IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KAJI, J.A., KILEO, J.A And KIMARO, J.A.)

CRIMINAL APPEAL NO. 87 OF 2004

1. ABUBAKAR HAMISI
2. RASHID ABDALLAH } .....APPELLANTS
3. ALLY HAMIS

VERSUS

THE REPUBLIC.....RESPONDSENT

(Appeal from the decision of the High Court at Arusha)

(Msoffe, J.)

dated 16th October, 2003
in
Criminal Appeals No. 8,9 & 10 of 2003

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JUDGMENT OF THE COURT

15th & 23rd April 2008

KIMARO, J.A.

The three appellants; Abubakar Hamisi, Rashid Abdallah and Ally Hamisi were jointly charged in the District Court of Babati , at Babati with the offence of armed robbery contrary to sections 285

and 286 of the Penal Code. They were all convicted and sentenced to thirty years imprisonment. Their appeal to the High Court was dismissed. Still aggrieved, the appellants preferred this appeal.

In the trial court the appellants' conviction was founded on the doctrine of recent possession and was upheld by the High Court. The evidence upon which the appellants' conviction was founded was to the effect that; a tractor with registration No. ART 574 belonging to John Ibrahim Mnyagatwa(PW2) was, on 4th August, 1999 under the custody of Richard John (PW1), his son. PW1 had kept the tractor in his farm, under the guard of Husein Said (PW3). PW3 testified that, himself and Bosco Jaffet(PW4) were on that date at 10.00 p.m. invaded by a group of thugs estimated to be around 10 in number. The thugs had their faces covered to hide their identity and were armed with various weapons including a firearm, *pangas,* swords, spears and clubs. PW3 and PW4 were threatened with death if they raised any alarm, their arms were tied backwards with elastics and they were ordered to go in their camp, where they remained until after the thugs had disappeared with the tractor.

On 7th August, 1999, three days after the tractor was stolen, the 3rd appellant is said to have approached one Antelim Paulo (PW5), a garage owner, with tractor spare parts for sale and asked PW5 if he was interested to buy them. PW5, who had already been informed by PW1 that his tractor was stolen, showed a positive response in pretence that he was interested to buy the spare parts. In order to give PW5 time to inform PW1 about the transaction so that PW1 could go and inspect the spare parts to ascertain whether they could be that of his tractor, PW5 suggested to the 3rd appellant to leave the spare parts there and return for payment later. The 3rd appellant agreed. In the meantime, PW5 went to inform PW1 who had put up in a nearby guest house about the transaction. PW1 went and inspected the spare parts. He confirmed that they were that of his tractor. As PW1 was under cover at the garage of PW5, he saw the 3rd appellant who was known to him before, coming to collect payment. The payment was agreed at T, shs 80,000/- and it was PW1 who had given the money to PW5 for paying the 3rd appellant.

Further testimony of PW5 was that PW1 had suggested to him that they should lay a trap. It was on this basis that PW5 asked the 3rd appellant if they had more spare parts for sale, of which the response by the 3rd appellant was positive but he suggested that PW5 should use his motor vehicle to collect them. PW5 agreed and they settled at a price of T.shs. 250,000/- and the spare parts to be collected at night. At 7.30 p.m. the 1st appellant went to PW5 and told him that it was time to go and collect the spare parts. The impression which PW5 got from the 1st appellant was that he was in the same group with the 3rd appellant. Using PW5's motor vehicle, with the 1st appellant leading the way and PW1 following behind closely, in accordance with the arrangements made between him and PW5, the 1st appellant took PW5 to the place where the spare parts were.

According to PW5, he saw a tractor that had been dismantled into parts. PW1 identified the tractor to be his property that was stolen on 4th August 1999. While they were there, the 3rd appellant and one Omary Juma joined them. As they were loading the parts of

the tractor in the motor vehicle, PW1 and a group he had arranged to assist him, ambushed them. The 1st appellant was arrested on the spot, while the 3rd appellant is reported to have escaped. As the 1st appellant was interrogated, he mentioned the 2nd appellant as being among the persons involved in the commission of the offence.

On the basis of the above evidence the appellants were charged with the offence of armed robbery, and as stated before, they were convicted on the doctrine of recent possession. The tractor was stolen on 4th August, 1999 and on 7th August the appellants were found with the tractor, dismantled. The trial magistrate was satisfied that the appellants failed to give a reasonable account of their possession of the spare parts. This finding of the trial court was upheld by the first appellate court.

The first appellant filed three grounds of appeal. These are conviction on insufficient evidence, improper evaluation of the evidence of PW1 and PW5 and failure to consider the defence evidence. The second appellant has two grounds; conviction on

contradictory prosecution evidence and failure to take the necessary caution on accomplice evidence. As for the last appellant he has three grounds; conviction for an offence which was not proved by concrete evidence, ignoring defence exhibits and improper evaluation of the evidence of PW5.

At the hearing of the appeal the appellants appeared in person. The respondent Republic was represented by Mr. Henry Kitambwa, learned State Attorney.

In arguing their appeal the appellants added other grounds of appeal; all of them faulting the first appellate court for upholding their conviction on insufficient prosecution evidence. The learned State Attorney on his part supported the conviction claiming that PW5, their key witness, was a credible witness and it was proper for the first appellate court to uphold the conviction of the appellants. He supported his argument by the case of **Twaha Elias Mwandungu Vs The Republic** Criminal Appeal No. 87 of 2004

(CAT)(Unreported). In the said case, Samatta, J.A as he then was, cited section 122 of the Law of Evidence Act, 1967 and said:

> "The presumption under this section embodies inter alia the well known doctrine of recent possession which is to the effect that a man who is found in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession by at least giving an explanation which may reasonably be true. The presumption can extend to any penal charge..."

In upholding the conviction against the appellants the learned High Court Judge Msoffe, J, as he then was, said:

"**One,** there is no doubt that PW5 was a very crucial witness in the case. This witness testified positively and actually uncontradicted, that he knew the appellants quite well even before the date of the incident.

Two, a close look of the testimony of PW5 will show that all appellants were involved in one way or another in the whole transaction beginning from the offer to sell the spare parts to the time when PW1's tractor was found dismantled.

Three, it should not be forgotten that the appellants surfaced with the offer to sell the tractor spares. Needless to say, these were the spares which were duly identified by PW1 as having been dismantled from his tractor. At the scene PW1 and PW5 could, actually see

the exact positions in the tractor from where the spares were taken out.

With respect to the learned first appellate judge, we agree with his findings fully, only in as far as the 1st appellant is concerned. There is no doubt that the first appellant was arrested on the spot as the process of loading the dismantled tractor into parts was going on. In his defence he never gave any account on how he came to possess the tractor of PW1 which was found dismantled to parts, he being the one who led the way to the place where the tractor was found. Instead, he denied commission of the offence, claiming that he was an employee of PW5 and on the date of his arrest, he was driving the motor vehicle of PW5 which he believed contained sun-flower, but he was surprised that when it was uncovered it had a tractor. We do not hesitate to say that his defence was a concoction because his employment with PW5 never featured in his cross examination when PW5 gave evidence in court. In this respect we are satisfied that he was properly convicted under the doctrine of recent possession. The facts of this appeal squarely fit in the remarks

made on the doctrine of recent possession by Samatta, J. A as he then was, in the case of **Twaha Elias Mwandungu** supra. The offence of robbery was committed on 4th August, 1999 and the 1st appellant was found with the tractor in a dismantled form three days after the commission of the offence and he did not account for his possession. There was no way in which he could escape conviction under the circumstances. The trial court properly convicted him and the first appellate court rightly upheld the conviction. The sentence meted out was the statutory minimum prescribed for the offence by the law. We dismiss his appeal in entirety.

As regards the 2nd and 3rd appellants we are mindful that this is a second appeal. For such appeals the established principle is that the Court rarely interferes with concurrent findings of facts by the lower courts, except where there are mis-directions and non-directions on the evidence by the first appellate court. See **Director of Public Prosecutions Vs Jaffari Mfaume Rashid[1981] TLR 149.**

As for the 3rd appellant his position is equally the same in the sense that the evidence against him creates doubt as to whether he was really involved in the commission of the offence. In arguing his appeal, he vehemently challenged the evidence of PW5 in various respects. First, his statement at the police was recorded on 14th October, 1999 while the tractor was recovered on 7th August, 1999. Second, the 3rd appellant was charged in court on 4th October, 1999 and the statement of PW5 was recorded ten days after he was charged. Third, he wondered why the spare parts which PW5 said he sold to him on 7th August 1999 were not tendered in court as exhibit.

We also pointed out another contradiction in the evidence of PW1 and PW5 on who rode with PW5 in his motor vehicle to the place where the spares were. There is yet another important question lingering in our minds. Why was the 3rd appellant not arrested on 7th August 1999 while PW5 said that PW1 confirmed that the spares parts were that of his tractor and he had given Tshs 80,000/- to PW5 to pay the 3rd appellant for the spare parts?

According to the testimony of PW5 the money was paid to the 3rd appellant while PW1 was in the garage of PW5 and PW1 said he saw the 3rd appellant receiving the money. In our considered view, that was the best opportunity for his arrest.

With all these doubts, we are settled in our minds that it was unsafe to convict the 3rd appellant. He was entitled to an acquittal on a benefit of doubt. The first appellate court misdirected itself in upholding his conviction. We allow his appeal, quash the conviction, set aside the sentence, and order his immediate release from prison unless he is held for any other lawful cause.

DATED at ARUSHA this 21st day of April, 2008

S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL