IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 262,263 & 264 OF 2012

1. **EMMANUEL MAGEMBE**
2. **MRISHO IBRAHIM** } .....**APPELLANTS**
3. **JOSEPH DAUD MASUNGA**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania At Tabora)

(Wambali, J.)

Dated the 30th day of July, 2012
in
(DC)Criminal Appeal Nos. 57, 58 and 59 of 2011

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JUDGMENT OF THE COURT

25th & 8th December, 2015

LUANDA, J.A.:

In the District Court of Kahama sitting at Kahama, Emmanuel s/o Magembe (1st Appellant) Mrisho s/o Ibrahim (2nd Appellant), Joseph s/o Daud @ Masunga Sayi (3rd Appellant) and Malenya s/o Sayi @ Masanja were jointly and together charged with armed robbery. The 3rd appellant was also separately charged with retaining stolen property. Save Malenya s/o Sayi @ Masanja who was acquitted, the three appellants were convicted as charged. For the offence of armed robbery each was sentenced to 30 years imprisonment. The 3rd appellant was further sentenced to five years in jail in connection with the second count. The appellants were aggrieved by the finding of the trial court, save the offence of retaining stolen property in

respect of the 3rd appellant which the High Court found the offence to have not been proved, the conviction for armed robbery was upheld. Dissatisfied, the three have preferred this appeal.

The evidence which implicate the appellants was that of the doctrine of recent possession. It was the case for the prosecution that on the fateful day i.e. 7/4/2010 around 20.00 hrs when Francis Donald was driving a motor cycle carrying his wife and a child (which he did not mention its registration number in evidence but tendered in Court as exhibit), he was ambushed by four armed bandits who claimed the three were the appellants. The bandits tied them with a piece of khanga and took money, cell phones and the motorcycle. Efforts were made on the same day to recover the stolen properties but it was not successful.

On 9/4/2010 E 2141 Cpl Godfrey (PW3) received an information from an informer to the effect that in the house of one Masunga in which the 3rd appellant was renting three people were in possession of a motor cycle and that they were seeking for buyers.

Armed with a search warrant PW3 went to the said house. He took a ten cell leader of the area one Budeba Ruja (PW2), the room of the 3rd appellant was searched. A motor cycle with registration number T 404 BES was found therein with three people who were the appellants. The 3rd appellant tried to ran away, he was arrested, hence the charge.

Both lower courts were satisfied that the appellants were the ones who stole the motor cycle.

In this appeal the appellants were unrepresented and so they fended for themselves. The Republic/respondent was represented by Mr. Rwegira Deusdedit, learned State Attorney.

Each appellant has filed his memorandum of appeal. The real issue in this appeal is whether the concurrent finding of the two Courts below in convicting the appellant basing on the doctrine of recent possession was correct.

Mr. Rwegira supported the appeal on the ground that the owner of the recovered motor cycle one Dominick s/o Paschal was not called to establish ownership by giving description of the said motor cycle. The recovered motor cycle might not be the property of Dominick s/o Paschal. What he said was that in order to invoke the doctrine of recent possession, the prosecution must establish among other things, the recovered property to have been duly identified and belonged to the complainant.

In upholding the conviction of the trial District Court relying on the doctrine of recent possession the learned judge said:-

> *"Indeed, the stolen property was found in possession of the appellants within a very short period, that is on 9/4/2010 after the same was robbed in the night on 7/4/2010.* ***The circumstances under which the appellants were found***

in possession of the robbed motorcycle met aii the ingredients of the offence set *in* ***Joseph Mkumbwa and Another*** *case (supra) as properly submitted by Mr. Bulashi. The accused persons did not explain sufficiently how they came to possess the said stolen property.*

In **Joseph Mkumbwa and Another** (supra) the Court of Appeal set the following elements for the doctrine of recent possession.

> ***"First, that the property is positively the property of the complainant. Second, that the property was found with the suspect. Third, that the property was recently stolen from the complainant. Fourth, that the stolen thing in possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commission of the offence charged."***

But was the motor cycle duly identified by the real owner Dominick s/o Paschal or the special owner as is defined under S. 258 (3) of the Penal Code (the code) one Francis s/o Donald (PW1) after its recovery? Dominick s/o Paschal did not testify at all. On the other hand PW1, though he had tendered in Court as exhibit, he did not inform the Court how and where he came about the said motor vehicle. Further no any other witnesses had said to have handed over the said motor cycle to PW1! Though the learned judge properly

addressed himself as to what constitutes the doctrine of recent possession, he misapplied it as there is no evidence the owners to have positively identified the motorcycle. In **Matola Kajuni & three Others v.R.,** Consolidated Criminal Appeals Nos. 145 of 2011, 146 of 2011 and 147 of 2011 the Court said:-

> *"In order for the doctrine of recent possession to hold, the prosecution must establish, inter alia, beyond any doubt that the alleged recovered property which is the subject matter of the charge to have been duly identified and belong to the complainant."*

In view of the foregoing, it is clear that the doctrine of recent possession was not properly invoked.

But there is evidence on record that all the three appellants were found in the house of the 3rd appellant which had the motor cycle and they did not claim ownership thereof and they did not explain how the motorcycle found its way there. The 2nd appellant ran away from the house and was arrested by Cosmas Benedicto (PW4) a civilian. That conduct of the 2rd appellant is not consistent with innocence. The point we wish to consider is whether a conviction of a minor offence can be substituted. The question now is whether the offence of retaining stolen property under s. 311 of the Code is a cognate offence to armed robbery.

The section reads:-

" Any person who receives or retains any chattel, money valuable security or other property whatsoever, knowing or having reason to believe it to have been stolen, extorted, wrongfully or unlawfully taken, obtained, converted or disposed of, is guilty of an offence and is liable to imprisonment for ten years."

The appellants were charged with armed robbery c/s 287 A of the Code. The offence was said to have been committed in April, 2010. So, the amendment affected by Act No. 4 of 2004 was applicable. Otherwise there is yet another amendment affected by Act No. 3 of 2011. The section reads:-

"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of the stealing used or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."

Now in order for the offence of armed robbery to stick, it must be shown that the accused had used or threatened to use any actual violence or there were more than two people with the purpose of obtaining or retaining the stolen property or to resist its being stolen or retained. And the word

"retain" has been defined as to keep or continue to have. (see **Oxford:** Advanced Learners Dictionary, Sixth Edition)

In order for an offence to be cognate it must be shown, it is of the same genes and species. In **Robert Ndecho and Another VR,** (1951) 18 EACA 171 at 174 the then East African Court of Appeal said:-

> *"In order to make the position abundantly clear we restate again that ... where an accused is charged with an offence, he may be convicted of minor offence, although not charged with it, if that minor offence is of a cognate character, that is to say of the same genes and species."*

In yet another case **Ali Mohamed Hassan Mpanda VR,** [1963] EA at 296 the Court of Appeal for East Africa said:-

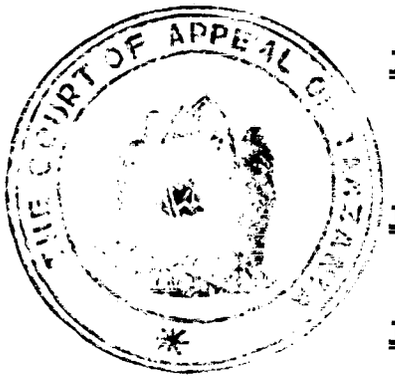
> *"... first whether the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by that charge constitute the minor offence also, and secondly whether the charged major offence gives the accused notice of all circumstances going to constitute the minor offence intended to be substituted." [see also **Miswahili Mulugala VR,** (1977) LRT No. 25].*

From what we have been trying to show, we are of the settled view that retaining stolen property is an essential ingredient of armed robbery. So, it is clear then that the offence of retaining stolen property which is created under

s. 311 of the Penal Code is a minor offence to armed robbery. In terms of S. 300 (1) (2) of the Criminal Procedure Act, Cap 20 RE, 2002 a conviction for the offence of retaining stolen property can be entered. We therefore partly allow the appellants' appeal. We quash the conviction for armed robbery and set aside the sentence of imprisonment of thirty years each and instead we hereby convict the appellants with that minor offence and sentence each appellant to nine years imprisonment from the date of conviction of armed robbery.

Order accordingly.

DATED at **TABORA** this 8th day of December, 2015.



B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

I certify that this is true copy of the original.

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL