

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

**(CORAM: RUTAKANGWA, J.A., BWANA, J.A., and MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 123 OF 2014**

**1. DEUS MNYAGA @ ZUNGU MAZUNGURU  
2. WILSON GABRIEL @ HAMIDU SHABANI } ..... APPELLANTS  
VERSUS**

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

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

**(Khaday, J.)**

**dated the 23<sup>rd</sup> day of November, 2010  
in**

**DC Criminal Appeal No. 4 of 2010  
C/F.DC CRIMINAL APPEAL NO. 5 OF 2010**

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**JUDGMENT OF THE COURT**

12<sup>th</sup> & 19<sup>th</sup> May, 2014

**MANDIA, J.A.:**

The appellant was part of a group of three persons who appeared in the District Court of Mpanda at Mpanda on a charge of Armed Robbery c/s 287A of the Penal Code. The third person among the two i.e CHOLA S/O THADEO @ MASONGA was found not guilty and acquitted by the trial Court. The appellant and the second accused person in the trial court, one WILSON S/O GABRIEL @ HAMIDU SHABANI were found guilty convicted and sentenced to thirty years imprisonment. Their appeal to the High Court was dismissed in its entirety, hence this appeal.

Evidence adduced during the trial showed that on 20/9/2008 at about midnight, 12.45 a.m. to be exact, PW1 Moses Juma @ Lumbwe, a driver employed by Mpanda District Hospital, had driven one Dr. Gerald Charles, home after work. Together with PW1 in the hospital vehicle was PW2 Mrs. Gisela Kashetela, a nurse employed by Mpanda District Hospital. As these two waited for Dr. Gerald Charles to enter his house, two unknown persons approached the vehicle driven by PW1, shone a torch on him, put a pistol to his head and ordered him to surrender all that he possessed. PW1 surrendered to the unknown persons a mobile telephone of Nokia 3110 make and cash sh. 52,000/=. PW1 reported the incident to the Police on the same day.

On the morning of 21/9/2008 PW1 was called to the Police Station where he identified the mobile telephone previously stolen from him barely seven hours before, and which he tendered in evidence as Exhibit P1.

At 2.30 a.m. on the morning of 20/9/2008, barely one hour and forty five minutes after the incident of robbery, the police knocked on the door of the house where PW3 Charles Raphael Nsemulwa lived together with the appellant. According to PW3 Charles Raphael Nsemulwa, the police told him (Charles) that they had followed footsteps from a scene of robbery to the house where PW3 lived, and had searched the appellant's room where they had retrieved a mobile telephone set and a pair of shoes whose sole resembled the footsteps which the police had followed from the scene of the robbery to the house where PW3 lived. PW3 tendered in evidence the shoes which the Police showed him amidst

objections from the accused persons in the trial court. The trial court overruled the objections without giving any reason, and the shoes were admitted and marked Exhibit P2. Another witness, PW4 Njile Lyebu testified that on 20/9/2008 at about 2.39 a.m. he saw lights of a motor vehicle going north and then turning back. He went out and found it was a police vehicle. The police told him a hospital vehicle had been attacked by bandits and some property stolen. The police showed him shoe and footsteps and they compared the footsteps and the shoes which matched. The police also told him they seized a cell phone and money.

The policeman who visited the scene of the crime was PW5 Japhet Kibona, the officer in charge C.I.D at Mpanda. He testified that on receiving the report of robbery he visited the scene together with other policemen. At the scene he found footsteps made by shoes. He followed the steps westwards to a house where the appellant lived. He knocked and the appellant and his confederate the second accused came out. He searched their rooms and found a pair of shoes whose print matched the footprints on the road. He also seized a cell phone with particulars going thus:-

*"Moses J. Lumbwe, Box 10 Mpanda, 0784 – 976067."*

As pointed out earlier, the appellant was convicted on the above evidence and accordingly sentenced. After losing his appeal in the High Court he lodged a memorandum of appeal which raises the following general complaints:-

- (a) That the search on him did not comply with S. 38(3) of the Criminal Procedure Act.
- (b) That the doctrine of recent possession was wrongly invoked to attach liability to him (appellant.)
- (c) That the appellant was not identified at the scene of crime and an identification parade was not held.

The appellant appeared in person, unrepresented, to argue his appeal while the respondent Republic was represented by Ms. Scholastica Lugongo, learned State Attorney. The appellant did not add anything to supplement the memorandum of appeal he filed. On her part the learned State Attorney argued the appeal generally.

The appellant was convicted together with one Wilson Gabriel @ Hamidu Shabani. The latter had lodged a Notice of Appeal against his conviction and sentence. He, however, could not be served with the record as he had escaped from prison and could not therefore be served with the record. The prison officer in charge of Ruanda Prison, Mbeya, returned the record unserved on 5/5/2014 vide letter Ref. 209/MB/2 IV/313. The court therefore proceeded under Rule 4(2) (a) of the Court of Appeal Rule, 2009, and dismissed the appeal filed by the second appellant for want of prosecution.

Ms. Scholastica Lugongo declined to support the conviction and sentence for the first appellant Deus Mnyaga @ Zungu Mazunguru.

With regard to the search Ms. Scholastica Lugongo agreed that the police officer conducting a search on premises must issue a receipt for any item seized, a receipt which shall show the signature of the owner of the premises searched, and the signature of the witnesses to the search if any. These requirements are missing in this case. She also pointed out that though it was the complainant who claimed that a telephone had been stolen from him, it was the same complainant who tendered the "stolen" telephone in evidence without explaining how he came into possession of the telephone after it was stolen from him. She pointed out that the telephone was seized by PW5 Japhet Kibona, and there was no explanation how Japhet Kibona let go of the telephone after seizing it.

Ms. Scholastica Lugongo also took issue with the evidence on foot steps leading from the scene to the appellant's house and the finding of shoes which marched the footprints. She pointed out the anomaly of PW5 Japhet Kibona, a police officer, seizing the shoes but not tendering them in evidence and instead relying on, PW3 Charles Raphael Nsemulwa, a co-tenant of the appellant, to tender the shoes while he did not participate in tracing the shoeprints made by the shoes.

We are in agreement with the observations made by the learned State Attorney and find it hard to justify the conclusions of fact and law made by the trial court and supported by the first appellate court. We will explain.

The starting point is the search made on the appellant's premises. It is common ground that the appellants were awakened from sleep after midnight and searched by a police officer PW5 Japhet Kibona who did not indicate his rank while testifying but only gave his command position as **officer in charge C.I.D.** He did not say that he was the officer in charge of any police Station. This information is important for the purposes of search on premises under Section 38(1) of the Criminal Procedure Act, which gives power to a **Police Officer in charge of a Police Station** to search a building, vessel, carriage, box, receptacle or place if he has **reasonable ground** that there is material which has connection with criminal activity. Under Section 38(1), the alternative to the search in person by the officer in charge of a police station is a **written** authority to any police officer under the officer in charge to conduct the search. PW5 Japhet Kibona was the officer in charge C.I.D and therefore not the officer in charge of the police station, so he ought to have sought written authority for the search. He did not do so. In addition, if a search is to be conducted inside a building under a warrant, Section 40 of the Criminal Procedure Act allows such search to be executed during daylight hours only. Conversely the search under written authority under Section 38 must be made during daylight hours only unless the search is carried out in an emergency as provided in Section 42 of the Criminal Procedure Act. Also, PW5 Japhet Kibona testified that from the scene of the crime they followed footsteps which led to the appellant's house, and that the lights of the vehicle they were travelling in helped them see the footsteps.

He did not indicate the distance from where the footsteps started to where they ended and what made the footsteps so visible at night from a moving vehicle. While inside the appellant's house he found shoes which matched the footsteps they had followed. The resemblance came up immediately after entering the appellant's house. Taking into account the fact that the appellant denied ownership, and taking into account that PW5 Japhet Kibona seized the shoes but felt shy to produce them in evidence and gave the job to a person who did not participate in the foot tracing, the story PW5 Japhet Kibona becomes more or less a fairy tale.

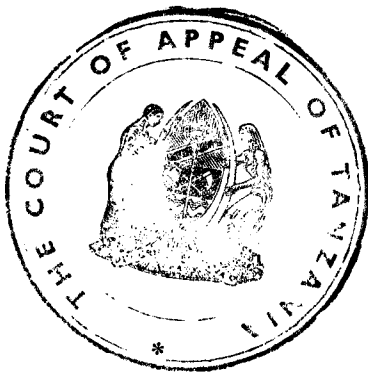
The same goes for the telephone put in evidence as Exhibit P1. The purported owner of the telephone PW1 Moses Juma @ Lumbwe claimed the telephone was stolen from him on 20/9/2008 at 12.45 a.m. yet when he testified on 27/11/2008, about two months later, the telephone was in his possession and he is the one who tendered it in evidence. He did not adduce evidence that the police had given back the telephone to him. This means he never lost possession of the telephone. This puts his claim of theft in jeopardy, as stealing always involves asportation. One of the essential elements of the doctrine of recent possession which was invoked to convict the appellant is that the property must be found with the suspect. In this case there is an unexplained riddle that the telephone claimed to be stolen is still with the owner in circumstances where he suspect has denied any connection with the telephone. In **JOSEPH MKUMBWA AND SAMSON MWAKAGENDA V. R.**, Criminal appeal No. 94 of 2007, this

Court set down the essential elements to be proved before the doctrine of recent possession can be invoked to pin liability on a suspect. We agree with Ms. Scholastica Lugongo that the essential elements of the doctrine are lacking in this case.

We will not go into the appellant's complaint that he was not identified at the scene of crime since this is a non-issue. The prosecution did not rely on visual identification but on identification of footprints whose identification by a witness in a moving car at night after midnight we have already held to be suspect.

For the above reasons we allow the appeal. The conviction is quashed and the sentence set aside. The appellant should be released from jail unless he is held on some other lawful cause.

DATED at MBEYA the 19<sup>th</sup> day of May, 2014.



E.M.K.RUTAKANGWA  
**JUSTICE OF APPEAL**

S.J. BWANA  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

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

  
F.J. Kabwe  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**