

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: LUANDA, J. A., JUMA, J. A. And MZIRAY, J.A.)

CRIMINAL APPEAL CASE NO. 214 OF 2011

ALLY MOHAMED MWAYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania  
at Dar es Salaam.)

(Mutungi, J.)

dated the 3<sup>rd</sup> day of November, 2010

in

Criminal Appeal No. 60 of 2010

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JUDGMENT OF THE COURT

10<sup>th</sup> & 27<sup>th</sup> November, 2015

LUANDA, J.A.:

In the District Court of Rufiji sitting at Utete, the appellant ALLY MOHAMED MWAYA and another, who was acquitted after a full trial, were jointly charged with three counts of armed robbery c/s 287A of the Penal Code, Cap. 16 R.E. 2002. The appellant was convicted with all the three counts and was sentenced to serve 30 years imprisonment for each count. The sentences were ordered to run concurrently.

Aggrieved, the appellant unsuccessfully appealed in the High Court of Tanzania (DSM Registry). Still dissatisfied, he has come to this Court on appeal. So this is a second appeal.

Briefly the prosecution case was that on the material day i.e. 29<sup>th</sup> day of September, 2009 at about 04.00 hrs while Selemani S/o Mussa (PW1), Seifu s/o Mohamed (PW2) and Hamisi s/o Mohamed (PW3) were each pushing a bicycle carrying bananas to a market place to sell, they were attacked by three people who robbed them their properties including the bicycles. The robbers used a bush knife and a piece of an iron bar to facilitate their mission. The matter was immediately reported to Utete Police Station where three police officers were promptly dispatched to the scene of crime. The police officers Cpl Nicholas (PW4) and Cpl Gravasson (PW5) managed to arrest the appellant while his two colleagues took to their heels. The two bicycles out of three were recovered. The two bicycles were tendered by PW2 which the appellant criticized in one of his grounds of appeal.

In his defence the appellant did not deny to have been arrested at the scene of crime. But denied to have robbed the three in conjunction with his two colleagues.

In this appeal the appellant raised eleven grounds in the memorandum of appeal. The appellant appeared in person unrepresented whereas the respondent/Republic was represented by Ms. Honorina Munishi, learned Senior State Attorney assisted by Ms. Haika Temu, learned State Attorney. Ms. Munishi did not resist the appeal and made submission in three key area; these are visual identification, the doctrine of recent possession and credibility of witnesses.

Submitting on visual identification, Ms. Munishi said the condition prevailing at the scene of crime were not conducive for the correct identification as no explanation was given as to the brightness of the moon. She went on to say, PW1 after he was attacked ran away and went to report to the area Chairman and then to police. It is not shown even the time PW1 spent in watching the attackers. Taking those factors into consideration, it is the submission of Ms. Munishi that it is doubtful the

witnesses to have positively identified the appellant. She cited **Waziri Amani vs R.** [1980] TLR 250.

Turning to the doctrine of recent possession, she said there is no evidence on record of ownership of the alleged recorded bicycles were given. The doctrine, under the aforesaid circumstances, cannot apply. She referred us to **Ali Bakari and Pili Bakari vs R.** [1992] TLR 10.

Last but not least is about credibility of the three key witnesses. She said the three contradicted each other as to who really reported the matter to police. Each claimed to have reported the incident to police. The three were not credible.

In convicting the appellant, both courts below were satisfied that the three key witnesses were credible, the appellant was positively identified and the doctrine of recent possession was applicable in the circumstances of the case.

On the other hand the appellant protested his innocence and maintained that the prosecution did not prove its case beyond reasonable doubt. He also attacked the manner in which the bicycles were tendered in Court as exhibits. He said he was not asked as to whether he had anything to say before the same were tendered.

Having carefully read the record, we are of the settled view that, the real issue in this appeal is whether or not the evidence on record is strong to support the conviction. We shall start with visual identification.

It is in evidence in the prosecution case that the incident occurred at about 04:00 hrs. No doubt that was night time. According to the key witnesses they said they were able to identify the appellant with the aid of the moon light. But the three did not state the intensity of the light it illuminated. Without more that evidence is weak. It cannot be relied on to convict (See **Waziri Amani case**).

However, in this case the question of visual identification is not an issue at all. This is because the appellant himself in his defence on oath did not deny to have been at the scene of crime. This is what he said:-

*"On the same morning met with PW2, and PW3 they were riding with their bicycles, they were coming on opposite side, we passed to each other, then after crossing the bridge met PW1 who had had a luggage of timer (sic) wood, near the small hill, there after I continue with my Safari, but after few steps and met PW1, I heard voice calling from behind then saw those two people who call them ridding a bicycles, they did not call by name, only said "HALLO, BWANA TUSUBIRI". Then they asked me if I have seen or met by one with a timber wood?"*

Since the appellant did not deny to have been at the scene of crime, we find no need of discussing the issue of visual identification for it does

not arise. The issue in our view is whether the three key witnesses were witnesses of truth. In otherwise whether they were credible witnesses.

The three key witnesses explained in detail how they were attacked by the appellant with his two colleagues who are at large. The matter was then reported to police. The police (PW4 and PW5) acted promptly by going to the scene of crime. They managed to arrest the appellant while pushing one of the stolen bicycle. So, PW4 and PW5 corroborated the evidence of the three key prosecution witnesses the appellant to have been pushing the bicycle. The appellant did not attempt to explain why these witnesses to have cooked that story. The three key witnesses might be exaggerating as to who actually reported the incident to police. But that alone is not a reason to ignore their evidence pertaining to the main story and treat them as unreliable. With due respect to Ms. Munishi the three key witnesses were reliable. The appellant was among the attackers who robbed the key witnesses their properties including the bicycles. His defence of denial could not hold. And going by the evidence on record, the appellant and his two colleagues attacked the three key witnesses together. No doubt they were acting under a common design. It is settled

that when two or more persons form an intention to prosecute an unlawful purpose conjointly and in the prosecution of which an offence is committed of such a nature that its commission was a probable consequence, each of them is deemed to have committed the offence. (See **R vs Tabua Yenka Kirya and Others** (1943) 10 EACA 51 and **Damiano Petro vs R.** [1980] TLR 260).

With that evidence alone, the conviction was sound, notwithstanding the flaw in admitting the bicycle as exhibit. The well established practice pertaining to the tendering of an exhibit is that wherever an object is intended to be tendered as exhibit, it should first be cleared for tendering, *inter alia*, asking the accused whether he has any objection. If an objection is raised, the Court to look into it and make a finding whether to admit or otherwise.

In this case that was not done. But even if we expunge that evidence, which in turn also touches the doctrine of recent possession, still the evidence is strong to ground conviction. The oral evidence of the three prosecution witnesses is credible.



In the upshot, we find the appeal devoid of merits. The same is dismissed.

Order accordingly.

**DATED at DAR ES SALAAM this 18<sup>th</sup> day of November, 2015**

B. M. LUANDA  
**JUSTICE OF APPEAL**

I. H. JUMA  
**JUSTICE OF APPEAL**

R. E. MZIRAY  
**JUSTICE OF APPEAL**

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

  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**