IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 322 OF 2007

HAMISI MASHISHANGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mziray, J.)

dated the 17th day of July, 2006
in
Criminal Appeal No. 134 of 2001

JUDGMENT OF THE COURT

31st May, & 3rd June, 2010

MBAROUK, J.A.

The appellant, Hamis Mashishanga, was charged with and convicted of the offences of burglary contrary to Section 294 (1) of the Penal Code and armed robbery contrary to sections 285 and 286 of the Penal Code in the District Court of Nzega at Nzega. He was sentenced to five (5) years imprisonment for the offence of burglary

and thirty (30) years imprisonment for the offence of armed robbery. The sentences were ordered to run concurrently. His appeal before the High Court (Mziray, J.) was dismissed. Undaunted, the appellant has preferred this second appeal.

Briefly, the facts that gave rise to the case were that, on 1-4-2004 at around 2.00 a.m. Masesa Charles (PW1) was invaded by bandits at his house. He was assaulted with machetes and the bandits stole various items worth T. shs. 200,000/=. With the aid of moonlight, PW1 claimed to have identified the appellant as one among the bandits after he peeped through the window. PW1 further claimed that, he knew the appellant prior to the incident as his fellow villager. The record shows that, PW1 mentioned the appellant immediately to the people who responded to the alarm. PW1, Richard Said (PW2) and Corporal Arnold (PW4) testified to the effect that shortly after the incident items like a black bag, receipts of development levy in the name of PW1, a medical chit in the name of PW1's child, a matress and a wall clock were all recovered when the appellant's house was searched. All the items were identified by PW1 and tendered as evidence at the trial.

In his defence, the appellant claimed that the case was framed against him due to the existence of grudges between him and PW1. He however, conceded that the said recovered items were seized at his house which he has abandoned.

In this Court, the appellant appeared in person, whereas Mr. Jackson Bulashi, the learned Senior State Attorney, represented the respondent Republic. From the totality of six grounds of appeal raised by the appellant, we are of the opinion that they boil down to two main grounds, namely identification and the doctrine of recent possession.

At the hearing, Mr. Bulashi from the outset supported the conviction and sentence imposed upon the appellant. He started by conceding that the facts of the case show that identification of the appellant was weak. He agreed that the conditions laid down in the case of **Waziri Amani V. R**. [1980] TLR 250 were not met. However, he added that the poor identification of the appellant was corroborated by the fact that the stolen items belonging to PW1 were

immediately found in the house possessed by the appellant who did not object to that effect. Hence, he said, the doctrine of recent possession applies. Mr. Bulashi added that, there is no evidence to support the appellant's claim on the issue of grudges against him. He said, the prosecution evidence at the trial court was water-tight leading to the appellant's conviction. For those reasons, the learned Senior State Attorney urged us to find that the appeal has no legs to stand on hence it should be dismissed.

As pointed out, the appeal stands on two major grounds, **one** identification, **two**, the doctrine of recent possession. On the issue of identification, we agree with both, the appellant and the learned Senior State Attorney that the conditions for the identification were not favourable, hence weak. According to the record, it has been shown that PW1 managed to identify the appellant by the help of the moonlight only. This clearly shows that the robbery took place at night (at 2.00 a.m.), and PW1 was the only one around. According to the decision of this Court in **Said Chally Scania v. R.**, Criminal Appeal No. 69 of 2005 (unreported), this Court stated:

"We think that ***where a witness is testifying about another in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable****. To do so, he will need to mention all aids to unmistaken identification* ***like proximity*** *to the person being identified,* ***the source of light, its intensity the length of time the person being identified was within view*** *and* ***also whether the person is familiar or a stranger.***" (Emphasis added).

In the instant case not all the conditions stated in the case of **Said Chally Scania** (supra) were met. Furthermore in the case of **Waziri Amani** (Supra) this Court said:

"..... no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

It seems that the circumstances have shown that the identification of the appellant was to some extent doubtful in this case. However, the record shows that apart from that weak identification, there is enough evidence to connect the appellant with the offences charged against him. This is in connection to the evidence of the items of PW1 found in the house possessed by the appellant. The record also shows that even in his defence the appellant had not disputed this. In the event, we are of the opinion that the doctrine of recent possession applies.

Since the appellant was found in possession of the property stolen in the course of armed robbery hardly a day after the robbery, and could not give a reasonable explanation or any at all as to how he acquired them, we are of the considered opinion that the appellant was rightly convicted on the basis of the doctrine of recent possession. This Court has held similar views in a number of cases of this nature, such as the case of **Twaha Elias Mwandugu V. R**, Criminal Appeal No. 80 of 1995, **Fadhili Msemo and Another V. R**, Criminal Appeal No. 78 of 2008, (both unreported) to name a few.

For the foregoing reasons, we have no reason to fault the concurrent findings of fact by the two courts below especially on the issue of the doctrine of recent possession.

In the event, the appeal is hereby dismissed.

DATED at TABORA this 1st day of June, 2010.

E. 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
COURT OF APPEAL