

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

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 308 OF 2013

**1. CHARLES MATO ISANGALA
2. MOSI MALIMA
3. HAMIS RAMADHANI**

..... **APPELLANTS**

VERSUS

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

(Mchome, J.)

**dated the 20th day of December, 2005
in
Criminal Appeal No. 212 of 2004**

.....

JUDGMENT OF THE COURT

26th May & 1st June, 2015

JUMA, J.A.:

According to the particulars of the charge sheet laid before the trial District Court at Tarime, it took slightly more than thirty minutes from 6.00 p.m. to 6.30 p.m. on 5/5/2003 in the midst of the Lake Victoria, for the three appellants, CHARLES MATO ISANGALA, MOSI MALIMA and HAMIS RAMADHANI to use actual violence in order to steal four engine boats, nets and other fishing items from four different boats which were at the time fishing in the lake. For this, the appellants were charged with four counts of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 as amended by Act No. 10 of 1989.

The trial magistrate made a finding that the prosecution had proved all the four counts beyond reasonable doubt. He accordingly convicted the appellants and sentenced each one of them to serve thirty years in prison and twelve (12) strokes of the cane for each count. He ordered the sentences to run concurrently. The appellants manifested their grievance by appealing to the High Court of Tanzania at Mwanza in Criminal Appeal No. 212 of 2004. They did not succeed because, within a space of two pages, Mchome, J. dismissed their appeal. He found what he described as "*ample evidence to support the conviction of the appellants*".

In their supplementary memorandum of appeal to this Court, the appellants have loaded their grounds of appeal with submissions, and occasional supporting authorities. We were able to discern five distinct areas of complaints requiring the attention of the Court.

Firstly, they question the way the first appellate Judge upheld their conviction on the basis of the visual identification evidence of three complainants, PW1, PW2 and PW3 and subsequent dock identification which was allowed without so much as requiring the complainants to have earlier furnished the description of their assailants. **Secondly**, the appellants raised concern over the way the doctrine of recent possession was applied to link them with exhibits P1, P2, and P3. They urged us to find that the recovery of the stolen boat engines and the way these engines were tendered and exhibited, infringed the

applicable legal procedures. **Thirdly**, the appellants maintained that in light of contradicting evidence of PW6 and PW7, the boat engines which were allegedly stolen were not positively identified in court as belonging to the complainants. **Fourthly**, the appellants contended that the two courts below failed to consider their defence. **Lastly**, the appellants contest the evidence of identification parade in circumstances where Police Form No. 186 was not exhibited in court to prove its conduct to justify the subsequent dock identification.

When this appeal came up for hearing before us on 26th May, 2015 the third appellant, Hamis Ramadhani was absent. According to the information from the Officer in Charge of Butimba Prison, this third appellant passed away on 14/12/2013. Following his passing, we accordingly ordered the abatement of his appeal in terms of Rule 78(1) (a) of the Tanzania Court of Appeal Rules, 2009.

The remaining first and second appellants, Charles Mato Isangala and Mosi Malima, represented themselves. Mr. Paschal Marungu, learned Senior State Attorney, appeared for the respondent Republic. The appellants preferred to let Mr. Marungu respond to their grounds of appeal.

When he rose to address us, the learned Senior State Attorney took a position of supporting the appeal. He summarized the grounds of appeal into two main areas of complaints which the learned State Attorney proposed to submit on. **First**, the grounds of appeal contend that the first appellate Judge erred

when he relied on evidence of visual identification. **Secondly**, he reckons that the appellants through their grounds of appeal, believe that the learned Judge on first appeal erred to invoke the doctrine of recent possession.

Beginning with the visual identification evidence of PW1, PW2 and PW3, Mr. Marungu submitted that these complainants had on one hand said that they were able to identify the appellants as their assailants during the armed robberies. The same complainants also testified on the fact that they did not know the appellants both by name and appearance. Mr. Marungu wondered aloud how, the complainants could still manage to identify the appellants at the police station without so much as conducting an identification parade. He submitted that in so far as no identification parade was conducted, the claim that the complainants could still recognize the appellants at the police station is untenable. He in addition described as incorrect, the conclusion reached by the learned first appellate Judge that ***"the robbers were also identified by the PWs at an identification parade."***

The learned Senior State Attorney reiterated that he was in full agreement with the appellants that from evidence on record, it cannot be said with certainty that the appellants were behind the incidents of armed robberies which took place on 5/5/2003. According to Mr. Marungu, the lasting impression from the record is that the appellants were for the first time identified when they stood in the dock.

Moving on to the next ground on the application of the doctrine of recent possession, Mr. Marungu submitted that the appellants could only have been correctly convicted if the conditions settled for the application of the doctrine are satisfied. With regard to the conditions for invocation of the doctrine of recent possession, he referred us to unreported decision of the Court in **James Kisabo @ Merango & Another vs. R.**, Criminal Appeal No. 261 of 2006 which referred to another decision of the Court in **Alhaji Ayub @ Msumari & Others Vs. R.**, Criminal Appeal No. 136 of 2009 (unreported) wherein four conditions for the application of the doctrine of recent possession were highlighted:

"... before a court of law can rely on 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".

To support his position that the recently stolen boat engines cannot be said to have been found with the appellants, Mr. Marungu revisited the evidence of the arrest of the appellants by Detective Corporal Daud (PW7). PW7 testified on how on 17/5/2003 he and detective corporal Andrew were sent by the Regional Crimes Officer Mwanza to Kamanga Ferry shores in Sengerema District to follow up on an informer report about the boat engines that had earlier been stolen. Upon his arrival at Sengerema, PW7 in the company of several police officers saw, along the lake shores, three engines which were fixed on three boats. The three appellants who were nearby were arrested while mending their fishnets. The arrest was witnessed by three women who were in the company of the appellants, and by the wife of a ten-cell leader.

The police then searched three nearby houses where they found another six boat engines. The wife of the ten-cell leader informed the police that those houses belonged to one Kishimba. Mr. Kishimba had rented them out to fishermen from Musoma. When they were arrested by PW7, the appellants claimed that they did not own the boat engines. Apart from a total of nine engine boats which PW7 took with him back to the Central Police Station in Mwanza, he brought along 11 fuel tanks and fuel pipes.

Mr. Marungu submitted that under the circumstances of the arrest, their possession of the nine boat engines cannot be said to be certain. It is not clear if

the appellants owned the boats or were even the tenants in occupation of the houses which the police searched. Only Mr. Kishimba could help.

The learned Senior State Attorney had another reason why he thought the appellants were in law not found in possession of the recovered boat engines. He referred us to the evidence of the complainants who identified in court the serial numbers of their stolen boat engines. Yet, upon his cross examination by the first accused, PW7 was definite that the boat engines he recovered from Sengerema had no serial numbers. Again, PW7 was not shown the boat engines which the complainants- PW1, PW2 and PW3 tendered as exhibits. So, the boat engines which PW7 recovered could not be the same as the serial numbered boat engines exhibited as evidence against the appellants, Mr. Marungu surmised. He could help but wonder why, after he had prepared his search party well in advance of the visit to Sengerema, PW7 still failed to exhibit Search Order and Certificate of Seizures. Mr. Marungu also wondered why the wife of the local ten-cell leader (*Balozi*) who witnessed the search and arrest of the appellants was not called to testify as an independent witness.

The appellants, when called upon to respond, they had nothing to add.

From the submissions on the grounds of appeal, it seems to us that this appeal turns on two salient matters. First, is on the way the two courts below re-evaluated the evidence of visual identification at the scene of crime and dock

identification. Secondly, on the way the doctrine of recent possession was invoked to link the appellants to the engine boats which the police from Mwanza recovered in Sengerema district. It is, therefore, imperative that we consider these two issues.

The settled rule on probity of evidence of visual identification which has been laid down, and consistently followed by the Court is that evidence of visual identification shall not be acted upon unless all possibilities of mistaken identity are eliminated and that the court concerned is satisfied that the visual identification evidence before it, is absolutely water tight: (see **Chokera Mwita vs. R.**, Criminal Appeal No. 17 of 2010 (unreported) which referred to **Waziri Amani v. Republic** (1980) TLR 250 and several decisions of the Court which followed it).

Ernest Odoyo (PW1) was the first victim of armed robbery. He narrated what transpired at 6.00 p.m. when he and another person by the name of Raidi, while fishing in their boat, were set upon by the bandits. Within the space of a quarter of an hour, the bandits had unfixed and stolen their boat engine together with their fishing nets. Riding on an apparent faster boat, the approaching bandits began firing shots into the air when they were within 40 metres of PW1's boat. A third shot was fired when the bandits were within ten metres from their target. Faced with so many flying bullets, PW1 and his colleague obeyed the

order to lie down on their boat. During his examination in chief, PW1 claimed to have identified all the three bandits:

*"...As I fell on the boat floor I managed to identify the invaders. The 3rd accused **[the second appellant herein]** was the one who had the gun. The others struggled to untie our engine as his fellow transferred some nets we had in the boat to their boat. The sun had not set and so there was enough light. As I lay on the floor I had my face up and so I very easily identified the three..... I remained in the lake till the following morning when we started towing **[rowing]** our boat towards the dry land...." [Emphasis added].*

But, upon being cross examined by Hamis Ramadhani (now deceased), PW1 modified his earlier assertion by stating that he identified only the bandit who carried a gun, that is, the second appellant herein: ***"... I identified the one with the gun before I lay down."***

This evidence of PW1 leaves begging the question whether this witness also managed to identify the first appellant and Hamis Ramadhani. Again, when he was cross examined by the first appellant herein, PW1 stated:

*"...I identified the others as one took off the engine and the other the nets. The second accused **[1st appellant herein]** was one of*

those I identified from the many at Mwanza Police Station.... After identification we left them at the police station.” [Emphasis added].

Jomanga Ndalawa (PW2) was the victim of the second incident of armed robbery which took place from 6.15 p.m., that is, fifteen minutes after the first incident. The identification evidence of PW2 states:

*“...I identified the four people. Three of these are the accused in this court....1st accused Khamis Ramadhani **[Hamis Ramadhani]** had the gun, while the 2nd and 3rd accused **[first and second appellants]** struggled to take away the engine. It was not yet dark because the sun had not set when they ordered us to sit down with our hands up I took that time to mark their faces...” [Emphasis added].*

Whilst being cross examined by Hamis Ramadhani, PW2 stated:

“To Mwanza I went to identify the engine and the robbers. There were about ten people in the police cells and out of them I identified these three accused persons. I had not gone to identify names. I had known their faces only and not their names.”

The third incident of armed robbery involved Juma Mashimba (PW3) which took place twenty five minutes after the first two incidents. The identification evidence of this witness states:

"...Two youths boarded into my boat from that invading boat and came to take up my engine together with the remaining 18 nets. All this time I still sat at where I had been ordered to seat. They took away the engine together with its fuel gallon and fuel pipe.... I also remember going to Mwanza where I identified three of the robbers from a group of ten people. These are the accuseds in court today. The fourth is not seen here, I also identified my engine. I had very easily identified those four robbers on the material day because the sun had not yet set...."

The trial magistrate (A.L.M. Mallya-SDM) evaluated the visual identification evidence of PW1, PW2 and PW3 in the following way:

"The first issue to deal with here is that of identification of the accused persons. It was between 6.00 and 6.30 p.m. and according to prosecution evidence the sun had not set. There was no darkness then. There was the time used to unlock/untie the engines from where they had been fitted, ferrying them in the robbers' boat, and the fact that those robbed did not have their

faces covered. It is therefore my considered opinion that those being robbed had enough time to identify the robbers. The robberies took place on 5/5/03 and about twelve days later the robbers were arrested and identified at Mwanza Police Station. They had been identified in court and they have not queried this. The time taken from when the robbery was committed to the time the accused's were arrested and identified by those robbed, coupled with the fact that robbery was committed at broad daylight have made me believe that the identification was properly made."

It seems to us that the generalized observation by the trial magistrate that "It was between 6.00 and 6.30 p.m. and according to prosecution evidence the sun had not set" does not lend any assurance that the trial magistrate eliminated all possibilities of mistaken identity before relying on the identification evidence of PW1, PW2 and PW3.

The duty of the first appellate court when faced with evidence of visual identification was restated in **1. Sokoine Range @ Chacha, 2. Nyamanga Range @ Chacha vs. The Republic**, Criminal Appeal No. 198 of 2010 (unreported). The Court underscored that the first appellate court is obliged without fail, to subject "the entire evidence to an objective scrutiny and arrive at his own findings of fact." In the instant appeal before us, the first appellate

judge did not subject the identifying evidence of PW1, PW2 and PW3 to that objective re-hearing and re-evaluation the Court emphasized in **1. Sokoine Range @ Chacha, 2. Nyamanga Range @ Chacha vs. The Republic** (supra). In fact, Mchome, J. on first appeal restricted his scrutiny to the evidence of PW3, generally describing this witness as amongst the prosecution witnesses who identified the three appellants at the scene of crime. But, looked at closely, the evidence of PW3 alludes to visual identification in a mere generalized, and it seems to us unhelpful, for the elimination of all possibilities of mistaken identity:

*"...These are the accuseds in court today. The fourth is not seen here, I also identified my engine. **I had very easily identified those four robbers on the material day because the sun had not yet set...**"* [Emphasis added].

In our own assessment of the evidence on record, we do not think that all possibilities of mistaken identity were eliminated to make the identification of the three appellants at the scene of crime absolutely water tight. In **Masolwa Sindano and Gerald Sindano vs. R**, Criminal Appeal No. 235 of 2011 (unreported) this Court discouraged the identifying witnesses from making general statements when identifying the offenders at the scenes of crime. For purposes of the instant appeal, the general and sweeping statements like "*the sun had not set*" by the trial court; or "*The robbers were identified by the victims, PW1, 2 and 3 as it was at around 6.00 p.m. and there was enough*

light," by the first appellate court; do not in themselves eliminate the possibility of the witnesses mistaking the appellants. We as a result hold that the appellants were not positively identified at the scene of crime. In the result, Mr. Marungu is fully entitled to conclude that the visual identification evidence has not linked the appellants to the armed robberies of 5/5/2003. He is also correct in submitting that it is quite possible that the appellants were for the first time identified by the complainants when they appeared in court. The record also bears out the learned Senior State Attorney in faulting the conclusion reached by first appellate Judge that appellants were identified at an identification parade. No such identification parade was conducted.

Next, we move on to consider the submissions on the application of the doctrine of recent possession. With due respect, Mr. Marungu has correctly relied upon the conditions guiding when to invoke the doctrine as laid down in many decisions of the Court, including the two unreported decisions in **James Kisabo @ Merango & Another vs. R.** and **Alhaji Ayub @ Msumari & Others Vs. R.** (supra) which the learned Senior State Attorney referred to us. He has, to our satisfaction, addressed the two salient conditions at the centre of the doctrine of recent possession as to whether, the appellants were found in possession of the boat engines at Sengerema; and whether those engines which had serial numbers, were properties of the complainants.

We agree with Mr. Marungu that lack of evidence tending to prove either actual or constructive possession by the appellants of the nine boat engines which PW7 recovered from Sengerema, makes it impossible for this Court on second appeal to conclude that the appellants were found in possession for the doctrine of recent possession to apply.

Possibility that the appellants were in possession of the engines that were stolen during the armed robbery is further diminished when the evidence of the complainants who identified the stolen engines in court, is compared with the evidence of PW7 who recovered the alleged stolen engines. The complainant PW1 identified the stolen engine (exhibit P1) in court by its serial numbers and distinct identifying marks:

*"In the police store we were shown .. many engines about nine in total out of which I identified the one stolen from me which had **serial numbers 1011096-15HP. My employer had a receipt to that engine and he showed it up.** If I see that engine today I may identify it. **The engine bears figures 15 together with serial numbers.** I also wrote the name **"Jackson"** on it. (witness shows up his identifying marks on an engine) I pray to tender the said engine as exhibit."*[Emphasis added].

On his part, PW2 was also definite that the engine that was stolen from his boat (Exhibit P2) had serial numbers:

*"...Later I got reports that the stolen engine had been recovered at Mwanza. I went to Mwanza to identify the robbers who were then at Mwanza Police Station. There were many engines there too but from them I identified the one stolen from me. **Its serial numbers were 1003634 Yamaha 9.9 HP. The engine also bears the name "Isaak" on the fail** (sic). I pray to tender this engine as exhibit."*[Emphasis added].

The third complainant (PW3) similarly identified the stolen by its serial numbers which he tendered as Exhibit P3:

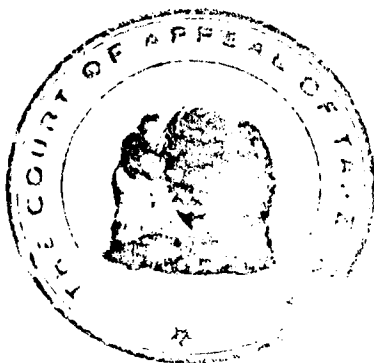
*"...My stolen engine had **serial numbers 051222-9 9HP. I have a receipt for this engine**.....Later we came to hear that some boat engines had been recovered at Mwanza. **One of us travelled to Mwanza with a list of all the stolen boat engines**. If I see my engine today I may identify it. I pray to tender the engine, its fuel tank and fuel pipe as exhibits. [Emphasis added].*

But, the irony is the nine boat engines which PW7 recovered from Sengerema had no serial numbers. This evidence came out from PW7 under cross examination. PW7 was not given the chance to comment on the engines

with serial numbers which the three complainants exhibited in court. In the absence of proof that the appellants were found in possession of boat engines that were exhibited as evidence against them, it is not possible to apply the doctrine of recent possession.

In the final analysis we are satisfied that this appeal has merit. We accordingly quash the convictions of the appellants and set aside their sentences. The appellants shall be released forthwith unless they are held for other lawful cause. The appeal is hereby allowed.

DATED at MWANZA this 28th day of May, 2015.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "Z.A. Maruma".

Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL