IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUNUO, J.A., MSOFFE, J. A. And KIMARO, J. A.)

CRIMINAL APPEAL NO. 136 OF 2009

1. ALHAJI AYUBU @ MSUMARI
2. OMARI JUMA @ MDOE } **.....APPELLANTS**
3. NICHOLAUS RICHARD @ RUBEN

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated the 2nd day of March, 2009
in
Criminal Appeal No. 27 of 2008

JUDGMENT OF THE COURT

16 & 19 March, 2010

MSOFFE, J.A.:

This appeal arises from the decision of the High Court at Tanga (Mussa, J.) upholding the conviction and sentence of thirty years imprisonment meted on the appellants by the District Court of Tanga (Rutta, SRM) for the offence of armed robbery contrary to section 287A of the Penal Code as amended by **Act No. 4** of **2004**.

In view of the position we have taken on the appeal we find it necessary to begin by stating the facts in a fairly sufficient detail as under.

PW3 Aggrey Arison Mshana told the District Court that he owned a motor vehicle Toyota Corolla with registration number T 785 ACU. He employed PW2 Ganga Bakari as his driver. In his testimony PW2 told the trial District Court that on 6/12/2006 at around 7.00 p.m. he was at the Tanga Bus station. The appellants came to him and requested to hire the vehicle. He obliged. He drove them up to *"Barabara ya nne"* in Tanga wherein the first appellant disembarked, went into a shop and bought some milk and water and then went back into the vehicle. What happened thereafter was a long story. It will suffice to say that the appellants forced him to drive the vehicle through a *"shell"* petrol station in *"Barabara ya Saba"* and a number of other places in town and eventually up to a cemetery in Gofu area where they chained PW2, forced him out of the vehicle, left him there, and drove away the vehicle. At some stage in the course of the ordeal the 1st appellant, who had a knife, pointed it at PW2's neck. The 2nd appellant had a pistol which he too pointed at

PW2's head. It is also significant to mention here that, according to PW2, the whole incident took 15 to 20 minutes.

In the meantime, on the following day (7/12/2006) at around 6.45 a.m. PW1, E9612 Cpl. David and other policemen were on patrol duty at YMCA roundabout in Moshi. They saw and suspected the above motor vehicle. They approached it. According to PW1:-

> *The 3rd accused was on the driver's seat. The 2nd accused Omary Juma Mdoe was on the front seat on the left side of the driver. The 1st accused one Alhaj Ayub was on the back seat and was alone. We pulled them from the motor vehicle and chained them by the shirt .....*

Again, what happened thereafter was a long story. It will suffice to say that the appellants were arrested, and together with the vehicle, were taken to the office of the Regional Police Commander, Kilimanjaro. Since the police at Moshi had prior information about the theft of the motor vehicle in Tanga they relayed information to their counterparts in Tanga. On 7/12/2006, in the evening, PW4 E6958 DC Innocent and two other policemen arrived at Moshi and on

8/12/2006 they brought the appellants and the vehicle to Tanga. While in Tanga on 9/12/2006 PW5 Inspector Madafu Omary Abdallah conducted an identification parade in which PW2 duly identified the appellants. In the meantime, five days after the incident, PW3 was summoned to Chumbageni Police Station at Tanga where he identified his vehicle.

In principle the appellants' defence was a common one. It was an *alibi*. They contended that in the morning of 6/12/2006 they travelled in a *"fuso"* pick up to Segera where they disembarked and boarded a bus christened "Air Bus" destined for Moshi. Upon arrival they spent a night at Shambarai, Kibosho road area in Moshi, in the home of the 3rd appellant. On the following day they were arrested on their way to Mbuyuni Market where they had intended to buy bananas for sale in Tanga. They were eventually driven back to Tanga where they were charged and convicted accordingly.

It is not in dispute that PW2 was robbed of the vehicle on the date of incident. It is also undisputed that the vehicle belonged to PW3. In this sense the appellants all along never claimed ownership

of the vehicle. It is also common ground that the vehicle was found at Moshi on 7/12/2006 and eventually driven back to Tanga on 8/12/2006 where PW3 identified it. It is also not in dispute that the appellants were arrested at Moshi and brought back to Tanga where they were charged and convicted accordingly. The crucial question is whether the prosecution case against the appellants was proved beyond reasonable doubt.

This is a second appeal. By virtue of **section 6(7)(a)** of the **Appellate Jurisdiction Act 1979**, only matters of law (not including severity of sentence) stand to be considered by this Court. However, if there are misdirections or non-directions on the evidence, a misapprehension of the evidence, a miscarriage of justice, etc. we are duty bound to interfere. In other words, we can interfere if we are convinced that either of the two courts below failed to consider matters that they ought to have considered or considered extraneous matters or on the facts before them they came to an untenable conclusion. Briefly, this is a jurisdiction which we exercise very sparingly – See the cases of **Dr. Pandya v R** (1957) EA 336, **Amratlal D.M. t/a Zanzibar Silk Stores v A. H.**

Jariwala t/a Zanzibar Hotel (1980) TLR 31 also cited by this Court in **Daniel Nguru and Others v Republic**, Criminal Appeal No. 178 of 2004 (unreported).

Admittedly, the determination of the case depended on the crucial aspects of identification, the doctrine of recent possession and the weight, if any, to be attached to the defence of *alibi*. Indeed, the complaints in the appellants' respective memoranda of appeal hinge on these aspects of the case.

We wish to state from the outset that in our determination of the appeal we will not address evidence on the identification parade and the *alibi*. We will not do so because we are satisfied that we can dispose of the appeal without referring to those aspects of the case.

The law on the evidence of visual identification is settled. This evidence is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. The principles to be taken into consideration were enunciated by this Court in the celebrated case of **Waziri Amani v Republic** (1980)

TLR 250 at page 252. Further to **Waziri Amani** we may also add the English decision in **R v Turnbull** (1976) ALL ER 549 which gave guidelines to help courts in deciding cases which depend wholly or substantially on the correctness of a disputed evidence of identification of a suspect. The guidelines were as follows:-

> *First, whenever the case against an accused depends wholly or substantially on the* ***correctness*** *of one or more identifications of the accused* ***which the defence alleges to be mistaken*** *the judge should* ***warn*** *the jury of special need for* ***caution*** *before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such warning* ***and should make some reference to the possibility that a mistaken witness can be a convincing one*** *and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly the judge should direct the jury* ***to examine closely the circumstances in which identification by each witness***

came to be made. How long did the witness have this accused under observation? At what distance? In what light? Was the identification impeded in any way as for example by passing traffic or press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the prescription of the accused given to the police and the witness when first seen by them and his actual appearance.

(Emphasis supplied.)

In this case PW2, the only identifying witness, stated that he was seeing the appellants for the first time, that there was security light at the Tawaqal office at the Bus station where he had parked the vehicle, that he spent about five minutes negotiating the hire charges with the appellants, and finally that the whole incident took 15 to 20 minutes. In our view a number of questions were

unanswered in the evidence of this witness. The following are some of the questions. How bright was the security light? How close was he to the appellants? In the five minutes he spent negotiating the hire charges to whom was he talking to? Was he talking to one of the appellants at a time or to all of them at the same time? If he was talking to one or all of them at the same time how did he identify one or all of them at the said time i.e. by their distinct clothing, colour, special marks, facial appearance etc.? In the absence of evidence of there being light of whatever kind at the shop in *"Barabara ya nne"* did he identify the 1st appellant? If he did, how? When he stopped at *"Barabara ya saba"* for purposes of refueling was there any light at the *"shell"* petrol station? If yes, was it bright enough for him to be able to identify the appellants who remained seated in the vehicle? In the 15 to 20 minutes of the ordeal, particularly in the course of driving, did he ever turn back to watch the appellants in the vehicle? If yes, how did he identify them? Did he at any one time ever switch on the light in the vehicle? If he did, how did he identify the appellants in the vehicle at the time? When he reported the incident to the police why didn't he, at the very least,

give description(s) of all or at least one of the appellants? In the circumstances of this case, as contended by the 1st appellant, a description of some sort would have helped in lending credence to his evidence of identification. Indeed, in the context of this case, the case of **Mohamed Alhui v Rex** (1942) 9 EACA 72 is relevant, thus:-

> *In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of highest importance of which evidence ought always to be given, first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.*

In this case, as already pointed out, PW2 did not describe the appellants. In similar vein, no evidence was forthcoming from the police to indicate that PW2 ever described to them the appellants when PW2 reported the incident to the police.

It occurs to us that in the absence of answers to some or all of the above questions, it is not safe to say with certainty that PW2 duly

identified the appellants on the fateful day. There were some doubts in his evidence of identification. The doubts ought to have been resolved in favour of the appellants by giving them the benefit of doubt.

In fact, we may add here that it is true, as urged before us by Mr. Oswald Tibabyekomya, learned Senior State Attorney for the respondent Republic, that under the provisions of **section 143** of the **Evidence Act** (CAP 6 R.E. 2002) it is not the number of witnesses which matters. What matters is the credibility to be attached to a witness. However, as cautioned by this Court in **Felix Kachele and Another v Republic**, Criminal Appeal No. 159 of 2005 (unreported), a court must be careful in acting on the evidence of a single witness of identification. The Court observed, *inter alia,* as follows:-

> *..... a court cannot be said to be satisfied that the single witness was telling the truth where circumstances show that although the witness might be testifying honestly on what they believe is the truth, yet they might be mistaken .....*

In this case, as already stated, in the absence of answers to the questions we posed above it might as well be correct to say that the persons in PW2's vehicle on that day were not necessarily the appellants in this case.

This brings us to the evidence on the doctrine of recent possession. In so far as this case is concerned, the only evidence on the doctrine was that of PW1. Before addressing the evidence of this witness we wish to restate the law, *albeit* briefly, on the doctrine of recent possession.

In our view, the Kenyan case of **Christopher Rabut Opaka v Republic**, Criminal Appeal No. 82 of 2004, a decision of the Court of Appeal of Kenya sitting at Kisumu, cited to us by Mr. Tibabyekomya, underscores the essence behind the presumption of the doctrine of recent possession. In that case the Court of Appeal cited a passage from its decision in **Isaac Ng'ang'a Kahiga *alias* Peter Ng'ang'a Kahiga,** Criminal Appeal No. 82 of 2004, in which it laid down the principles of law applicable in cases in which the doctrine of recent possession is in issue, thus:-

> *..... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof first;* ***that the property was found with the suspect;*** *secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view,* ***any discredited evidence on the same cannot suffice no matter from how many witnesses.***
>
> (Emphasis supplied.)

Back home, we have the case of **Hamisi Meure v Republic** (1993) TLR 213 whereby this Court upheld Mwalusanya, J. in Criminal Sessions Case No. 76 of 1992 of the High Court at Dodoma that by the

With respect, our answer to the first question above is in the negative. PW1 stated that at the YMCA Moshi/Arusha Road junction in Moshi on 7/12/2006 at around 6.45 a.m. he saw the vehicle in question. He was with PC Vincent and PC Idd. The vehicle had tinted glasses and the windows were closed. They surrounded the vehicle and "*Each police opened one door of the car*". In the vehicle they found the appellants. Then he went on to say:-

> *The 3rd accused was on the driver's seat. The 2nd accused Omary Juma Mdoe was in the front seat on the left side of the driver. The 1st accused one Alhaj Ayub was on the back seat and was alone. We pulled them from the vehicle and chained them by the shirt. We searched them. Each one had a mobile phone. We kept these mobile phones. Then we put them in our motor vehicle and went up to the office of the RPC of Kilimanjaro Region. There we found ACP Lucas Ngoboko ..... There at the said ACP Lucas Ngoboko interrogated them ..... This is the motor vehicle. I am the one who drove it from the round about .....*

doctrine of recent possession a person found with stolen property immediately after the murder will be taken to be the murderer.

Also, in the case of **Ally Bakari and Pili Bakari** (1992) TLR 10 (also cited by this Court in **Paulo Maduka and four others v Republic**), Criminal Appeal No. 110 of 2007 (unreported), this Court observed as follows on the doctrine of recent possession:-

> *..... the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt,* ***it is the prosecution who assumes the burden of proof*** *.....*
> (Emphasis supplied.)

The questions then that have to be posed and answered are these:- Did the evidence of PW1 alone establish the doctrine of recent possession in this case? Isn't it correct to say that in order to establish the doctrine fully more evidence was needed in the case?

As already pointed out, in terms of **section 143** of the Evidence Act *(supra)* the number of witnesses in a trial does not matter. What matters is the credibility to be attached to a single witness. As already observed, PW1 was the sole witness for the prosecution who testified on the doctrine of recent possession. In our considered view, in order to establish the doctrine fully it was imperative upon the prosecution to summon PC Vincent, PC Idd and ACP Ngoboko. The fact that each policeman opened one door of the vehicle coupled with the other factor that it was PW1 alone who drove the vehicle to the police station suggest in effect that each policeman played a different role in the matter. Furthermore, if PC Vincent and PC Idd had testified they would have assisted in lending credence to the evidence of PW1 on the above sitting arrangement by the appellants in the vehicle at the time. In fact, in the course of opening the doors and watching the appellants in the vehicle one would have expected evidence on whether or not the three policemen or one of them identified the appellants, say by their clothing, facial appearance etc. Also the evidence of PC Vincent and PC Idd would have shown exactly who between them drove the

appellants to the police station. In similar vein, the evidence of ACP Ngoboko would have helped in showing the nature of the interrogation he had conducted on the appellants.

This brings us to the second question whose answer has, in a way, been answered by our discussion of the first question. We only wish to add that the above witnesses ought to have been summoned in order to address the appellants' defence that they were not arrested at the junction in question, after all. In order to disprove this assertion the evidence of these witnesses was necessary to buttress the evidence of PW1. Apparently, no evidence from these witnesses was forthcoming along the lines we have suggested above. The absence of evidence by these witnesses created a missing link in the prosecution case against the appellants on the doctrine of recent possession.

In the case of **Aziz Abdallah v Republic** (1990) TLR 71 this Court had occasion to point out under holding (iii) thereof that:-

> *The general and well known rule is that the prosecutor is under a prima facie duty to call*

> *those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.*

Applying **Aziz** to this case, we think that the failure to summon the above witnesses had an adverse inference to the case for the prosecution on the doctrine in issue, and the courts below ought to have held so.

Before concluding this judgment we wish to make one observation in passing. In our reading and understanding of the evidence on record one thing becomes clear to us. This was a case which was poorly investigated and prosecuted. We think the prosecution could have done a better job. For instance, if the case had been properly or adequately investigated and prosecuted perhaps the evidence of PW2 would have provided answers to some, or all, of the questions we posed above. Likewise, if PC Vincent and PC Idd had testified probably their evidence would have provided the missing link in the evidence on the doctrine of recent possession.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellants are to be released from prison unless lawfully held.

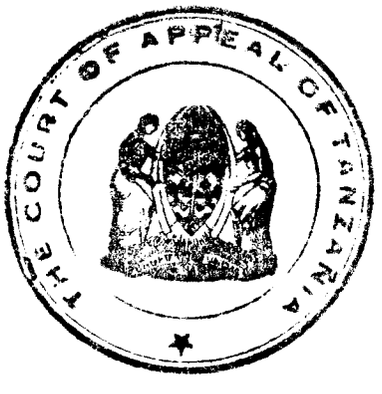
DATED at TANGA this 18th day of March, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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



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