

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 232 OF 2011

1. ZABRON MASUNGA }
2. DOMINIC MATONDO }APPELLANTS
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Nyangarika, J.)

dated the 17th day of August, 2011

in

Criminal Appeal No. 16 of 2011

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JUDGMENT OF THE COURT

1st & 5th August, 2013

KIMARO, J.A.:

The facts giving rise to this appeal upon which the appellants were charged and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, [Cap 16 R.E. 2002] are as follows: On 10th November, 2009 Mayala Revocatus Kadashi (PW1), a taxi driver at Magu Bus Stand was hired by two persons whom he took to be ordinary passengers at an agreed hire fare of T.shillings. 2500/= to take them to Itumbili Secondary School. On arrival at the said school, the appellants descended from the taxi. The 1st appellant told the 2nd

appellant to pay for the hire fare. Instead of being paid the taxi fare, PW1 was forced out of the taxi at pistol point, was tied the legs and arms and put in the boot of the motor vehicle. The appellants then took the motor vehicle, the first appellant being its driver then. When they reached Malalaki River, they dropped PW1 there. PW1 managed to untie himself at 11.00 p.m., and took refuge on a tree until the next morning when with the assistance of some people he reported the incident to the police at Maswa. PW2 corroborated the evidence of PW1 that he was the owner of the motor vehicle, a Toyota Mark II registration No.T 926 ABG which was being used as a taxi and that PW1 was its driver. He got a report of the robbery of the motor vehicle from PW1 and on a follow up he was told that it was recovered at Bariadi.

E. 9477 Detective Corporal Tegemea (PW3) said after the theft was reported at the police, information was sent to all police stations in the country. He was later informed that the motor vehicle was seen at Rayulima village. PW3 and E 6012 PC Silaji (PW4) made a follow up of the motor vehicle at the village and managed to arrest the appellants and seized the motor vehicle in the presence of Sayi Nyenye (PW5) and Ndilanha Mwebya (PW6) who were at that time working in the shamba of PW5. PW3, PW4, PW5 and PW6 said when the motor vehicle was seized, the 1st appellant was the one who was driving it. The

testimonies of PW3, PW4, PW5 and PW6 were that the appellants admitted upon interrogation, that they committed the offence. Both appellants made extra judicial statements before Justices of Peace. John Methusela (PW8) and Reben Amos (PW 10) both Primary Court Magistrates took extra- judicial statements of the 1st and 2nd appellants, respectively. PW8 said in his evidence that the 1st appellant admitted commission of the offence while PW10 said the 2nd appellant exonerated himself and implicated the 1st appellant that he was the one who forced him to commit the offence after he threatened to kill him if he refused to do what he ordered him to do.

Both appellants denied in their defences, the commission of the offence. As for the extra-judicial statements both appellants said they were taken under torture.

The trial court was satisfied that the prosecution evidence proved the case against the appellants beyond reasonable doubt. They were convicted and sentenced to thirty years imprisonment each. The convictions and sentences were sustained by the High Court on first appeal.

Still aggrieved, they have filed this second appeal. A memorandum of appeal containing six grounds of appeal has been filed by Magongo

and Company Advocates; grounds 2 to 7 being in alternative to ground

1. The grounds of appeal are:

1. That the cumulative failure to fully comply with the provisions of section 231 (1) of the Criminal Procedure Act; the trial proceeding on a defective charge and the improper admission and recording of exhibits rendered the trial a nullity.

In the alternative:

2. That had both courts below properly directed their minds to the conditions of identification and the issue of credibility of PW1, both would have found that the appellants were not identified at the scene of crime.

3. That both courts erred in fact and in law by failing to see the inconsistencies and contradictions in the evidence of the prosecution witnesses.

4. That the evidence of PW5 and PW6 in the circumstances of this case did not support the alleged identification of the appellants at the scene.

5. That as the evidence on record did not prove the ownership of the motor vehicle (if at all) was actually stolen, the doctrine of recent possession was not applicable.

6. That as a whole the evidence on record was insufficient to ground the appellants' conviction.

At the hearing of the appeal Mr. Salum Amani Magongo, learned advocate appeared for the appellants. The respondent Republic was represented by Mr. Castus Ndamugoba learned State Attorney.

In support of the appeal the learned advocate for the appellants said that the charge sheet was defective as the appellants were charged under section 285 and 286 instead of section 287A of the Penal Code, the correct provision applicable under the circumstances. He said although the Learned Judge on first appeal noted the defect, he said the same could be cured by section 388 of the Criminal Procedure Act, [CAP 20 R.E.2002]. Another irregularity the learned advocate challenged, was admission of exhibits and their marking. He said the motor vehicle and pistol were wrongly admitted collectively in evidence. His considered opinion was that they should have been admitted and marked separately. He also said some exhibits were tendered in court by witnesses who were not supposed to tender them. The exhibit he had in

mind is the registration card of the motor vehicle which was tendered by the owner of the motor vehicle. The learned advocate also challenged the admission of the extra judicial statements without a finding on their voluntariness. Citing the case of **Nyonzuma Jamal V R** CAT Criminal Appeal No. 216 of 2008 (unreported) the learned advocate requested the Court to allow this ground of appeal because the cumulative effect of the irregularities could not be cured by section 388 of the CPA.

For the alternative grounds of appeal the learned advocate opted to argue on ground 5 and abandoned the rest of the alternative grounds. He faulted the first appellate court for sustaining the conviction of the appellants on the evidence of recent possession while the circumstances did not allow the application of the doctrine. He said before the doctrine of recent possession can apply, there must be evidence on record that the property was stolen. He cited the case of **Rashid V R** (2011) 2 EA 350 at page 355. The learned advocate challenged the evidence of PW1 that he did not mention the type of the motor vehicle he was driving. He said PW2 claimed ownership of the motor vehicle and said its registration number was T 926 AMG. He also tendered a registration card No. 2219268 exhibit P2 but he did not say it related to which motor vehicle. Revisiting the evidence of PW3, the learned advocate said that PW3 was the one who seized the motor vehicle and its registration card and so he

was the proper person to tender the exhibits. This procedure however, was not observed. As regards the evidence of PW5 and PW6, Mr. Magongo said they did not give the description of the motor vehicle. He also questioned why the registration card was returned to the owner of the motor vehicle before the case was completed.

The learned advocate observed further that the extra-judicial statements were not used in conviction of the appellants. However, he noted that they were wrongly admitted in evidence as the appellants claimed they were tortured. Moreover, said the learned advocate, their admissibility in court flouted the procedure of admission as they were admitted in infringement of the appellants' right of saying whether or not they had any objection to their admissibility. He prayed that the appeal by the appellants be allowed.

The learned State Attorney Mr. Castus Ndyamugoba supported the convictions and sentences of the appellants. He admitted shortfalls in the admission of exhibits and their markings as well as the identification of the motor vehicle. However, he requested the court to take them as human error which did not affect the case for the prosecution. He insisted that they were minor irregularities curable under section 388 of the CPA.

The learned State Attorney said there is sufficient evidence on record that the appellants were arrested with the motor vehicle. Summing up the prosecution case, the learned State Attorney said the evidence of PW3, PW4, PW5, PW6 PW8 and PW10 show that the appellants committed the offence of armed robbery charged as they were arrested with the motor vehicle. He said even in the extra-judicial statements the appellants admitted commission of the offence. He prayed that the appeal be dismissed.

In a brief reply the learned advocate reiterated that the courts below ignored some of the evidence as they did not use the evidence of the extra-judicial statements. He said since the appellants said they were tortured, the trial court ought to have taken caution. He reiterated his prayer of allowing the appeal.

We start with the irregularities in the trial. It is true there were some irregularities in the proceedings of the trial court. The learned advocate for the appellant correctly pointed out that the appellants were charged under wrong provisions of the law. The proper provisions under which the appellants were supposed to be charged were sections 287A of CAP 16. Also admitted is the irregularity in the admission and marking of exhibits. The requirement of the law is that the person who is in

possession of the exhibits is the proper person to tender the exhibits in court. In this case it is police officers who seized the motor vehicle and its registration card. PW3 was the right witness to tender in court the motor vehicle and its registration card. We also agree that it was wrong for the trial court to mark the motor vehicle and pistol as collective exhibits. The pistol had to be marked separately. But all in all the irregularities did not vitiate the proceedings. In addressing the issue of irregularities the first learned Judge on first appeal said:

"I agree with the appellants that there are a lot of omissions by the trial court, in respect of the charge, as said and on the tendering of the exhibits. Also there are irregularities in marking exhibits, but, all these are curable under section 388 of the CPA."

We agree with the learned Judge and we have no reason for a different opinion. The omissions or irregularities did not occasion any miscarriage of justice on the appellants. See the case of **Thomas Elias and another V R** [1993] T.L.R.263.

Coming to the alternative ground relied upon by the learned advocate, we do not agree with him that there was any dispute on the

ownership of the property. PW2 said the motor vehicle was his property. PW1 testified on how it was stolen from him at the bus stand by use of threat. A pistol was used to scare him. Later he was tied both hands and legs and was put in the boot of the motor vehicle and left at River Malalaki. PW3 said after the matter was reported to the police, information was sent to all the police stations. Later, PW3 and PW4 recovered the motor vehicle at Mwanhima village being driven by the 1st appellant who was in the company of the 2nd appellant. The motor vehicle was recovered in the presence of PW5 and PW6 who were working in the shamba of PW5. Before all the four witnesses, the appellants were said to have admitted the commission of the offence. The offence was committed on 10th November, 2009. The motor vehicle was recovered on 12th November, 2009 only two days after the commission of the offence. The owner of the motor vehicle, Leonard Mayala Kadashi (PW2) identified the motor vehicle as his property. The appellants did not claim ownership of the motor vehicle. The appellants were convicted on the doctrine of recent possession. The High Court sustained the convictions and sentences.

Do we have a reason to fault the learned Judge on first appeal? This is a second appeal. The Court can interfere with findings of facts by the courts below if in evaluating the evidence the courts below

misdirected themselves and in so doing occasioned miscarriage of justice to the appellants. See the case of **Salum Mhando V R** [1993] T.L.R. 170.

Three conditions must be satisfied to sustain a conviction on the doctrine of recent possession. One, it must be established that the appellant was found in possession of stolen property. Two, the stolen property must be that of the complainant. Three, the property was recently stolen from the complainant. See the case of **Alhaji Ayubu Msumari & another V R** Criminal Appeal No. 136 of 2009 (unreported).

Were the above conditions satisfied in this case? The answer is positive. The motor vehicle forming the subject of the charge was the property of Leonard Mayala Kadashi(PW2). The motor vehicle was being used as a taxi. Mawala Revocatus Kadashi (PW1) was the driver of the motor vehicle. On 10th November, 2009 it was stolen from him at gun point. Later it was recovered by PW3 and PW4 being driven by the 1st appellant who was together with the 2nd appellant. They did not claim ownership of the motor vehicle. The way the appellants took the motor vehicle from PW1 proved the intention to steal it. They pretended to be passengers but the evidence proved later that their real intention was to

steal it. The explanation they gave for being in possession of the motor vehicle was not satisfactory. With this background we see no reason for faulting the learned Judge on first appeal.

We dismiss the appeal in its entirety.

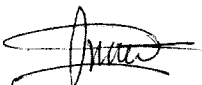
DATED at MWANZA this 3rd day of August, 2013.

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