IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 73 OF 2010

JOHN NICOMED GEAY.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal From the Decision of the High Court of Tanzania)

At Arusha)

(SAMBO, J.)

Dated the 6th day of April, 2010
in
Criminal Appeal .45 of 2009

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JUDGMENT OF THE COURT

3rd & 8th June, 2013

KAIJAGE, J. A.:

Before the District Court of Babati at Babati, the Appellant, JOHN NICOMED DAMIANO @ GEAY, together with three other persons were prosecuted for armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002. At the conclusion of the trial, the appellant was found guilty, convicted and sentenced to serve a term of thirty (30)

years of imprisonment with twelve (12) strokes of the cane. Appellant's appeal to the High Court was unsuccessful, hence the present appeal.

We propose to begin with the brief account of evidence which led to the conviction of the Appellant. Going by the record, the evidence in support of the charge against the appellant came from Detective Corporal Godfrey Mmary (PW1), Ramadhani s/o Lohay (PW2), Detective Corporal Dojwan Osala (PW5) and Inspector Athuman Mhina (PW 6).

PW2, a resident of Sigino Village within Babati District, testified to the effect that on 27/5/2000 at 04.00 hours or thereabout, four bandits armed with bush knives and iron bars forcibly entered his dwelling house, assaulted him, ransacked the house and eventually made away with various items of property including two bicycles, one radio cassette, one jacket, four plates and cash to the tune of Tshs. 1,129,000/=. At the material time, the house which was broken into was occupied by PW2 and one John s/o Bamboo. Neighbours appeared at the scene of crime in response to the alarm raised by the appellant. Amplifying on what actually transpired in the course of robbery, PW2 told the trial Court that his house was ransacked by the bandits with the aid of torch light through which he

was also able to identify the appellant as one of the bandits. Apart from the appellant, PW2 made no claim of having identified other bandits.

After the robbery incident, PW2 made a report to the Police Authorities. PW1 who was then a police officer stationed at Babati Police Station, arrived at the scene of crime few hours after the incident. He confirmed that the house of PW2 was broken into by the robbers and he was told that an assortment of items, the property of PW2, were stolen therefrom. Initial investigations led to the arrest of two suspects who were acquitted by the trial Court under section 235 of the Criminal Procedure Act, Cap 20 R.E. 2002.

On 13/7/2000, PW2 saw the appellant wearing a jacket he claimed to be one of the items stolen from his house by the bandits. This was about forty five (45) days after the robbery. Immediately thereafter, the appellant was arrested by PW5. Apart from the jacket, the appellant was also found in possession of a bicycle. While being escorted to the Police Station by PW5, the appellant managed to escape to an unknown destination. He left behind the bicycle which in the course of trial was admitted in evidence and marked Exh P3. The said bicycle was not one of the items allegedly stolen from PW2.

About a month later, on 16/8/2000, the appellant was, once again, seen at Magugu in Babati District. On 20/8/2000 he was arrested by PW6 who was the then Officer Commanding Station (OCS) of Magugu Police Station. Appellant had hired a room in Ngorongoro Guest House where he was found and arrested. Following a search conducted in the appellant's room, a jacket with a burnt mark hole at its bottom right and a missing button at its collar was recovered from a plastic bag found under the bed. In the course of trial, the said jacket was tendered in evidence by PW1 and was accordingly marked as Exh P2. In his testimony before the trial Court, PW2 asserted that the said jacket with the said identifying marks was his property stolen by bandits during the night of the robbery incident.

PW1 also obtained and recorded a cautioned statement (Exh P1) from the appellant. Exh P1 was admitted under a strong protest by the appellant who repudiated it. It is significant to note here that despite appellant's objection, the trial Court proceeded to admit the statement without conducting an inquiry into the voluntariness or otherwise of the alleged confession contained therein.

In his sworn defence, the appellant denied having committed the offence he was convicted of, stating that the jacket (Exh P2) found in his

possession belongs to him and that the identification evidence implicating him with the offence of armed robbery is not watertight.

In its judgment, the trial Court made a finding that the appellant was properly identified at the scene of crime and that the jacket which was found in his possession was the property of PW2. It further invoked the doctrine of recent possession to find the appellant guilty as charged. On appeal, the High Court fully associated itself with the findings made by the trial Court and consequently sustained the conviction entered and the sentence passed against the appellant.

