IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 170 OF 2012

DAVID MATIKU .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Mihayo, J.)

dated 20th day of September, 2006
in
Criminal Appeal No. 34 of 2005

JUDGMENT OF THE COURT

5th & 6th August, 2013

MSOFFE, J.A.:

In Criminal Appeal No. 34 of 2005 of the High Court of Tanzania at Mwanza Mihayo, J. upheld the conviction of the appellant for armed robbery and the sentence of thirty years imprisonment and corporal punishment of twelve strokes of the cane by the District Court of Tarime. The courts below were satisfied that on 16/11/2004 at around 3.30 p.m. PW1 Vicky John was going home from work and as she passed through a path that crosses a stream called Mto Ng'ombe the appellant came from behind, overtook her, crossed the stream and stood at the other end. The appellant held her by the arm and drew a pen-knife and pointed it at her

face ordering her to give him all that she had in her possession. She immediately raised an alarm after which the appellant threw her down, snatched her handbag and took to his heels. PW2 Kambarage Mkurya and other people quickly responded to the alarm and chased the appellant, caught up with him, assaulted him and took him to a police station. A cellphone was found in the appellant's pocket. The cellphone was identified by the said PW1 as one of the items which were in the handbag that was snatched by the appellant. On the basis of the above evidence, the appellant was convicted and sentenced as aforesaid, after both the trial court and the High Court rejected the appellant's defence of *alibi.*

The appellant has filed a memorandum of appeal containing seven grounds of complaint which read as follows:-

1. *That, the learned appellate judge had misdirected himself in law and fact to convict the appellant basing on identification claim lacking the necessary description of the assailants Aloo Gal Vs Rep (1960) EA. 86.*
2. *That, the Doctrine of recent possession was prematurely invoked by the learned appellate judge, in that none of the items were*

sufficient application – Ally Bakari @ Pili Bakri vs Rep (1992).

3. *That, the learned appellate judge gravely erred on the point of law to uphold conviction upon the appellant merely relying exhibit P1, which was tendered in court by the person who never seized it an act which deprived the appellant's right to cross-examine the witness.*
4. *That, the appellate judge did highly oversight to commits the appellant as charged while there is no documentary proof (i.e first report) tendered in court to prove whether or not the exhibit P1, was handled in the Police Post in connection with a claimed crime on the material day.*
5. *That, the appellate judge did not even observe that PW2 who claimed to arrest the appellant with exhibit P1, was not shown such exhibit by court to prove whether was the same materials he seized form the locus – in quo.*
6. *That, the appellate court did lose direction he concluded that the prosecution's witnesses 1,2 and 3 were credible witnesses as long as PW3 had not facing the invader not*

awareness present when the claimed searched and exhibit P1 found.

7. *That, learned appellate judge had erred himself in law for making a fleeting reference upon appellants uncontroverted defence case.*

At the hearing, the appellant appeared in person, unrepresented. The respondent Republic had the services of Mr. Athumani Matuma, learned State Attorney who argued in opposition to the appeal. Mr. Matuma was of the affirmative view that the evidence on record established the prosecution case against the appellant beyond reasonable doubt. Thus, there is no basis for this Court to interfere with the findings of fact by the courts below, he contended. With respect, we agree with him.

As correctly submitted by Mr. Matuma, essentially the memorandum of appeal raises three grounds of complaint. **One,** the manner in which exh. P1 was introduced and admitted in evidence. **Two,** the evidence of identification in the case. **Three,** that the defence case was not considered.

We propose to begin with exh. P1. On 17/11/2004 the cellphone the pen-knife and the small black purse, all being the properties of PW1, were tendered and admitted in evidence collectively as exh. P1. They were produced by PW1, the undisputed owner of the said properties. They were produced without objection by the appellant. If we understood the appellant correctly, and we think we did, the basic complaint in grounds 2-5 in the memorandum of appeal is that they ought not to have been produced by PW1. Rather, they ought to have been produced by the person who actually seized them at the time of the said chase and arrest. Ideally, we can understand why PW1 was the one who was called upon to produce the items. Presumably, that was because she was the undisputed owner, hence probably better placed to say something about them. However, we tend to agree with the appellant, and Mr. Matuma for that matter, that the person who actually seized them from the appellant ought to have produced them in evidence. The advantage would be that the said person would be in a better position to explain the circumstances of the seizure and arrest. In this case, probably PW3 would have been better placed to produce them because she and others were the persons who actually seized them from the appellant. Be as it may, we will go along

with Mr. Matuma that the evidence on the manner in which exh. P1 was introduced and admitted in evidence may safely be expunged from the record.

Once exh. P1 is expunged from the record we are left with the evidence of identification. This is the spirit of the appellant's complaints under grounds 1 and 6. On this, the appellant is of the view that he was not properly identified on the date and time of incident. If anything, he was an innocent passerby at the material time and place in question, so he alleges.

With respect, the issue of identification need not detain us. The incident took place in broad daylight. The evidence on record reveals that the appellant was literally chased and arrested with PW1's properties. As opined by the courts below, the chasing party never lost sight of the person who had snatched something from PW1. If so, as correctly remarked by Mr. Matuma, surely in the circumstances, evidence of identification would not be all that relevant as the appellant would wish everybody to believe. It sufficed that the appellant was seen and identified at the scene by PW1; was chased by PW2, PW3 and others; and arrested a short distance away and time thereafter.

The complaint in the seventh ground of appeal is that the defence case was not considered. With respect, this ground is not supported by the record. The record is clear that in his judgment the learned Principal District Magistrate considered the appellant's defence. Likewise, the judge on first appeal did the same. At any rate, it is trite law that once the court believes the prosecution case the defence of *alibi* dies a natural death, so to speak. In this case, the appellant's *alibi* suffered the same fate.

The appeal is devoid of merit. We hereby dismiss it.

DATED at MWANZA this 5th day of August 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL