IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., MJASIRI , J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 73 OF 2009

FREDRICK WILLIAM AND TWO OTHERS ..... APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(SHAIDI, J.)

Dated the 10th day of February, 2009

in

Criminal Appeal No. 155 of 2007

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JUDGMENT OF THE COURT

24th November, 2010 & 31st January, 2011

MJASIRI, J.A.:

This is a second appeal. In the District Court of Temeke District, the appellants, Fredrick William; Ezron Sao and Fred John Maga were charged and convicted of the offence of armed robbery contrary to section 287 (A) of the Penal Code Cap 16 R.E. 2002 and were sentenced to 30 years imprisonment. Being aggrieved by the decision of the District Court, they appealed to the High Court against both conviction and sentence. Their appeal to the High Court was unsuccessful, hence the appeal to this Court.

At the hearing of the appeal the Appellants were unrepresented and the Republic was represented by Mr. Tumaini Kweka, learned State Attorney.

Briefly the facts of this case are as follows: PW1 was a taxi driver in Dar es Salaam driving a Toyota motor vehicle with registration No. T407 AKA. He used to park the taxi at the New Africa Hotel. On July 10, 2006 at about 11.45 hours he was approached by the three appellants who requested to be taken to the Keko Flats. They negotiated the fare and eventually agreed on a price. While on the way, upon nearing Keko Flats, they accosted PW1. A rope was thrown around his neck and he was pushed to the back seat. The first appellant occupied the driver's seat. PW1 was severely beaten up by the second and third appellants who were occupying the back seats. His tooth was knocked out in the course of the beating, he also became unconscious. He was thrown out of the car while he was still unconscious. His legs were tied and his mouth gagged. He was fortunately found by good Samaritans who untied him and took him to the police station. The incident of the car theft was communicated to the police officers who were on patrol. The anti - robbery Unit saw the motor vehicle answering the description of the stolen car at Kibangu area and later at Tabata junction. They trailed the car and stopped it at the Ubungo External Area. The three appellants were arrested. The third appellant was found with PW1's mobile phone which he had reported stolen. A piece of rope, a long knife and plate no. T 407 AKA was also found in the car.

The Appellants filed a joint eleven (11) point memorandum of appeal. Essentially, the said grounds of appeal could be reduced to the following:-

(i) The appellants were not properly identified.

(ii) The doctrine of recent possession was wrongly applied.

(iii) The conviction of the appellants was based against the weight of the evidence.

Mr. Kweka opposed the appeal. According to him the appellants were properly identified. He based this conclusion on the strength of the evidence of PW1 and PW3. He submitted further that the appellants were found in possession of the motor-vehicle

within a short time after it was stolen. It was clearly established that the motor vehicle driven by the appellants was the one stolen from PW1. The registration No. of the said motor vehicle was also found in the car. All the three appellants were arrested when the car was stopped by the anti-robbery squad patrol car.

After reviewing the evidence on record and the submissions by the appellants and the learned State Attorney, we are of the view that the crucial issue to be determined is whether there was sufficient evidence to prove the offence of armed robbery and whether the appellants were the robbers.

This is a second appeal, the principles to be followed in dealing with the finding of facts and conclusion reached by the lower Courts is clearly set out in various decisions of the Court of Appeal for East Africa. In **R v Hassan bin Said** (1942) 9 E.A.C.A. 62 it was held that the Court of Appeal is precluded from questioning the finding of fact of the trial Court, provided that there was evidence to support those findings, though it may think possible or even probable, that it would not have itself come to the same conclusion. See **also R v Gokaldas Kanji Karia and another**, 1949 16 E.A.C.A. 116; **Reuben Karari s/o Karanja v R** (1950) 17 E.A.C.A. 146.

In **Peter v Sunday Post**, 1958 EA 424 it was held that whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Court should stand, this jurisdiction is to be exercised with caution. Where there is no evidence to support a particular conclusion or if it shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to decide. See also Salum **Mhando v R** 1993 TLR 170.

The evidence linking the appellants with the offence is that of PW1 and PW3. Unlike the learned trial Judge we think the evidence of identification is weak because the prosecution witness (PW1) did not specify the type of light which lit the scene of the crime. The physical description of the appellants was also not given nor was the

T.L.R. 250 at page 252.

However, we are clear in our minds that the conviction of the appellants was properly grounded on the doctrine of recent possession. This is because all the three appellants were apprehended and caught red handed in the taxi (which was stolen) within a short span of time after the same was stolen. It was only a matter of a few hours. The knife and rope mentioned in PW1's testimony were also found in the motor vehicle. In addition to that the third appellant was found in possession of PW1's mobile phone shortly after the robbery took place and immediately after his arrest. The mobile phone was reported stolen by PW1.

We are increasingly of the view that within that short length of time, the stolen car and the stolen phone could not have changed hands, so the doctrine of recent possession was clearly invoked by the first appellate Court. The learned High Court Judge clearly stated in the judgment that the Court did not rely on identification alone. He took into consideration the fact that the appellants were found in the stolen car a few hours after the car was stolen from PW1. We are satisfied that the doctrine of recent possession was rightly invoked here because of the circumstance surrounding the arrests of the appellants.

The doctrine of recent possession is to the effect that a person who is found in possession of property which was recently stolen and who is unable to give a reasonable explanation on how he came by those things was the thief or the guilty receiver. It was therefore a fair inference that the appellants were the ones who stole PW1's motor vehicle.

In the case of **Ally Bakari and Pili Bakari v R** [1992 T.L.R. 10 it was stated as under:

> *"It is essential for a proper application of the doctrine of recent possession, that the stolen thing in the possession of the accused must have a reference to the charge laid against the accused. That is to say that the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the*

accused is the one that was stolen during the commission of the offence charged, and, no doubt, it is the prosecution who assumes the burden of such proof."

See also, **James s/o Paulo @ Masibuka and Another** v R, Criminal Appeal No. 61 of 2004 and **Jumanne Rashid @ Kichochi v R,** Criminal Appeal No. 206 of 2005 (both unreported).

Given the status of the evidence of PW1 and PW3, we are satisfied that such evidence is sufficient to establish the guilt of the appellants and can therefore be relied upon. We are therefore satisfied that it has been proved beyond reasonable doubt that an armed robbery took place and that the three appellants were the robbers.

For the foregoing reasons, we are satisfied that there was sufficient evidence to warrant the appellant's conviction. We therefore dismiss the appeal against the conviction, and, as the sentence imposed is the statutory minimum, we cannot disturb that.

DATED at Dar es Salaam this 24th day of January, 2011

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
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