The appellant filed a memorandum of appeal listing seven (7) grounds, but we think that they could be condensed into two grounds namely;

1. *That, the appellant was not properly identified at the scene of crime.*
2. *That, the two Courts below did not properly invoke the doctrine of recent possession.*

Before us, the appellant appeared in person, unrepresented. The respondent/Republic which resisted the appeal was represented by M/s Eliaineny Njiro, learned State Attorney.

Arguing generally on the grounds of appeal, the appellant criticized identification evidence adduced by PW2. In elaboration, he contended that identification by torch light is highly unreliable and that PW2 made no disclosure to anybody of a person he claim to have identified in the course of the robbery. It was appellant's contention that PW2's version that he identified him at the scene of crime came after the former had seen the latter wearing the jacket (Exh P2). The appellant further contended that in view of the fact that Exh P2 is his own property, the doctrine of recent possession was inappropriately invoked to find him guilty of the offence of armed robbery.

Responding to the appellant's submission, the learned State Attorney who appeared for the respondent /Republic maintained that the concurrent findings of fact by the two Courts below that the appellant was properly identified at the scene of crime should not be faulted. While conceding that torch light identification is not normally reliable, she nevertheless stressed that the circumstances at the scene of crime were such that PW2 was able

to identify the appellant. This is when at a certain stage during the robbery, the bandits flashed torch light to the appellant and PW2, she said.

This being a second appeal, we are, ordinarily, not free to interfere with the concurrent findings of facts by the two Courts below on the issue whether or not the appellant was unmistakably identified as one of the robbers who invaded the house of PW2 on the night of 27/05/2000. We are only supposed to deal with questions of law. But this approach rests on the premises that the findings of facts are based on a correct appreciation of evidence on record or findings arrived at without breach of any established principle of law. If both Courts below completely misapprehends the substance, nature and quality of evidence, resulting in an unfair conviction, this Court must in the interest of justice intervene. (see; ***Ludovide Sebastian VR.***, Criminal Appeal No. 318 of 2009 and ***Yassin s/o Rashid@ Maige VR.***, Criminal Appeal No.461 of 2007 (both unreported). With this principle in mind, we now proceed to determine the present appeal.

It is common ground that the conviction of the appellant was grounded upon two pieces of evidence touching on visual identification and recent possession by the appellant of Exh P2 allegedly stolen from PW2.

The law on visual identification is now settled. Visual identification is evidence of the weakest kind and Courts should not act on such evidence unless satisfied that all possibilities of mistaken identity are eliminated and the evidence is absolutely watertight (See; ***WaziriAmani V.R.,*** [1980] TLR 250.

The immediate question which calls for consideration and determination at this stage is whether PW2 was able to identify the appellant unmistakably. In this regard, we shall hereunder endeavour to examine the conditions in which the appellant is said to have been identified.

There is no gain saying that the robbery in question was committed during the night. On how the appellant was identified at the scene of crime, PW2 is on record to have told the trial Court thus:-

> " *The gangsters proceeded to search my house by using a torch... This accused No. 4 was identified by me as he was the one whom I showed my goods and* ***his colleagues were focusing their torches to that area where I was with the accused No. 4 ".*** *(emphasis supplied)*

It is highly inconceivable that PW2 was able to identify the appellant when other bandits were flashing torch light towards them (PW2 and the appellant). If that was the manner in which the appellant was identified at the scene of crime, we are increasingly of the view that the prevailing conditions and circumstances at the scene of crime were not ideal for an unmistaken identification. Ordinarily, it is easier for one holding a torch to identify the person against whom torch light is flashed and not the vice versa. While on this aspect of the case, we have subjected the evidence of PW2 to a further close scrutiny.

In his testimony, PW2 made no elaboration on the intensity of the torch light through which he purportedly identified the appellant. Indeed, he did not also disclose the approximate time he subjected the appellant under observation through torch light. It is therefore not clear whether torch light was such as to enable PW2 identify the appellant to the elimination of any possibility of mistaken identification.

In the case of ***Jaribu Abdullah*** V.R., Criminal Appeal No. 220 of 1994 (unreported), this Court made the following pertinent observation:-

"... in matters of identification it is not enough merely to look for factors favouring accurate identification. ***Equally important is the credibility of witnesses.*** *The conditions of identification might appear ideal but that is no guarantee against untruthful evidence." [emphasis added].*

Consistent with the foregoing observation, this Court has held, in many occasions, that a credible identifying witness would be expected to give a description of the suspect in relation to physiques, attire etc, and if he knows him, to name him at the earliest opportunity. (See; ***Mussa Hassan Barie and Another VR.,*** Criminal Appeal No. 292 of 2011, **Marwa Wangiti Mwita and Another V.R.** , Criminal Appeal No. 6 of 1995 (both unreported).

In the present case, the evidence on record is clear that the robbery incident was reported to the Police Authorities. PW1, a police officer who arrived at the scene of crime immediately after the robbery, was not informed, by PW2, that the latter had identified the appellant in the course of robbery. Similarly, he made no such disclosure to his neighbours who had gathered at the scene of crime in response to the alarm he raised.

PW2's version of having identified the appellant at the scene of crime came belatedly after he had seen the appellant wearing the jacket allegedly stolen. The holding in ***Marwa Wangiti Mwita's , Case*** (supra) underscores the need for an identifying witness to name a suspect at the earliest opportunity thus:-

> *"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 unexplained delay or complete failure to do so should put a prudent Court to inquiry."*

In similar vein, in this case, the failure on the part of PW2 to disclose, at the earliest opportunity, the fact of him having identified the appellant at the scene of crime and the latter's description in relation to his physiques, attire etc, has cast serious doubt on his (PW2) reliability as a witness. This point was amplified in the case of **Juma Shaban @ Juma V Republic**, Criminal Appeal No. 168 of 2004 (unreported) thus:

> *"... It is common knowledge that* ***details of the identification of an accused*** *person are required*

particularly where ***the witnesses did not know the accused before the incident****".*

In the instant case, the appellant was a stranger to PW2. There is certainly nothing on record showing or suggesting that PW2 knew the appellant before the robbery incident. It was, therefore, imperative on the part of PW2 to give a detailed description of the appellant prior to giving evidence in Court. Upon the foregoing brief observations, we are settled in our minds that identification evidence of the appellant at the scene of crime was not watertight.

Next for consideration and determination is the question whether the two courts below properly invoked the doctrine of recent possession.

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). For the said doctrine to be properly invoked, the following elements must be proved:-

1. *The stolen property must be found with the suspect.*

2. *The stolen property must be positively identified to be that of the complainant.*
3. *The property must be recently stolen from the complainant.*
4. *The property stolen must constitute the subject of the charge. (See;* ***Abdi Julius @ Mollel and Another V.R.,*** *Criminal Appeal No. 107 of 2009.*

We think that the jacket (Exh P2) was not positively described to be that of PW2 immediately after the robbery. PW2 was supposed to make a description of special marks on the said item before he had seen it with the appellant forty five (45) days after the robbery incident. (See; ***Henry Gervas VR.*** [1967] HCD No. 129, ***Nassoro Mohamed VR*** [1967] HCD No. 446 and ***Ally Zuberi Mabukusela VR;*** Criminal Appeal No. 242 of 2011 (unreported).

Going by the record, it appears that the identifying marks on Exh P2 were disclosed by PW2 for the first time when the appellant was arrested wearing it. It is clear in his evidence that he made no distinctive description of the said jacket ahead of same being seen with the appellant

and before it was tendered in Court. The appellant having asserted ownership over Exh P2, there could be no assurance that same, undoubtedly, was the property of PW2 stolen from him in the course of robbery. In any case, it is common knowledge that clothes like (Exh P2) look similar. Being common items, they are prone to exchange hands easily. Considering the foregoing circumstances, we think that a period of forty five (45) days after the robbery is not recent enough for a proper invocation of a doctrine of recent possession. We have thus found it extremely difficult to link up the appellant with those who perpetrated the robbery and to safely invoke the said doctrine. Be that as it may, the trial Court in the proceedings dated 24/11/2000 at page 18 of the record, did not confirm the fact of having admitted (Exh P2) in evidence with its distinctive marks alleged by PW2.

In the course of hearing of this appeal, the learned State Attorney conceded that the cautioned statement (Exh P1) which was objected to by the appellant in the course of trial, was improperly admitted in evidence without there being an inquiry to determine its voluntariness or otherwise. The learned State Attorney urged us to expunge it from the record. With

respect, we agree. Exh P1 is accordingly hereby expunged from the record.

Once Exh P1 is expunged, the remaining evidence on record is far from satisfactory to sustain the conviction of the appellant on a charge of armed robbery. Consequently, we allow this appeal, quash the conviction and set aside the sentence. The appellant is to be released from custody forthwith unless he is otherwise lawfully held.

DATED at **ARUSHA** this 8th day of June, 2013.

E. A. KILEO
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