IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 326 OF 2007

ROBERT MNINGWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Masanche, J.)

dated the 22nd day of March, 2000
in
Criminal Appeal No. 33 of 1999

JUDGMENT OF THE COURT

9th &15th June, 2010

MASSATI, J.A.:

The appellant and four others, were arraigned before the Resident Magistrate' Court of Shinyanga, with four counts of Armed Robbery contrary to sections 285 and 286 of the Penal Code (Cap. 16 R.E. 2002) in which it was alleged that on 2/5/1998 they robbed three different persons (with one of them having been robbed twice). The appellant was one of those who were convicted on the first

count and sentenced to 30 years imprisonment. His first appeal to the High Court (Masanche, J.) was dismissed, and in addition, enhanced by an order that he also suffers twelve strokes of the cane. Undaunted he has now come to this Court.

The charge laid at the Appellant's door with which he was convicted alleged that on the fateful day, at 9.45 p.m., at Bukondamoyo village, Kahama District, Shinyanga Region, he and his co accuseds jointly robbed a motor vehicle make Land Cruiser registration number TZF 6029 worth shs18,000,000/=, the property of John Igembe, but was at the time being driven by one **Benardo Kalato**, on whom a firearm was used in order to obtain the said motor vehicle. As the accused pleaded not guilty, the prosecution assembled seven witnesses to testify, whereas the court called one witness presumably under section 195 of the Criminal Procedure Act, (Cap 20 RE 2002). The prosecution case was that after the robbery, and abandoning the occupants of the car, the robbers drove to Shinyanga, parked the car at a garage and went to the house of one **Martin s/o Kabado** (PW2) where they reached at midnight (12.00 a.m.) They knocked his door and one of them identified himself as

Kimati. PW2 opened for them. The visitor informed him that they had a car which they were selling and that they would take him to see the vehicle the following morning at Mark Garage. PW2 played detective and agreed to their suggestion but alerted the police. In the morning, PW2 left for the garage to view the merchandise in the company of the said Kimati and the one who drove the car. The rest remained behind. The Appellant was one of them. At the garage PW2 saw the motor vehicle, and before they could seal the "*deal*" they were ambushed by the police. Those arrested at the garage and PW2 were escorted back to PW2's home. On seeing the police, those, who had remained behind, fled in different directions. However the appellant was arrested shortly thereafter. After establishing the ownership of the vehicle the appellant and his co accused were charged as shown above.

The appellant raised a defence of alibi. His story was that he was hospitalized, and produced a discharge card to authenticate his story. But the witness, who was called by the court after the close of the defence case, examined the said card, and opined that is was forged. So the trial court disbelieved his alibi on the ground that the

appellant's exhibit D1 was a forged card, but also that the defence itself was not preceded by a notice under section 194 of the Criminal Procedure Act.

Before the High Court, the appellant complained that he was not properly identified by PW4 and PW5 (the victims of the robbery) and that he had an alibi. The first appellate court opined that the identification was watertight and the defence of alibi had to fail because it did not "confirm" (sic) with section 194 (4) of the Criminal Procedure Act.

Before us, the appellant appeared in person and adopted and clarified his 7 grounds of appeal, which in our view, could be condensed into four clusters. **First**, that the courts below erred in finding that the appellant was properly identified as one of the robbers. **Two**, that the trial court had no territorial jurisdiction to try the case which arose from a district (Kahama) different from where the trial was held (Shinyanga). **Three**, that the courts below did not properly consider his defence. **Lastly,** that both courts below erred in law and fact in finding that the case against him was proved

beyond reasonable doubt. The appellant also, cited a number of decisions in his memorandum (a practice that is increasingly becoming trendy with those drawn by or on behalf of unrepresented prisoners but frowned upon by Rule 72 (2) of the 2009 Court of Appeal Rules). These include **RAYMOND FRANCIS V. R.** (1994) TLR. 100 (CA) **MICHAEL HAISHE V. R.** (1992) TLR. 92, **MAKWIZI MUSUKO AND OTHERS V. R.**, Criminal Appeal No. 8 of 2001 (CA) (unreported) **MSANGI V. R.** (1969, HCD. 238, **RAPHAEL V. R.** (1990 TLR. 3. After which, the appellant prayed that his appeal be allowed, his conviction quashed and sentence set aside.

Mr. Jackson Bulashi, learned Senior State Attorney, who appeared for the Respondent/Republic opposed the appeal. He condensed the appeal into 3 main grounds and argued them accordingly. On the question of identification, Mr. Bulashi was of the view that, the circumstances of identification were favourable and the appellant was amply identified by PW4 and PW5 whose evidence was corroborated by PW2. On jurisdiction, the learned Counsel, urged us to take judicial notice that the Chief Justice has under section 5 of the Magistrates' Court Act (Cap 11 – RE 2002) established a Resident

Magistrate's Court at Shinyanga Region. He did not cite the establishment order. Since the offence was committed in Kahama District, which is in Shinyanga Region, and since the case was tried by a Resident Magistrate, he argued, the case was tried by a competent court and so this complaint lacked merit. The learned counsel also submitted that the two courts below rightly dismissed the appellant's defence of alibi as he had produced a forged discharge card (Exh D1) as confirmed by the court witness. Besides, counsel went on to argue, the appellant's participation was amply evidenced by PW2 who testified that the appellant and his co accused visited his home the night before his arrest. It was therefore his view that, the appeal lacked merit and should be dismissed.

We shall begin with the question of jurisdiction. We think, this point should not detain us. In his argument, the appellant had referred to us the unreported decision of this Court in **MAKWIZI MSUKO AND OTHERS V. R.**, Criminal Appeal No. 8 of 2001, in which the proceedings of Mwanza District Court were nullified because it tried an offence which was committed in Magu District and the trial was by a District Magistrate. We agree with Mr. Bulashi

learned counsel, that, that case is distinguishable from the instant case, because it was held there that the jurisdiction of a district court under section 4(1) of the Magistrates' Courts Act (Cap) 11 – RE 2002) was confined to a district in which it is established. In the present case, although the offence was committed in Kahama District, the trial was held by a Resident Magistrate, in the Resident Magistrates' Court. Courts of Resident Magistrates are established by an order of the Chief Justice under section 5 (1) of the Magistrates' Courts Act. Under that section, the jurisdiction of such court is to be designed in the order establishing them. The Court of the Resident Magistrate of Shinyanga Region was established by the proclamation of the Chief Justice in GN 238 of 1968 of 12th June, 1968, and its area of jurisdiction is described as Shinyanga Region. Since there in no dispute that Kahama District is in Shinyanga Region, we are of the settled view that the trial court and magistrate were clothed with jurisdiction to try the case. This ground of complaint is therefore baseless, and we accordingly dismiss it.

With regard to the first cluster of grounds of appeal; which is on identification, the appellant attacked the credibility of PW4 and

PW5 who purpoted to identify him at the scene of crime on three fronts. **First**, he said, PW4 said in examination in chief that he had seen and known him for the first time on the day of the incident but in cross examination, the witness claimed that he had known him from before. **Second**, the appellant argued that both PW4 and PW5 failed to identify him at the identification parade. The appellant said that the prosecution deliberately withheld the identification parade register, despite demands for its production by the accused persons. The appellant told the Court that the witnesses were only able to identify the appellant from the dock. **Thirdly**, these witnesses contradicted themselves on the kind of attire that he was in on the night of the robbery.

As shown, above the first appellate court (and Mr. Bulashi supported it) observed that the conditions were not only favourable, but also that PW2 has been known to the appellant from before. We have carefully looked at the evidence and judgments of the two courts below, regarding the identification of the appellant at the scene; (forgetting PW2 for the moment). According to the High Court, the identification was "*watertight*" because, **first**, it was the third and this appellant who entered into the car and searched PW4

and PW5, before they were blindfolded. **Second**, there were lights in the vehicle which enabled them to see the appellant, and **lastly,** PW4 had known the appellant from before. The appellant's response was that, if the two witnesses had seen him well, why did they contradict themselves on the description of his attire, or not give a description at the police before his arrest and why did they fail to identify him at the identification parade.

The record of the evidence of PW4 and PW5 makes an interesting reading. According to PW4, he identified the appellant at the identification parade, conducted on 4/5/1998. No where in his evidence in chief, however, does he describe how he came to identify him. In cross examination, he reveals that he had known the appellant from before by appearance, and that on that day he had put on a Zebra T shirt, a white trouser and black shoes. But PW5 said in cross examination that the appellant was dressed in a Zebra T shirt with a red pair of trouser and not white trousers. According to this witness also, apart from car lights there were also **torch lights**. One wonders, why would one use torch lights, if the car lights were sufficient. The contradictions between PW4 and PW5 as to the

appellant's attire on that night, cannot, in our view be waved away as mere triflings. This is more so if they are taken against the background that these witness had not given any prior description of the person or attire of the appellant to any one prior to testifying as to how they identified the appellant, and that if the identification parade was conducted as the witnesses and the appellant claim and acknowledged by PW6, the identification parade register was not produced in evidence nor any police witness who conducted the parade called to prove that the appellant was identified by PW4 and PW5, (which the appellate denies), but also that it was conducted lawfully. The importance of explaining to the trial court how these witnesses identified the appellant was underscored by this Court in **JUMA MUSSA V. R.**, Criminal Appeal No. 165 of 1991 (unreported). In that case the Court allowed the appellant's appeal because:-

> "PW1 did not give any explanation as to how he purported to identify the appellant. The record is completely silent as to the features of the appellant"

None of the police officers who testified as PW1, PW6, and PW7 explained whether the identifying witnesses described the appellant or what he wore before they were taken to the identification parade. Although PW6 admitted in cross - examination that there was an identification parade, neither he, nor any one else told the court why the identification parade register was not produced in court. With all the above shown discrepancies, can it be said that the identification of the appellant at the scene of crime was "*watertight*" as the first appellate court had held? We do not think so. We think, the trial court reached at a correct conclusion that the evidence of PW4 and PW5 alone was not sufficient to prove that the appellant was identified at the scene. There is therefore merit in this part of the appellant's complaint.

Having found that the appellant was not sufficiently identified by PW4 and PW5, the trial court and again, we think rightly so, decided to look for corroboration and found that the presence of the appellant at PW 2's place made him a party to the offence and therefore corroborative in probative value. The first appellate court described PW2 as the appellant's "prospective customer". The High

Court also found that, this was another piece of evidence that connected the appellant to the offence. The learned judge, we think, must have had in mind the doctrine of recent possession when he concluded that the appellant was among those "that way laid the motor vehicle in which PW4 and PW5 were traveling on 1/5/1998, the appellants were caught with the stolen vehicle." The question we ask ourselves is whether in the circumstances, the appellant could be said to have been in possession of the stolen vehicle, to justify the invocation of the doctrine?

It must be noted that at the preliminary hearing, the only undisputed matter was that the appellant was found in possession on cash shs.2000/=. Possession of the vehicle by the appellant was therefore a fact that the prosecution had to prove beyond reasonable doubt.

We must first state that it is settled law now that an unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against an accused person for any aggravated and minor crime committed in

the same transaction. (See, **ALLY BAKARI V R.,** Criminal Appeal No. 47 of 1991 (unreported). There is also no doubt in this case that the motor vehicle in question was feloniously obtained. But the question is whether in the circumstances the appellant could be said to have been in possession of the motor vehicle?

We are not unaware of the wide definition of the word "possession" in section 4 of the Penal Code (Cap 16 – RE 2002) which is:

> "possession .....
>
> (a) not only having one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person
>
> (b) if there are two or more persons and any one or more of them with the knowledge and

consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."

We are, however, also aware of the judicial controversy that the applicability and scope of this definition has generated in the past. For instance, in **KARA V. R.** (1971) EA 191 it was held that the definition of "possession" did not apply to the offence of receiving stolen property. And considering that the doctrine of recent possession is only an evidential presumption or inference under section 4 of the Evidence Act (Cap 6 – RE 2002) and is not defined any where in the Penal Code. We doubt whether it could properly apply in the present case, but let us, for the sake of argument, assume that it also applies to support the inference. We have to consider that even in that definition "knowledge" (which is the mens rea) is an essential element that must be proved in order to establish both physical and constructive possession contemplated in that definition. The question is, whether the prosecution had proved that the appellant was in physical or constructive possession of the motor

vehicle. The only witness here was PW2. In so far as the appellant is concerned, part of his evidence reads as follows:-

> *"On 2/5/1998 at 12.00 midnight while at home in bed there came a knock on my door. I asked as to who was knocking. The reply was that "I am Kimati" I opened the door because I knew him. Kimati was accompanied by four colleagues.*
>
> *He told me that he was there to sell a vehicle. When he told me he wanted to sell a car, and that vehicle belonged to them all, I agreed*
>
> *I identified these people. Except for Kimati, I was seing the others for the first time"*

It must be noted here that at that time PW2's visitors had no car with them, as it was already parked in the garage, where they undertook to take PW2 the following morning. Now, if this was true

the words of Kimati were certainly relevant as against each of the conspirators under section 12 of the Evidence Act, which reads as follows:

> "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons referring to or in execution or furtherance of their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such party was a party to it."

