IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A; MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO 261 OF 2006

1. JAMES KISABO @ MIRANGO
2. YUSUFU ABDALAH @FADHILI } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rweyemamu, J.)

dated the 21st day of March, 2006
in
Criminal Appeals Case Nos. 338 & 339 of 2004
.....

JUDGMENT OF THE COURT

8 & 15 FEBRUARY, 2011

MASSATI, J.A.:

This is a second appeal. The appellants and two others were charged before the district court of Mwanza, with Armed Robbery contrary to sections 285 and 286 of the Penal Code (Cap 16 – RE, 2002). The other

two were acquitted while the appellants were convicted and sentenced to 30 years imprisonment and six strokes of the cane each. Their appeals to the High Court were unsuccessful, hence the present appeal.

The facts of the case as could be gathered from the record are that, on the midnight of 28/5/2003 at about 1.50 a.m, one WP 3114 Cpl. Mary who was asleep at her home in Kirumba area, within Mwanza City, was woken up by 4 persons who broke the door of her house and forcefully entered therein. When she woke up she saw that the intruders were armed with a gun, a panga (bush knife) and sticks. While the man with the gun ordered her to keep quiet, the others were busy collecting different properties. One of them even attempted to rape her before her daughter shouted to the assailant to leave her alone, while the other intruders called him out to leave before people in the neighbourhood thronged the area. The robbers then disappeared with bags of clothes, a TV, golden chains, two pairs of rings, two pairs of earings, a mobile phone, two big radio, speakers and a radio. When people gathered to assist her, the robbers had vanished and on their advice, she decided to report the matter at Kirumba Police Station. Following a tip off, a search was mounted. On the

30th May, 2003, she was summoned by the police. She went there and "identified" the 2nd appellant who was found with her radio's remote control. At the central police station, she was also shown and was able to identify her radio together with 3 discs (CDs) as well as her police baton, and a pair of her underpants.

The appellants denied to have committed the offence, or being found in possession of any of the stolen properties. They also raised the defences of alibi. Both the trial court and the first appellate court rejected their defences.

Before this Court, the appellants fended for themselves, whereas, the Republic/respondent was represented by Ms JACKLINE EVARISTUS MREMA, learned State Attorney.

Each of the appellants filed a separate memorandum of appeal, which they adopted at the hearing. In addition, the first appellant sought

and was granted leave to argue three additional grounds of appeal. The second appellant on the other hand, also filed a supplementary memorandum of appeal containing 4 grounds. In his original memorandum of appeal, the first appellant essentially challenges the evidence of visual identification that links him with the offence. In his oral additional grounds of appeal, the first appellant further augmented his attack on the evidence of dock identification and confusion in his names, and the incredulity of there being no other civilian witness that was present at the scene of crime. On the other hand, the second appellant submitted that he was not searched and or found with any of the victim's properties. He also criticized the police for not producing a single civilian witness who witnessed the search and seizure of the alleged stolen properties.

On her part, Ms Mrema, the learned State Attorney, declined to support the conviction basically on two grounds. First, the evidence of visual identification was weak, incredible, and contradictory. Second, in view of the discrepancies in the description of the stolen articles, the irregularities in the search and seizure of the alleged stolen properties, and the circumstances in which the properties were introduced in court as

exhibits, it could not be said that the doctrine of recent possession was properly applied in the circumstances. For those reasons, she urged us to allow the appeal.

The first appellate court dismissed the appeal on two grounds, first, that both appellants were sufficiently identified by the victim, and secondly that the second appellant was, in addition, found in possession of some of the articles stolen from the victim(PW1). The doctrine of recent possession was thus invoked to strengthen the prosecution case.

Although those are issues of fact, nevertheless, this Court is, empowered to interfere, if there are clear misdirections in reaching such findings; see, **EDWIN MHONDO Vs R (1993)** TLR 170 at 174. In the present appeal, we feel duty bound to interfere with the findings of the two courts below on the following grounds:-

In the first place, we agree with Ms Mrema, that the evidence of PW1, the only identifying witness is not consistent. In her testimony in court, PW1 told the court that the appellants went back to her bed and attempted to rape her, but in exhibit D2, she told PW3 that only one went back to her room. Secondly, PW1 testified that, with the aid of electric light, and the time she spent with the robbers, together with her previous knowledge of them as her neighbours, the conditions of identification, were favourable and so was able to identify the appellants. But as held by this Court in **JARIBU ABDALLAH Vs R** (2003) TLR 271, in matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The ability of the witness to name the offender at the earliest opportunity is a reassuring though not decisive factor. In the present case, although PW1 claimed to have known the appellants from before, neither of the prosecution witnesses testified that PW1 had described or named any of the appellants on reporting the crime. None of PW1's neigbhours who according to her, even told her that they identified the culprits, came to testify in court. This is also borne out by PW3, who on being cross examined by the 1st appellant said:-

"I had information that the properties of Mary, complainant have been stolen ..... I got information of theft from the police report book. There (are), no names of the suspects".

If PW1 had mentioned the names of the suspects to third parties, that in itself would have been a sufficient description. But PW3's evidence above and the circumstances in which the appellants were arrested, is not consistent with the prosecution contention that PW1 did know the appellants, or that they were her neighbours.

The principle in **JARIBU ABDALLAH'S** case was sounded before. It was earlier held in **MARWA W. MWITA AND ANOTHER Vs R** (Criminal Appeal No, 6 of 1995 (Mwanza) (unreported) that:-

"..... the ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".

Contrary to the findings of the two Courts below, we do not find any credible evidence on record, to prove that PW1 had mentioned, or described any of the appellants to the police or to her neighbours that volunteered to testify. The two courts below should therefore have been more cautious and not wholesomely accept PW1's evidence as credible especially on the question of identification, because, even in most favourable of conditions there is no guarantee against untruthful evidence or mistaken identity. PW1's evidence, being that of the single witness of identification, it was prudent for the two courts below to have looked for corroboration, before proceeding to found a conviction. On our part we are not prepared to accept that in the circumstances, the evidence of visual identification of the appellants was watertight.

It is tempting and indeed the two courts below found that identification was strengthened by evidence of recent possession of properties allegedly belonging to PW1. The question is whether the doctrine of recent possession was properly applied in the circumstances of the case? In a chain of cases decided by this Court, the most recent of which, is **ALHAJ AYUB @ MSUMARI & OTHERS Vs R** Criminal Appeal no 136 of 2009 (unreported) it was held that:-

> ***"..... before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, ... It must positively be proved, 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.***

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses".

In the present case, the alleged stolen properties that were tendered in court by PW1 as exhibits, were the underpants and the police baton (Exh. M1 and M2 respectively) and the radio and all its components (Exh. M3 collectively). The prosecution case was that these properties were found with the 2nd appellant. The record is, however, silent as to the circumstances in which the 2nd appellant was found with the radio, the police baton, and the underpants. As Ms Mrema, the learned State attorney, rightly observed, in the absence of a search order, or certificate of search or evidence of who was present, or even whether the appellant was present, during the search, it cannot, be said, (and we agree) that there is any evidence that the properties were found in the appellant's possession. As for the remote control allegedly found from the appellant's private parts, there are two hitches. First, like the others this exhibit was

not described by PW1 as her property before she was allowed to tender it in evidence. Second, according to the record it was not PW1, but PW3 who seized it and the other exhibits from the appellant, but PW3 was not asked to identify them as the same properties seized from the appellant, nor was the chain of their custody explained to the trial court. So under the doctrine of recent possession two elements are wanting in the present case. First, it has not been proved beyond any sane doubt that the appellant was found in possession of the radio, the police baton and the underpants (Exh. M1 and M2, and part of Exh. M3). If anything was found in his possession, it has not been proved by prior description before the same were introduced in court as exhibit that the properties belong to PW1. Consequently, we think that the doctrine of recent possession was misapplied in the circumstances of this case.

In view of the weak identification of the appellants and the shortfalls in the application of the doctrine of recent possession, we think the conviction of the appellants is not safe. Accordingly, we allow the appeal,

quash the conviction, and set aside the sentences. The appellants are to be released forthwith from custody, unless otherwise lawfully incacerated.

Order accordingly.

DATED at MWANZA this 11th day of February, 2011.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL