

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 233 OF 2011

JUMA BUNYIGEAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rweyemamu, J.)

Dated 25th day of July, 2007

in

Criminal Appeal No. 58 of 2006

JUDGMENT OF THE COURT

1st & 2nd August, 2013

JUMA, J.A.:

The main issue in this second appeal to this Court is whether the two courts below, were right to invoke the doctrine of recent possession to link Juma Bunyige, the appellant herein, with an incident of armed robbery that resulted in the stealing of an assortment of medicines and medical facilities from Malembeka Dispensary in Bunda.

The appellant and another Sera Bitu, were charged at the District Court of Bunda with the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. It was alleged in the particulars of the offence that around 1 a.m. on 15/5/2005 they broke into Malembeka Dispensary in Bunda, and they not only stole assortment of medicines and medical equipment, they used a panga to slash one Ruben Mkeka who was on night guard duty. Whereas his co-accused was acquitted, the appellant was duly convicted and sentenced to thirty(30) years sentence of imprisonment.

His first appeal to the High Court (Rweyemamu, J.) at Mwanza was dismissed. The learned Judge sustained the conviction of the appellant on the basis of the doctrine of recent possession.

Apart from his Memorandum of Appeal containing six grounds of appeal, which he filed on 29th April 2013; the appellant in addition filed a supplementary memorandum of appeal containing two grounds of appeal. In both, the appellant faults the application of the doctrine of recent possession to convict him of the offence of armed robbery. Specifically, the appellant contends that since the assortment of medicines which were allegedly found in his

possession were not tendered, ownership of these medicines was not proved and the Judge on first appeal erred in invoking the doctrine of recent possession.

The brief background facts leading to this second appeal are well set out in the record of this appeal. Reuben Mkeka (PW2) was the watchman on duty on 15th May, 2005 at Malembeka Dispensary. The prosecution case is that at around 1 a.m. PW2 saw torch flash lights. Thinking it was the Clinical Officer (Juma Mboso, PW1) who was visiting the dispensary, PW2 called out to ask who the person behind the torch light was. It turned out that it was not the Clinical Officer, but two people facing him. They set upon him slashing him using a panga (machete) which they carried. They stole his torch, bow and his Tshs. 16,000/= . The invaders proceeded to steal the pharmaceuticals and medical equipment before disappearing into the night using their bicycles.

Juma Mboso, PW1 the Clinical Officer was awoken a few minutes later. The injured watchman informed PW1 that he had been injured following an incident of armed robbery at the dispensary. PW1 checked the dispensary and prepared a list of items that had been stolen before reporting the incident to the

police post. Joyce Fadhili (PW3) who had rented a room in a house where the appellant also had rented rooms, testified how at around 3 a.m. she heard a knock at her window. It was the appellant who asked her to open the main door to enable the appellant to gain entry into the house and into his own room. When PW3 opened the main door, the appellant entered carrying his luggage.

At around 6 a.m. PW3 was preparing tea when she noticed that the appellant was around. PW3 confirmed that she saw the luggage when it was brought in but later realized that the luggage contained various types of pharmaceuticals. PW4 Kinanda Kiyango (Chairman of the local Sungu Sungu militias), PW5 Idrisa Nyamtengera Zenge, PW6 Lucas Masenza, PW7 Jonathan Delei, were amongst the people who were present when police corporal Michael (PW8) searched the appellant's rooms and found three bags containing various items of stolen medicines and medical equipment. After conducting search and seizure of the items that were found, PW8 prepared a certificate of seizure. This certificate was tendered as exhibit P3. The trial court was not in doubt that the evidence of prosecution had established beyond reasonable doubt the guilt of the appellant. On first appeal, the learned

Rweyemamu, J. invoked the doctrine of recent possession to link the appellant with the offence of armed robbery, on page 37 of the record of appeal:

"From the evidence on record and parties' submissions, the fact that; the offence committed was armed robbery; the medicines stolen therein, recovered and tendered in court as exhibit belonged to the complainant PW5; and that the appellant offered no explanation consistent with innocent possession, are not disputed. The contested issue is whether there was sufficient proof that the stolen medicines were found in the appellant's possession?"

The learned Judge on page 42 of the record concluded her judgment which left no doubt the doctrine of recent possession linked the appellant to the offence of armed robbery:

"... I concur with the trial court finding the appellant was found in possession of very recently stolen property; that he gave no reasonable explanation of possession, and that his alibi, was not sufficient to raise any doubt at all in the prosecution's case. He was therefore properly found guilty of the offence charged under the doctrine of recent possession....."

When this appeal came up for hearing, the appellant appeared in person, unrepresented. Ms. Revina Tibilengwa, learned State Attorney, represented the respondent Republic. Appellant preferred the learned State Attorney to submit first on the grounds of appeal. The learned State Attorney supported the appeal and she urged us to find that the two courts below erred in invoking the doctrine of recent possession to convict the appellant.

Ms. Tibilengwa faults the learned Judge for suggesting that the medicines stolen from Malembeka Dispensary were recovered and tendered in court and exhibited as belonging to the complainant. She expressed her surprise that while prosecution witnesses like PW1, Juma Mbose (the clinical officer responsible for the dispensary that was broken into), PW5, Idrisa Nyamtengera Zenge (the owner of the house where the appellant rented rooms) and PW8 C. 8915 CPL Michael (the police officer in charge of the search) all testified about the search that discovered three bags full of medicines, the medicines concerned were never tendered in court. In addition, the learned State Attorney contended that it is still not clear whether the contents of three bags were amongst the medicines that were stolen from the dispensary. With due respect,

Ms. Tibilengwa is correct. We will demonstrate later that there is no evidence to prove that the assortment of medicines and medical equipment that were found in one of the rooms rented out to the appellant were the same as those earlier stolen from the dispensary. The correct position is that no such medicines were ever exhibited in court as suggested by the learned Judge.

PW1, (the clinical officer) would have been the best witness to establish the link between what was stolen from the dispensary with what was seized by the police. PW1 testified how he found the doors of the dispensary broken and how he visited the police out post and saw the medicines that had been stolen. PW1 should have offered more in terms of linkage, he did not. It was not enough for PW1 to merely tender in court a "list of types of medicines" without furnishing linkage with what was stolen from a dispensary under his supervision. It was not enough for other witnesses like PW4, and PW5 to testify that they saw three bags full of medicines recovered from the appellant's room without so much as providing the link with what was stolen from the dispensary.

This Court has on several occasions provided tests to assist in determining when the doctrine of recent possession can properly be

invoked. Two tests are missing in the present appeal before us. First, is the proof that the property belongs to the complainant. Second missing test, is proof that the property found on the accused was stolen from the complainant. In CRIMINAL APPEAL NO. 15 OF 2010, **SILVANUS ANSIGALI @ MBILINYI VS. THE REPUBLIC** (unreported) this Court relied on tests it had earlier articulated in CRIMINAL APPEAL NO. 136 OF 2009, **ALHAJ AYUBU @ MSUMARI & ANOTHERS vs. REPUBLIC** (unreported) wherein we had stated that:-

*"...before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case... It must positively be proved, **first that the property was found with the suspect; secondly that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant, and lastly that the property was recently stolen from the complainant."*** [Emphasis added].

This appeal provides us with those few occasions where we are obliged to interfere with concurrent findings of fact by the courts below. The trial and the first appellate courts failed to evaluate evidence relating to proving that the three bags of medicines which witnesses claimed were recovered from one of the

rooms rented out to the appellant, belonged to the complainant (Malembeka Dispensary) and were stolen from this complainant during an incident of armed robbery.

After the police had seized the medicines from one of the appellant's rooms, the chain of custody moved on to police out post, then to Bunda Police Station where it ran cold. The Police at Bunda Police Station who held custody of the medicines did not see it fit to tender the medicines in court at least for the complainant (PW1) to establish some semblance of evidential linkage with medicines that were stolen from the dispensary. There is therefore no evidential basis to support the conclusions of the first appellate court that the medicines seized were in fact stolen from Malembeka Dispensary. Similarly, PW 8 the police officer who carried out the search and took custody of the medicines did not testify on any link between what he found in the room rented out to the appellant, and what was stolen from Malambeka Dispensary.

Because the prosecution had failed to prove that medicines seized belonged to the Malambeka Dispensary, there was no basis to expect the appellant to give an explanation that could possibly be true how he came by the medicines seized from one of his rooms.

In the upshot we are satisfied that this appeal has merit. We allow the appeal, quash the conviction and set aside the sentence. We order forthwith release of the appellant, unless lawfully held.

DATED at MWANZA this 1st 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