IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 185, 186 & 187 OF 2008

1. **CHARLES MVAIPONYA**
2. **MAULID SWEDI** } .....**APPELLANTS**
3. **JEROME IBRAHIM**

VERSUS

THE REPUBLIC.....**RESPONDENT**

(Appeal from the Court of Resident Magistate at Tabora)

(Mbuya, PRM E/J.)

dated 11th June 2008
in
Criminal Appeals No.42, 43 CF 44 of 2006

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JUDGMENT OF THE COURT

27 & 30 June, 2011

KIMARO, J.A.:

The District Court of Nzega convicted the three appellants of the offence of armed robbery contrary to sections 285 & 286 of the Penal Code, [CAP 16 R.E.2002]. Each was sentenced to thirty years imprisonment. Their first appeal was dismissed by the Court of Resident Magistrate at Tabora, exercising extended jurisdiction.

Still protesting their innocence, they have filed a second appeal in this Court.

The appellants were alleged to have on the 10th April, 2004 at about 02.30 hours, with use of force, broken into the dwelling house of one Peter Mabanda of Nkuge Village , and at gun point, took away cash T,shs 180,000/=, a radio cassette and an assortment of goods from his shop.

The evidence that was led in the trial court was to the effect that the complainant, Peter Mabanda (PW1) managed to identify the 1st appellant at the scene of crime with the assistance of a lamp which was on at the time of the commission of the offence. According to his testimony, the appellants broke the window to his bed room using a stone which fell on his bed. Then gun shots directed to his bedroom followed. PW1 was slightly injured in the process. To save his life, PW1 when forced by the appellants to surrender the money he had, he told the appellants that he had T.Shs 180,000/=, which he was willing to surrender. Then the first appellant went nearer to the window to receive the money and it was then the complainant identified the 1st appellant by his name as he was known to him before. After receipt of the cash money, the appellants ordered the

wife of PW1 to open the door and she complied. When they entered into the room, PW1 also identified the 2nd and 3rd appellants by their faces and names. The appellants then ordered PW1 to give them a bag which they used to keep the various items they stole from his shop.

After the appellants left, people gathered at the residence of the complainant in response to the alarm that was raised. Among them was Joseph Mgwe, (PW2) the Village Executive Officer to whom PW1 mentioned the name of the appellants as the persons involved in the commission of the robbery. According to the testimony of PW1 and PW2 the movement to trace the appellants started with the 1st appellant, but he was found missing at his house. He was arrested by sungusungu at Mwakashahala village, on the same day at 7.00 p.m. and upon being interrogated on the offence that was committed at the house of PW1, he admitted the commission of the offence, and led to the recovery of the gun and some of the shop items which included bicycle spare parts, biscuits and other items from his house.

As for the 2nd and 3rd appellants, Raphael Ngasa, (PW3) and Paulo Ngeleja (PW5) the Village Executive Officer and the Commander of sungusungu of Ipumbile village respectively, told the court that they

arrested the 2nd and 3rd appellants on 24th April 2004 at 7.00 p.m. as they became suspicious of them. Upon interrogating them about the commission of the offence in the house of PW1, the two appellants also admitted involvement. The 2nd and 3rd appellants took the witnesses to Kilino village where they recovered a gun, radio cassette and weighting machine, car battery, and a suitcase containing clothes of the wife of PW1 which PW1 also identified as being among the properties that were stolen from his house.

D/Stg Lucas (PW4) said he wrote a cautioned statement of the 2nd appellant who admitted the commission of the offence. The statement was admitted in court without objection as exhibit P1. PC Charles (PW5) said he investigated the case and received the appellants and the various items recovered from the search that was conducted at their homes.

In their defence all the appellants denied the commission of the offence. The 1st appellant admitted being arrested on 10th April 1004 when he was returning home from an auction where he went to sell his cattle. On the next day he was taken to Puge village where the offence was

committed. He admitted knowing the complainant (PW1) and claimed that he was indebted to him. He denied knowing the other appellants.

The 2nd appellant admitted that he was a villager of Kilino village and that he was arrested at Ipumbili village where he went to see his sick wife. Regarding his cautioned statement he said he signed it after torture. The 3rd appellant on the other hand said he was arrested as he was on his way back home after sending his pregnant wife to hospital. He admitted that his cautioned statement was recorded by PW4.

On that evidence the trial court was satisfied that the prosecution proved the case against the appellants on the standard required and convicted the appellants as charged and sentenced them as aforesaid.

Their first appeal before the Resident Magistrate with extended jurisdiction was dismissed basically on the ground that they were properly identified by the complainant and the stolen property was recovered in their homes a few hours after the commission of the same for the 1st appellant and a few days for the 2nd and 3rd appellants.

Each appellant has filed a separate memorandum of appeal but basically their grounds are more or less similar. One major ground of complaint for all the appellants in this appeal is that it was wrong for the first appellate court to hold them responsible on the ground of the recovery of the stolen property because there was no evidence to prove that the stolen property was found in their house as no search order was used in the process of the recovery of the alleged stolen property. The second one is that the prosecution evidence was not water- tight and the ingredients of the offence were not proved.

Before us the appellants appeared in person. They were not represented. Ms Lilian Itemba, learned State Attorney, appeared for the respondent Republic. The appellants chose not to elaborate on their grounds of appeal before hearing from the learned State Attorney. The learned State Attorney supported the conviction and the sentence. Starting with the 1st appellant, the learned State Attorney said that with an assistance of a lamp which was lit at the time of the commission of the offence, PW1 correctly identified the 1st appellant. He was not only known to him before but was a close relative. He first demanded money from him

before moving inside the room to take other properties. He also mentioned his name to the first persons who reported at the scene of crime.

Moreover, said the learned State Attorney, the 1st appellant was arrested a few hours after the commission of the offence and he admitted the commission of the offence and led some of the prosecution witnesses to his home where some of the stolen properties were recovered. Under the circumstances, argued the learned State Attorney, the doctrine of recent possession was applicable to the appellant who neither claimed ownership of the properties nor gave a reasonable account on how he came to the possession of the properties which PW1 identified as being that of his. As for the search which was carried on without a search warrant, the learned State Attorney said the ground lacks substance because section 42 (3) of the Criminal Procedure Act [CAP 20 R.E.2002] allows search without warrant and apart from that, oral evidence was led in respect of the search that was conducted in the homes of the appellants.

As for the 2nd and 3rd appellants the learned State Attorney said they were arrested on 28th April 2004, not a long period after the commission of the offence. They admitted the commission of the offence and they also

led the arresting team to their homes where the stolen property was recovered and the complainant also identified the properties as his. Like the 1st appellant, neither the 2nd nor the 3rd appellant claimed ownership of the property. As for the ingredients of the offence of armed robbery, the learned State Attorney said it was sufficiently proved as PW1 testified on how use of force was used to threaten him, and he had to surrender his money and other properties at a gun point. The learned State Attorney said the evidence was sufficient to prove the charge against all the appellants. She prayed that the appeal be dismissed.

In his reply, the first appellant insisted that there was no reason for not using a search warrant because those who arrested him had ample time to look for one. As for the second appellant he said he was forced to sign the cautioned statement and he did so to save his life. The 3rd appellant on the other hand said he had grudges with the Village Executive Officer over a woman, and he insisted that there was no reason for the search to be carried out without a search warrant. All the appellants prayed that the appeal be allowed.

We are minded that this is a second appeal where we should not interfere with the finding of facts by the lower courts unless there are misdirections or non directions on the assessment of evidence leading to injustice. See the cases of **Hussein Idd and Another Vs R** [1996] T.L.R. 166 and the **Director of Public Prosecutions Vs Jafari Mfaume Kawawa** [1981] T.L.R. 149. In as far as the case is concerned, and as we will soon endeavour to show, there is no reason to interfere.

We will also start with the first appellant. The learned State Attorney submitted, and correctly in our view, that the evidence of his identification left no doubt on his correct identity. PW1 said he knew him before; there was lamp light in the room which illuminated the area, and that is how he saw the appellant. The 1st appellant was known to him before and they had blood relations and he mentioned his name to the village authorities who responded to the alarm raised. Following the identification guidelines laid down in the case of **Waziri Amani V R** [1980] T.L.R. 250 we are satisfied that conditions for identification were favourable and the complainant could not have mistaken the identity of the 1st appellant. This is one aspect of the evidence.

The second aspect is the time of the arrest of the 1st appellant. He was arrested not many hours after the commission of the offence; he admitted the commission of the offence and led to the recovery of some of the properties that were stolen from the house of the complainant which he duly identified. Neither did the 1st appellant claim ownership of the properties recovered from his home nor give a reasonable account of his possession of the same. Under the circumstances he cannot evade criminal liability under the doctrine of recent possession. See the case of **Juma Martin Vs R** Criminal Appeal No. 71 of 2001 (unreported).

As for the ground raised on proving the ingredients of the offence, which the appellants were charged with, with respect to the learned State Attorney, we agree that the ingredients of the offence were proved. The appellants were charged with armed robbery contrary to sections 285 and 286 of the Penal Code. The essence of the offence of armed robbery is use of force in the course of stealing. The particulars of the offence alleged that immediately before stealing the various properties as indicated in the charge sheet, they threatened the complainant with a gun. PW1 testified in court how the appellants shot in his room demanding for

money. Following that threat, and to save his life, he had to surrender his Tshs. 180,000/= to the appellants. He testified further that in the process of the appellants shooting towards his room, he was slightly injured. As already stated, a gun the weapon that was used to threaten PW1 was recovered and also some of the properties that were stolen. That evidence sufficiently established the ingredients of the offence of armed robbery.

On the 2nd and 3rd appellants they were also identified by PW1 at the scene of crime, he also mentioned their names; they also admitted the commission of the offence when they were arrested about fourteen days after the commission of the offence. They led sungusungu who arrested them at their respective homes where properties stolen from PW1 were recovered. Like the 1st appellant, neither the 2nd and 3rd appellant claimed ownership of the properties nor gave a reasonable account of how the property which PW1 identified as his, came to their possession. Following the decision of the case of **Martin Ernest Vs R** (supra) the 2nd and 3rd appellants cannot escape criminal responsibility.

Lastly is the complaint by the appellants that the search which was conducted at their respective homes was unlawful. Outrightly, we must

say that the appellants have no reason for complaining because they are the ones who volunteered to lead the sungusungu who arrested them at their respective homes and showed the properties which they stole from the complainant.

From what we have said above, we find the appeal by all the appellants to lack merit. The appeal is dismissed in its entirety.

DATED at **TABORA** this 29th 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