IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 304 OF 2013

JOSEPH SERA LIUMILE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mruma, J.)

dated 31st day of May, 2013
in
Criminal Appeal No. 84 of 2011

JUDGMENT OF THE COURT

28th May & 1st June, 2015

MUSSA, J.A.:

In the District Court of Musoma, the appellant and another, namely, Kassim Fadhili @ Tununu, were jointly arraigned and convicted for robbery with violence, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the laws. Upon conviction, both were sentenced to a term of thirty (30) years imprisonment with a corporal punishment of twelve (12) strokes of the cane. We shall henceforth refer the appellant's colleague (Tununu) to simply as "the co-accused."

The appellant and the co-accused were aggrieved but, each took a separate plight in their quest to impugn the verdict of the trial court. The

co-accused, who was the first to pick the cue, had his first appeal against the conviction dismissed by the High Court (Mchome, J.), save for the custodial sentence which was reduced to a term of fifteen (15) years imprisonment. Nonetheless, on his second appeal, this Court (Kimaro, J.A., Luanda, J.A. And Mandia, J.A.) upheld his conviction and, in addition, restored the custodial sentence meted out by the trial court.

On his part, the appellant who sought to vacate the decision of the trial court a good deal later, had his first appeal dismissed by the High Court in its entirety (Mruma, J.). Dissatisfied, he presently locks horns with the verdict in a lengthy memorandum comprised of seven (7) points of grievance. For a better appreciation of the circumstances giving rise to the apprehension, arraignment and the ultimate conviction of the appellant, it is necessary to briefly explore the factual background.

From a total of three witnesses and several material exhibits, the case for the prosecution was to the effect that on the 13th September, 1999, at Mukendo Kati, within the Township and District of Musoma, the appellant and the co-accused jointly stole a plastic bag in which were several items, namely, a quartz wall clock, four blouses, a torch, a bottle of mosquito jelly, a piece of cloth for sewing, a piece of Khanga, a wedding

contribution card, a wallet and a sum of Tsh. 17,000/= in cash; all of which were alleged to be belongings of Moshi Kabondo (PW2). It is, perhaps, noteworthy, that the piece of clothing for sewing, the piece of khanga, the wedding contribution card and the wallet were not amongst the properties itemised on the charge sheet.

To fortify the prosecution contention, PW2 told the trial court that on the fateful day, around 6:00 a.m., she was strolling along Mukendo Kati area heading towards Mkendo Street, within Musoma township. PW2 was holding in her hand the plastic bag into which the referred items were stuffed. As she moved on, the lady caught sight of two men, hitherto unknown to her, who were just standing near the house belonging to a certain Mzee Mchumila. PW2 walked past but, to her surprise, the two strangers hurriedly followed from behind and, no sooner, they closed up on her. Next, one of the strangers grabbed and held PW2 by her neck, whilst the other, who was holding a bow and arrow, swirled forward and took aim at the lady. Then, suddenly, the two thugs snatched the plastic bag from PW2's grip and bolted away with it.

Meanwhile, as PW2 was facing the unfolded predicament, a team of police officers were on a swoop around Musoma township in a crackdown

aimed at robbers and burglers. The team was led by the officer commanding criminal investigations in Musoma District (OC-CID) and No. B7878 detective sergeant Kombe (PW1), was amongst the ranks. Apparently, by a sheer stroke of coincidence, as they strolled along Mukendo street, the team of police officers came across PW2. As was expected, the lady disclosed to the police officers the terrible ordeal she had just been through and gave them details of the items dispossessed of her by the culprits. In a gesture of assistance, the OC-CID advised her to report the incident at the police station.

Thereafter, the team of police officers proceeded to Amri Abeid street where they took positions at a certain bar operating by the name of "Kwa Mama Esther." According to the sergeant, that area is a reputed crime-busters hideout. A little while later, two men emerged at the site one of whom was armed with an arrow and carrying a plastic bag. As the police officers braced themselves for an arrest, those two clicked their heels and took flight. In response, the police officers raised an alarm to attract public attention and, indeed, within a while, the fleeing culprits were restrained by an angry mob and, eventually, securely apprehended by the team of police officers. As it were, the apprehended culprits turned out to be none

other persons than the appellant herein and the co-accused. Upon retrieval by the police, the plastic bag which was in the hands of the appellant happened to contain all the items which were allegedly stolen from PW2, minus the sum of Tsh. 17,000/= in cash. In the course of testimony, PW1 tendered into evidence the plastic bag as well as its contents (exhibit P1).

Later, around 10:00 a.m. and 11:15 a.m., on that same day, a police Assistant Inspector Boniface (PW3), conducted two identification parades in which the co-accused and the appellant were, respectively, the suspects. In both parades, PW2 was the sole identifying witness and, according to PW3, she managed to identify both the appellant and the co-accused. At the close of his testimonial account, the Assistant Inspector tendered into evidence two identification parade registers (exhibit P4 and P5) to buttress the occasion. With this detail, the prosecution drape was drawn closed.

In his sworn reply, the appellant claimed that he was arrested by *sungusungu* vigilantes on a divers date and month in the year 1999. His captors subjected him to untold torture before handing him over to the police at the Musoma Central Police Station. Thereafter, he was hospitalised and attended medical treatment at Musoma Government

Hospital. Upon being discharged, he was surprised to be implicated in the accusation culminating in his trial and conviction to which he completely disassociated and protested innocence. The appellant deplored the testimony of PW3 and claimed that he was actually featured in five identification parades conducted by the police in a row. In the first four parades, PW2 failed to identify him and only managed to implicate him in the fifth parade. That was, he said, after the parade officer tapped him on the shoulder and thereby figuratively elicited on PW2 to identify him.

As hinted upon, on the whole of the evidence, the learned trial Magistrate was impressed by the version told by the prosecution witnesses and, accordingly, convicted the appellant as well as the co-accused. Upholding the appellant's conviction, the first appellate judge summed up his reasons thus:-

> *"**First**, the offence was committed early in the morning and there was light with which the complainant could see the appellant and his colleague from far. **Second**, the complainant reported the incident a few minutes after it occurred and she gave details of her stolen items including wedding cards which bearing (sic) her*

names (exhibit P1). ***Third****, the appellant and his colleague was arrested by the police few minutes after the incident and they were found in possession of all items mentioned by the complainant (PW2) to the police.* ***Fourth****, the appellant and his collegue failed to explain how they came into possession of those items (exhibit P1) and* ***Fifth****, the appellant was identified in the identification parade which was conducted few hours after the incident."*

As, again, already intimated, the appellant is aggrieved upon a lengthy memorandum which may be crystalised under five headings:-

1. That the memorandum of undisputed facts compiled by the trial court during the preliminary hearing was not read over to the appellant;
2. That to the extent that PW2 did not identify the appellant at the *locus in quo*, the identification parade was valueless;
3. That the identification parade was unfairly conducted;

4. That the doctrine of recent possession was misapplied against the appellant; and
5. That the appellant's defence was unfairly dispatched without due consideration.

As will come into picture in the course of our judgment, the area of contention was later narrowed down and evolved on the issue whether or not the doctrine of recent possession was justifiably invoked by the two courts below.

At the hearing before us, The appellant was fending for himself, whereas the respondent Republic had the services of Ms. Bibiana Kileo, learned Senior State Attorney. The appellant fully adopted the memorandum of appeal without elaboration. He, however, asserted his right to make a rejoinder, if need be, in the wake of the submission of the learned State Attorney.

On her part, Ms. Kileo commenced her address by discounting the claim advanced by PW2, in the course of her testimony, that she identified the appellant and the co-accused at the scene of the crime. In this regard, the learned Senior State Attorney had reference to her other converse account to the effect that the culprits were not previously known to her

and that she only identified them by attire. Having discredited PW2's claim with respect to her alleged visual identification of the culprits, Ms. Kileo proceeded further to similarly discount PW2's identification of the appellant at the police parade. To say the least, we entirely subscribe to the view that once the alleged identification by PW2 at the scene is discounted, it necessarily follows that her subsequent claim of identification at the police parade cannot be entertained. We may perhaps add, in this regard, that the manner in which PW3 conducted the identification parade left a lot to be desired. This is, for instance, discernible from PW3's riposte to the co-accused's cross-examination:-

> *"You have no right to call your relative or advocate at the identification parade. It is conducted by the police alone for the republic for justice. That is the police procedure. It is not illegal."*

The police procedure on identification parades which PW3 was seemingly unaware is comprised in the Police General Orders (PGO) which under item 232 (2) (d) reads:-

> *"If the suspect desires the attendance of a solicitor or friend, arrangements must be made*

for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing."

To reiterate our remark, it is doubtful whether the parade was conducted in accordance with the prescribed procedure.

Having distanced herself from PW2's claim of seeing the appellant at the scene of the crime as well as her identification of him at parade, the learned Senior State Attorney, nevertheless, insistently supported the conviction on account that the doctrine of recent possession was justifiably invoked against the appellant with respect to properties which were stolen from PW2 and found in possession of the appellant and the co-accused. This being the contention, it is, therefore, pertinent to clearly have in mind the law on the applicability of the doctrine. Fortunately, the law on the subject is, upon numerous decisions, well settled. In the unreported Criminal Appeal No. 56 of 1992 - **Mwita Wambura vs. The Republic**, this Court reiterated four prerequisites for the invocation of the doctrine of recent possession:-

"(1) The stolen property must be found with the suspect;

(2) The stolen property must be positively identified to be that of the complainant;

(3) The property must be recently stolen from the complainant; and

(4) The property stolen must constitute the subject of the charge."

Thus, the presumption of guilt can only arise where there is cogent proof that the stolen thing which is possessed by an accused is the very one that was stolen during the commission of the offence charged and, no doubt, it is the prosecution which assumes the burden of such proof, irrespective of the event where the accused does not claim ownership of the property (see **Ally Bakari and Another vs. The Republic**, [1992] TLR 10).

To buttress her contention, Ms. Kileo strenuously argued that the plastic bag along with the properties found therein were the very ones stolen from PW2 and, accordingly, the two courts below justifiably invoked the doctrine of recent possession against the appellant. The learned Senior

State Attorney added that, not insignificantly, one of the items, namely, the wedding contribution card, bore the name of PW2 which, according to her, in itself enhanced PW2's ownership to it.

With respect to the position taken by Ms. Kileo, it should be recalled that the plastic bag as well as the properties allegedly stolen were tendered into evidence by PW1 and, in the course of her testimony, the purported owner (PW2) did not attempt any distinctive description of them. That is where the problem began and, much worse, when the items were shown to her in court the witness did not make a physical description on any of them. Rather, she simply made a bland assurance that:- "*These are my property.*" Again, with respect, the proper procedure of identification of property in court was briefly but succinctly prescribed in the High Court case of **Nassoro s/o Mohamedi vs. The Republic** (1967) HCD n. 446 in the following words:-

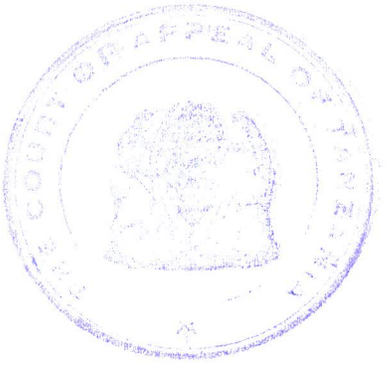
> *"...the claimant should describe the item before it is shown to him so that it can be clear to the court when the item is eventually tendered whether or not he was able to identify it."*

The foregoing statement of principle was referred and authoritatively adopted by this Court in the unreported Criminal Appeal No. 99 of 2000 – **Abdul Athuman @ Anthony vs. The Republic**. To the extent that PW2 simply gave a nondescript assurance that the sized items were her belongings, the identification of the allegedly stolen items was wholly inadequate. The allegation that, for one, the wedding contribution card bore PW2's name is not of any material significance, particularly since the detail was not exhibited in court and, in any event, the so-called wedding contribution card was not constituted as a subject of the charge.

The learned Senior State Attorney, additionally, sought to capitalize on the conduct of the appellant and the co-accused of running away soon after seeing the team of police officers. In her submission, such conduct was not consistent with the innocent. With respect, we are far from being persuaded that the conduct of running away, standing alone, comes within a measurable distance of proving the offence charged. It may be that the appellant and the co-accused desperately wanted to avoid the team of policemen, but that is really all what one can discern from their conduct. Whatever they were fleeing from is, on the available evidence, a matter of mere speculation.

To this end, were are of the settled opinion that the evidence in support of the case for the prosecution left too many loose ends untied and, in the result, the accusation laid at the appellant's door was not sufficiently demonstrated. His conviction and sentence is, accordingly, set aside and the appellant should be released from prison custody forthwith unless he is held for some other lawful cause.

DATED at **MWANZA** this 29th 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.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL