

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A., And MMILLA, J.A)

CRIMINAL APPEAL NO. 186 OF 2013

**1. NKUBA MANGULA @ YOHANA JULIUS }
2. SOSOMA S/O NKUBA }APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

dated the 30th day of October, 2012

in

Criminal Appeal No. 20 and 21 of 2012

.....

JUDGMENT OF THE COURT

18th & 25th September, 2013

MMILLA, J.A.:

Nkuba Mangula @ Yohana Julius and Sosoma Nkuba (herein to be regularly referred to as the first and second appellants respectively or simply the appellants) were on 18.10.2011 arraigned before the District Court of Shinyanga in Shinyanga Region. They faced a charge of robbery with violence c/ss 285 and 286 of the Penal Code Cap. 16 of the Revised Edition, 2002. On conviction, they were each sentenced to fifteen (15)

years imprisonment. They were also ordered to pay shs 100,000/= to the complainant being compensation for the damage caused to the motor cycle which was the subject of the said robbery. Their appeals against conviction and sentence to the High Court of Tanzania at Tabora was unsuccessful, hence this second appeal.

The evidence of the prosecution was anchored on the testimony of PW1 Madeleke Mahona who was the complainant. That witness testified that he and the appellants were residents of Wigelekelo village, and that he owned a motor cycle with Reg. No. T. BCT make Dayun.

On 8.10.2011 around 7.00 am he said, while he was at Wigelekelo Centre he was approached by the first appellant who asked to hire him intending to be taken to Nyamtengela village in Kishapu District to meet his girlfriend. He said that the first appellant pleaded to PW1 to carry the second appellant. PW1 said he accepted the request and prescribed his fare to be shs 18,000/=. Having picked the second appellant, PW1 said, the trio left for Nyamtengela village. On arrival there, the first appellant alighted and went to look for his girlfriend but he reportedly missed her. It was then that they decided to go back to Wigelekelo village.

On arrival at Nhumbu Bridge on their way back home, the second appellant told them that his sandals had dropped off and intended to pick them. Upon stopping to let him pick his sandals, suddenly that person strangled him as a result of which he fell down and lost consciousness. He regained consciousness at about 10.00 and realised that he was in a cotton farm. He found out that his motor cycle, a mobile phone make Nokia and cash shs 40,000/= which were in his trouser pockets were missing. He walked to the village of Mani at which he allegedly reported the incident to the village chairman. The village leadership assigned the traditional guards to trace the suspects. Accompanied by those persons, they travelled to Wigelekelo village. On arrival there, he reported the incident to the village leaders who raised an alarm and the villagers were informed of the incident. Report was made to the Police at Maswa on the following day. He was given a PF3 and proceeded to Maswa Government Hospital for treatment.

On 10.10.2011, PW1 heard that the appellants had been arrested, and that they were communicating with one Japhet Peter and were looking for a customer to buy the motor cycle in Shinyanga. It was then that a group of traditional guards were despatched to Shinyanga to follow

up the matter and they succeeded to find the appellants with the motor cycle in issue. That was the basis of the charges of robbery which were preferred against the appellants.

The appellants' story on what actually happened is quite different from that told by PW1. While both of them admitted that they were found in possession of the said motor cycle, they claimed that they hired the motor cycle from PW1 in order to go to Shinyanga to visit their brother who was seriously sick. They said that since PW1 had filled the tank of his motor cycle and had asked for refund, they paid shs 18,000/= after which leaving the complainant at Wigelekelo Centre, they left for Shinyanga where they arrived at about 08.00 pm. They spent the night there and on the following day they visited their sick brother at Shinyanga Government Hospital. They said in common that they did not communicate with PW1 to inform him that they delayed to go back to Wigelekelo because they did not have his mobile contact number, but that the latter contacted them at around 6.00 am the following day asking them to meet him at Shinyanga Bus Stand. They said they went to the Bus Stand and waited for him at a Kiosk at which to their surprise, PW1's brother one Shija Kija

and other persons came and attacked them on the pretext that they were thieves. They maintained that they did not commit the alleged offence.

The appellants had filed separate memorandum of appeal in which each one of them raised four grounds which were similar in content. Their common major complaint is in respect of sufficiency of evidence on the basis of which they were convicted.

Before us, both appellants appeared in person and were not represented while the respondent Republic was represented by Ms Juliana Moka, learned State Attorney. She was quick to point out that they were supporting the appeal.

Appellants had the right to begin, but they elected for the respondent Republic to begin suggesting that they would be making responses later if need there be. We allowed Ms Juliana Moka to start.

In her submission, the learned State Attorney joined issue with the appellants that the evidence of PW1 that the former attacked him on arrival at Nhumbu Bridge on their way back home from Nyamtengela

village in Kishapu District needed corroboration. She asserted that corroborative evidence ought to have come from the chairpersons of Mani and Wigelekelo villages who were alleged to have been the persons to whom he had first reported the robbery incident. She stressed that the evidence of the chairperson of Mani could have provided the link that actually, PW1 was seen in Mani village on the alleged day and reported about the said incident; also that he could have been in the position to explain the state of condition in which the complainant was after the alleged attack. In her views, that could have in turn weakened the appellants' assertion that they were in lawful possession of the motor cycle which was on the centre of the robbery, having hired it from the former (complainant) to enable them go to Shinyanga to visit their sick brother, the town in which they were arrested. Ms Juliana Moka submitted further that the evidence of PW2 John Zengo and PW3 Shija Kija that they recovered the motor cycle from the appellants in Shinyanga did not shake the appellant's defence that they were in lawful possession of the said motor cycle having it been handed over to them by the complainant himself. The burden of disproving that line of the appellants' defence lay squarely on the shoulders of the prosecution, and that the prosecution did not succeed to destroy the appellants' defence, hence her support to

the latter's assertion that the doctrine of recent possession was wrongly invoked in the circumstances of this case.

We have given this point a serious thought. We think that there is merit in the assertion that those two persons, particularly the chairperson of Mani village, were crucial witnesses in the circumstances of this case. We go along with the appellant and the learned State Attorney in particular that had the chairperson of Mani village called on to testify in court, he could have provided a link that actually, PW1 was seen in that village at the alleged day and time. Also, he could have been in the position to explain the state of condition in which he was at the time he saw him. This in turn, could have weakened the appellants' claim that they were in lawful possession of the said motor cycle. As it is, there is doubt that there was any robbery committed at Nhumbu Bridge as was claimed by PW1.

We similarly agree with her that the evidence of PW2 John Zengo and PW3 Shija Kija that they recovered the motor cycle from the appellants in Shinyanga did not shake the appellant's defence that they were in lawful possession of the said motor cycle having it been handed

over to them by the complainant himself. The burden of disproving that line of the appellants' defence lay squarely on the shoulders of the prosecution, and that the prosecution did not succeed to destroy the appellants' defence, hence her support to the latter's assertion that the doctrine of recent possession was wrongly invoked in the circumstances of this case. We will elaborate.

The doctrine of recent possession evolves around proof that an accused person is found in possession of the property recently stolen. This was reflected in the case of **Director of Public Prosecutions v. Joachim Komba** [1984] TLR 213 in which it was held that:-

"The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."

This is a case of the High Court, but it expresses the correct principle of the law and we agree. See also the case of **Rex v. Bakari Abdalla** (1949) 16 EACA 84.

However, it is pertinent to stress that the doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of the truth. This was lucidly put in the case of **George Edward Komowski v. R** (1948) 1 TLR 322 in which the court said that:-

"...[The doctrine of recent possession...] is not strong as to displace the presumption of innocence to the extent of throwing on the accused the burden of giving legal proof of the innocent origin of his possession. He has merely to give a reasonably probable explanation of how his possession originated and if he gives such an innocent explanation he is entitled to an acquittal unless the prosecution can disprove his story. Even if he gives an explanation which does not convince the court of his truth he need not necessarily be convicted. The true test is whether his story is one which might reasonably be true and if that is the case, it follows that the crown has not discharged the onus which lies continuously on it in this as in other criminal cases, to prove the accused's guilty beyond reasonable doubt."

In our present case, the appellants told the trial court that that they hired the said motor cycle from the complainant. We are far from being

persuaded that the prosecution managed to destroy appellants' line of defence. This being the case, we agree with learned State Attorney that the doctrine of recent possession was not properly invoked in the circumstances of this case for reasons we have demonstrated above.

The appellants have complained similarly that the first appellate court erred in law in failing to observe that the trial court did not comply with the provisions of section 231 of the Criminal Procedure Act. In essence, they are saying that it did not express to them that they had the right to call witnesses to buttress their defences.

On this, we agree with the learned State Attorney that the ground is baseless. The reason is clear that looking at page 12 of the court record, the learned trial magistrate dutifully addressed them in terms of section 231 of that Act and their responses appear on page 13 of the court record at which they were recorded to have in common said that they had no witnesses to call but were going to defend themselves. As such, this ground is devoid of merit and is dismissed.

In the upshot, save for the last ground which we have dismissed, we find that the appeal as a whole has merits in respect of both appellants and we allow it. Their conviction is quashed and the sentences and the order of compensation are set aside. We order their immediate released from prison unless they are otherwise lawfully held.

Appeal allowed.

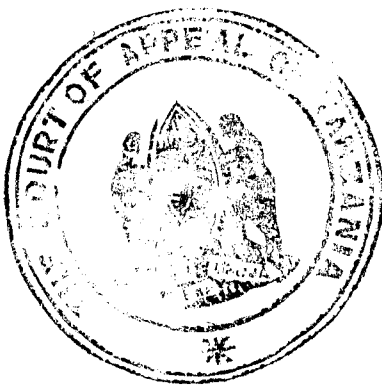
DATED at TABORA this 24th day of September, 2013.


M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL