

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

(CORAM: KILEO, J.A., MBAROUK, J. A. And MASSATI, J.A.)

CRIMINAL APPEAL NO.110 OF 2008

**ACKLEY PAUL }
RUMUL PAUL } APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court
of Tanzania at Moshi)**

(Munuo, J.)

**dated the 21st day of December, 1998
in
Criminal Appeal No. 84 & 85 of 1998**

JUDGMENT OF THE COURT

14th & 18th September, 2012

KILEO, J. A.:

In the District Court of Rombo, at Mkuu the two appellants were charged with and convicted on two counts. On the first count they were convicted on a charge of armed robbery contrary to sections 285 and 286 of the Penal Code and on the second count they were convicted of rape contrary to sections 130 and 131 of the Penal Code. A sentence of 30 years

imprisonment and six strokes of the cane was passed on the first count and on the second count the appellants were sentenced to three years imprisonment and six strokes of the cane. They lost their appeals to the High Court and they have now come to this court on a second appeal. The facts of the case briefly stated show that around midnight on 7. 12. 1995, PW1 who was sleeping in his house with his family including his wife (PW3) and their maid (PW2), were invaded by armed bandits. The bandits, in addition to robbing PW1 of his properties which included cash money and a motorcycle also raped their house maid. Conviction was based on identification and the doctrine of recent possession.

The appellants filed a joint memorandum of appeal comprising of seven grounds which can be conveniently condensed into the following three main grounds:

- 1. That there was not sufficient evidence of identification of the appellants as having been at the scene of crime*
- 2. That the doctrine of recent possession was wrongly applied.*
- 3. That there were contradictions apparent in the testimonies of the prosecution witnesses which rendered the case for prosecution to*

fall short of the standard required in a criminal trial such as this one.

The appellants appeared in person. In addition to their memorandum of appeal they had also filed additional grounds of appeal which they asked us to adopt. This additional memorandum of appeal was in essence a written submission in support of the grounds of appeal.

Ms Immaculata Banzi, learned Senior State Attorney represented the respondent Republic at the hearing of the appeal. She did not find it fit to support the conviction. She was of the opinion that identification was not watertight on the following grounds:

The appellants were not known to the witnesses prior to the incident.

The incident occurred at night and the intensity of the light which enabled the witnesses to make a positive identification was not given.

She also opined that the doctrine of recent possession was wrongly applied in arriving at a conviction.

There are two crucial issues in this case as brought forth by both the appellants and the learned Senior State Attorney. These are:

Whether the appellants were adequately identified at the scene of crime and whether they were found with the stolen property shortly after the crime was committed.

Admittedly, the crime was committed at night. It has been stated time and again by this Court in a number of cases that visual identification is of the weakest kind and before basing conviction on such evidence the court must be absolutely sure that it is watertight. See **Waziri Amani Vs. Republic** (1980) TLR 250 where the Court stated:

"...in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight....."

Again in **Raymond Francis vs Republic** (1994) TLR 100 the Court held:

"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."

In **Jaribu Abdalla v. R**, Criminal Appeal No 220 of 1994, (unreported), this Court went further and linked the issue of credibility to identification.

The Court held thus:-

"..... in matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."

The above proposition of law was re-asserted in **Nyakango Olala James v. R** -Criminal Appeal No. 32 of 2010 (unreported) in the following words:

"This principle of law is still very valid today as it was when it was first propounded. Therefore, eyewitness testimony ... can ... be devastating when false witness identification is made due to honest confusion or outright lying."

Having considered all the circumstances pertaining to identification, we are in concurrence with both the appellants and Ms Banzi that the conditions pertaining at the scene of crime were not sufficient for watertight identification. In the first place, the appellants were not known to the witnesses prior to the incident. In the second place, the intensity of the electric light which was allegedly shining that midnight was not given and thirdly, it is not in evidence that a description of the invaders was ever

given to the police, neighbors or other persons in authority. It was unsafe in the circumstances to rely on the evidence of identification to arrive at, and sustain a conviction of the appellants.

The second basis upon which the appellants were convicted was the doctrine of recent possession. **Joseph Mkumbwa & Samson Mwakagenda vs. R** – Cr. Appeal No. 94 of 2007 (unreported) stated the position of the law in regard to the doctrine of recent possession in the following terms:

*"where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second** that the property is positively proved to be the property of the complainant, **third**, that the property was recently stolen from the complainant, and **lastly**, that the stolen thing constitutes the subject of the charge against the accused.. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...."*

In the present case there is no evidence that the appellants were the ones who were found with the motorcycle that PW1 claimed was stolen from him. If we are to go by the evidence of PW4 it was one Aloyce who told him that he had parked the motor cycle that was left with him by the appellants at Stella bar. The said Aloyce was never called to testify. Moreover, there were some contradictions in the testimonies of the prosecution witnesses as to where the motorcycle was found, a fact which should have alerted both courts below as to the credibility of those witnesses. PW1 said the motorcycle was found at West Kilimanjaro Guest House. PW4 said it was found at Stella bar. Yet, PW6 said it was found at Stella Guest House. These witnesses were all together when the motorcycle was recovered and it is surprising that each gave a different account as to where the motorcycle was found. Further still, there was not sufficient evidence from PW1 that the recovered motorcycle belonged to him. He did not tender in court any document to prove ownership. All in all, we are of the settled view that the criteria laid down by **Joseph Mkumbwa & Samson Mwakagenda vs. R** (supra) was not met for the doctrine of recent possession to apply in this case.

In the end, we find the appeal to have been filed with sufficient cause for complaint. We accordingly allow it. Conviction entered against the appellants is quashed and sentences are set aside. The appellants are to be released from custody forthwith unless therein held for lawful cause.

DATED at **ARUSHA** this 15th day of September, 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL