**IN THE COURT OF APPEAL OF TANZANIA**
**AT MWANZA**

**(CORAM: MSOFFE, J. A., ORIYO, J. A., And MMILLA, J. A. )**

**CRIMINAL APPEAL NO. 302 OF 2013**

**1. CHACHA MWITA**
**2. CHACHA KIMONGE**
**3. MWITA CHACHA** ..... **APPELLANTS**

**VERSUS**

**THE REPUBLIC** ..... **RESPONDENT**

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

**(Mruma, J.)**

**Dated 24th day of May, 2013**
**in**
**Criminal Appeal No. 81 of 2009**

.....

## JUDGMENT OF THE COURT

13th & 17th October, 2014

**ORIYO, J.A.:**

In the District Court of Serengeti at Mugumu, the three appellants and another one not before the Court, were arraigned for armed robbery contrary to section 287 A of the Penal Code, Cap 16, R.E. 2002. Upon conviction, each was sentenced to 30 years imprisonment together with a corporal punishment of twelve (12) strokes of the cane. A second count of

rape contrary to sections 130 (b) and 131 of the Penal Code, was directed against the first appellant only. He was convicted as charged and was sentenced to thirty (30) years imprisonment and six (6) strokes. The sentences against the first appellant were to run concurrently. The appellants consolidated appeal to the High Court was found by the first appellate court to be devoid of merit and dismissed. The appellants preferred this second appeal.

Briefly, the facts at the trial court that led to the convictions and sentences imposed on the appellants occurred on 12/12/2007 at about 11 pm at Masinki village, Nyabosogo sub-village, within Serengeti District, Mara Region. It was the prosecution case as testified by a total of five (5) witnesses at the trial, that the appellants broke into the house of Christina Nicholaus, (PW1), armed with machetes and carrying torches. At first the bandits dealt with PW2, Flora Antony, a sister in law of PW1. They covered her whole body with a bed sheet before beating her up. Next, they demanded money from PW1. Her initial response was that she did not have any money, but upon receiving beatings from the bandits, she led them to her shop cum kiosk outside the house; and gave them shs

250,000/=. Dissatisfied with the amount, they demanded more money. PW1 informed them that she did not have. In addition, she gave them a bag of wheat flour which was in the shop cum kiosk for sale.

It was further alleged that after collecting the cash money and the wheat flour, the first appellant proceeded further and raped PW1 at the scene.

At 6.00 am on 13/12/2007, the robbery was reported to Cosmas Machogoto, PW3, a resident of Masinki village and a sub-village chairman of Nyabosogo sub-village where PW1 and PW2 were residents. It was his testimony in the trial court that PW1 told him that the bandits took shs 250,000/= from her and she was able to identify all of them at the scene. Then he went on how he spread the information around to his people and organised them into groups to look for and arrest the bandits who apparently were residents of the sub-village. His efforts allegedly bore fruits in that it led to the arrests of the first appellant with a bag of flour and the 2nd and 3rd appellants. On being interrogated, each appellant admitted the offence, asked for forgiveness and each retuned the balance

of money in his custody from his share of the robbed cash, totaling shs 117,000/=.

PW3 tendered in court the cash money, shs. 117,000/= and two bags of flour which were collectively admitted as Exhibit "P1".

As already indicated, the appellants are challenging the concurrent findings of fact by the two lower courts on the basis of the grounds shown in their separate memoranda of appeal. Before us, the appellants fended for themselves while the respondent Republic was represented by Mr. Castus Ndamugoba, learned State Attorney, who forthrightly supported the appeal.

The learned State Attorney submitted that the conviction of the appellants was anchored on two grounds, namely, the evidence of visual identification by PW1 which did not state the source of light and or its intensity; and the application of the doctrine of recent possession. He urged us to find that the doctrine of recent possession was wrongly invoked.

The appellants had nothing useful to contribute as a response to the learned State Attorney's submissions. Each of them, however, separately agreed with the learned State Attorney's submissions in support of their appeal.

The appeal was initiated by a joint notice of appeal in terms of Rule 68 (1) and (3) of the Court Rules. Apparently, on 9/10/2014, each appellant preferred to lodge a separate memorandum of appeal, with several grounds of complaints which are in most part, identical. The major complaints in the memoranda of appeal are on the quality of the visual identification of the appellants at the scene by PW1 and the misapplication of the doctrine of recent possession.

In their respective testimonies, both PW1 and PW2 claimed to have seen the appellants at the scene inside their house demanding money, after breaking the door. Both claimed to have identified the appellants because they were residents of the same sub-village, they knew each other before and they named them to the relevant authorities at dawn the next day.

We have revisited the record and the testimony of PW1, in particular, however, we find no evidence that PW1 ever gave any description regarding the appearance or the type of clothes worn by any of the appellants at the scene. Further it was part of the evidence of PW1 that the bandits were carrying torches but she did not go far enough to state the source of light which aided her to visually identify the appellants – whether it was the light from the torches of her assailants or from another source and if so, what was the intensity of such light.

This Court, in the case of **Waziri Amani vs R** [1980] TLR 250 laid down certain factors to be taken into account by a court in order to satisfy itself on whether such evidence is water-tight. They include the following:-

- the time the witness had the accused under observation;
- the distance at which he observed him;
- the conditions in which such observation occurred;
- if it was day or night time;
- whether there was good or poor lighting at the scene;

- whether the witness knew or had seen the accused before or not."

There is no gainsaying that where a witness is testifying about identifying another person in unfavourable circumstances as in this case, he must give clear evidence which leaves no doubt that the identification is correct and reliable and must mention all aids to unmistaken identification, like the source of light and its intensity, etc; see **Said Chally Scania v R**; Criminal Appeal No. 69 of 2005 and **Abdi Julius @ Mollel Nyangusi and Another vs R,** Criminal Appeal No. 107 of 2009, (both unreported).

It is for these reasons that we find merit in the complaint by the appellants that the prosecution evidence on visual identification was not conclusive that it was the appellants who robbed the complainant on the material night. It was therefore, not proper to ground the conviction of the appellants.

Reverting to the next complaint on whether the doctrine of recent possession was rightly invoked by the courts below, the position of the

Court on the applicability of the doctrine was amply stated in the case of **Joseph Mkumbwa and Another v R**, Criminal Appeal No. 94 of 2007, (unreported) as follows:-

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of 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."*

Indeed, on the basis of the principles set out in the case of **Joseph Mkumbwa,** (supra), the prosecution has the onerous duty to positively

establish that the property retrieved from the accused is the very same one which was stolen from the complainant; before the doctrine of recent possession is invoked.

In the case under consideration, the recently retrieved properties were cash money totaling shs. 117,000/= and a carton of wheat flour. It was unfortunate that both items are common trade merchandise which can change hands quite easily, and in the absence of any special mark on the carton of flour or on the cash notes or in some rare cases, where the serial numbers of the cash notes were recorded, it may not be possible to achieve a proper and adequate identification of a recently retrieved property in this category, by its owner. Such evidence of positive identification is glaringly lacking in this case. We therefore, agree with the learned State Attorney that the doctrine of recent possession was wrongly invoked in the circumstances. This ground of complaint is allowed as well.

In the event, we allow the appeal. Accordingly, the convictions for armed robbery are quashed and the prison sentences of 30 years are set

aside. The appellants are to be released from prison forthwith unless otherwise lawfully held.

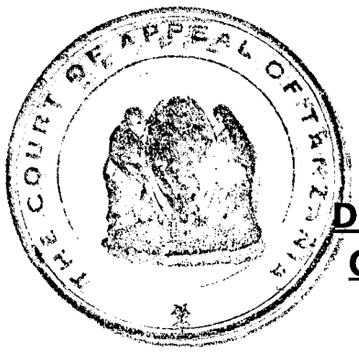
DATED at MWANZA this 16th day of October, 2014.

J. H. MSOFFE
**JUSTICE OF APPEAL**

K. K. ORIYO
**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**