IN THE COURTOF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 102 OF 2011

1. DISMAS BUNYERERE] **..... APPELLANT**
2. SADICK MAGAMBO @ MISOSI]

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Nyangarika, J.)

dated the 08th day of December, 2010
in
Criminal Appeal No. 288 of 2005

JUDGMENT OF THE COURT

26th & 30 July, 2013

KIMARO, J.A.:

The District Court of Sengerema at Sengerema convicted the appellants of the offence of armed robbery contrary to sections 285 and 287A of the Penal Code, [CAP 16 R.E. 2002] and sentenced each of them to thirty years imprisonment. Their appeal to the High Court was dismissed. In the trial court the first appellant was the second accused and the second appellant was the first accused. According to the charge sheet the offence was committed on 7th September, 2005 at Jubaragazi

was fishing and the appellants and others who were not arrested, robbed him one fuel line, one switch of a boat, engine and fishing nets. Before the appellants stole the mentioned items above, they used "pangas" and heavy clubs. The owner of the stolen properties was Gregory John Kazembe (PW1 and the complainant.)

In the trial court the appellants were convicted on evidence of identification from Faida Charles (PW2) and cautioned statements of the appellant recorded by E 8366 D/Sgt. Masiga (PW3). The statements were admitted in court as exhibits P7 and P8 respectively. PW3 was the one who investigated the case and he said the 1st appellant admitted upon interrogation, being in possession of the properties which were stolen. Using a search certificate, the room of the 1st appellant was searched. What was recovered were one out boat engine, make Yamaha, one fuel line tank, switch and 43 fishnets. The search was witnessed by Kulwa Tibejura (PW4) and Simon Faida (PW5) the Village Chairman and Village secretary of Kabaganga Village respectively, and Edwin Ngulubayi (PW6).

The 1st appellant had denied commission of the offence but claimed ownership of the boat engine. The 2nd appellant on the other hand denied the commission of the offence and raised the defence of

alibi. The trial court believed the prosecution evidence and rejected the defence evidence.

On appeal to the High Court, the appellants complained of insufficient evidence to sustain their conviction. They challenged their identification that the conditions of identification were not favourable and the cautioned statements were wrongly admitted in evidence.

The first appellate court sustained the complaint on the identification. It agreed with the appellants that the identifying conditions were not favourable. As for the cautioned statements, the learned appellate Judge said they raised no objection when they were admitted in court. That evidence was used, in addition to the evidence of the recovery of the stolen property from the 1st appellant (doctrine of recent possession) to sustain the conviction of the appellants.

In this appeal the 1st appellant in his grounds of appeal is complaining about wrong admission of the cautioned statement, wrong application of the doctrine of recent possession, he was denied the right to call his defence witnesses, contradictory evidence of the prosecution witnesses, and his incorrect identification . The second appellant raised six grounds of appeal challenging the evidence relied upon to convict him; wrong admission of the cautioned statement, wrong

application of the doctrine of recent possession, unlawful search conducted in his room, his right to call defence witnesses was infringed, contradictory evidence of the prosecution witnesses and failure to consider his defence.

At the hearing of the appeal the appellants appeared in person(s). The respondent Republic was represented by Mr. Athumani Matuma, learned State Attorney. Both appellants did not elaborate their grounds of appeal. Lacking legal knowledge, they felt safer to first listen to what the learned State Attorney was going to say in response to their grounds of appeal.

The learned State Attorney supported the appeal by the 2nd appellant. He said the learned Judge on first appeal rightly held that the identification evidence was weak and could not be relied upon to convict the 2nd appellant. The offence was committed at night and the circumstances which allowed the witness to identify the appellants were not disclosed. On the cautioned statement of the 2nd appellant the learned State Attorney said it was not rightly admitted in evidence as the 2nd appellant was not given an opportunity to say whether he had any objection to it or not. He said since this evidence was valueless in basing the conviction of the appellant, it was wrong for the first

appellate court to use it to sustain his conviction. Regarding his right to call his defence witnesses, the learned State Attorney said the complaint has no substance. He was accorded that right but he waived it when he told the court that he would no longer call his witness because he had shifted to another place. All in all, the learned State Attorney said that the evidence that was on record was not sufficient to sustain the conviction of the second appellant.

As for the 1st appellant, the learned advocate supported the conviction and sentence. However, he said the 1st appellant was entitled to the same treatment as the 2nd appellant in respect of the cautioned statement and the evidence of his identification. Regarding the complaint that he was not given the opportunity to call his defence witnesses the learned State Attorney said the record of appeal does not support him as he voluntarily abandoned that right when he informed the trial court that he would no longer summon his witness. He said minus the cautioned statement and the evidence of his identification, the 1st appellant was found with stolen property and he was the one who led to the recovery of the stolen property and in his defence he claimed ownership of the property but he did not give satisfactory evidence to account for his possession. He prayed that the appeal be dismissed.

The 1st appellant in reply said that the evidence of PW4 was not correct as he was not found with any stolen property and even the engine numbers of the boat were not mentioned. He prayed that his appeal be allowed.

In as far as the 2nd appellant is concerned we agree that the evidence on record is not sufficient to sustain his conviction. From the judgment of the first appellate court, the conviction of the 2nd appellant was sustained on his cautioned statement alone. We say so because the learned Judge on first appeal ruled out the evidence of identification. He said:

> *"In their caution statement s (Exhibits P7 and P8) the appellant admitted to have been found with the stolen property with guilty knowledge. In a sense that they knew or had reason to believe that the properties has been stolen or otherwise feloniously obtained."*

With respect to the learned Judge on first appeal, he should have inspected the proceedings in the trial court before reaching such a conclusion. The statement of the appellant was tendered in court by

PW3. The record of appeal shows at page 8 that all that the witness said was:

"Here is the statement of the 1st accused person. I tender it as exhibit."

1st accused:

"This is my statement which I gave at the police station"

Court:

"Exhibit P8"

With respect to the learned Judge that was not sufficient. The trial court had to move a step further to ask the 2nd appellant if he had any objection to the admissibility of the statement. Since that step was omitted, it cannot be said that the 2nd appellant was fairly treated by basing his conviction on a statement which was admitted in court improperly. Apart from that observation by the first appellate court, there is no other evidence linking the 2nd appellant with commission of the offence. For this reason we allow his appeal, quash the conviction and set aside the sentence. He should be released from prison forthwith, unless held for any other lawful purpose.

The position of the 1st appellant is fairly easy to deal with. It is true as stated by the learned State Attorney that if the evidence of identification and cautioned statement is disregarded, there remains on

record sufficient evidence to sustain his conviction. The first appellate court was right to sustain the conviction of the 1st appellant on evidence of recent possession.

PW3 was the one who conducted the search at the room of the 1st appellant. What was recovered there was out boat engine (exh.P1), fuel tank (exh. P2), fuel line (exh. P3) switch (exh.P4) and 43 fishing nets (exh.P.5). All these properties were recovered through a search certificate which was admitted in court (as exh. P6) and the 1st appellant admitted that he signed the search certificate. Moreover PW3, PW4, PW5 and PW6 were present when the items were recovered from the room of the 1st appellant. PW3 confirmed that when he interrogated the 1st appellant he admitted that the stolen properties were in his room and he was the one who led them to the room where the properties were found. The theft occurred on 7th September, 2005 and they were recovered on 22nd September, 2005. This was a short period. That was two weeks after the commission of the offence. Although the 1st appellant claimed ownership of the boat, the trial court was not satisfied that he gave a reasonable account of his possession. The court believed the prosecution evidence that the owner of the properties (PW1) correctly identified them.

Under the circumstances we see no reason for faulting the finding of the first appellate court in respect of the 1st appellant. We dismiss his appeal in entirety.

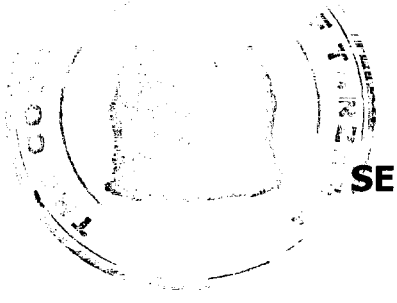
DATED at MWANZA this 29th day of July, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
HUSTICE 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