transit from the scene of crime, carrying stolen cushions, shortly after the armed robbery which stolen cushions were identified by the complainant and his wife. Within that short span of time, the stolen cushions could not have changed hands so the doctrine of recent possession was correctly invoked by the learned Judge, Chipeta, J., as he then was, who observed -

---- The first accused was arrested in flagrante delicto in possession of some of the stolen articles.

We are satisfied that the doctrine of recent possession was rightly invoked here because the appellant was caught red handed carrying stolen cushions on his way back from the scene of crime. In the case of **Rex versus Bakari** (1949) 16 E.A.C.A. 8 the Court of Appeal of Eastern Africa at that time had this to say on recent possession:

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.

With regard to the contention of the appellant that we be guided by the decision in the Kenyan case of **Abdallah Chibingo**, cited above, we find this contention unacceptable because we do not have sufficient material before us for a fair consideration of the said decision.

In the light of the above, we are satisfied that the conviction and minimum sentence imposed on the appellant warrant no interference. We accordingly dismiss the appeal.

DATED at DAR ES SALAAM this 26th day of July, 2005.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR

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In Court this 26th day of July, 2005

**Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
And The Honourable Madame Justice E.N. Munuo, Justice
of Appeal**

THIS APPEAL coming for hearing on the 13th day of July, 2005 in the presence of the Appellant AND UPON HEARING the Appellant and Ms. Maganga, State Attorney, for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:

IT IS ORDERED that the appeal be and is hereby dismissed.

Dated this 26th day of July, 2005.

Extracted on the 26th day of July, 2005.

S. M. RUMANYIKA

DEPUTY REGISTRAR