IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUNUO, J.A., KILEO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO 312 OF 2009

JAMAL MOHAMED.....APPELLANT

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)
(Sambo, J.)

dated the 26th day of August 2009

in

Criminal Appeal No 5 of 2009)

JUDGMENT OF THE COURT

14th & 21st February, 2012

KILEO, J.A

In the District Court of Kiteto at Kibaya, the appellant Jamal Mohamed was charged with and convicted of the offence of robbery with violence contrary to sections 285, 286 and 287A of the Penal Code. He was sentenced to 30 years imprisonment and in addition he was ordered to

return the amount of shs. 370,000/= that was stolen from the complainant. His appeal to the High Court was partly allowed. His sentence was reduced to 15 years imprisonment and the order for return of shs. 370,000/= was set aside. Being still aggrieved he has come to this Court.

At the hearing of the appeal the appellant appeared in person and was unrepresented. He filed two grounds of appeal against the decision of the High Court. **First**, that he was not sufficiently identified at the scene of crime and **secondly**, that both courts below erred in convicting him on contradictory evidence.

The facts leading the appellants' conviction are quite brief and are to be found in the testimonies of four prosecution witnesses. The complainants, PW1 and PW2 were husband and wife respectively and residents of Engusero village in Kiteto Distrct. On the night of the incident, at around 2.00 am, they were invaded by a group of bandits who made away with their bag containing shs. 370,000/=. The bandits disappeared when the couple raised an alarm for help. Other villagers including PW3 and PW4 responded to the alarm. The appellant's conviction was based on

the witnesses' testimonies on his identification and possession of the stolen bag.

The issues before us are therefore only two. One, whether the appellant was sufficiently identified at the scene of crime and whether he was found in possession of the bag that was stolen from the complainants -i.e. whether the doctrine of recent possession would apply in this case.

Submitting before us the appellant argued that the circumstances pertaining at the time of commission of crime were not favorable to make a positive identification of the appellant. As for possession of the stolen bag he submitted that in view of the contradicting testimonies concerning his possession of the bag it was not proper to base his conviction on possession of the bag.

The Republic which was represented by Mr.Zakaria Elisaria learned Senior State Attorney at the hearing of the appeal did not support the appellant's conviction and sentence. The learned Senior State Attorney conceded that the conditions of identification at the scene of crime were not favorable for a positive identification. Referring to a decision of this Court in **Abdi Julius @ Mollel & Another vs Republic** -Cr. Appeal No

1007 of 2009 in which the doctrine of recent possession was discussed he submitted that the circumstances of the case at hand did not meet the criteria for the doctrine of recent possession to apply.

We respectfully agree with both the appellant and the learned Senior State Attorney that the conditions for identification pertaining at the material time were not favorable for positive identification. Though PW1 claimed that there was moonlight on the night that the crime was committed, however it is not very clear how the moonlight assisted him in identifying the appellant considering that they were invaded while they were inside their house. PW2 just mentioned that she knew them as there was light in the room. She did not specify what kind of light there was in the room.

It has been settled that visual identification evidence is of the weakest character and that before a conviction is entered basing on such evidence it must be absolutely watertight. The celebrated case of **Waziri Amani vs. R.** (1980) T.L.R. 250 enumerated factors to be taken into account by a court in order to satisfy itself on whether or not such evidence is watertight. These factors include:

'the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, if it was day or night time; whether there was good or poor lighting at the scene; whether the witness knew or had seen the accused before or not.'

The necessity for clear evidence which leaves no doubt that the identification is correct and reliable cannot be over emphasized. The High Court judge who heard the first appeal observed as follows in relation to identification:

> **'Certainly, they were not preparing the said "DAKU" in darkness. They did identify them, after which they found refuge to the roof of his house."**

We concur with the learned Senior State Attorney that the above observation was a wrong assumption which the learned judge was not entitled to make. Suffice it to say that the appellant was not sufficiently identified at the scene of crime and for this reason we find merit in his first ground of appeal.

The second issue for consideration is whether the doctrine of recent possession can properly apply in this case. This Court in **Abdi Julius @ Mollel & Another vs R.** *supra* discussed **Joseph Mkumbwa & Samson**

Mwakagenda vs. R – Cr. Appeal No. 94 of 2007 (unreported) which 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...."*

We are of the settled view that in this case the prosecution failed to prove, beyond reasonable doubt that the appellant was found in possession of the bag that was stolen from the complainants in the course of the robbery. There were contradictions between the evidence of PW1 and PW3 as to whether the appellant was actually found with the bag or it

was found behind the toilet in which the appellant was said to have hidden himself. PW1 said the bag was found behind the toilet whereas PW1 stated that the appellant was found with the bag. We think that this being a criminal case where the prosecution had a duty of proving the charge against the accused beyond reasonable doubt the contradictions we have shown above ought to have been resolved in favor of the appellant. We accordingly also find merit in the second ground of appeal.

It is in the light of the above considerations that we find merit in the appeal preferred by Jamal Mohamed. In the circumstances we allow the appeal. Conviction is quashed and sentence is set aside. The appellant is to be released from custody forthwith unless he is held for some other lawful cause.

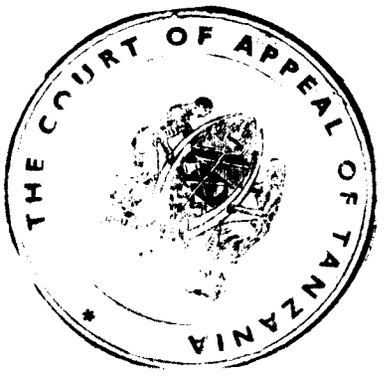
DATED at ARUSHA this 15th Day of February 2010

E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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