IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: KIMARO, J. A., MANDIA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO.13 OF 2013

1. HARUNA BERNADO.....1ST APPELLANT
2. BAZIYANKA PETER.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Songoro, J.)

Dated the 27th day of February, 2013

in

Criminal Appeal No. 3 of 2004

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JUDGMENT OF THE COURT

7th & 9th May, 2013

KIMARO, J.A.:

The two appellants were jointly charged in the District Court of Kibondo with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code [CAP 16 R.E.2002]. They were convicted and sentenced to 40 years imprisonment each. Their appeal to the High Court succeeded on the sentence which was reduced to thirty years. The conviction was sustained.

The evidence upon which the conviction of the appellants was based and which the first appellate Court was satisfied that the trial Court did a

proper analysis is that, the offence was committed at night when PW1 and PW2 were on their way to Katanga Village carrying an assortment of commodities on their bicycles.

They were invaded by armed bandits who threatened to kill them. In that process their commodities and bicycles were stolen. They could not identify any of the bandits. Upon tracing the stolen property the victims of crime followed the footprints of the culprits from the scene of crime to a Refugee Camp where they recovered a bicycle which PW2 identified as his, being among the properties that was stolen in the course of the commission of the robbery. The property was said to have been recovered at the house of the first appellant. The appellants were convicted for their failure to give a reasonable explanation on their possession of the stolen property.

Still aggrieved, they filed this appeal against the conviction and sentence. Both appellants filed separate memoranda while in prison. However, Mr. Kamaliza Kamoga learned advocate, file supplementary memorandum in Court. He adopted the memorandum and argued the appeal for both appellants. The supplementary memorandum has two

grounds. The first ground of appeal is that this Court, as second appellate Court, has reasons to interfere with the findings of the two lower Courts because they mis-directed themselves in evaluating the evidence and convicted the appellants without sufficient evidence. That resulted in a miscarriage of justice to the appellants. The second one is that the doctrine of recent possession was wrongly invoked in convicting the appellants.

At the hearing of the appeal Mr. Kayaga, learned advocate represented the appellants. The respondent Republic was represented by Mr. Edward Mokiwa, learned State Attorney.

Submitting in support of the first ground of appeal, the learned advocate for the appellants faulted the first appellate Court for sustaining the findings of the trial Court which was wrong. He said the conviction of the first appellant was based on the evidence of Thobias Leonard (PW2) and Baseka Joseph (PW3), that the first appellant was found with a stolen bicycle five days after the offence of armed robbery was committed. He said the evidence of the two witnesses is contradictory. PW2 said it was the second appellant who led the witnesses to the house of the first

appellant. They found the first appellant at home. His house was searched and bicycle tyres were found there. Then the first appellant took a hoe and dug at the place where the remaining parts of the bicycle were hidden. According to this witness, the place was covered with grass and the witness identified it as his bicycle. The learned advocate said the evidence of PW3 on how the bicycle was recovered is different. The witness said when they went to the house of the first appellant; they did not find the first appellant. They found a 14 year old boy and it was this boy who showed the witnesses where the parts of the bicycle were hidden. It is not shown in the evidence that the first appellant was the one who dug at the place where the stolen items were hidden.

The 14 year old boy was not summoned to testify, so whatever he told the witnesses, the learned advocate argued, remained hearsay.

As for the second appellant, the learned advocate said he was not found with anything but the learned judge on first appeal sustained a finding by the trial Court that both PW1 and PW2 said that he admitted the commission of the offence to *"sungusungu" and* he also mentioned the places where the stolen items were recovered. The learned advocate said

the appellants were not supposed to be convicted on such contradictory evidence.

As for the second ground of appeal the learned advocate said that having pointed out the shortfalls in the recovery of the stolen bicycle, it was wrong for the first appellate Court to sustain the conviction on the doctrine of recent possession. He prayed that the appeal be allowed and the appellant be set free.

The learned State Attorney supported the conviction and the sentence. He said notwithstanding the facts that the 14 year old boy was not summoned in Court to testify, the evidence of PW2 and PW3 sufficed to convict the appellants. They explained how they went to the scene of crime and followed the footprints of the culprits up to Kanembwa Refugee Camp and to the recovery of the stolen bicycle at the house of the first appellant. It was the second appellant Baziyanka Peter who mentioned the first appellant Haruna Bernado that he also participated in the commission of the crime. He said the properties were recovered within a short period after the commission of the offence and so the prosecution discharged its burden of proof on the standard required.

In sustaining the conviction against the first appellant, the learned judge on first appeal held:

> *"I find that according to the testimonies of PW1 and PW2, he was mentioned by the first appellant as one of the robbers who participated in the commission of the offence. Also, I find that, there was the testimonies of PW1, PW2, and PW3 who told the trial Court that the premises of the second appellant was searched in their presence and one frame of bicycle which was hidden under the hole and its rings were recovered at his premises...The testimonies of PW1 and PW2 that the stolen bicycle and its parts were found at the premises of the second appellant was supported by Baseka Joseph, PW3 a refugee living at the camp who also witnessed the search."*

In the first appellate Court Haruna Bernado filed Criminal Appeal No. 3 of 2004 and Banziyaka Peter Criminal Appeal No. 4 of 2004. The learned

Judge on first appeal consolidated the two appeals into Criminal Appeal No. 4 of 2004. Banziyaka Peter became first appellant, and Haruna Bernado, second appellant. The learned judge on first appeal said the first appellant did not give a reasonable explanation on why the dismantled parts of the rings of the bicycle were in his premises.

As for the second appellant, the learned judge on first appeal said that he admitted the commission of the offence in the course of interrogation by the *"sungusungu"* who apprehended him and he mentioned the first appellant being one of those who participated in the commission of the offence. He sustained the conviction on that basis.

It is true this is a second appeal. The jurisdiction of this Court to interfere with findings of facts of the Courts below is restricted to the unreasonableness of the decision, misapprehension of evidence or a violation of a principle of law. The case of **Iddi Shabani @ Amasi V R.** Criminal Appeal No. 111 of 2006 CAT (unreported) referred to the Court by the learned advocate for the appellant is applicable here.

The issue before us is whether there was a misdirection by the lower Courts which calls for interference by the Court. The learned advocate said the lower Courts failed to see the contradictions in the prosecution evidence. On the other hand the learned State Attorney said there was none. After going through the evidence of PW2 and PW3 and having thoroughly gone through the record of appeal as a whole, we must say that we agree with the learned advocate for the appellants that the evidence of how the parts of the bicycle were recovered from the first appellant is contradictory. If PW3 was a witness who saw the search that was conducted in the house of the first appellant, we do not see why his evidence should differ with that of PW2. PW2 said it was the appellant who showed and dug where the hidden parts of the bicycle were. PW3 on the other hand said the first appellant was not at home when the search was conducted, and it was a fourteen year old boy who showed where the stolen parts were hidden. He did not even say who dug the place to show the stolen parts. The 14 year boy was not even called as a witness to clear the contradiction in the evidence of witnesses. It is cardinal principle of criminal law that the prosecution are the ones who have the burden of proving the charge against an accused person. See the case of

Chiwanga Mapesa V R. Criminal Appeal No. 252 of 2007 (unreported) also referred to the Court by the learned advocate. The prosecution did not discharge this burden. Their evidence leaves doubt as to whether the items were actually found in possession of the first appellant. The first appellate Court should not have sustained the conviction of the appellant on the doctrine of recent possession. Whenever they is doubt in the prosecution case, the doubt must always be resolved in favour of the accused.

In the case of **Mohamed Mahita** [1990] T.L.R 3. The Court held that:-

> *"Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duly to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions go to the root of the matter."*

We are satisfied that the contradictions in the evidence of PW2 and PW3 is not minor. Witnesses who were at the house of the first appellant at the same time cannot give a different version of what took place.

As for the second appellant, the same position applies to him. He was said to have admitted before *"sungusungu"* that he committed the offence and then led the witnesses to the first appellant for the recovery of the stolen property. Evidence shows that he was not found with any stolen property. The prosecution evidence on how the stolen parts of bicycle were said to have been recovered from the first appellant is unreliable because of the contradiction we have pointed out.

Given the shortfall in the prosecution evidence on the recovery of the stolen property, we also find that the prosecution did not prove the offence against the second appellant.

We find the appeal by both appellants having merit. We allow their appeal, set aside the conviction and sentence and order their immediate release from prison unless they are held there for other lawful purpose. It is ordered.

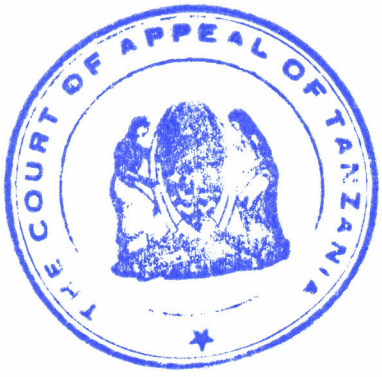
DATED at **TABORA** this 9th day of May, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL