IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., BWANA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 295, 296 OF 2007

1. JOEL JAMES]
2. VEDASTO JOHN MASATU "POWER"] ..... APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mussa, J.)

dated the 3rd day of July, 2007
in
Criminal Appeals Nos. 60 and 61 of 2005

JUDGMENT OF THE COURT

21 & 23 February 2012

MSOFFE, J.A.:

As correctly opined and held by the trial Resident Magistrates' Court of Bukoba (Mzuna, PRM as he then was) and the High Court (Mussa, J.) on first appeal the determination of this case essentially rests on the doctrine of recent possession. We say so because when the boat engines, the subject of the case against the appellants, were stolen at gun point on 18/2/2004 at about 19.00 hours at Goziba

Island within Lake Victoria in Muleba District none of the prosecution witnesses identified the culprits. As fate would have it, the owners of the boat engines, i.e. PW1 Richard Ndagabwene and PW4 Masansa Lusato, were informed about the theft and accordingly mounted a search whereupon after visiting Mwanza and Bukoba they were eventually reliably informed that the boat engines were at Musoma. PW1 said that he eventually managed to identify one of the boat engines as it bore his name. Likewise, PW4 identified one of the boat engines and a receipt evidencing ownership of the same was produced and admitted in evidence as exhibit P6.

Apparently it is in evidence that the recovery of the boat engines was a result of a successful operation mounted by the police. Briefly, on 27/2/2004 PW5 C 3850 Detective Sergeant Joseph of CID Office, Musoma, received information about the theft of the boat engines. On 2/3/2004 he was reliably informed that two of the stolen engines were in the process of being transported in a taxi to Shirati, Tarime. He worked on that information. He went out in search of the taxi. Eventually he got hold of the taxi in which there

tried by the District Court of Muleba within whose jurisdiction the offence took place.

Apparently the above jurisdictional issue was never canvassed before the court of first instance and in the first appeal before the High Court notwithstanding the fact that in both courts the first appellant was represented by learned counsel. At best, in the petition of appeal to the High Court filed by the second appellant this Court's decision in **Makwizi Msuko and two Others v Republic,** Criminal Appeal No. 8 of 2001 (unreported) was cited but without elaboration. However, since this is a question of jurisdiction, which is an issue of law for that matter, we are duty bound to address it. Indeed, **Section 6 (7) (a)** of the **Appellate Jurisdiction Act** (CAP 141 R.E. 2002) mandates us to deal with matters of law in a second appeal such as this one.

Section 6 (1) of the **Magistrates' Courts Act** (CAP.11) R.E. 2002) (the **Act**) constitutes magistrates' courts. It reads:-

> 6 (1) Subject to the provisions of section 7, a magistrates' court shall be duly constituted when heard by a single magistrate, being –
>
> (a) in the case of a primary court, a primary court magistrate
> (b) in the case of a district court, a district magistrate or a resident magistrate
> (c) in the case of a court of a resident magistrate, a resident magistrate.

We will begin by citing a few cases by this Court which addressed **Section 6 (1) (c).** Although the cases were decided on facts that were different from the ones obtaining in this case they will, to an extent of some sort, assist in understanding the true import of **Section 6 (1) (c).**

In the case of **William Mallya v Republic** (1991) TLR 83 a Principal District Magistrate sat and decided the case in the Resident Magistrates' Court. This Court held that the court was not properly constituted within the meaning of **Section 6 (1) (c).** Indeed, this Court went on to say by way of emphasis that:-

> .... In our view the correct meaning to be attached to that provision is that if a case is designated for a particular court, then it should be heard only by a member of that court notwithstanding that a member of some other court has substantive jurisdiction over the offence and could hear it ....

In **Thomas Elias v Republic** (1993) TLR 263 a Principal District Magistrate presided over a case filed in the Resident Magistrates' Court. This Court, citing **William Mallya** (supra), declared the proceedings a nullity because the magistrate in question had no jurisdiction to sit and preside over the case in the Resident Magistrates' Court. Indeed, in **Thomas Elias** (supra) this Court went on to state at page 266 that the proceedings could not be cured by invoking the provisions of **Sections 387** and **388** of the **Criminal Procedure Act** because:-

> ... the irregularities, errors and omission that can be cured by invoking these provisions of the Criminal Procedure Act are of such a

> nature as not to have occasioned a failure of justice and more importantly they must proceed from a trial by a court of competent jurisdiction. This was not the case in the instant appeal. The proceedings were a product of a court which was not properly constituted. The result was a nullity which cannot be saved by any of the above mentioned provisions of the Criminal Procedure Act 1985. ...

In **Makwizi Msuko** (supra) the situation was slightly different in that the offence was committed at Magu District and the trial was conducted at Mwanza District Court and presided over by a Resident Magistrate. This Court, citing the provisions of **Sections 180, 181** of the **Criminal Procedure Act** and **Sections 4** and **6 (1)** of the **Magistrates' Courts Act** held that although the case was tried by a Resident Magistrate, yet since it had been filed in the District Court of Mwanza the proceedings were a nullity because the court itself lacked jurisdiction to try offences originating from Magu District whether or not it was presided over by a Resident Magistrate.

Three points emerge from the above authorities. **One,** a District Magistrate cannot preside over cases filed in a Resident Magistrates' Court. **Two,** a Resident Magistrate cannot sit in a judgment over cases filed in a District Court which lacks jurisdiction to try the offence(s) in question in the first place. **Three,** a case filed in a Resident Magistrates' Court must be tried by a Resident Magistrate.

The above authorities do not, however, answer the pertinent question posed in this appeal, i.e. whether the Resident Magistrate had jurisdiction to try the case in respect of an offence which was committed in one of the Districts in the Region.

In our considered opinion, the answer to the above question is in the affirmative in view of the clear provisions of **Section 6 (1) (c)** read together with **Section 5 (1)** of the **Act** and the **Magistrates' Courts (Courts of a Resident Magistrate (Re-Designation) Order** – GN No. 570 of 1986. In the schedule to this **GN** it is clear that the Chief Justice invoked **Section 5 (1)** of the **Act** and

established Courts of a Resident Magistrate. The Court of the Resident Magistrate of Bukoba appears in the schedule and it is evident therein that its area of jurisdiction is the whole of Kagera Region. So, as correctly submitted before us by Mr. Seth Mkemwa, learned Senior State Attorney for the respondent Republic, in this case the trial Resident Magistrate had jurisdiction to try the case filed in the Court of the Resident Magistrate, Bukoba because the offence was committed within his area of jurisdiction. By parity of reasoning, it is no wonder that even in the case of **Makwizi Msuko** (supra) cited to us by the appellants, after this Court nullified the proceedings in its Order dated 16/2/2005 it directed, *inter alia,* that the Director of Public Prosecutions was at liberty to institute a fresh case in the Resident Magistrates' Court of Mwanza. In conclusion therefore, this jurisdictional ground fails and we hereby dismiss it.

This brings us to the crux of the appeal. As observed earlier, the case was determined on the basis of the doctrine of recent possession. Indeed, the rest of the grounds of appeal are mainly centred on this point. Very briefly, we are satisfied that the courts

below eloquently stated the law on the presumption underlying the doctrine. If we may repeat by way of emphasis, the doctrine is based on the premise that if a person is in possession of stolen property recently after the stealing it lies on him to account for his possession and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly. Of course, it will all depend on the surrounding circumstances whether he is a guilty receiver or the actual thief. See **Kantilal Jivraj and Another v R** (1961) EA 6 at page 7 and **Iddi Waziri v R** (1961) EA 146.

The issue is whether the courts below properly applied the doctrine in the justice of this case. Very briefly, we must say from the outset that we are in agreement with Mr. Mkemwa that the doctrine was misapplied to a certain extent in this case. As for the first appellant, it is apparent that there was a search conducted at the home of one Mang'ana Matitu of Buhare, Musoma. This is borne out by the Search Order appearing on pages 79 – 80 of the record before us. In the certificate of seizure, the engine boats that were seized are stated therein. Curiously, and as was correctly submitted

by Mr. Mkemwa, we too wonder why the said Mang'ana was not summoned as a witness! If summoned, we hope, he would have explained the circumstances in which the engines found their way to his home. In the absence of the evidence of this person it follows that there is a vital missing link in the prosecution case against this appellant.

The same thing applies to the second appellant. It is in evidence, as reflected on page 40 of the record before us, that this appellant, and the first appellant for that matter, were in a taxi in which there were the two boat engines (Exh. P3 and P5). It is also in evidence that in the taxi there was also a woman whose name was not disclosed. Yet again, the taxi driver and the said woman were not summoned to testify as witnesses in the case! In the absence of the evidence of both of them, or at least one of them, again it seems to us that there was another important missing link in the case for the prosecution. The two of them, or at least one of them, could have probably explained the manner in which the engines found their way into the taxi in which they were travelling in. Indeed, talking

about the taxi driver it is also surprising that he was not called upon to be present in the search mounted at the home of Mr. Mang'ana. Again, we respectfully think that his presence thereat might probably have helped in shedding some light as to how the engines found their way to the home of Mr. Mang'ana.

For the foregoing reasons, there is reasonable doubt in the presumption underlining the doctrine of recent possession in this case. For this reason, we think, the appellants were entitled to be given the benefit of doubt and thereby earn an acquittal.

Accordingly, except for the position we have taken on the jurisdictional ground of appeal, we hereby allow the appeal, quash the conviction and set aside the sentences of thirty years imprisonment and corporal punishment of twelve strokes of the cane in each of the two counts in which there was also an order for the sentences to run concurrently. The appellants are to be released from prison unless they are lawfully held therein.

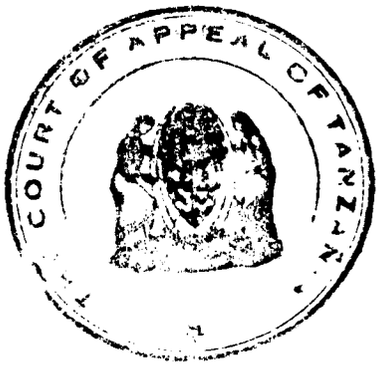
DATED at **MWANZA** this 22nd day of February, 2012.

J.H. MSOFFE
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



(J.S. MGETTA)
DEPUTY REGISTRAR