IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A, BWANA, J.A AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 15 OF 2006

1. AZIZI MOHAMED
2. HAMZA MOHAMED MADAI @ MUNJA } **... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction an Sentence of the High Court of Tanzania at Mtwara)

(Lukelelwa, J.)

Dated the 22nd day of December, 2005

in

Criminal Appeals Nos. 78 – 79 of 2005

JUDGMENT OF THE COURT

28 SEPTEMBER & 4 OCTOBER, 2010

MASSATI, J.A.:

The appellants were charged with different offences including Armed Robbery contrary to sections **285 and 286** of the **Penal**

Code (Cap 16 – RE 2002). The District court of Mtwara which tried them convicted them with the aforementioned offence, and sentenced them to 30 years imprisonment and 12 strokes of the cane. They unsuccessfully appealed to the High Court Mtwara, and now they have come before us.

The facts as found by the lower courts are that, on 4/3/2002, Rashid Abdallah (PW1) had hired a lorry owned by Alhaj Makungu (PW2) to transport his kerosene which he had purchased from Mozambique, a neighbouring country. They started off at 12.00 midnight. Somewhere in between, before reaching Mtwara, they were ambushed by a group of thugs. PW1 and his company were roughed up. PW3, the lorry's driver was threatened with a pistol wielded by one of the thugs in police uniform before being forced to part with the vehicle switch and thrown off it and hit by a blunt object on the head and injured thereby. The victims were tied up and left by the road side, while the thugs vanished with the lorry together with the consignment. PW1 and other victims liberated

themselves and walked to Mtwara where they reached in the early hours of the next morning. Soon after, PW1 mounted a hunt. The search team went to Kiwalala village where some tins of kerosene were found under a mango tree near a certain house.

The appellants were found in a neighbouring house. By their conduct, the appellants got themselves arrested and handed over to the police, where they were charged as shown above. The trial court and the first appellate court rejected the appellants' defences that they were arrested on 6/3/2004 as they were coming from Masasi to Mtwara.

In this appeal the appellants appeared in person and fended for themselves. Although they filed separate memoranda of appeal, their grounds rotate around the same points, that is to say:

i. That the trial court erred in point of law when it recorded the evidence of the witnesses contrary to section 210 (3) of the Criminal Procedure Act (Cap 20 – R.E. 2002)

ii. The prosecution case did not prove beyond reasonable doubt the quantity and value of the alleged kerosene.

iii. That the two courts below did not take into account that the said alleged property was illegally imported by PW1

iv. That the courts below did not properly evaluate the contradictory evidence of the witnesses of the prosecution.

v. That the two courts below did not satisfy themselves whether the alleged stolen property was properly identified in the absence of any description.

vi. The doctrine of recent possession was not properly invoked.

vii. In the absence of an identification parade, the second appellant was not properly identified given that the robbery took place at night.

viii. The lower courts wrongly acted on the appellants' cautioned statements which were taken contrary to sections 50 and 51 of the Criminal Procedure Act and admitted without inquiring into their voluntariness.

ix. That the two courts below erred in acting on the cautioned statements without corroboration.

The appellants then urged us to allow their appeals.

On the other hand, Mr. Ismail Manjoti, the learned State Attorney, who appeared for the respondent/Republic conceded that the evidence of visual identification was weak, that the 1st appellant was not identified at all, that the alleged stolen property was not properly identified and none of it was physically found in possession of the appellants, so the doctrine of recent possession was not properly invoked in the circumstances. He also conceded that in large part, the provisions of section 210 (3) of the Criminal Procedure Act, was not complied with in recording the evidence of PW4 to PW13, but was not certain whether this irregularly was curable, under section 388 of the Criminal Procedure, Act. He wound up by submitting that if the Court found that, that omission was curable he would fully support the conviction. In his view, despite these weaknesses in the prosecution case, the same are overwhelmed by the appellants' confessions (Exh. P.7 and P.8) He said that these were admitted without objection from the appellants and their

attempt to recant them during their defence was a mere afterthought. He further submitted that the cautioned statements were corroborated, first by the 1st appellant's oral confession to PW1 at Kiwalala, and their conduct to attempt to run away from the custody of PW1 and village authorities.

This is a second appeal. We are alive to the fact that in such a case, an appellate court should be very slow in disturbing the concurred findings of facts of the lower courts unless the courts below have completely misapprehended the substance, nature, and quality of the evidence resulting into an unfair conviction (See **MICHAEL ALLAS v R,** Criminal Appeal No. 243 of 2007 (unreported.)

We shall begin by disposing those grounds relating to the non compliance with section 210 (3) of the Criminal Procedure Act and the one on the alleged illegally imported kerosene by PW1. We shall only give one short answer.

As a matter of general principle an appellate court cannot allow matters not taken, pleaded, or decided by the courts below to be raised on appeal. (See. **KENEDY OWINO ONYACHI AND TWO OTHERS vs R,** Criminal Appeal No. 48 of 2006 (Unreported), **GANDY VS GASPER AIR CHARTER** (1956,) 23 EXH. 139 **MELITA NAIKMINTAL & ANOTHER VS SELLEYO LOIBANGAJI** (1998,) TLR. 120 **KAMANDO CHISIMA VR,** (1995) TLR 140.)

Since no complaint was raised in the trial court or the first appellate court about the alleged irregularities, it was not proper and this Court cannot entertain such grounds of appeal. We therefore reject them.

Coming to the substance of the other grounds of appeal, we wish to note that the conviction of the appellants in this case is based on three classes of evidence, visual identification, recent possession and cautioned statements of the appellants which as demonstrated above, have attracted heavy criticism from the appellants.

First, we propose to set out the principles of law governing those aspects, albeit briefly. In evidence of visual identification, the court has to be satisfied that for positive identification of the suspect all possibilities of mistaken identity must be eliminated (See **WAZIRI AMANI v R,** (1980, TLR, 252)) In such cases the court has consistently held that the evidence of description of the suspect, naming him at the first opportunity, and if at night the intensity of light aiding the identifier, are factors of the highest importance. (See **JARIBU ABDALLAH v R,** Criminal Appeal No. 220 of 1984, (unreported)). But if an accused person is known to a witness there is no need of any description. (See **PAULO MAKARANGA v R,** Criminal Appeal no. 26 of 2006 (unreported.)) But naming him at the first opportunity has been held to have enhanced the credibility of such witness.

With regard to the doctrine of recent possession, simply put, it means that if one is found in possession of the fruits of a crime recently after it was committed, it is presumptive evidence against that person, not only that he received it with guilty knowledge or

stole it, or even of any aggravated and minor crimes committed in the same transaction (See **ALLY BAKARI v R,** Criminal Appeal No. 47 of 1991 (Unreported)) For the proper application of this doctrine, there must be evidence that the thing possessed by the accused has a reference to the charge laid against him. (See **SALEHE MWENYA & 3 OTHERS v R,** Criminal Appeal no. 66 of 2006 (unreported)) Everything must however, depend on the circumstances of each case. Factors, such as the nature of the property stolen, whether it be of a kind that readily passes from hand to hand, and the trade or occupation to which the accused person belongs can all be taken into account (See **REPUBLIC v. HASSAN S/O MOHAMED** (1948) 15 E. A. CA 121) But most importantly there must be proof that the property was found with the accused (See **ALLY BAKARI AND PILI BAKARI v R,** (1992,) TLR 10.)

Finally, a word about cautioned statements. These statements are admissible under section 27 (1) of the Evidence Act (Cap 6- R.E. 2002). But it must be proved that they were voluntarily made by an accused person. The burden of proving the voluntariness is on the

prosecution. The Criminal Procedure Act has now put in place statutory precautions that the police must take in recording such statements. These include section 50, 51, 57 and 58. This Court has recently declared that statements obtained contrary to the procedure laid down under sections 48 to 51 of the Criminal Procedure Act are inadmissible. Similarly, those taken contrary to section 57 and 58 of that Act (See **JANITA JOSEPH KOMBA & 3 OTHERS v R,** Criminal Appeal No, 95 of 2006 (unreported) No. A 5204 **WRD VICTORY PASCHAL v R,** Criminal Appeal No. 195 of 2006 (unreported).)

There is a presumption however, that a confession or statement was voluntarily made until objection to it is made by the defence on the ground that it was not so, or that it was not made at all (See **SELEMAN HASSAN v R,** Criminal Appeal no. 364 of 2008 (unreported).) If any objection is taken after the trial court has informed the accused of his rights to say something in connection with the allegation, the trial court must stop everything, and in the case of a subordinate court, proceed to conduct an inquiry into the voluntariness of the alleged confession before such confession is

admitted (See **TWAHA ALLY & 5 OTHERS v R,** Criminal Appeal No. 78 of 2004 (unreported)). Otherwise it is an incurable irregularity. But the proper time to make such objection is ordinarily when such statement is about to be tendered (See **KAZILA SIMBILA v R,** Criminal Appeal No. 122 of 1990 (unreported)). When it is objected to but the court rules that the cautioned statement/confession was made by the accused voluntarily the statement is nevertheless rendered either repudiated or retracted, depending on the nature of the objection. In such a situation the position is that although it is dangerous to rely upon a retracted/repudiated confession in the absence of corroboration, the court could still act on such confession if it is conviced that it must be true (See **TUWAMOI v R,** 1967, EA 84, and **WANJA KANYORO KAMAU v R,** 1965 E.A. 50.)

Now, in the present case, there is no dispute that the robbery took place at midnight. PW1 claims to have identified the second appellant with the aid of moonlight and vehicle lights. It was his first time to see him. He admitted that he never saw the first appellant there, but saw him the next day at Kiwalala village, and where he

(the first appellant) confessed to have been privy to the conspiracy. PW3 did not identify any of the robbers because they dorned police uniforms and covered their faces with police caps. PW6 claimed to have identified, among others, the 2nd appellant. He was in police uniform. There was bright moonlight and vehicle lights. He did not know him before. Therefore he only saw him at the scene of crime. So PW1 and PW6 claimed to have identified the 2nd appellant but only met the first appellant at Kiwalala. On the other hand although PW1 alleges that the whole saga lasted for about half an hour, and there was moonlight, he and PW6 did not tell the court how close the 2nd appellant had gotten to them, given that even PW3 who came to a very close encounter with the armed thug who hit him on the head, could not identify any of them because they had covered their faces with police caps. The record is silent if PW1 and PW6 ever gave any detailed description of the second appellant to the next person to whom they first reported or to the police. In the circumstances, we think that much as PW1 and PW6 may have been honest in the absence of an identification parade, the identification of the second appellant at the scene of crime was not satisfactory, let

alone the fact that they did not identify the first appellant at the scene of crime. So this piece of evidence of visual identification could not ground a conviction.

There is no doubt that there is evidence of the arrest of the appellants at a house in Kiwalala where the first appellant is alleged to have confessed to have been privy to the robbery and promised to assist PW1 in recovering his merchandise. There is then the evidence of their conduct when they attempted to run away, as they were under arrest and being taken to show where the rest of the kerosene tins were hidden. That apart however, nothing of substance was found in their possession. As shown above, in order to involve the doctrine of recent possession, the accused must be proved to have been found in possession of the stolen property. In order to prove that possession there must be acceptable evidence as to the search of the suspect and recovery of the allegedly stolen property (See **CHRISTOPHER RABIA OPAKA v R,** (Court of Appeal of Kenya) Criminal Appeal No. 82 of 2004(unreported)) and **HAMIS MEURE v R,** 1993, TLR, 213). In the present case, there was

possession of the stolen kerosene. It follows that the doctrine of recent possession was wrongly invoked here. There is therefore substance in this ground of complaint too.

The appellants cautioned statements were admitted as exhibit P7 (2nd appellant) and P8 (1st appellant) respectively. When they were asked if they had any objections, the appellants told the trial court that they had no objections, although the 2nd appellant extensively cross examined on how the statement was recorded; whereas the 1st appellant never asked anything at all. However, both of them denied in their defences having ever written any statements to the police. But as shown above and as submitted by Mr. Manjoti, their denial were mere afterthoughts, having failed to object at the time of their admission. As a matter of practice however, such statements ought to be corroborated, although convictions based on such confessions would not necessarily be illegal.

We have studied exhibits P7 and P8. We are satisfied that they contain so much detail of the transaction that the police officers who recorded them could not have concocted them. They contain nothing but the truth. The conduct of the appellants in trying to run away from PW1 and PW6 is demonstrative of guilty conscience and in our view, sufficient corroboration to the confessions.

Having discussed the above it is hardly necessary to discuss the other grounds of appeal raised by the appellants, because we do not think their decisions are necessary for the determination of this appeal.

For the above reasons we are satisfied that the guilt of the appellants has been proved beyond reasonable doubt. Although, the 1st appellant was not at the scene of crime he is as guilty a principal offender as the other participants in terms of section 22 of the Penal Code as he was part of the whole conspiracy. Their appeal are therefore devoid of merit, and are accordingly dismissed in their entirety.

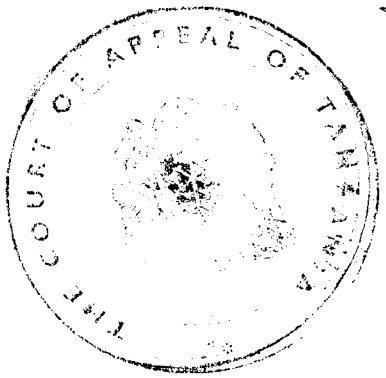
DATED at MTWARA this 1st day of October, 2010.

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



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DEPUTY REGISTRAR
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