IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: ORIYO, J.A.,KAIJAGE,J.A., And MUSSA,J.A.)

CRIMINAL APPEAL NO. 73 OF 2011

FRATERIN CONSTANTIN SHAYO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Moshi)

(Mzuna, J.)

Dated the 7th day of September, 2010
in
Criminal Appeal No. 6 of 2006

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JUDGMENT OF THE COURT

12th & 20th June, 2013

KAIJAGE, J.A:

The appellant, FRATERINE s/o CONSTANTINE SHAYO and another person appeared before the District Court of Rombo, at Mkuu, to answer a charge of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002. Following a full trial, the appellant was convicted as charged and sentenced to a term of thirty (30) years imprisonment. His appeal to the High Court was dismissed, hence the present appeal.

The following is a brief account of what led to the conviction of the appellant:- On 16/1/2005 shortly before midnight, a group of armed bandits raided a dwelling house of PW3, Pendo Arbogast. They ingressed the house after hurling a big stone which left a front door broken. At the material time, PW3 was inside the house asleep with her young children. According to PW3, two bandits entered her house welding a machete and demanded money from her. Through the light of the hurricane lamp, she managed to identity one of the bandits. She identified her cousin, one Matata, who is reportedly dead. In her testimony, PW3 told the trial court that she managed to escape through a window of a room after she had made the bandits believe that she would get the money they were demanding therefrom. Apparently, she fled to Tarekea Police Station where she reported the incident. PW1, No. C. 9709 Detective Sergeant Benjamin, was on duty at the station. He immediately mounted investigations of the case and visited the scene of the alleged crime.

At the scene of crime, PW1 was told by PW3 that after breaking into her house, the bandits made away with various items including one mattress, shoes and clothes for herself and children. In the course of police investigations, the appellant was found at his home in possession of

two black trousers (Exh. P5), shoes (Exh. P6) and one belt (Exh P7) which PW3 identified to be her items of property stolen during the robbery incident. The appellant was arrested there and then. This was on 20/1/2005. Following his arrest, PW1 obtained and recorded a cautioned statement (Exh P3) from the appellant in which the latter confessed to have been involved in the robbery incident.

On account of the evidence of PW1 and PW3, both courts below were satisfied that the case against the appellant was established beyond reasonable doubt. The concurrent findings of fact by the courts below were based on visual identification of the appellant by PW3 at the scene of crime, appellant's cautioned statement (Exh P3) and the recent possession by the appellant of items (Exhs P5, P6 and P7) allegedly stolen in the course of the robbery in question.

The appellant filed a memorandum of appeal containing six (6) grounds which could be condensed into three (3) substantive grounds namely;

1. That, the first appellate court grossly erred in upholding appellant's conviction relying on faulty identification evidence.

2. That, the first appellate court erred in law by not finding that the cautioned statement was improperly admitted in evidence and was taken outside the period stipulated under section 50 of the Criminal Procedure Act.
3. That, the first appellate court erred in upholding appellant's conviction on the basis of the doctrine of recent possession in respect of items of property which were not positively identified by PW3, the victim of robbery.

Before us, the appellant appeared in person, unrepresented. The respondent/Republic was represented by Mr. Oscar Ngole, learned State Attorney.

Arguing the first ground of appeal, Mr. Ngole submitted that the identification evidence of the appellant at the scene of crime was far from being satisfactory. He stressed that the conditions for identification were not favourable and did not meet the guidelines set in **WAZIRI AMANI V.R;** (1980)TLR. 250. In elaboration, he submitted that PW3, the only witness of identification, gave evidence to the effect that she was able to identify the appellant from the light of the hurricane lamp. She did not state the positioning of the hurricane lamp and its light intensity. Indeed,

the time duration the appellant was subjected to her observation and at what distance does not feature in her testimony. Upon these unsatisfactory features, Mr. Ngole was of the view that PW3 could not have unmistakably identified the appellant.

With respect, we are in full agreement with Mr. Ngole. This court in **SAID CHALY SCANIA VR.,** Criminal Appeal No. 69 of 2005 (unreported), had an occasion to make the following pertinent observation:-

> " *We think that where a witness is testifying about identifying another person in unfavorable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable.* ***To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*** [emphasis supplied].

In the present case, not only did PW3 fail in her testimony, to give clear evidence mentioning the aids to unmistaken identification of the appellant, but her credibility is also put in question when she failed to

name and give a description of the appellant to PW1, a police officer to whom she firstly reported the robbery incident. On this aspect of the case, this court in **MARWA WANGITI MWITA AND ANOTHER V.R ,** Criminal Appeal No. 6 of 1995 (unreported) stated the following:-

> " *The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry."*

In this case, it is clear from the record that the assertion by PW3 that she identified the appellant at the scene of crime came belatedly when she was giving her evidence before the trial court. Her failure to describe and mention the appellant at the earliest opportunity cast doubt to her reliability and credibility. This said, we are settled in our minds that the first appellate court should not have sustained appellant's conviction upon such weak and unreliable identification evidence adduced by PW3.

Once identification evidence of the appellant is disregarded, one of the remaining pieces of incriminating evidence against the appellant is his cautioned statement (Exh P3) in which he allegedly confessed to the robbery. This brings us to the second ground of appeal.

On the second substantive ground, Mr. Ngole for the respondent/Republic emphatically submitted that the appellant was not accorded an opportunity to raise any objection on Exh P3 before it was admitted in evidence and that same was taken outside the period stipulated under section 50 of the Criminal Procedure Act, cap. 20 R.E. 2002. Upon these patent deficiencies, he urged us to discount the evidence in Exh P3. Once again, we are in agreement with the learned State Attorney.

The record is clear that the said cautioned statement was admitted in evidence by the trial court without the appellant being asked on whether he had any objection or not. Since the appellant was not accorded such an opportunity for raising any objection on the caution statement before it was admitted in evidence, it would certainly be risk taking to assume here that it was voluntarily made. This court came face to face with a similar situation in **TWAHA S/O ALI AND 5 OTHERS Vs R.**, Criminal Appeal No. 78 of 2004 (unreported). In that case, the Court said:-

> " ... *Accuseds procedural rights are there to be strictly observed not only for their benefit but also to ensure that justice is done in the case.* ***The omission***

committed by the trial Court was, in our firm view, a fundamental and incurable irregularity and it greatly prejudiced the appellants *as is evident from the judgments of both the trial court and the High Court. We are accordingly constrained to discount the confession evidence of the appellants."*[emphasis supplied].

We wholeheartedly subscribe to the views expressed in **TWAHA'S** case. In the present case, the first appellate Court in sustaining appellant's conviction, relied on Exh P3. It stated the following in its judgment:-

> " *The trial magistrate believed the confession voluntarily made to be true and was entitled to do so basing on the evidence and corroborations connected with it."*

On the strength of the holding in **TWAHA S/O ALI AND 5 OTHERS Vs R** (supra), appellant's confession evidence in the cautioned statement cannot be spared. We accordingly hereby discount the confession evidence in Exh P3. That done, the only remaining piece of evidence which tend to link up the appellant to the robbery incident is in regard to exhibits; P5, P6 and P7 which are items of property found in his possession about five days after the robbery incident. The said exhibits were identified by PW3 to be hers. On this aspect of the case, Mr. Ngole submitted, rightly in

our view, that PW3 did not positively identify the exhibits to be her property and that in the circumstances of the case, the doctrine of recent possession was not properly invoked by the first appellate Court in sustaining appellant's conviction. He referred to **DAVID CHACHA AND 8 OTHERS Vs R.,** Criminal Appeal No. 12 of 1997 (unreported) in which this Court lucidly stated the following:-

> *" it is a trite principle of law that properties suspected to have been found in possession of accused persons* ***should be identified by the complainants conclusively. In a criminal charge, it is not enough to give generalized description of the property*** *"*[emphasis supplied]

In this case, PW3 did not mention to anybody any identifying marks of her property allegedly stolen in the course of robbery. Upon the arrest of the appellant in possession of the exhibits in question, PW3 merely told the arresting officer (PW1) that the belt, two trousers and the shoes belong to her. She repeated the same version when testifying before the trial Court. She did not mention to anybody any identifying marks of her property allegedly stolen. This was, certainly, a generalized description of the property she claimed to be hers. PW3 was supposed to make a description

of special marks on the said items before she had seen them with the appellant five days after the robbery incident (See; **HENRY GERVAS V.R** (1967) HCD No. 129 and **NASSORO MOHAMED V.R** (1967) HCD No. 446.

It is a rule of evidence that an unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft, but also for any offence however serious. (See; **MWITA WAMBURA V.R;** Criminal Appeal No. 56 of 1992 (unreported). This is the essence of the doctrine of recent possession. It is common knowledge that for the doctrine to be properly invoked, the following elements must be established:-

(i) The stolen property must be found with the suspect.

(ii) The stolen property must be positively identified to be that of the complainant.

(iii) The property must be recently stolen from the complainant.

(iv) The property stolen must constitute the subject of the charge.

In this case, the record is clear that the belt (Exh.P7) does not constitute the subject of the charge and, as said before, the trousers (Exh. P5) and the shoes (Exh. P6) were not positively identified by PW3 to be her property. In other words, it is hard to find that exhibits P5, P6 and P7 belonged to PW3 and were stolen as a consequence of an armed robbery at the latter's dwelling house. We are satisfied that in the circumstances the doctrine of recent possession could not have been safely invoked to link up the appellant with the robbery incident.

We are alive to the legal principle that this Court usually does not lightly interfere with the concurrent findings of fact of the Courts below. It can only do so if it is clearly shown that there was misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice. However, for the reasons which are apparent in this judgment, we think that the circumstances of this case merit our intervention.

Having discounted the identification evidence of PW3, the confession evidence in Exh P3 and having made a finding that the doctrine of recent possession was misapplied by the Courts below, we are left with no cogent evidence upon which appellant's conviction could have been sustained by

the first appellate Court. Thus, we accordingly allow the appeal of the appellant, quash his conviction of armed robbery and set aside the sentence of 30 years imprisonment imposed on him. He is to be released from prison unless he is otherwise lawfully held.

DATED at ARUSHA this 20th day of June, 2013.

K. K. ORIYO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

(Malewo M.A)
DEPUTY REGISTRAR
COURT OF APPEAL