IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 371 OF 2014

MRISHO MUSSA BASUKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a Decision of the High Court of Dodoma at Dodoma)

(Kaji, J.)

dated the 18th day of February, 2004
in
Criminal Appeal No. 2 of 2003

JUDGMENT OF THE COURT

8th & 10th June, 2015

MASSATI, J.A.:

The appellant and another person who is not before the Court, were arraigned before the District Court of Kondoa, Dodoma, and charged with one count of armed robbery and another of robbery with violence contrary to sections 285 and 286 of the Penal Code. Both were convicted of the first count and sentenced to 30 years imprisonment and 12 strokes of the cane, but the second accused who is not here, was sentenced in absentia.

The appellant unsuccessfully appealed to the High Court, and has now come to this Court.

It was alleged in the trial court that, on the 17th September, 1998, at around 13.00hrs at Bubuchangwa village, in Kondoa District, the appellant and his colleague robbed a motorcycle from one MOHAMED s/o TEMBO, worth Tshs.5,000,000/= and Tshs.70,000/= cash from one RUSHONGORWA s/o KAJOKA, who was riding as a passenger in the said motor cycle. In order to obtain and retain the said properties, they used a gun and physical violence. They both pleaded not guilty.

In order to prove their case, the prosecution fielded five witnesses, namely ALLY IDDI NYANGE (PW1), BASHIRU YUSUFU MAKWAYA (PW2), MOHAMED TEMBO (PW3), LUSHOGORWA M.I KAJOKA (PW4) and NO. C.2496 D/SGT ENOCK (PW5). In essence PW3 and PW4 who were the victims of the robbery, testified that they were employed by Tanzania Leaf Tobacco Company (TLTC) and stationed at Manyoni. On the material date and time they had gone to visit a tobacco field at Bubu Changaa, where they were overseeing a project. Their routine would end up in their riding back to Kondoa each evening. On that day as they were returning to

Kondoa between Changaa and Munguri on a motorcycle provided to them by their employer, they were stopped by two youths who emerged from the bush. They were armed with a gun and a bush knife. At gun point, they were ordered to part with the motor cycle and their personal clothes, and their cash, Tshs.30,000/= and Tshs.40,000/= respectively from PW3 and PW4. Half naked, they walked up to Munguri Folk Development Centre, where some teachers helped them with some clothes. They then proceeded to Kondoa where they reported the incident to the police. After a manhunt, the appellant and his brother were arrested the following day, with the assistance of his father who was later joined as the third accused person.

PW1's testimony was that he was the accused person's neighbour and that on 18/9/98 he and his wife witnessed the appellant, riding a motor cycle, with a passenger who he identified as the second accused, on a path. Next day, when he heard of the robbery, he reported it to one Maganga, a police officer who did not testify. PW2 testified that on 20/9/98, while taking a bath at Bubu river, he witnessed the appellant's father (3rd accused) place a branch of a tree, a battery and a flag in his

shamba, and left. Later he witnessed the police visiting the place and recovering the motorcycle from the same place.

PW5 D/SGT ENOCK was the arresting officer. When he arrested the appellant, PW3 and PW4 were present and identified him. He said that they recovered the motorcycle on 21/8/1998. Most of the remaining part of his evidence was hearsay, but it is important to note that after recovering the motorcycle, no effort was made to link the recovered motorcycle with the evidence of PW1 and PW2.

On his part, the appellant denied to have committed the offence. He informed the court that on 18/9/98 he was busy managing bricks before he saw two people who complained of having been robbed of their motorcycle; and they even asked for clothes. That he was not present when the motorcycle was recovered on 21/8/98 although he had already been arrested on 19/8/98. Despite these denials, the appellant was convicted.

In this Court, the appellant has appeared in person, armed with a total of 14 grounds of appeal, but we think they can be condensed into six major complaints. **Firs**t, that PW4 gave evidence twice. **Second,** that he

was not properly identified at the scene of crime. **Third,** the stolen motorcycle was not properly identified. **Fourth** certain witnesses were not called. **Fifth,** there were contradictions in the evidence of PW3 and PW4. And **lastly,** that the prosecution case was but fabrication, and was not proved beyond reasonable doubt. For those reasons, the appellant beseeched the Court to allow the appeal.

The respondent/Republic was represented by Ms. Beatrice Nsana, learned State Attorney. She did not support the conviction and sentence, but for only some, not all the reasons advanced in the grounds of appeal. The grounds she did not support include, for instance, the complaint that PW4 gave evidence twice. She explained that this was because the charge was substituted and in terms of section 234 of the Criminal Procedure Act (Cap. 20 – R.E. 2002 (the CPA) the accused persons had to plead afresh and witnesses recalled. She also agreed that there were some contradictions in the prosecution case, but that some were material, but some were not; such as the date the motorcycle was recovered; but the contradiction between twenty paces and twenty metres, was not material. She also agreed that some vital prosecution witnesses were not called and that the evidence of PW5 was mostly hearsay. She further agreed that the

evidence of visual identification of the appellant, and identification of the motorcycle left a lot to be desired. It creates a lot of reasonable doubt which should be resolved in favour of the appellant. She therefore urged us to allow the appeal.

The complaints raised by the appellant in his lengthy memorandum of appeal, were also raised and argued in the High Court on first appeal. The High Court exhaustively dealt with nine complaints raised by the appellant, including the calling of PW4, twice, the contradictions etc. We are satisfied that, the learned judge dealt with them satisfactorily and we do not need to go over them again in this appeal. However, in dismissing the appeal, the first appellate court identified and we agree that the main issue was that of identification. The High Court was satisfied that in view of the favourable conditions the appellant was properly identified and that:

> *"The appellant and his comrade in crime were later seen with a red motorcycle day (sic) PW1 ALLY IDDI NYANGE driving along footpath."*

From this passage, it seems that the first appellate court was applying the doctrine of recent possession, in confirming the conviction of

the appellant. The issues before us are therefore, **one**, whether the appellant was identified, at the scene of crime; and **two,** whether the doctrine of recent possession was properly invoked in the circumstances of the case.

On the question of identification, we agree with the first appellate court that the identifying witnesses were PW3 and PW4. It is true that the robbery took place during day time. But it is also true that that was the first time for them to see the appellant, and there was no identification parade. But were these conditions, however favourable they could have been, a guarantee against mistaken identity? We think not. That is why we have held in several decisions that:

> *". . . in matters of identification it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions for identification might appear ideal but that is no guarantee against untruthful evidence."*

(See **JARIBU ABDALLAH v. R** Criminal Appeal No. 220 of 1994, **ABDALLA MUSSA MOLLEL @BANJOO v. R** Criminal Appeal No. 31 of 2008 (both unreported).

It is for the above reason that this Court has developed certain rules to guard against mistaken identity, especially where the suspect is seen by the witnesses for the first time.

One such rule is that, such witness (es) ought to give a detailed description of the suspect(s) to the person to whom they first report about the theft (robbery) before they have a chance of seeing the appellant after he is arrested. The description would be on say, clothes, appearance, colour, height, or any particular mark of identity (See **IBRAHIM SONGORO v. R),** Criminal Appeal No. 298 of 1993 (unreported), **RAYMOND FRANCIS v. R** (1994) TLR, 100 (CA).

In the present case, both PW3 and PW4 said that they first called on some teachers at Munguri Folk Development Centre who provided them with clothes, before proceeding to report the matter to the police, at Kondoa. Neither of them, nor any of the teachers or the police who received their reports, testified that PW3 and PW4 ever gave any description of how the robbers looked like. If anything, going by the evidence of PW5 D/SGT ENOCK, PW3 and PW4 identified the appellant at the police station after he had been arrested following information from

about the way the appellant was identified. As a matter of practice and prudence, their evidence of identification required corroboration.

But these unsatisfactory features would have been ironed out if the appellant was found with any of the properties stolen from PW3 and PW4. The first appellate court was satisfied that PW1 had seen the appellant with a motorcycle. This takes us to the second issue. Was the doctrine of recent possession properly invoked?

For the doctrine of recent possession to be properly invoked, it must be proved that, **first**, that the property was found with the suspect; **second,** 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. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements (See **MKUMBWA MWAKAGENDA v. R** Criminal Appeal No. 94 of 2007 (unreported).

In the present case, it is not disputed that the motorcycle was dug out from a shamba, somewhere near Bubu river. The appellant was not present when it was recovered, and it is not known what prevented his presence at the scene during the search and seizure. There is no evidence that the place from which the motorcycle was dug out was under the control of the appellant. It was held in **NUHU SELEMANI v R** (1984) TLR 93 (CA), that where an exhibit is seized in the absence of an accused person and neither shown nor asked of it, it is not sufficient evidence to link it to an accused person.

The learned judge in the first appellate court had relied on the evidence of PW1 who said he saw the appellant riding a red motorcycle, but with respect, such evidence was not sufficient to establish that it was the very motorcycle that had been stolen from PW3 and PW4, because PW1 was not asked to identify whether the motorcycle he saw the appellant with was the one tendered in court as the stolen motorcycle (Exh. P1). PW2, said he saw the third accused person near the river where he went to place a branch of tree and a flag, and later witnessed the police unearthing the motorcycle from that place. But this evidence does not link the appellant with the possession of the stolen motorcycle for two reasons.

First, the appellant was not present when the motorcycle was dug out. **Secondly,** like PW1, this witness was also not asked to identify and compare Exh P1 with the one he saw being dug out. So, we are constrained to answer the second issue also in the negative. The doctrine of recent possession was not well placed.

For the foregoing reasons, we think that the appellant's conviction is not safe. We accordingly allow the appeal. We quash the conviction and set aside the sentence. We order that the appellant be forthwith released from prison unless he is held for some other lawful cause.

Order accordingly.

DATED at **DODOMA** this 9th day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL