IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 242 OF 2008.

MUSTAPHA DARAJANI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Songea)

(Kaganda, J.)

dated 1st day of September, 2008
in
DC. Criminal Appeal No. 10 of 2008.

JUDGMENT OF THE COURT

14th & 19th March, 2012.

MASSATI, J.A.:

The appellant and another, who appeared as the 1st and 4th accused persons respectively in the trial court, were convicted of two counts of housebreaking and stealing contrary to sections 296 and 265 of the Penal Code (Cap.16 – R.E 2002). They were

sentenced to 10 years imprisonment each. Their joint appeal was dismissed by the High Court (Kaganda, J). The appellant had preferred the present appeal.

The facts as found by the lower courts, are that on the midnight of 6th October, 2006, PW3 Omari Msafiri, who was a watchman in the neighbourhood, heard a bang from some shop in the commercial premises. At that time he was at the backyard; while the noise came from the front; where there was another watchman, who did not testify. When PW3 rushed there, he found three men running away from the scene, carrying with them some things wrapped in sulphate bags. He could not catch them, but was able to identify them and repeated the story to PW1, a police officer who was on patrol before the matter was reported to the police station. By then, the owner of the premises/saloon PW2 MARIAM RASHID had also been notified and was around. According to her, two (2) hair driers, and a 5 band radio cassette went missing from her

saloon, as a direct result of the larcency. On 9/10/2006, PW2 got wind that someone was selling driers. In the company of D/C James (who did not testify) they traced that person to the 4th accused person in the trial, who admitted taking them to one HIDAYA ABDUL (PW4). PW4 admitted that the appellant and his cohort (4th accused) sent three driers to her and pawned them for a loan of T.Shillings 180,000/=. PW6 MOHAMED PONERA confirmed and witnessed the transaction. It was on the basis of this evidence that the appellant was convicted.

In this Court, the appellant appeared in person and unrepresented. Ms Andikalo Msabila, learned Principal State Attorney, appeared for the respondent/Republic.

The appellant has filed a 6-ground memorandum of appeal. In short; in the first, second, and fifth grounds, the appellant is complaining that he was not properly identified; and that therefore the case was not proved beyond reasonable doubt. In the third ground, the complaint was that, the alleged stolen

properties were not properly identified. In the fourth ground, the complaint was that, the appellant was not given opportunity to cross examine PW4. And in the last, sixth ground, the complaint was that, the charge was defective in that, since the offence was committed at night, the correct offence which should have been cited in the statement was burglary, not house breaking. In support of his grounds of appeal the appellant referred to us, the cases of **WAZIRI AMANI v R (1980) TLR.250, ROBSON v R** (1986) - RC 40, **BHANDARY CANTAMA v R** (1964) E.A.606, and **CHAMBO RAMADHAN v R** (1985) TLR.178. He therefore urged us to allow the appeal, quash the conviction and set aside the sentence.

On her part, Ms Msabila, urged us to dismiss the appellant's third, fourth and sixth grounds, because; in her view; first; the two driers were sufficiently identified by the owner, PW2; secondly, the record reflects that PW4 was cross-examined by the appellant; and lastly, if there was any defect in the

charge sheet, it was curable under section 388 of the Criminal Procedure Act (Cap.20 – R.E 2002). However, she agreed that the remaining grounds of appeal had merit. According to the learned counsel, the evidence of visual identification was wanting, considering that PW3 was not forthright in his testimony, on the intensity of the light which he claimed enabled him to see the appellant; was not consistent on whether he knew the appellant by name as PW1 claimed, and whether also he even described the special mark at the appellant's neck as PW1 claimed in court. Furthermore, learned counsel went on, it appeared that PW3 was at the backyard, and not in the immediate vicinity of the scene of crime, so it was difficult to tell how far away he saw the thieves, and running away from there, at that. Drawing inspiration from the decision of this Court in **EPSON s/o MICHAEL AND RIZIKI LUSASI v R** Criminal Appeal No.335 of 2007 (unreported) she submitted that the discrepancies on the question of the description of the appellant by name and mark between PW1 and PW3 raises serious doubts

on whether PW3 really identified the appellant. That doubt should be resolved in favour of the appellant, she argued. So, Ms Msabila urged us to allow the appeal on those grounds alone.

We will begin with the two complaints relating to the alleged infraction of procedure. The first is whether, the appellant was given a chance to cross-examine PW4 – the subject of the fourth ground of appeal. And the second, is whether the charge was defective.

The complaint that the appellant was not afforded opportunity to cross-examine PW4 should not detain us. It is amply refuted by the record. The evidence of that witness appears on pages 18 and 19 of the record of appeal. On page 19 it is shown that PW4 was cross-examined by the 1st accused (who is now the appellant) to the following effect:

"XXD by 1st accused:

I know you by face. We discovered first, ... I had no money by then. You came later to collect money. You kept quite."

It is not therefore true that the appellant did not cross-examine PW4. He did. The complaint is therefore devoid of substance. It is accordingly dismissed.

The next procedural irregularity was on the alleged variance between the charge and the evidence. If the complaint had stopped at that, it would have called for investigation under section 214 at the Criminal Procedure Act, whose redress would be an amendment to the charge sheet and taking of a fresh plea; and not as easily curable under section 388 of the Criminal Procedure Act, as Ms Msabila seems to suggest. But if we understood the appellant well, and after reading the decision of **CHAMBO RAMADHANI v R** (supra) that he referred to us his complaint was that since the offence was committed at night, the proper offence should have been burglary. With respect,

this complaint also lacks substance. An offence of burglary is committed under section 294 (1) and (2) when the breaking happens to a dwelling house in the night. In the present case, the alleged broken premises were not a dwelling house but merely a saloon. So, even though it allegedly took place at night, it did not amount to burglary. In **CHAMBO RAMADHANI's** case the breaking was into a dwelling house; but even there, the High Court held and we think, rightly so, that the defect was curable under section 388 of the Criminal Procedure Act. In our judgment however, the charge of breaking into building under section 296 of the Penal Code, was correctly laid at the doors of the appellant. The sixth ground of appeal therefore also fails.

The remaining grounds of appeal can conveniently be considered together under the classification – whether the case against the appellant was proved beyond reasonable doubt. We think not.

First, we wholly associate ourselves with Ms Msabila in her support of the 1st, 2nd and 5th grounds of appeal. It is common ground that the offence was committed at night. It is also not in dispute that the only witness of identification (PW3) was at the backyard when the breaking was alleged to have taken place. It only needed a daring man like PW3 to come forward and testify that even though the thieves had already taken to their heels, he was able to identify the appellant. We are unable to comprehend how this was possible in those circumstances. There is yet a discrepancy between PW1 and PW3, on how he was able to identify the appellant. What PW1 told the court is not what PW3 told the court. PW1 told the trial court that, he PW3, told him that he could identify the appellant because he had a scar on the neck, and used to see him when he came to play the game of pool. But PW3 did not mention any scar in his testimony, but that he mentioned the appellant by name. These contradictions cannot be reconciled and adversely affect the credibility of PW3, the only single witness of identification. We

agree with the appellant that the conditions for identification were not favourable, and that the guidelines set in **WAZIRI AMANI'S** case were not met. (See also **RAYMOND FRANCIS vs R** ((1994) TLR.103), where this Court said:

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

In the present case however, the conviction of the appellant was based not only on visual identification, but also on the doctrine of recent possession, though not said so in so many words. This is what the High Court said on first appeal, at page 96 of the record.

> *"The appellants were convicted on the strong evidence that they jointly delivered the driers to PW4 as a surety to the mortgage in witness of PW5 and PW6. The issue of mistaken identity could not arise because the*

identification was not from the scene of crime."

There, the doctrine of recent possessing was introduced by implication. The appellant attacked this finding in his fourth ground of appeal, but Ms. Msabila thinks that PW4 properly identified the driers.

For the doctrine of recent possession to apply it must be established that; **Firstly** that the property was found with the suspect; or there should be a nexus between the property stolen and the person found in possession of the property; **Secondly**, the property is positively the property of the complainant; **thirdly**, that the property was recently stolen from the complainant; and **lastly**, the stolen property in possession of the accused must have a reference to the charge laid against him. (See **JOSEPH DAUDI AND ROZA SEGENGE v REPUBLIC** Criminal Appeal No. 337 of 2007, **ALHAJ AYUB @ MSUMARI & OTHERS v REPUBLIC** Criminal Appeal N. 136 of 2009; and **JAMES KISEBO @ MIRENGO AND YUSUFU ABDALLAH @**

FADHILI v REPUBLIC Criminal Appeal No. 261 of 2006 (all unreported).

In the present case, it is not in dispute that the appellant was not found in possession of the driers. The two courts below however seemed to have found as a fact that the appellant and his associate were seen to have delivered the driers to PW4. Under the doctrine of recent possession they seemed to be saying that there was a nexus between the appellant and the stolen driers.

The main players in this scene are PW1, PW2, PW4 and PW6; as well as Exh.P4 collectively (the two driers). The sequence shows that the offence was committed on 6/10/2006. The driers were brought to the police station by PW4 on 12/10/2006. That is where the problem began. The chain of custody is not clear, as to who received them, and where they were kept. According to PW1, PW2 identified the driers at the police station; but it is not clear how she was able to identify

them. PW1 did not disclose it. On 6/12/2006, PW1 tendered the driers as exhibits before they were identified by PW2 to the court. It was only after they were tendered in court, that PW2 came in to testify and identify the driers describing the alleged special marks. But this was not proper. In such cases description of special marks to any property allegedly stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits (See **NASSOR MOHAMED v R** (1967, HCD 446). It has also been held that before an exhibit is tendered in court the chain of seizer and custody must be established. (See **HEMED ATHUMANI SILAJU v R** Criminal Appeal No. 120 of 2006 (unreported). As shown this was missing here.

As if that was not enough, after giving her evidence, the two driers were handed over to PW2 for safe custody on that same day. When PW4 and PW6 came to testify in court on 31/1/2007 and 22/3/2007 respectively the driers were not

shown to them so that they could confirm whether they were the very ones that were allegedly sent to PW4. How did the court then satisfy itself beyond reasonable doubt that the exhibits were the very ones sent by the appellant? We think that such finding would be unsafe, notwithstanding that the appellant did not claim any ownership to the driers because that did not relieve the prosecution of their burden of proof. (See **SALEHE MWENYA AND 3 OTHERS v R** Criminal Appeal No.66 of 2006 (unreported).

In the circumstances, we do not think that the prosecution had succeeded in establishing the nexus between the driers (Exh.P4) and the appellant. So, with due respect to Ms Msabila, learned counsel, we do not think that PW2 has positively identified the two driers beyond reasonable doubt; and with even greater respect to the first appellate court, we are unable to accept that the doctrine of recent possession was properly applied in the present case.

For the above reasons, we think that the conviction of the appellant is unsafe. We accordingly allow the appeal, quash the conviction and set aside the sentence. Unless he is otherwise lawfully held, he is to be set free forthwith.

DATED at **IRINGA** this 17th day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL