

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA**

(CORAM: KILEO, J.A., BWANA, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 8 OF 2011

**1. MALUQUS CHIBONI @ SILVESTER CHIBONI
2. JOHN SIMON APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania,
at Dodoma)**

(Kwariko, J.)

**dated the 4th day of August, 2008
in
(DC) Criminal Appeal No. 108 of 2007**

JUDGMENT OF THE COURT

29th March & 1st April, 2011

BWANA, J.A:

This is a second appeal. Initially, the two appellants together with other people were charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Chapter 16 (R.E. 2002) in the District Court of Manyoni at Manyoni. They were sentenced to serve the statutory, mandatory sentence of thirty (30) years

imprisonment. They were also ordered to compensate their victim, to the value of shs. 600,000/=. Their appeal to the High Court was unsuccessful, hence this second appeal.

Before us the appellants were unrepresented while the respondent Republic was represented by Ms Rosemary Shio, learned State Attorney.

The respondent Republic did not support the conviction of the two appellants. The appellants filed two separate Memoranda of Appeal but their grounds of appeal were substantially similar centred on the following points.

- That the prosecution did not prove their case to the required standard in a criminal case.
- That there was no sufficient proof that the coats recovered during a search in their houses were the ones stolen in the course of the robbery, some days earlier.
- That the search conducted at their residences was in contravention of known procedure.

The facts of this case as discerned from the record are as follows. The complainant, one Mbonea Mngulu, was driving to Mwanza, along the Dodoma – Mwanza highway. At Solya area of Manyoni District he was waylaid and robbed at gunpoint and some of his properties were taken. These included four bags of clothes, money and mobile phones. It is on record that the complainant did not identify his assailants however, he reported the incident at Kilimatinde Police Post. A manhunt got started. The police managed to arrest the second appellant. Upon being interrogated, the said appellant admitted to have participated in the highway robbery. He mentioned the first appellant and others as his accomplices. A subsequent search at the second appellant's home led to a number of items, including clothes, suspected to be part of the loot, being recovered.

Having been arrested, the first appellant admitted his involvement in the said robbery. It is said that he led the police to where the gun used in the robbery, was hidden, that is, at Karangasi area of Tabora Rural District. He was also found in possession of a coat, suspected to be part of the

looted property. Both appellants were subsequently charged with the offence of armed robbery.

In their defence, they denied any liability. In so far as the first appellant is concerned, he averred that he had been given the said used clothes for sale at Karangasi area. He claimed that his house was searched in his absence and disclaimed ownership of any clothes that were recovered therefrom. In his defence, the second appellant made general denial regarding the allegations against him.

The prosecution case was that the first appellant led the police to a place where the gun used in the robbery, was hidden. There was no proof that in deed it was the material gun. Tests and a report by a ballistic expert confirming the same, would have strengthened the prosecution case. The absence of such proof was, in our considered view, a serious omission.

The other issue hinges on the doctrine of recent possession. Some items, to be specific, coats, allegedly belonging to the complainant, were

found in the possession of the appellants, a few days after the robbery. Could the said clothes be part of the loot? We do note with concern that the identification of the said clothes was not satisfactory to establish the ownership as well as the link between the robbery incident and the subsequent recovery from the appellants. The defence that the appellant was given those clothes for sale at Karangasi and help in selling them as second hand clothes, cannot be dispelled all together.

It is settled law that where property has been stolen and that soon thereafter a person is found in possession of the said property, that person may be held liable for the commission of that offence, unless he can prove his innocence, of course on a balance of probability. **Archbold** (2004 Ed, page 1924 para4) states:-

"The rule of recent possession is where it is proved thatproperty has been stolen and that soon thereafter defendant was found in possession of the property, it is open to the jury to convict himThis of course applies equally to thefts other

than burglary, whether pick – pocketing or armed robbery.....”

The alleged highway robbery took place on 3 February, 2004. The second appellant was arrested on 7 February, 2004 while the first appellant was arrested on 12 February, 2004. In our considered view, the doctrine of recent possession would not apply under the circumstances for the following reasons. **First**, we are mindful of the fact that items such as coats or other second hand clothes do change hands easily. Therefore a lapse of four to nine days is reasonably a long period to enable such items to change hand. **Second**, is the defence case that the appellant was given those items for sale in return for 10,000/= as his wage. We consider this to be reasonable explanation supportive of the appellant’s defence.

Connected with the foregoing are claims that searches were conducted at the homes of the appellants in their absence. They, therefore, challenge the legality of the said search and its consequences.

case in the instant case and we are of the view that it was fatal to the case for the prosecution. An explanation that the appellants hide in the bushes during the day and came to their homes only at night, lacks plausible support from the evidence on record.

This being a second appeal, we are mindful of the cherished principle that a second appellate court should not willingly interfere with the findings of fact of a trial court. It is held to be so because of the advantage the trial court has over the appeal court. The former court has a full dimension of the trial, the demeanour of the waitresses and the like. The appellate court, on its part, relies on what is contained in the record.

Therefore, the appellate court would interfere with factual issues of a case in the extreme circumstances such as, but not restricted to, glaring errors on the face of the record, errors in calculations, mix up of part of the evidence, **ejusdem generis**. This court held, in **Edwin Mhando vs Republic** (1993) TLR 170, at 174 that:-

"....on a second appeal, we are supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If, as in this case, both courts completely misapprehended the substance, nature and quality of the evidence, resulting in an unfair conviction, this Court must, in the interest of justice, intervene".

We intend to "intervene" in this case particularly when we take into consideration the consequences of the totality of the issues raised herein namely-

- The improper conduct of the search.
- The unsatisfactory identification of the clothes allegedly stolen from the complainant. The said complainant did not give evidence in court and identify the said clothes to the satisfaction of the said trial court, bearing in mind that the said items, i.e. used clothes, are commonly available everywhere.
- The reasonable and persuasive defence evidence.

We therefore allow this appeal. We quash the convictions and set aside the sentences imposed against the appellants. We further order that unless otherwise lawfully held, the two appellants, Maluqus Chiboni @ Silvester Chiboni and John Simon, be set free forthwith.

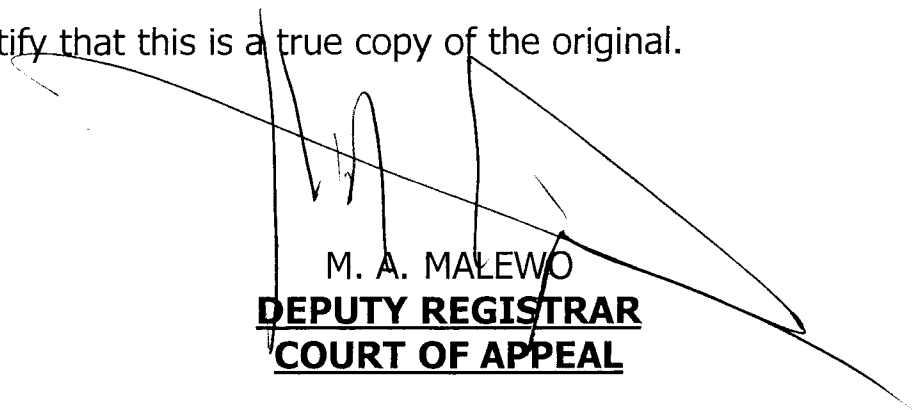
DATED at DODOMA this 30th day of March, 2011

E. A. KILEO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL