IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO 305 OF 2007

SUMARI HAU AND 4 OTHERS..APPELLANTS

AND

THE REPUBLIC...RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Bwana, J.)

dated the 23rd day of July, 2007
in
Criminal Appeal No 46 of 2005

JUDGMENT OF THE COURT

23 & 25 August, 2010

KILEO, J.A.:

Sumari Hau, Bura Zuberi, Rajabu Abdallah, Lala Ninga and Michael Gora were all convicted of armed robbery contrary to sections 285 and 286 of the Penal Code by the District Court of Babati. They were sentenced to the statutory term of 30 years imprisonment. Their appeal to the High Court was unsuccessful hence this second appeal.

According to the evidence which was led at the trial, on 30th October, 2003 at about 01.00 hours, PW1, a resident of Gijadabung village within Babati District in Manyara Region, was invaded by a group of armed robbers. He

was seriously assaulted and his properties which included a bicycle were taken away. PW1 and his wife who testified as PW2 claimed to have identified the robbers. Subsequently, the bicycle which belonged to PW1 was traced in the vicinity of the first appellant's compound.

The appellants' conviction was based mainly on identification and on the doctrine of recent possession.

Before us the five appellants appeared in person. The respondent Republic was represented by Mr. Prosper Rwegerera, learned State Attorney. Sumari Hau, Rajabu Abdallah and Bura Zuberi filed a joint memorandum of appeal while Lala Ninga and Michael Gora each filed a separate memorandum. Several grounds of appeal were listed in the memoranda; however, the appellants' main challenge of the decisions of the courts below is on sufficiency of identification in view of the circumstances pertaining at the scene of crime. The first appellant also argued that the doctrine of recent possession was not applicable in the circumstance of the case as the stolen bicycle was not found in his possession. He submitted that anyone could have deposited the stolen bicycle where it was traced.

The appellants also pointed out that the proceedings were flawed in that they were convicted on a substituted charge without compliance with section 234 of the Criminal Procedure Act.

The learned State Attorney did not support the conviction that was entered against the appellants. He conceded that the evidence that was available

for identification was not sufficient for watertight identification. In elaboration, the learned State Attorney pointed out that the incident occurred at night and as such the circumstances of identification were poor. He also submitted that the fact that PW1 and PW2 did not mention the appellants by name and the fact that no identification parade was conducted weakened the case for the prosecution.

As for the doctrine of recent possession, the learned State Attorney submitted that it was not applicable in the circumstances of this case as the bicycle was not found in the 1st appellant's house; rather it was found outside his compound. Moreover, there were contradictions in the witnesses' account of the spot where the bicycle was exactly found, a fact which discredited the case for the prosecution, the learned State Attorney submitted.

On the question of non- compliance with section 234 (2) (b) of the Criminal Procedure Act after the substitution of the charge, while conceding that this was an irregularity, Mr. Rwegerera however submitted that it was one that could be cured under the provisions of section 388 of the Criminal Procedure Act.

The case before us as indicated from the very beginning revolves around identification and the doctrine of recent possession. Admittedly, the crime was committed at night and the question arises as to whether the

appellants were sufficiently identified by the prosecution witnesses. **Waziri Amani Vs. Republic** (1980) TLR 250 is the celebrated case on visual identification. The Court in this case stated:

> *"...in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight......"*

In **Raymond Francis vs Republic** (1994) TLR 100 the Court held:

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance"*

In the case at hand PW1 gave the source of light which enabled him to identify the invaders as a lamp which he had left burning as it was the month of fasting. He did not specify what type of lamp it was and the intensity of the light was not established. He was also unable to mention the invaders by their names. Moreover, he informed the court that when the police went to record his statement he mentioned those whom he suspected. This leads us to the conclusion that indeed he was not certain about the identity of the people who raided him on the material night. The evidence of PW1's wife should also not have been relied upon. It is to be noted that she was not in the same house with her husband at the time of the attack. She was in another house. If she was not inside the house

where her husband was it is most likely that she would not have been in a position to sufficiently identify those who robbed her husband particularly in view of the fact that the night was dark. Given the above circumstances we agree with the appellants as well as the learned State Attorney that the conditions pertaining at the scene of crime were not sufficient for watertight identification.

Coming to the doctrine of recent possession we are also of the settled view that it is not applicable in this case because there was not enough proof that the stolen bicycle was found in the possession of the first appellant. PW6 at the trial claimed that the bicycle was found some 72 paces from the appellant's house and that it was hidden amongst pigeon peas left overs. PW4 claimed that the bicycle was found some three paces from the first appellant's house. Apart from the contradictions in the testimonies of the witnesses about the spot where the stolen bicycle was found it is obvious that it was not found in the first appellant's house. The possibility of someone else hiding the bicycle at the spot it was found was not ruled out. The doctrine of recent possession is therefore inapplicable here.

Our considerations above are sufficient to dispose of this appeal. However, we wish to comment, albeit very briefly, on the complaint raised by the first appellant with regard to the trial magistrate's failure to comply with section 234 (2) (b) of the Criminal Procedure Act. The record shows that on 11/08/2004 the prosecution asked for substitution of the charge, an

application which was granted. On this day five witnesses for the prosecution had already testified. After the substituted charge had been admitted and read over to the appellants the trial magistrate went ahead and took down evidence of the sixth prosecution witness. We think that this was an irregularity. Though we are satisfied that this irregularity is curable under section 388 of the Criminal Procedure Act, we feel obliged to point out however that it is always good that proper procedure be followed by courts. The procedure in this case which ought to have been adopted is provided for under section 234 of the Criminal Procedure Act. The appellants ought to have been given an opportunity to express whether or not they wished to have any of the witnesses who had testified recalled for either giving their evidence afresh or for further cross-examination. The relevant provision states:

> **"234. Variance between charge and evidence and amendment of charge**
>
> **(1) Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the**

provisions of this subsection shall be made upon such terms as to the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection–

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate and, in such last mentioned event, the prosecution shall have the right to re-examine any such witness"

As we have already indicated the irregularity is curable under section 388 of the Criminal Procedure Act which provides:

"Subject to the provisions of section 387, no finding sentence or order made or passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or in any inquiry or other proceedings under this Act; save that where on appeal or revision, the court is satisfied that such error, omission or irregularity has in fact occasioned a failure of justice, the court may order a retrial

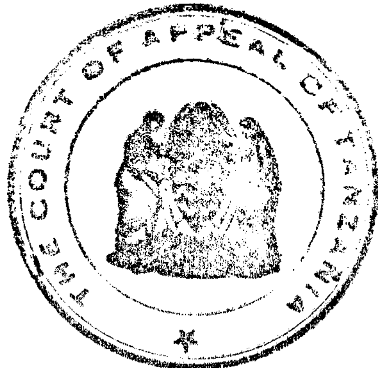
or make such other order as it may consider just and equitable."

Moreover, we have examined both the earlier charge and the substituted one and we have been unable to see any substantive alteration. Even though the appellant were not given an opportunity to have the witnesses recalled they were not in the circumstances of this case prejudiced.

Apart from the above observation we otherwise find merit in the appeal and for this reason we allow it. Conviction entered against the appellants is quashed and sentences are set aside. All appellants are to be released from custody forthwith unless they are otherwise lawfully held.

It is ordered accordingly.

DATED at **ARUSHA** this 24th day of August, 2010.



J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this a true copy of the original.

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL