IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 307 OF 2013

1. MAGESA CHACHA NYAKIBALI
2. YOHANA JOSIA MANUMBU .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mruma, J.)

dated the 7th day of June, 2013
in
Criminal Appeal No. 11 of 2011

JUDGMENT OF THE COURT

16th & 17th October, 2014

MSOFFE, J.A.:

The prosecution led evidence at the trial to the effect that on 8/6/2006 at about 20.00 hours Spice Rite Hotel, Bunda, Mara Region, was broken into by bandits and a shotgun make Excelsior 12 bore with serial number 0069 with ammunitions in it was stolen in the process. It was alleged in the particulars of offence that the gun belonged to Mara Security Guards and Patrol Services Co. Ltd. The incident was reported to the police and investigations were carried out immediately. Meanwhile, on 14/6/2006 and 8/7/2006 incidents of armed robbery in the houses of one Njugulile and

another Juma Marwa, respectively, were reported. Information was revealed that the bandits who ambushed the residence of Juma Marwa were heading to Mwanza through the TANESCO High tension power line which passes through Rubana River. A trap was laid. In one car, a Hiace, the police suspected two men who happened to be the first Appellant herein and one Matiko Sando. Upon interrogations the two confessed to have participated in the robbery at Spice Rites Hotel and mentioned the second Appellant as having been in the team that robbed the gun at the hotel on the date and time in question. Following his arrest, the second Appellant confessed to have committed the robbery and led the police to Rubana River where two guns and several machetes were retrieved. One of the guns (exh. P1) was eventually identified by the first accused Samwel Mboje who was guarding the Hotel at the time of incident. PW2 Wilson Wangwe, the General Manager of Mara Security Guards Ltd. also identified the gun.

It was essentially on the basis of the above prosecution evidence that the Appellants were convicted of armed robbery contrary to Section 287A of the Penal Code and each was sentenced to the statutory thirty years term of imprisonment by the District Court of Bunda (Tiganga, RM.) Their first appeal to the High Court (Mruma, J.) was dismissed. Still aggrieved, they have preferred this second appeal. At the hearing, they appeared in

person(s) while the respondent Republic had the services of Ms. Martha Mwadenya, learned State Attorney, who argued in support of the appeal.

In their respective memoranda of appeal the Appellants have canvassed a number of grounds. In substance, however, they are of the view that the doctrine of recent possession invoked in grounding their conviction did not establish the prosecution case against them beyond reasonable doubt.

With respect, as correctly submitted by Ms. Martha Mwadenya, there is merit in the above general ground of complaint. However, before addressing the complaint, there is a basic problem in the case which we wish to address at this early outset.

The particulars of offence in the charge preferred against the Appellants read as follows:-

> *"PARTICULARS OF OFFENCE: That YOHANA s/o JOSIA@ MANUMBU and MAGESA s/o CHACHA@ NYAKIBALI are jointly and together charged on 9th day of June 2006, at about 19:45 hours at Kabarimu area within Bunda District in Mara Region, did steal one short gun make Excelsior 12 Bore with serial number 0069 valued at Tshs. 300,000/= and two ammunitions valued at Tshs 4,000/=. All total valued*

at Tshs. 304,000/=, the property of one Mara Security Guards and Patrol Service Co. LTD and immediately after such time of stealing did fire bullet of a gun in order to obtain the said gun."

Under section 287A of the Penal Code (CAP 16 R.E. 2002) the **threat** "*to use actual violence to any* ***person or property*** ..." are very important ingredients of the offence. A look at the above particulars of offence will show that no **threat** was disclosed and to **whom**. As it is, this was a defective charge because important elements of the offence were not disclosed in order to allow the Appellants the opportunity to meaningfully understand it and to be able to prepare their defences. At this juncture, it is instructive to observe that in **Mussa Mwaikunda v Republic** [2006] TLR 387 this Court observed that the principle has always been that an accused person must know the nature of the case facing him and that this can be achieved if the charge discloses the essential elements of an offence. Restating the same principle of law in **Isidori Patrice v Republic**, Criminal Appeal No. 224 of 2007 (unreported) this Court stated:-

"...It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence. This requirement hinges on the basic rules of criminal law and evidence to the effect that the prosecution has to prove that the accused

committed the actus reus of the offence with the necessary mens rea. Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law."

It follows that in the justice of this matter we could have safely ended up here by discharging the Appellants or by ordering a retrial. However, as correctly submitted by Ms. Martha Mwadenya, in the circumstances of this case, a retrial would not serve any useful purpose. At any rate, a retrial would only amount to inviting the prosecution to fill in gaps in their case - an action that will not augur well with the interests of justice. We say so mainly because the evidence on record fell short of establishing the prosecution case against the Appellants beyond reasonable doubt. It is in this context that we will address, *albeit* briefly, the main complaint in the grounds of appeal with the sole aim of showing that an order for a retrial would only lead or amount to an exercise in futility.

It is common ground that the Appellants were not identified at the scene of crime. None of the prosecution witnesses, even the first accused for that matter, ever testified to have seen and identified the Appellants at the scene. As it is, the Appellants were convicted by virtue of the doctrine

of recent possession which was invoked on the basis that they "possessed" the shotgun retrieved from Rubana River.

In a number of cases this Court has pronounced itself on what the doctrine of recent possession entails. For example, in **Alhaj Ayub@Msumari and Others v Republic,** Criminal appeal No. 136 of 2009 (unreported) this Court stated:-

> *"...before a court of law can rely in (sic) the doctrine of recent possession as a basis of conviction in a criminal case, ...it must positively be proved,* ***first*** *that the property was found with the suspect;* ***secondly****, that the property is positively the property of the complainant;* ***thirdly*** *that the property was stolen from the complainant,* and ***lastly*** *that the property was recently stolen from the complainant.*
>
> *In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses".*

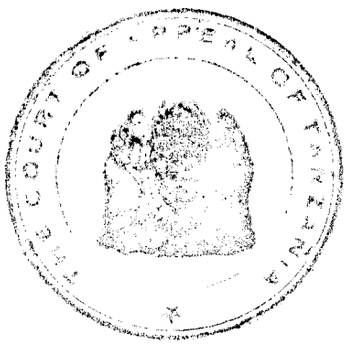
In the present case, the evidence of PW3 D4550 D/Sgt Mpangalala, was basically that the Appellants led the search team to Rubana

River where the two firearms and machetes were recovered. To be exact, upon recovery or retrieval of the guns PW3 took possession of them. With respect, that might as well have been what actually happened. However, the evidence is not clear as to how the shotgun subject of this case found its way to PW2 who eventually tendered it in court! As it is, by sequence of events there was a broken "chain of custody" in the handling of the shotgun which raises doubts as to whether the gun exhibited in court was the same one as the one which was said to have been recovered at Rubana River! As if that was not enough, in his testimony at page 12 of the record before us, PW3 was not even certain as to which among the two guns was stolen from the hotel. This is borne out by the fact that while PW2 said that exh. P1 was the gun stolen from the hotel PW3 talked of "another gun". In the midst of all this, Ms. Martha Mwadenya was correct in asserting quite forcefully before us that no cogent evidence was led at the trial to prove that the Appellants were found with the gun (exh. P1) subject of the case against them. In this regard, there were doubts in the prosecution case which ought to have been resolved in favour of the Appellants and thereby earn an acquittal.

For reasons stated, in view of the shortfalls in the application of the doctrine of recent possession in the case at hand, we are of the considered view that the Appellants' conviction is not safe. Consequently, we allow the

appeal, quash the conviction and set aside the sentences. The Appellants are to be released from prison unless held on a lawful cause.

DATED at MWANZA this 17th day of October, 2014.



J.H. MSOFFE
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL