IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CRIMINAL APPEAL NO. 209 OF 2014

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

RICHARD JOSEPH CHACHA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

Dated 9th day of April, 2014
in
HC. Criminal Appeal No. 38 of 2013

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JUDGMENT OF THE COURT

30th Nov. & 9th December, 2015
KAIJAGE, J.A.:

This is a second appeal. It emanates from Criminal Case No. 276 of 2012 of the District Court of Tarime, at Tarime (the trial court) in which the appellant and his co-accused were convicted as charged of the offence of armed robbery contrary to section 287A of the Penal Code. Each was consequently sentenced to thirty (30) years imprisonment. Their joint appeal to the High Court against such both conviction and sentence was partly successful as against the appellant, who was found guilty of robbery for which a sentence of thirty (30) years imprisonment earlier meted out by the trial court was substituted for that of fifteen (15) years imprisonment.

The appellant's co-accused was acquitted. Still aggrieved, the appellant has now preferred this second appeal.

We propose to preface our judgement by stating a brief account of evidence which led to the appellant's conviction.

From a total of three (3) witnesses, the prosecution led evidence to the effect that during the morning of the 6/3/2012 at 10:00 am or thereabout, PW1 Yunis Amos was on her way, on foot, to Bomani in Tarime Township from the Tarime based National Microfinance Bank (NMB) where she had withdrawn a sum of Tshs.600,000/= in cash. The cash withdrawn was kept in her hand bag. Arriving somewhere near a bridge, she was intercepted by two persons whom she later identified as the appellant and his co-accused. The duo posed as soldiers with the Tanzania Peoples Defence Forces (TPDF) who were looking for money allegedly stolen from their establishment's account. To that end, they forcibly searched PW1 and dispossessed her of Tshs.600,000/= and a mobile phone. That done, they took to flight to the unknown destination.

The trial court was further told that the said robbery incident was immediately reported to the police authorities at Tarime who immediately swung into action in collaboration with PW1. In the course of a brief search

for the perpetrators of robbery in and around Tarime Township, PW1 spotted and identified the appellant and his co-accused. The duo were accordingly arrested by PW2 No. 9816 DC Ramadhani and were taken to the police station for further investigative purposes.

At Tarime Police Station, the appellant was searched by PW2 in the presence of PW1 and PW3 No. 2737 DC John. He was found in possession of a Nokia mobile phone with serial number 351948054539049. To prove that the same phone was her property, PW1 momentarily produced a receipt for its purchase. Indeed, it was confirmed that the profile of the same phone had the name of PW1. In the course of trial, the said Nokia mobile phone and its purchase receipt No. 0153 were tendered, admitted in evidence and marked as EXHP1 and EXHP2, respectively.

In his sworn defence, the appellant denied having robbed PW1 stating, in the main, that EXHP1 was not the mobile phone which was found in his possession at the time he was searched by PW2 at Tarime Police Station. Additionaly, he invited the trial court to find him not guilty on the ground that he was not found with cash money stolen from PW1. His defence notwithstanding, the trial court was satisfied that the appellant was guilty as charged.

Upon consideration and re-evaluation of the entire evidence on record, the first appellate court, like the trial court, rejected the appellant's defence story and found the evidence of the prosecution witnesses credible, reliable and supportive of the offence of robbery for which the appellant was found guilty, convicted and sentenced to serve a term of fifteen (15) years imprisonment. The appellant filed a memorandum of appeal listing seven (7) grounds of grievances, but we have culled the following which touch on matters which were raised and decided by the first appellate court:-

1. *That, the two courts below erred in convicting the appellant upon incredible evidence of the prosecution witnesses.*
2. *That the charge against the appellant was not proved beyond reasonable doubt.*

Before us, the appellant appeared in person, unrepresented. He adopted his grounds of appeal and reserved his right to respond to the learned State Attorney's submission. The respondent Republic had the services of Ms. Mary Yasinta Lazaro, learned State Attorney.

Addressing the first ground of appeal, the learned State Attorney submitted that there is no material basis on record upon which to fault the concurrent findings of fact made by the two courts below on the credibility and reliability of the witnesses who testified for the prosecution. She

contended that what transpired immediately before, during and after the robbery incident was as meticulously told by the prosecution witnesses in their respective testimonial accounts. She thus urged us to dismiss the first ground of appeal.

Arguing the second ground of appeal, the learned State Attorney was emphatic in asserting that the charge of robbery as against the appellant was proved beyond reasonable doubt, and that the two courts below properly invoked the doctrine of recent possession. Elaborating on this, she pointed out that the robbery was committed in broad daylight and those who were believed to be the perpetrators were traced, found and arrested on the same day. In addition, she said that upon being searched, the appellant was found in possession of a mobile phone (EXHP1) which PW1 positively proved to be hers. She thus urged us to find that the doctrine of recent possession was properly invoked by the two courts below and that the prosecution in this case discharged its burden of proving the charge of robbery beyond reasonable doubt. Finally, she pressed us to also dismiss the second ground appeal.

Responding to the learned State Attorney's submission, the appellant focused much on matters and issues which were not taken and decided by

the first appellate court. On this, we wish only to say that this Court has repeatedly pronounced itself, in various past decisions, that as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court (s) below to be raised on appeal: (see; for instance, **KENNEDY OWINO ONYONGO AND OTHERS V.R;** Criminal Appeal No. 48 of 2006 (unreported). Nevertheless, the appellant maintained that his conviction was predicated upon incredible evidence of the prosecution witnesses.

We shall first deal with the complaint that the appellant's conviction was predicated upon the evidence of the prosecution witnesses who were not credible.

Going by the record, it is clear that the two courts below accepted as cogent, the evidence adduced by the prosecution witnesses and unreservedly rejected the appellant's defence. We wish to point out, at this stage, that it has long been taken as settled law that issues of credibility are issues of fact and are best dealt with by the trial courts: See, for instance, **RICHARD MGAYA @ SIKUBALI MGAYA V.R;** Criminal Appeal No. 335 of 2008 and **NANGERA V.R;** (1972) H.C.D 24. The trial court's finding as to the credibility of a particular witness is usually binding on an appeal court

unless there are circumstances on the record which warrants a re-assessment of such credibility: See; **OMARY AHMED V.R;** (1983) T.L.R 32.

Amplifying on what was stated in **OMARY AHMED** case (supra), this court, once again, had this to say:-

> *"...It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

In this case, having scanned the evidence of PW1, PW2 and PW3, we have found no circumstance or reason justifying interference by this Court of the lower courts' assessment of the said witnesses' evidence and its credibility. Having taken that position, we are constrained to dismiss the appellant's first ground of appeal, as we hereby do.

Reverting to the next complaint on whether the case for the prosecution was proved beyond reasonable doubt, we wish to say, briefly, that we have had an advantage of revisiting the entire evidence on record. Upon our objective re-evaluation of the same, we are settled in our minds that the conviction of the appellant for the offence of robbery was predicated upon sufficient incriminating evidence and the proper invocation of the doctrine of recent possession.

its legitimacy in section 122 of the Evidence Act, Cap 6 R.E 2002, is now well settled. It is a rule of evidence. It operates on the basis that unexplained possession by an accused person of the fruits of a particular crime recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft, but also for any other offence however serious. (See; **MWITA WAMBURA V.R;** Criminal Appeal No. 56 of 1992 (unreported).

The presumption behind the doctrine has to be applied with great circumspection. That's why in **ALLY BAKARI AND PILI BAKARI V.R;** (1992) T.L.R.10 this Court had this to say:-

> *"...The presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof..."*

In this case, it was found established that in the course of the robbery in question, the unrecovered sum of Tshs.600,000/=, in cash, together with a mobile phone (EXHP1) were stolen from PW1. Found established, is also the fact that few hours after the robbery incident the appellant was arrested

by PW2 in collaboration with PW1, the victim of robbery. Following his arrest and upon being searched by PW2 in the presence of PW1 and PW3, the appellant was found in possession of EXHP1, proved to be the property of PW1. Amidst all these material established facts, we hold a firm view that the doctrine of recent possession was properly invoked by the first appellate court to find the appellant guilty of robbery.

In the light of the foregoing discussion and this being a second appeal, we are satisfied that the nature and quality of the evidence relied upon by the first appellate court in grounding the appellant's conviction for the offence of robbery does not merit our intervention.

Accordingly, we dismiss this appeal.

DATED at MWANZA this 7th day of December, 2015.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL