IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 83 OF 2012

SADICK MARWA KISASE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rwakibarila, J.)

dated 18th March, 2011
in
Criminal Appeal No. 85 of 2009

JUDGEMENT OF THE COURT

23rd & 29th July, 2013

KIMARO, J.A.:

The High Court of Tanzania sustained a conviction and the sentence of thirty years imprisonment imposed on the appellant by the Geita District Court for the offence of armed robbery contrary to sections 287A of the Penal Code, [Cap 16 R.E. 2002]. In addition the High Court imposed on the appellant a corporal punishment of twelve strokes of the cane. Six strokes were to be imposed forthwith and the remaining six at the end of the custodial sentence.

Still aggrieved by the judgement of the High Court, the appellant has filed this appeal. It was alleged in the District Court that the appellant and five others who were jointly charged with the appellant broke into the house of January Ndunguru on the night of 15th November, 2007 and stole therefrom, after threatening the complainant with a panga, one generator, one set of nokia, two pairs of shoes and a recorder. The total value of the properties stolen was T.shillings 565,000/=. Martine Matundwe who was alleged to have received the generator that was stolen from Ndunguru was charged in a separate count as the (6th accused) for the offence of receiving stolen property contrary to section 311 of Cap 16.

Two of the accused persons who were jointly charged with the appellant were acquitted after the close of the prosecution case for having no case to answer. At the end of the trial it was only the appellant who was found guilty and convicted of the offence of armed robbery.

The evidence that was led by the prosecution witnesses was that when PW1 was asleep, his house was broken into by use of a big stone. As he went to the corridor to see what was going on, he saw persons who had their faces masked having machetes and they threatened to harm him if he raised any alarm. It was in that process the items mentioned in the charge sheet were stolen.

According to Consolata Anton PW2 the wife of Martine Matandwe, (6th accused in the trial), the wife of the appellant visited the house of the (6th Accused) with a generator and informed the (6th accused) that he wanted to sell it to him. The (6th accused) showed interest to purchase the generator but at that time he had no funds. He said that he was travelling on the next day to the village. He reluctantly agreed with the appellant to have the generator left at his house.

On the same day, No. E 1985 D/Cpl Wifred PW4 said he arrested the appellant and took him to the police station. Upon interrogation, the appellant admitted having in his possession a generator which was in the custody of the (6th Accused). The appellant led PW4 and his colleagues to the house of the (6th Accused). The (6th accused) was not found at home. When his wife was asked about the generator, she admitted that the generator was at their house and that it was the appellant and his wife who took it there. Timotheo Ngasa Mbasa, PW3, the ten cell leader of the (6tt accused) was present when PW4 went to the residence of the (6th accused) where PW2 admitted that the generator was there and said that it was taken there by the appellant and his wife. The generator was then seized. It was in that background the appellant and the others were

charged with the respective counts of armed robbery and receiving stolen property.

In his defence the appellant raised the defence of alibi that he was not present at the time the offence was committed. He said he travelled to Tarime on 10th November and returned on 17th November, 2007. As already said, the trial court was not satisfied with the appellant's defence. It convicted the appellant on the doctrine of recent possession. The trial court's reasoning was that the armed robbery in which the generator was stolen was committed on 15th November, 2007 and it was recovered on 16th November, 2007 at 4.00 p.m. The trial magistrate said the period between the theft and the recovery of the generator justified the application of the doctrine of recent possession. The defence of the appellant was considered but rejected.

The appellant filed eight grounds of appeal but his basic complaint is that he was convicted on contradictory prosecution evidence. In his first ground of appeal the complaint is that the evidence of PW2 and PW3 contradicted each other. His second ground of appeal faults the learned judge on first appeal for not noting that the evidence of PW4 was admitted in evidence while the statement of the appellant was not recorded at the police station. The third ground of appeal faults the first appellate court

for failure to note the discrepancy in the evidence of PW4 who first said the information about the generator was from an informer while at the same time said it was the appellant who led him to the house of the (6th accused). The complaint of the appellant in the 4th ground is that the evidence of PW4 and the (6th accused) was from family members. His complaint in the fifth and sixth grounds is that his defence of alibi was not considered and the first appellate Judge failed to appreciate the fact that the appellant had no duty to prove his defence of alibi. The seventh ground of complaint is that the generator was wrongly admitted in evidence because it was not listed as documents to be relied upon during the preliminary hearing. The last ground of complaint is that the learned Judge failed to see that the evidence of PW1 on the identification of the generator was not trustworthy as he did not show that he had acquired the generator lawfully.

During the hearing of the appeal, the appellant fended for himself. He had no legal representation. The respondent Republic was represented by Ms Revina Tibilengwa and Ms Martha Mwadenya both learned State Attorneys.

In arguing the appeal, the appellant felt safer to elaborate on his grounds of appeal after hearing what response the learned State Attorneys for the Republic had to say.

Ms Martha Mwadenya supported the conviction and the sentence. She said most of the grounds raised by the appellant in this appeal are new and the established principle under section 6 of the Appellate Jurisdiction Act is that the Court is vested with jurisdiction to hear appeals from the High Court and Court of Resident Magistrate acting on extended jurisdiction. On his part the appellant did not have anything useful to tell the court on this aspect. The reason is obvious. He is a layman.

The grounds of appeal in the petition filed in the High Court, at page 60 of the record of appeal supports the learned State Attorney that some of the grounds raised in this appeal are new. Grounds five, six, seven and eight are new grounds. They were not raised in the first appellate court. The Court has repeatedly held that matters not raised in the first appeal court cannot be raised in a second appellate court. For this reasons the grounds of appeal which the appellant did not raise in the first appellate court will not be considered by the Court. In the case of **Ramadhan Mohamed V R** Criminal Appeal No.112 of 2006 (unreported) the Court held that:

"We take it to be settled law, which we are not inclined to depart from, that "this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High court on appeal"

This principle is also found in the cases of **Elias Msaki V Yesaya Ntateu Matee**, Civil Application No.2 of 1982 and **Richard Mgaya @ Sikubali Mgaya V R** Criminal Appeal No. 335 of 2008 both (unreported).

In ground one the learned State Attorney urged the Court to dismiss it for lack of substance. She said PW2 and PW3 were credible witnesses as they saw when the generator was retrieved from the residence of the (6th accused). Furthermore, said the learned State Attorney, PW2 the wife of the (6th Accused) said in her evidence that the generator was taken to the house of the (6th accused) by the appellant who was accompanied by his wife.

In reply to this ground of appeal the appellant denied taking the generator to the house of the (6th accused). He said PW2 and Martine

Matundwe, the (6th accused) knew where they got the generator. He prayed that this ground of appeal be allowed.

We do not think that this ground should detain us. The evidence of PW1 is clear on the properties which were stolen from his residence. Among them was a generator. He said after reporting the incident to the police the generator was recovered and he was later summoned at the police station to identify the generator of which he did. He identified it to be of the type tiger, blue in colour. The identifying marks he gave were as follows:

> *"The generator had identify mark to the marking glass*
>
> *to check the fuel where I used a superglue to the glass gauge."*

After giving that piece of evidence, he showed the trial court the identifying mark he had referred to. PW2 the wife of Martine Matundwe explained how the appellant took the generator to their residence, the negotiation that went on between the (6th accused) and the appellant about the sale of the generator and eventually how the generator was recovered by the police from their house. PW3 the ten cell leader of

Martine Matundwe said he was a witness to the seizure of the generator from the house of Martine Matundwe.

The appellant's conviction was based on evidence of recent possession. The learned Judge in upholding the conviction and sentence of thirty years imprisonment imposed on the appellant cited the cases of **Ally Bakari & Pili Bakari V Republic** [1992] T.L.R. 10 where the Court gave circumstances under which the doctrine of recent possession applies. The property must be found in possession of the accused and must have reference to the charge laid against the accused. Evidence must also prove that the property found in possession of the accused was the one stolen in the commission of the offence.

Given the sequence of the prosecution evidence on the time the theft of the generator took place, that was on the 15th November, at 02.00 hours, the short period within which it was recovered, that was on the 16th November 2007 at 4.00 p.m, the place where it was recovered, (the house of the 6th accused), the evidence on how the generator was taken there, by whom, how and when it was recovered, we see no room for faulting the first appellate court. We agree with the learned State Attorney that this ground has no merit. The finding on the first ground of appeal suffices to dispose of the appeal. We see no reason to dwell on the rest of

the grounds of appeal because they will serve no purpose. They will not alter the position in view of what we have said in respect of the conviction and the sentence of imprisonment.

However, there is an observation we would like to make on the additional penalty of corporal punishment which the first appellate court imposed on the appellant. The section under which the appellant was charged provided for corporal punishment in addition to imprisonment. It was proper for the learned Judge on first appeal to impose the sentence of corporal punishment. Section 12 (3) of the Corporal punishment provides for the administration of the corporal punishment. In imposing the sentence of corporal punishment the learned Judge on first appeal said:

> *"In view of the aforesaid circumstances, appellant is, in addition, sentenced to twelve strokes of the corporal punishment to wit, six (6) strokes of the same shall be inflicted on his body forthwith and six (6) other strokes shall be inflicted on his body at the end of his custodial sentence."*

The direction by the learned Judge on first appeal that six strokes of the cane be imposed forthwith seems to pause a problem of administration. Normally corporal punishment is administered under the supervision of the court. In the circumstances, there was no need for the learned Judge on first appeal to go beyond imposing the sentence of corporal punishment.

Given what we have said and observed, the appeal is 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