However, PW2 did not maintain his word. He later changed and said:-

"They told me the vehicle was from Kahama. **They did not tell me if the vehicle belonged to them or not."** (Emphasis added)

That was not in keeping with what he had said earlier. This was the only piece of evidence from which one would have drawn an inference that the appellant had knowledge and consent to the possession of the stolen vehicle. In view of PW2's self contradiction on that aspect, we, are left with nothing but mere suspicion that the appellant was a party to the act of being in possession of the vehicle sufficient enough to bring it within the doctrine of recent possession. Even if his defence of alibi was disbelieved and it was established that the appellant had fled from PW2's place on sighting the police. that, in our view, only strengthened the suspicion. But as has often been said, suspicion alone, however, strong cannot prove possession, whether constructive or physical.

For the foregoing reasons, we do not agree that it would be safe to invoke the doctrine of recent possession and hold out the

appellant in the circumstances of this case. So, we do not agree that the appellant was sufficiently identified or that there was any corroborative evidence to strengthen the weak identification evidence. So the appellant's complaint on this cluster of identification is not without substance.

The next group of complaint was against the treatment of the appellant's defence by the courts below. As hinted, the appellant had testified to the effect that on 1/5/1998 up to 3/5/1998 he was admitted at the Shinyanga government hospital, and tendered the discharge card as Exhibit D1. The trial court noted that, the appellant had not given due notice of his intention to raise the defence of alibi in terms of section 194 of the Criminal Procedure Act (Cap. 20 – RE 2002), but nevertheless took cognizance of his defence and considered it. This, approach was, in our view, backed by the spirit of the law, and as enunciated in the case of **CHARLES SIMON V. R.** (1990) TLR. 3. But after considering the defence and calling a court witness **DR YELA S/O CHARLES KIDUTA SAHANI** the court concluded that Exh. D1 tendered by the appellant was forged and so dismissed the appellant's defence of alibi.

On its part, the first appellate court did not so much as even cast a glance at this aspect, but just proceeded to confirm that the defence of alibi was not maintanable for non compliance with the dictates of section 194 (4) of the Criminal Procedure Act, lending support from the decision of this court in **ROBI S/O MARWA AND ANOTHER V. R.**, Criminal Appeal No. 62 of 1987 (Mwanza) (unreported).

We commend the approach adopted by the trial court, as the correct one. As stated in **CHARLES SIMON'S** case (supra) the trial court is not necessarily barred from considering the defence of alibi simply because an accused had not given notice of intention to rely on the defence of alibi before the prosecution closes its case. We understand it to be the law, that where an accused person does not give such a notice, the trial court has a discretion. It may consider it (i.e. take cognizance of it) or ignore such defence and accord no weight to it. But in our view if the court takes cognizance of the defence, it must subject it to a critical analysis, bearing in mind that

an accused person has no duty to prove the alibi, but only to raise a reasonable doubt. (See, **ALLY MSUTU V. R**. (1980) TLR). 1

In the present case, it is doubtless that the appellant did not give a formal notice of intention to give the defence of alibi as lawyers understand it. But we shall not lose sight of the fact that so far, there is no prescribed form for giving such a notice (See, **DPP V NYANGETA SOMBA AND 12 OTHERS** (1993) TLR. 69. The law only demands that such notice and the particulars of the alibi, be furnished before the close of the prosecution case. The notice could be in writing or oral. The purpose of such notice is to enable the prosecution marshal evidence in rebuttal.

When PW6 was testifying, the appellant asked him in cross examination whether he had any of his tickets to show that he had recently travelled and that he instructed the RCO to find out if he had not been hospitalised and that he had a discharge card. Part of the answer in cross examination of PW6 runs as follows:-

> "You did not tell the RCO that you had just come from hospital ward. You were fit such that you could "overturn me" (sic). There was no instruction that I trace your hospital cards at the hospital. If you bring any cards, you will have forged them. ..... I will check if it is true that there are your documents and tickets at police. I personally did not see them....."

So, in our view, the prosecution were put on notice that the appellant was going to raise the defence of alibi and since by then the prosecution case was not yet closed, it must be deemed to have been a valid notice of alibi, and investigators should have worked on this and produce rebuttal evidence, if they had any.

But it took the trial court to realize the importance of such evidence. Of course, the trial court was perfectly entitled to do so under section 195 (1) of the Criminal Procedure Act, (Cap 20 – RE 2002) which reads as follows:

"195 (1) Any court may, at any stage of a trial or other proceeding under this Act, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re examine any person already examined and the court shall summon and examine or recall and re examine any such person if his evidence appears to be essential to the just decision of the case"

Our concern is on the weight that the trial court and the first appellate attached to the evidence of that court witness. When shown Exh D1, this witness said:

"This card (Exhibit D1) is of **Robert Mnigwa** aged 35 year admitted on 1/5/1998 discharged on 3/5/1998 quite different from our register. He was admitted for cerebral

malaria. He could not have been admitted for only two days".

Then, in cross examination by the appellant this witness said:

"No, we have no doctor with the signature appearing on this card. If you produce him then you will have jointly forged with him. The names on the register and the card differ. I am the doctor of ward II. I am the doctor in charge of the ward. A nurse does not discharge patients".

It is not insignificant that the register mentioned by the witness was not produced in evidence for the inspection by the court and the appellant who may have sought clarification on it. In the absence of the said register, the court not only acted on secondary oral evidence but also denied itself that precious opportunity to satisfy itself as to the authenticity of the records, before it could conclude that the card (Exhibit D1) was indeed a forged document. As the law stands now

under section 67 of the Evidence Act documentary evidence like Exh D1 could only be proved or contradicted by primary evidence (i.e. the register or certified copy of the extract of the relevant page) and not oral evidence as had happened in this case. So, we think that the appellant has a legitimate complaint that his defence of alibi was not properly handled by the lower courts.

The last cluster of complaint is a general one, and it is that the two courts below were in error both in law and on the facts, in finding that the prosecution had proved its case against the appellant beyond all reasonable doubts.

The prosecution case rested on two pillars of evidence, identification and recent possession of the stolen vehicle. We hope, we have, amply demonstrated above, that in the circumstances and on the totality of the evidence on record it cannot be said that the appellant was sufficiently identified by PW4 and PW5. If they identified them at the identification parade, it is not borne out by any other witness to the parade or the identification parade register. In such circumstances such evidence ought to have been corroborated.

If the prosecution and the courts below relied on the fact that the appellant was in the company of Kimati who knocked at PW2's door and introduced his friends, they were not, we think, entitled to come to the conclusion that the appellant was found in possession of the stolen vehicle. The only legitimate conclusion they could come to was that, his company and his flight on seing the police only built a very strong suspicion that the appellant may have been part of the conspiracy. But, as has often been said suspicion alone, however strong, cannot be the basis for a conviction. This together with the trial court's handling of his defence, makes his complaint legitimate. On the premises, we think that this cluster of grounds of appeal is, too, well founded.

For all that we have tried to say above, we think, that this appeal has merit and must succeed. We therefore allow the appeal. We quash the conviction and set aside the sentence imposed on the appellant and order that he be forthwith released from prison, unless otherwise lawfully held.

It is so ordered.

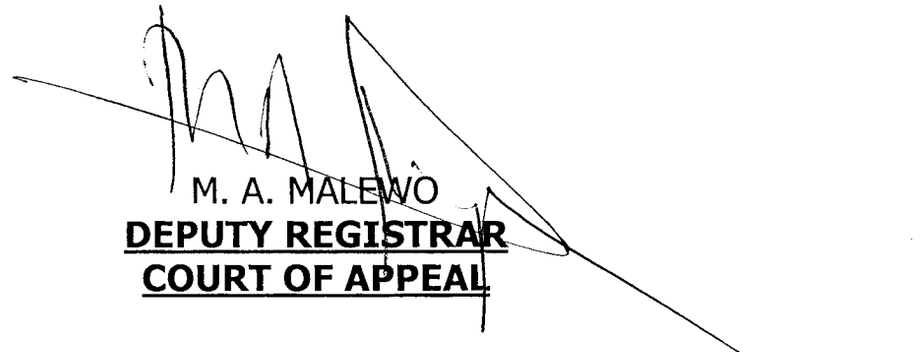
DATED at TABORA this 14th day of June, 2010.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
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