IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO.253 OF 2008

JOHNY OMARY MUSA KASEMBE
@CHAMKONO AND 2 OTHERS ..... APPELLANTS

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court

of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 15th day of July 2008

in

Criminal Appeal Nos. 93-95 of 2007

JUDGMENT OF THE COURT

21st & 29th September 2011.

MBAROUK, J.A.:

In the District Court of Masasi at Masasi, the appellant with two others were jointly charged with the offence of armed robbery contrary to sections 285 and 287(A) of the

Penal Code Cap.16 as amended by Act No.4 of 2004. All the three appellants were convicted and sentenced to thirty (30) years imprisonment each. They were also ordered to pay shs.350,000/= to the complainant being the value of her unrecovered property. Aggrieved, the appellants appealed to the High Court (Mjemmas, J.) at Mtwara. They lost their appeal, hence this second appeal.

Briefly stated, the facts giving rise to the case were that, on 21-7-2007 at 3.00p.m., Felista Swala (PW2) was going to Chikukwe village. She had a bicycle and a small bag containing a mobile phone, Tshs.50,000/=, NMB Bank pass-book, National Health Insurance Fund Card and her Identity Card. On her way to Chikukwe, PW2 met the three appellants who ordered her to stop. They threatened to kill her while they took away her bicycle and bag. She was also cut on her left leg. She raised alarm and the appellants ran way. Mary Soseleji (PW3) who was coming from Chikukwe heard the alarm raised by PW2. She went to the direction

where the voice was coming from and she found PW2. She also saw the appellants running away. She went home and informed PW2's husband Lucas Michael Mholoko (PW4) about the incident. PW4 followed PW2 who told him about the ordeal including the people who attacked her. Thereafter, PW4 took his wife (PW2) to the Village Executive Officer and to Ndanda Police Station where they were advised to report the matter to Masasi Police Station. At Masasi Police Station, PW2 was issued with a PF3 and went to Mkomaindo Hospital for treatment.

In their defence at the trial court the appellants denied any involvement in the case against them. The first appellant, John Omari Mussa Kasembe @Chamkono deposed that on 11-2-2007 while he was at a house of his uncle (the third appellant) police came and arrested him. Thereafter, he was charged with the offence in this case.

The second appellant, Michael s/o Michael Mrope @Chikaputula deposed to the affect that he was arrested at his house and a search was conducted but nothing was found. He said, he was then taken to the police station and later charged.

As to the third appellant, Isaya Saidi Mlaponi, he deposed that on 14-1-12007 the 1st and 2nd appellants came at his house and stayed there until 19-1-2007. On 21-1-2007, he heard that his visitors robbed a bicycle, money, phone and identity cards from a teacher. On 25-1-2007 while he was at his farm, he was arrested and taken to police and later charged.

Both, the trial court and the first appellate court were convinced that the case against the appellants was proved beyond reasonable doubt, hence convicted and sentenced them as shown earlier.

In this appeal, the appellants just like in the lower courts appeared in person unrepresented. Looking at their memoranda of appeal, it seems the appellants are complaining on similar grounds, mainly based on the following grounds:-

1) That, they were not correctly identified at the scene of crime.
2) That, the evidence tendered by the prosecution witnesses was not enough to prove the offence against the appellants.
3) That, it was not proper for the doctor who wrote PF3 Form to tender it in court.
4) That, the prosecution witnesses were not listed during a preliminary hearing.

At the hearing, the appellants had nothing much to elaborate.

On his part, Mr. Ismail Manjoti, learned State Attorney, assisted by Mr. Prudens Rweyongeza, learned Senior State

Attorney represented the respondent Republic. From the outset, the learned State Attorney submitted that, he does not support the appeal.

He centred his argument on the issue of identification. He submitted that, the testimony of PW2 (the complainant) to the effect that she knew all the three appellants even before the incident. Mr. Manjoti added that, the incident happened at a broad day light, hence PW2 managed to identify all the appellants. He said, that is why PW2 managed to identify and name all of the three appellants who attacked her at the scene of crime. In support of his argument, he cited to us the case of **Gerald Lucas v. Republic,** Criminal Appeal No.220 of 2005 (unreported) where elements of avoiding the possibilities of mistaken identity have been stated. He mentioned the elements as stated in the case of **Gerald Lucas** (supra) which are relevant to the instant case as follows:-

Firstly, he said, PW2 stayed with the appellants under observation for long time.

Secondly, the proximity between the appellants and PW2 was very close that is why the appellants managed to attack her.

Thirdly, PW2 knew the appellants before that incident.

Fourthly, there was no obstruction experienced by PW2 to interrupt her concentration.

Fifthly, the incident happened in a broad day light.

For those reasons, Mr. Manjoti was of the view that identification of the appellants was water-tight.

On our part, we are of the considered opinion that the prosecution's evidence on identification mainly relied on PW2's evidence who was the victim in that incident. Her evidence relates the 1st and 2nd appellants as those who attacked her on that day. As for the 1st appellant involvement, PW2 submitted that, he was the one who

caught her neck to prevent her from shouting. She said, it was the 1st appellant who cut on her left leg and took her hand-bag which contained her identity cards. As to the 2nd appellant's involvement, PW2 submitted that he was the one who seized and took her bicycle and told her not to shout otherwise they will kill her. As to the 3rd appellant, PW2 only said that he was among those who stood with a bush knife.

Due to the fact that the incident happened in broad day light, we are of the opinion that PW2 rightly identified the 1st and 2nd appellant due to elaborative explanation in her testimony. However, as we shall explain later in this judgment, we are doubtful about the 3rd appellant's involvement.

As on the appellants claim that the evidence tendered by the prosecution was not enough to prove the offence, Mr. Manjoti submitted that PW7 at page 12 of the record clearly stated that when the police came and searched the 1st appellant's place, they were able to find the identity cards of

PW2 in his possession. Furthermore, he said the 1st appellant had not taken a chance to cross-examine PW7 on the documents belonging to PW2 found in his possession.

We think, this surely involves the 1st appellant with the commission of the offence under the doctrine of recent possession. The doctrine requires the appellant to be held liable for the commission of the offence having been found in possession of the stolen property, in this case, shortly after the armed robbery.

In the instant case, the 1st appellant failed even to cross-examine PW7. Such a failure, left the testimony of PW7 unchallenged. See: **Goodluck Kyando v. Republic**, Criminal Appeal No.188 of 2003 (unreported). For that reason, the evidence of PW7 on the issue of the doctrine of recent possession of the goods of PW2 remains unchallenged as the 1st appellant failed to explain on how he acquired possession of those stolen goods belonging to PW2. Several decisions of this Court held liable accused persons

found in possession of stolen property which were recently stolen. For instance, see: **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992, **Seif Salum v. Republic**, Criminal Appeal No. 150 of 2008, **Alex Thomas v Republic**, Criminal Appeal No.230 of 2008 (all unreported). For that reason, we are constrained to draw adverse inference by implicating the 1st appellant as he was found in possession of the complainant's stolen goods.

On the other hand, PW2 managed to identify the 2nd appellant sufficiently at the scene of crime. She also named the 2nd appellant as one among those who attacked her. Hence the 2nd appellant's involvement in the commission of the offence has no doubt.

We are in doubt as to the involvement of the 3rd appellant in this case. As claimed, he was involved only because he invited the 1st and 2nd appellants to stay in his house for few days and just then the incident happened. We satisfied that there is not enough evidence to prove the guilt

of the 3rd appellant. The evidence against him is very weak. In those circumstances, we give a benefit of doubt to the 3rd appellant and find him not guilty.

As to the appellants claim that, the doctor should have not tendered the PF3, Exhibit P1, Mr. Manjoti rightly pointed out that Section 240(3) of the Criminal Procedure Act provides that a court has to inform an accused person of his right to require medical officer who wrote the PF to be called to enable the accused to be given a chance to cross-examine him. That is the position in law. For that reason, we are of the opinion that, that ground of appeal has no merit.

As on the ground that all prosecution witnesses were not listed during the preliminary hearing, Mr. Manjoti urged us to find the ground without merit as there is no law to that effect. In support of his argument he cited to us the decision of this Court in the case of **Bandoma Fadhil Makoro and Another v. Republic**, Criminal Appeal No. 14 of 2005 (unreported). In that case, it was found that, there

is no law which prohibits the calling of witnesses not listed at the preliminary hearing.

We think the decision in the case of **Bandoma** *(supra)* has a right answer to the complaint made by the appellants, where it was stated that:

> "There is no equivalent provision for trials in the subordinate Courts and there is no law therefore which prevented the prosecution to call as witnesses PW2 and PW5, even though those witnesses were not listed at the preliminary hearing."

As there is no law which prohibits the subordinate courts to call witnesses not listed at the preliminary hearing, we find the ground of appeal lacking in merit.

For the reasons stated herein above, we find the 1st and 2nd appellants appeal with no merit. Hence their appeal is dismissed. On the other hand, the 3rd appeal appellant's

appeal is hereby allowed, his conviction quashed and the sentence imposed on him is set aside. Hence the 3rd appellant is hereby to be released from prison forthwith unless otherwise lawfully held.

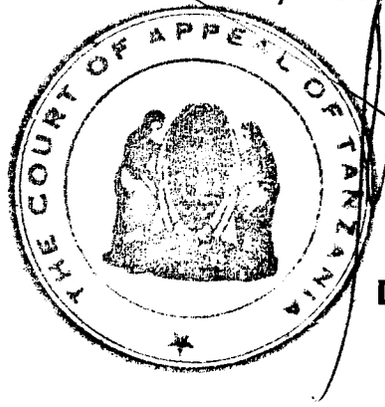
DATED at MTWARA this 23rd day of September, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



M. A. Malewo
DEPUTY REGISTRAR