IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO, J.A., MASSATI, J.A., And MMILLA,J.A.)

CRIMINAL APPEAL NO. 23 OF 2013

GODFREY LUCAS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Massengi, J.)

dated 27th December, 2012

in

Criminal Appeal No. 35 of 2012

.....

JUDGMENT OF THE COURT.

2nd & 5th December, 2013

KIMARO,J.A.:-

This is a second appeal by Godfrey Lucas who was convicted by the District Court of Babati for the offence of receiving stolen property contrary to section 311 of the Penal Code [CAP 16 R.E.2002].

The appellant was charged in the District Court with seven other accused persons with three offences namely, burglary contrary to section 294(1) (a) and 2, stealing contrary to section 265 and receiving stolen property. All

the other accused persons were acquitted of all offences except the appellant who was found guilty, convicted and sentenced to serve seven years imprisonment for the offence of receiving stolen property. His appeal to the High Court against the conviction and sentence was dismissed.

The appellant filed five grounds of appeal and the advocate he engaged later to defend him, Mr. John Materu, learned advocate, filed only one ground which encompasses all the grounds filed by the appellant. Hence the sole ground of appeal now challenges the learned judge on first appeal for failing to make a finding that the charge against the appellant was not proved beyond reason doubt, the standard of proof required in criminal cases.

At the hearing of the appeal Mr. Materu learned advocate appeared for the appellant. The respondent Republic was represented by Mr. Hangi M. Chang'a learned State Attorney.

The evidence relied upon by the lower courts to convict the appellant came from four prosecution witnesses. According to G. 6126 PC Eliya

(PW3) the complainant in the case, on 14th October, 2011 he was on night duty from 17 .00 hours. He returned home from work the next morning on 15th October, 2011 and found the door of his room broken. Subwoofers make Saepino, TV Sangsung, Deck Samsung, all their remotes and a mattress were stolen. The matter was reported to the police. On 16th October, 2011 he was informed to go and identify some properties found in one of the nine houses of the accused persons. When he went there, he found the subwoofer, deck, TV and their remotes which he claimed were his properties. He tendered in court two receipts which were admitted in court collectively as exhibit P3. In cross examination by the complainant who was charged as the first accused in the case, he confirmed that the properties were outside the house when he went to identify them.

Ally Salim Kulutu (PW1), the ten cell leader of the area where the appellant resided said he was a witness to the search that was conducted in the room of the appellant in the house of one Mama Blandina and a lot of items were recovered including TV. In cross examination by the appellant he said the appellant signed the search warrant.

Another witness was G 6749 PC Donald (PW2). He said he investigated the case and went to search the room of the appellant on 16th October, 2006 where a TV 21 inches Samsung with its remote, subwoofer with its remote, deck of Samsung and its remote were recovered. All the recovered properties were admitted in court collectively as exhibit P2. Another witness who testified on the recovery of properties from the room of the appellant was E 8080 DC Jimmy. He said in the room of the appellant they found 1 deck; make Samsung, 1 remote Sang sung, 1 subwoofer and Searpion.

The appellant admitted in defence that his room was searched in the presence of PW1 the ten cell leader, but said what was taken there from were his properties. These were a TV Sony 24 Inches, one subwoofer make rising, and one deck make Samsung, silver colour, two beds and mattresses. He said although he denied having committed the theft, he was told by PW5 that "Trip hii inakula kwako."

With this evidence the trial court convicted the appellant of the offence of receiving stolen property and sentenced him as aforesaid. The first court on appeal sustained the conviction and the sentence.

In support of the appeal, Mr. Materu learned advocate said the evidence relied upon to convict the appellant was not sufficient to prove the charge. He said the evidence of the prosecution witnesses was contradictory on the properties recovered from the room of the appellant and the complainant did not give a description of the marks of the properties to show that they belonged to him. He said there was also a contradiction on the persons who witnessed the search. He said even the receipts the complainant tendered in court (exhibit P3) were not a conclusive proof that the properties belonged to the complainant as they lacked important particulars which always go with that kind of properties which are common commodities possessed by a large number of people.

He cited the cases of **Ally Bakari and Pili Bakari V R** [1992] T.L.R 10 and **Abdi Julias @ Mollel and Another V R** Criminal Appeal No. 107 of 2009 (unreported) which he said supported the appeal by the appellant and requested the Court to allow the appeal.

The learned State Attorney for the respondent supported the appeal by the appellant. He agreed with the learned advocate for the appellant that the complainant did not give sufficient description for his properties.

The learned State Attorney submitted that the complainant was expected to give a proper description which would have proved that the properties belonged to him and not anybody else. Instead, said the learned State Attorney, PW3 ended up giving just a general description which did not eliminate the possibility of the property belonging to somebody else. Challenging the validity of the receipts which PW3 tendered in court, exhibit P3, the learned State Attorney said they had no serial numbers nor the colour of the properties which would have assisted the court to ascertain whether the serial numbers tallied with those in the properties the complainant was claiming ownership. Citing the case of **Joseph Mutua & Nashon Ambuye V R** Criminal Appeal No.166 of 2011(unreported), the learned State Attorney requested the Court to allow the appeal, quash the conviction and set aside the sentence.

As stated before, this is a second appeal. The court can only interfere with findings of facts by the lower courts when it is satisfied that there were misdirection, or non- directions on the evidence resulting in a miscarriage of justice on the part of the appellant. The cases of **Mussa Mwaikunda V R** [2006] T.L.R. 287 and **Director of Public**

Prosecutions V Jaffari Kawawa Mfaume [1981] T.L.R. 149 are some of the authorities on the point.

Where a person is found in possession of property recently obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. The case of **Joseph Mkubwa & Samsong Mwakagenda V R** Criminal Appeal No. 94 of 2007 (unreported) cited in **Abdi Julias** (supra), give three conditions which must be satisfied before the doctrine of recent possession can be applied to convict an accused person. The conditions are:

> *"First, that the property was found with the suspect, second, that the property is positively proved to be the property of the complainant, and lastly, that the stolen thing constitutes the subject matter 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 to prove the above elements..."*

In this case there is no dispute that the appellant's conviction was founded on evidence of the recovery of items which the complainant (PW3) claimed to be his property that was stolen from his room, the culprits having broken it open in his absence when he was on duty. According to him the offence was committed on 15th October, 2011 and the properties were recovered on 16th October, 2011 two days after the commission of the offence.

The question we ask is whether there is evidence to hold the appellant responsible for the commission of the offence on the doctrine of recent possession. In this case we are satisfied that the prosecution have failed to lead sufficient evidence to connect the appellant with the commission of the offence of receiving stolen property on the doctrine of recent possession. In the case of **Joseph Mutua & another V R** (supra) the appellants were convicted on evidence of recent possession. The appellants were seen with mobile phones after the incident and that the complainants identified the mobile phones a few hours after the incident and they produced receipts with serial numbers. The Court rejected that

evidence because the trial court did not ascertain that the serial numbers in the receipts tallied with those in the mobile phones. The Court held that:

> *"It was not enough for the witnesses to say that the phones bore serial numbers appearing in receipts without more. In the absence of clear evidence to that effect, it was possible that the phones that were produced and admitted in evidence were not necessarily the same as those which were robbed from PW1 and PW2."*

In this case it is apparent that PW3 did not give sufficient evidence for enabling the court to be satisfied that the properties belonged to him. The receipts he tendered in court and admitted in court as exhibits P3 did not contain the necessary information to enable the court link them with the properties which were admitted in court. They contained no serial numbers. This was important information which would have enabled the trial court to ascertain whether the serial numbers tallied with the properties the complainant claimed to be his (exhibit P2).

Since the trial court did not establish the link between the receipts and the properties, then one of important ingredients of ownership of the properties for establishing the offence of recent possession was not proved. Moreover, the appellant said what was recovered from his room was a TV Sony and it was his property. This evidence was not seriously disputed by the prosecution. As stated by the learned State Attorney the prosecution sought to shift the burden of proof to the appellant before proving ownership of the properties. That was wrong. All three elements as stated in the case of **Joseph Mkumbwa & Another** (supra) had to be established before shifting the burden to the appellant to give reasonable explanation for possessing the properties. Since the prosecution failed to prove ownership of the properties, the learned judge on first appeal erred in upholding the conviction on the doctrine of recent possession. Because of that omission on the part of the prosecution, she should have held that the prosecution did not prove the offence against the appellant. With respect, we fault her for that error.

Since the prosecution case was not proved to the standard required, we find the appeal by the appellant having merit. We quash the

conviction, set aside the sentence and order his immediate release from prison, unless he is held there for other lawful purpose. It is ordered.

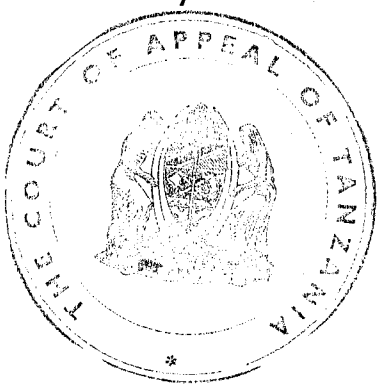
DATED at ARUSHA this 4th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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



F.J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL