IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 247 & 248 OF 2007

1. **SHABANI HARUNA.....1ST APPELLANT**
2. **JUMBE RASHID.....2ND APPELLANT**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court (Appellate Extended Jurisdiction) at Tabora)

(Mbuya, PRM, Extended Jurisdiction)

dated the 29th day of May, 2005
in
Criminal Appeals No. 8 & 9 of 2007

JUDGMENT OF THE COURT

13 & 20 June, 2011

KIMARO, J, A.:

Both appellants were convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code and they were sentenced to thirty years imprisonment. Aggrieved by the conviction and the sentence, they appealed to the High Court. The High Court, under section 45 A of the Magistrates' Courts Act transferred the appeal to the Court of Resident Magistrate to be heard by a Principal Resident

Magistrate (Extended Jurisdiction). Their appeal was dismissed. Still dissatisfied, they have lodged this second appeal.

Both appellants have filed various grounds of appeal faulting the decision of the first appeal court, but basically they are claiming that the prosecution evidence on record was not sufficient to sustain their conviction.

The 1st appellant claimed in his first, fourth and fifth grounds of appeal that the properties belonged to him. In his third ground he said he was injured by the police and the case was framed against him for purposes of evading criminal responsibility. On his sixth ground of appeal that he was held liable on the doctrine of recent possession, the 1st appellant contended that the complainant did not give description of the properties she said were stolen from her house.

As for the second appellant he also challenged in his first, second and third grounds of appeal the basis of his conviction on the doctrine of recent possession while the complaint failed to give a description of the properties she claimed were stolen, and that nothing was found in his house when it was searched. He said he was not even living in the house of the 1st

appellant. He also complained that there was no certificate of seizure to show that he was found with the stolen properties. The 2nd appellant also contended that he was denied the right to call his witnesses. He claimed in his fourth ground of appeal that under those circumstances his conviction was unjustified.

Briefly, the prosecution evidence upon which the conviction of the appellants was based was that in the night of 1st June, 2004 at 3.00 a.m., the appellants and another person who was acquitted by the trial court forcibly entered into the residential house of Jane Sambale, after breaking a window. Using a knife, one of them went into her bedroom and demanded for money. The complainant testified in the trial court as PW1. When she said she did not have money, she was cut by a knife. The appellants then stole from her an assortment of properties. In the process of implementing their criminal act, they forced the complainant to sleep underneath the bed and remain silent. According to the complainant there was light in her bedroom and she saw the appellants. It was her testimony that after the appellants went away, at around 4.00 to 5.00 a.m. she reported the incident to the Village Chairman who, with assistance of others, made a follow up of the robbers by following bicycle tyres marks, a

bicycle being one of the items stolen from the complainant. According to the complainant, she used the bicycle to facilitate her transportation to and from work. She was a nurse. James Kalangu (PW2), the Village Chairman to whom the crime was reported, and Leonard Kishiwa (PW3) who assisted in tracing the robbers, said the bicycle tyre marks ended at the 1st appellant's house.

PW2 said at the house of the 1st appellant three people came out running and they managed to arrest the 2nd appellant. The others ran away. As for the 1st appellant he locked himself in. The 1st appellant was forced by his ten cell leader, Juma Said (PW4) to open the door. According to (PW4) several items, being some of the properties that were stolen from the complainant were found in the house of the 1st appellant. No. C. 1553 D/C Edward (PW6) who went to the house of the 1st appellant testified that the complainant who had earlier on reported the commission of the crime to the police station, identified the items found in the house of the 1st appellant as her properties.

In their defence both appellants denied the commission of the offence. The 1st appellant said the properties were sent to his house by

the 2nd appellant. The 2nd appellant raised a defence of alibi that he was not present at the scene of crime at the time of the commission of the offence but the trial court rejected his defence. The trial court was satisfied with the evidence of the prosecution that the appellants were correctly identified and hence their conviction. On appeal to the first appellate court, their conviction was sustained on the doctrine of recent possession. Citing the case of **Martin Ernest Vs R** [1987] T.L.R., the Appellate Principal Resident Magistrate with extended jurisdiction said that the stolen properties having been recovered from the house of the 1st appellant on the same material date they were stolen, and the appellants having failed to give a reasonable account on how they came into possession of the said properties they could not evade criminal responsibility.

As already stated, this finding of the first appellate court aggrieved the appellants and they filed this second appeal. At the hearing of the appeal the appellants appeared in persons. Ms Lilian Itemba, learned State Attorney represented the respondent Republic. The appellants opted to hear from the learned State Attorney first, before giving their reply.

On her part, the learned State Attorney supported the conviction and the sentence. In opposing the grounds of appeal for the appellants on their conviction on the doctrine of recent possession and the ownership of the properties, the learned State Attorney said none of the appellants raised the question of ownership of the properties at the time of the trial. In her considered opinion, the appellants are raising this ground as an afterthought. On the ground of appeal by the 1st appellant that he was injured, the learned State Attorney said the appellant might be right that he was injured, however, that does not exempt him from criminal responsibility under the circumstances in which the properties were found in his possession. On the issue of failure by the complainant in giving the description of the properties, the learned State Attorney said it has no substance as the properties were found in possession of the appellants soon after the commission of the offence and the properties were recovered not at a distance very far from where they were stolen and the complainant identified them as her properties.

As for the second appellant on his conviction on the doctrine of recent possession the learned State Attorney submitted that for similar reasons she submitted in respect of the 1st appellant , his conviction cannot

be faulted. On the defence of alibi, the learned State Attorney said the 2nd appellant was found in the house of the 1st appellant and so his conviction cannot be faulted. As regards the issue of the properties being recovered without a seizure certificate, the learned State Attorney said even if the prosecution made a procedural mistake for not using a seizure certificate at the time of recovery of the properties in the house of the 1st appellant, which in her opinion was a minor mistake, that did not affect the evidence upon which their conviction was based. She prayed to the Court to dismiss the appeal.

In their reply the 1st appellant insisted that the properties belonged to him. He prayed that the appeal be allowed. As for the 2nd appellant he reiterated his grounds of appeal and prayed that his appeal be allowed.

This is a second appeal where the jurisdiction of the Court is restricted in interfering with finding of fact by the lower courts unless there is misdirection on the evaluation of the evidence, hence leading to injustice. See the case **Hussein Idd and Another V R** [1986] T.L.R. 166. In our considered opinion we have no justification for interfering with the

findings of facts in respect of the first appellate court for the reasons given below.

In the case of **Juma Marwa Vs R** Criminal Appeal No. 71 of 2001 (unreported), the Court said that:

> *"The doctrine of recent possession provides that*
>
> *if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a quilt receiver."*

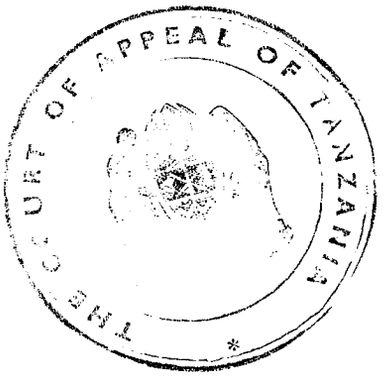
The evidence on record shows that the culprits who stole from the complainant gained access to the house by breaking the window. Various properties were stolen from her using a knife to injure her as well as threatening her to lie underneath the bed so as to enable them take away what they wanted. Among the properties stolen was a bicycle, and in making a follow up of the stolen properties, PW2 and PW3 traced tyre marks which were seen on the ground and in making a follow up of them, the tyre marks ended at the house of the 1st appellant. Among the properties stolen from PW1 were found in the house of the 1st appellant and PW1 identified them as her properties. Her house was broken into at

appellant did not claim ownership of the properties. When he was required by PW2 and PW3 to open the door of his house, he refused and locked himself in until his ten cell leader; PW4 intervened and required him to open the door. When the properties were recovered, the explanation which the 1st appellant gave was to implicate the 2nd appellant as being the one who took to him the properties. Under the circumstances, we agree with the learned State Attorney that the 1st appellant cannot escape criminal responsibility under the doctrine of recent possession. We find his grounds of appeal lacking merit and dismiss his appeal in its entirety.

As for the 2nd appellant the evidence on record shows that he was arrested at the house of the 1st appellant. The 1st appellant mentioned him as the person who took the properties there. He did not give any explanation whatsoever in respect of the properties. Instead, he raised the defence of alibi, which in our opinion was correctly rejected by the trial magistrate because the evidence on record shows that the 2nd appellant was arrested at the house of the 1st appellant where the stolen property was found. Under normal circumstances, he was expected to give a reasonable explanation about the properties, which would have raised

doubt, that he was neither a thief, nor a guilty receiver of the stolen property. Instead, he opted to raise a defence of alibi which in our opinion was correctly rejected by the trial magistrate and sustained by the first appellate court. Moreover, prosecution eye witnesses proved him a liar. Under the circumstances, we equally find his grounds of appeal lacking merit. We also dismiss his appeal in its entirety.

DATED at **TABORA** this 17th day of June 2011.



J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL