IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 265 OF 2010

MACHELA MAGESA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Nyangarika, J.)

dated 4th day of October, 2010
in
Criminal Appeal No. 147 of 2009

JUDGMENT OF THE COURT

25th & 29th July, 2013

JUMA, J.A.:

The appellant MACHELA MAGESA was in the District Court of Bunda, charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 read together with section 2 of Act No. 10 of 1989. The alleged armed robbery occurred at Mikomarilo village in Bunda District around 3:00 a.m. on 5th May, 2006. It was further alleged that during the incident, the appellant stole 15 heads of cattle valued at shs. 450,000/= and immediately before stealing used arrows and panga to obtain the stolen cattle.

The trial court accepted the prosecution evidence that the appellant was not only positively identified at the scene of armed robbery, but was found in possession and trying to auction two heads of cattle before he ran away. The appellant was convicted and sentenced to serve thirty (30) years in prison and to suffer twenty four (24) strokes of the cane. Aggrieved, the appellant preferred an appeal to the High Court of Tanzania at Mwanza in Criminal Appeal No. 147 of 2009. Although the High Court (Nyangarika, J.) agreed with the appellant that the conditions at night of armed robbery were not conducive for using torchlight to positively identify a person, the learned Judge all the same concluded that the appellant was conclusively found in recent possession of cattle earlier stolen and was in fact trying to sell the stolen cattle. On the basis of the doctrine of recent possession, the first appellate court upheld the conviction and the sentence of thirty years in prison and to suffer twenty four (24) strokes of the cane which the trial court had earlier imposed. Still aggrieved, the appellant preferred this second appeal.

The appellant itemised five grounds of appeal in his memorandum of appeal. But at a closer scrutiny, those grounds, in essence complain about the decision of the first appellate court to invoke the doctrine of recent possession to link him with stealing a head of cattle (exhibit P2)

during the armed robbery. The appellant also put to question the failure of PW2 and PW3 to raise an alarm at the Kiabakari public auction to allow many other people to come forward to corroborate the evidence of these two witnesses. The appellant also claims that section 231 (1) (b) and (4) of the Criminal Procedure Act was not complied with because he was denied his fundamental right to call witness to his defence. In the fourth ground, the appellant contends that there are two witnesses, D/sgt Mwita (PW6) and Detective Corporal Vendelius (PW7), who were not included in the list of prosecution witnesses during the preliminary hearing. According to the appellant, these two should not have testified in the trial. Finally, the court erred in law for failing to analyze the evidence of the defence.

The facts leading up to this second appeal are briefly as follows. On 4/5/2006 Chacha Munanka was planning to travel. He invited his son, Munanka Chacha Munanka (PW1), to come over and sleep at his house in order to keep watch over the homestead. At nightfall, PW1 herded his father's livestock into the compound for the night. He was awoken at around one o'clock in the morning to the sound of knocking from the direction of cattle shed. Curious, he lit his torch and saw the appellant who had just aimed an arrow spear at him. PW1 raised an alarm and

neighbours flocked to the compound. He checked the cattle shed and found it had been burglarized. 15 heads of cattle were stolen. Marera Chacha (PW2) was amongst the villagers who not only responded to the alarm and visited the scene of armed robbery, but was also part of the group that tried to trace the missing cattle early in the morning. Predictably, PW2 visited the public cattle auction at nearby Kiabakari. As fate would have it, he saw the appellant trying to sell two cows. The appellant immediately retreated back and away from the auction when PW2 saw him approaching. Appellant escaped. From evidence, before he ran away when he saw PW2, the appellant was negotiating the price of the cows with PW3, Nyamanga Iroga who identified himself as the purchaser to whom the appellant was planning to sell the two cows at the auction before Marera Chacha (PW2) intervened with the information that the two cows had been stolen. PW3 testified how they tried to chase the appellant without success. Testifying in his own defence, the appellant had dismissed off the prosecution evidence that he had been found at Kiabakari in possession of stolen cows. This evidence, he pointed out, was an attempt to frame him with an offence he did not commit.

At the hearing of the appeal, the appellant was unrepresented. Mr. Victor Karumuna, the learned State Attorney appeared before us on behalf of the respondent Republic. He supported the conviction of the appellant, and urged the Court to dismiss the appeal. The learned State Attorney also urged us to reject the contention by the appellant that he was denied an opportunity to bring his own witnesses to his defence. On this, he referred us to page 17 of the record of this appeal where after concluding his testimony as DW1, the appellant told the trial court that he was closing his defence for he did not have witnesses to call. With due respect, the learned State Attorney is correct. The record bears out the fact that the appellant did not have further witnesses and he informed the trial court as much.

Mr. Karumuna similarly adverted to the complaint that two witnesses, PW6 and PW7 should not have been allowed to testify because they were not listed down during the preliminary hearing. Mr. Karumuna responded by submitting that the Criminal Procedure Act does not require the list of witnesses to be drawn up during the Preliminary Hearing and bind the parties to restrict their witnesses only to those listed. Urging us to reject this ground, the learned State Attorney observed that the appellant has not shown that he had been prejudiced

in any way. With due respect, Mr. Karumuna is correct. This Court has on several occasions restated that, there is no law preventing the prosecution from calling witnesses, even those who were not listed at the preliminary hearing. In CRIMINAL APPEAL NO. 69 OF 2011, PETER S/O KIDOLE VS. THE REPUBLIC (CAT at IRINGA) (unreported) we cited our earlier decision in CRIMINAL APPEAL NO. 14 OF 2005, BANDOMA FADHILI MAKARO AND ANOTHER VS THE REPUBLIC, (CAT at MWANZA) (Unreported) at pages 7 - 8 wherein the Court observed that –

> *"The first appellant complained in one of his grounds of appeal that witnesses who had not been listed at the preliminary hearing gave evidence at the trial ----- and argued that he was denied justice when the trial court allowed those witnesses to testify. Unfortunately for the first appellant, that provision did not apply to his case. It applies to trials in the High Court. Trials in the High Court are normally preceded by committal proceedings in a subordinate court at which statements of prospective prosecution witnesses are read out in the open court in the presence of the accused. --- There is no equivalent provision for trials in the subordinate courts and there is no law therefore which prevented the prosecution from calling witnesses --- even those whowere not listed at the preliminary hearing. There is no substance in the complaint"*

We also agree that there was nothing preventing the prosecution from calling PW6 and PW7 who were not listed down during the preliminary hearing.

Next, as we observed earlier, the learned Judge on first appeal upheld the conviction of the appellant on the basis of the doctrine of recent possession. Two witnesses, PW2 and PW3 are at the centre of the application of the doctrine to link the appellant to the armed robbery. It was PW2, who after the armed robbery and disappearance of several heads of cattle traced the stolen cows at Kiabakari public auction where he found the appellant transacting the sale. PW3 had gone to the auction to purchase cattle to help him his cultivation. The arrival of PW2 made the appellant to run away, thereby ending whatever transaction that was taking place between PW3 and the appellant.

In his grounds of appeal, the appellant not only attacked the application of the doctrine of recent possession to convict him, but also credibility of PW2 and PW3. On credibility, the appellant wondered why these two witnesses failed to shout an alarm which would have attracted many more witnesses at the public auction. Appellant believes that the failure to raise the alarm affected the credibility of these two witnesses.

In response, Mr. Karumuna found PW2 and PW3 credible. The learned State Attorney urged us to reject the appellant's complaint because it was mere allegation without supporting proof. On failure to raise an alarm which would have attracted many more witnesses, he referred us to section 143 of the Evidence Act, Cap. 6 and submitted that the prosecution was not obliged to call many witnesses because it is not the number of witnesses who testify that matter in so far as proof is concerned.

On credibility of the two witnesses, we shall begin from our well settled position to the effect that every witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations. In CRIMINAL APPEAL NO. 99 OF 2010, **ALLY HUSSEIN KATUA VS. THE REPUBLIC**, (CAT at Tanga) (unreported) we cited in **GOODLUCK KYANDO V REPUBLIC,** Criminal Appeal No. 118 of 2003 (unreported) wherein we said that:

> *... It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness...*

We should at this point observe that the appellant did not raise the question of credibility of these two witnesses at the trial and the first appellate court. The issue of credibility did not feature in his

memorandum of appeal to the High Court. Even while cross-examining the two witnesses and also during his own defence the appellant did not raise the question of credibility. We cannot but conclude that there are no good and cogent reasons to question the credibility of PW2 and PW3.

On the applicability of the doctrine of recent possession in this appeal, this Court has settled down circumstances under which the doctrine can be invoked. In CRIMINAL APPEAL NO. 94 OF 2007, **JOSEPH MKUMBWA & SAMSON MWAKAGENDA VS. THE REPUBLIC** (unreported) restated that:

> *For the doctrine to apply as a basis for conviction, it must be proved, **first**, that the property was found with the suspect, **second** that the property is positively proved to be the property of the complainant, **third** that the property was recently stolen from the complainant and **lastly**, that the stolen thing constitutes the subject of the charge against the accused.*

Using the above four principles for evaluation of evidence as our guide, there is no dispute the incident of armed robbery took place at around 3 a.m. on 5/5/2006, when several cows were stolen from the homestead of the late Chacha Manko but under the care of PW1. There is similarly no dispute that less than twelve hours later, two cows were found about to be sold to PW3 at a Kiabakari auction.

There is also what we can readily say, overwhelming evidence that the two stolen cows were found in possession of the appellant at the public auction. PW2 offered this evidence of possession. He saw the appellant in close proximity with the cows, trying to negotiate price with PW3. PW3 confirms how the appellant offered to sell. When PW2 approached at the spot of the public auction where transaction was taking place, the appellant ran away leaving PW3 with stolen cows. PW3 tendered the two cows as exhibit P2. Alarm was unsuccessfully raised to try and arrest the appellant. PW5, PC Ngewa was one of the police officers stationed at the public auction to ensure peace. PW5 arranged the two cows to be transported from the auction to Kiabakari Police Station. This was after he had earlier responded to the alarm. PW4, Tarime s/o Chacha is one of the sons of the late Chacha Manko. PW4 went to Kiabakari Police Station where he positively identified the two cows as having been stolen from his late father's homestead.

With the foregoing evidence, there is no basis for the appellant to come before us on second appeal, to dispute his having been found in recent possession of the stolen cows. The law as we expressed in JOSEPH MKUMBWA & SAMSON MWAKAGENDA (supra) is to the effect that "...*where a person is found in possession of a property recently*

offence connected with the person or place wherefrom the property was obtained." The appellant is presumed to have participated in the commission of armed robbery for which he was convicted. In his defence, the appellant did not offer any explanation why he was offering for sale cows, which had earlier been reported stolen. He could not of course offer this explanation because he chose to not only run away from where he was found in possession of the cows, but to also totally deny having been at the Kiabakari public auction that day. The learned Judge was with due respect correct to sustain the conviction of the appellant on the basis of the doctrine of recent possession.

Accordingly this second appeal is devoid of merit and it shall stand dismissed.

DATED at **MWANZA** this 26th day of July, 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