IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MASSATI, J. A., MUSSA, J. A. And MWARIJA, J. A.)

CRIMINAL APPEAL NO. 375 OF 2015

MATHIAS SHISHI @ MULUMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Tabora)

(Mgonya, J.)

dated the 22nd day of April, 2015
in
DC. Criminal Appeal No. 172 of 2014

.....

JUDGMENT OF THE COURT

20th & 22nd April, 2016

MASSATI, J.A.:

The appellant appeared before the District Court of Bukombe, in Geita Region, and charged, along with one other person, with two counts; conspiracy to commit offence contrary to section 384, and theft, contrary to sections 258 (1) and 265 of the Penal Code.

According to the substituted charge filed on 2/8/2013, it was alleged in the first count that, on the 10th June, 2013 at 19:00 hrs at Bukombe Village, the appellant, and one SUMBA HANGO, conspired to commit the offence of theft. In the second count, it was alleged that on the same day and time

the duo did steal one motorcycle, make SAN LG registration No. T.263 AXW, valued at Tshs. 1,850,000/= the property of one EDWARD AMOS. They both pleaded not guilty.

The prosecution case was that on 8/6/2013 the police at Bukombe got information that there was a stolen motor cycle at Kilimahewa Street, and that the appellant was the suspect. So, the OC CID instructed (PW1) E 9556 D/Sgt Joseph to begin investigation. By then, the appellant was already in custody. PW1's investigation began by interrogating the appellant's wife. The latter, according to PW1, took him to the house of one Said Kassanga, (PW2). PW2 admitted the presence of the motorcycle in his house, and on interrogation, he informed the police that the motorcycle was brought by the appellant. The motorcycle was seized and taken to the police station. The search order and the motorbike were admitted in evidence as Exhibits P1 and P2 respectively. ZACKARIA LIGANGA (PW3) witnessed the search.

In his sworn evidence, the appellant told the trial court that, he was arrested on 6/6/2013 and interrogated about a stolen motorcycle. He was detained for two days, when he saw his wife, who told him that she had also been arrested and taken to a certain house at Kilimahewa Street, where a motorcycle was recovered. The police then connected him with the

motorcycle, and was initially charged with robbery, a charge that was later withdrawn. He denied any knowledge about the offence. His wife, CELINA VALENTINO (DW 3) testified in support of his defence. She told the trial court that the appellant was actually arrested on the night of 4/6/2013. On 7/5/2013 when she went to visit him she was taken by the police to a certain house, where a motorcycle was taken out. She denied to have sent the police there or any knowledge about the motorcycle. She was however, arrested and locked up until the next day when she was released.

On the basis of this evidence, the trial court believed the prosecution case and convicted the appellant "accordingly" but acquitted his co accused. It was not clear which of the two offences was the appellant convicted, or if he was convicted of both counts. On appeal, although the Republic did not support the conviction, after reevaluating the evidence on record, the High Court was satisfied that although the stolen motor bike was found in PW2's house, the latter was a credible witness, and so found that the appellant was in constructive possession of the stolen motor cycle. So, in the view of the learned judge, the prosecution case was proved beyond reasonable doubt and so dismissed the appeal in its entirety.

Aggrieved, the appellant has preferred the present appeal. His memorandum of appeal comprised of five grounds of appeal, to wit:-

MEMORANDUM OF APPEAL

Made under rule 72 (1) & (2) of the CAT rules, 2009.

I, the appellant herein above appeals to the court of Tanzania at Tabora, hereby appeal to the court of appeal of Tanzania against the above mentioned decision, whereby I was convicted of conspiracy to commit an offence and theft c/s 384 and 265 of the penal code cap. 16 R.E. 2002.

1. *That, the two lower courts below erred on point of laws and fact to impose recent possession, while having a reason to believe that the said stolen Motorcycle was caught or seized in my dwelling place.*
2. *That, the learned judge totally erred on point of law and she misdirected herself in her judgment when she failed to observe that there is no direct evidence to prove or to show that the appellant sent the said Motorbike to PW2's House, therefore the conviction was injustice at all.*
3. *That, the honourable judge erred on point of law in believing and uphold that the prosecution witness proved the case beyond reasonable doubt. My lord judges the prosecution side alleged that the said Motorcycle was stolen from Edward Amos or it was property*

of EDWARD AMOS why did prosecution fin it convenient not to call Edward Amos to prove his ownership and to identify the same.

4. *That, the learned trial judge erred on point of law and fact in believing the evidence of PW2 THE ONE WHO THE Motorcycle was found in his house, therefore, he was giving the evidence for interest to save the own skin therefore, his evidence was supposed to be expunged in the proceedings.*
5. *That, from the above grounds of appeal I therefore humbly pray that this appeal be allowed conviction and sentence be set aside and order to my immediately released from the Prison wall.*

Dated at Tabora this 11th day of September, 2015

THE APPELLANT:- ***MATHIAS S/O SHISHI @ MULUMBA***

At the hearing of this appeal, the appellant appeared in person, and adopted his memorandum of appeal and agreed to let the State Attorney begin to submit, while he reserved his right to reply if the need arose.

Mr. Ildephonce Mukandara, learned State Attorney, who appeared for the respondent/Republic declined to support the conviction. Instead, he supported the appeal.

Arguing generally in favour of the appeal, Mr. Mukandara, submitted that **first**, the motorcycle in question was not found with the appellant. It was, instead, found with PW2, but there was no independent evidence as to how the motorcycle reached there; as the evidence of PW1 and PW3 is contradictory in that aspect. **Second**, there were no reasons why the alleged owner of the motorcycle, one Edward Moses was not called to testify, although he was around. **Lastly**, the learned counsel submitted that there was a variance between the particulars in the charge sheet and the evidence as to the date of the commission of the offence. This was not a minor error, he submitted, referring to the decision of this Court in **MAKELELE KULINDA vs R,** Criminal Appeal No. 175 B of 2013 (unreported). The learned counsel also pointed out that there was no order of restitution of the motorcycle, which was an irregularity.

Answering to some questions from the bench, Mr. Mukandara, admitted the existence of another irregularity; which was that, although on 2/8/2013, the charge was substituted and withdrawn against the third accused, DANIEL s/o ERASTO, the subsequent proceedings show that he was still on and even cross examined PW1 (p.9) and PW2 (p.10) long after that.

Secondly, the learned counsel also pointed out that it is not clear from the judgment of the trial court of which of the two counts or both, the appellant was convicted; and that, however, with the acquittal of the other accused person, it was impossible to convict the appellant of the offence of conspiracy.

Given the chance to reply, the appellant said that he had nothing useful to say. He just reiterated his prayer to the Court to allow his appeal.

Just as Mr. Mukandara did, we intend to deal with the grounds of appeal, generally, since they all gravitate around the same point – whether the appellant was found in possession of the motorcycle in question.

The conviction of the appellant of the offence of theft of the motorcycle, was based on the doctrine of recent possession. This proceeds from the concurrent findings of the two courts below, that, the appellant was found in "constructive possession" of the motorcycle, because although PW2 was the one that was found in physical possession, it was established that he (the appellant) was the one who took it there.

Without fear of contradiction, it may now be stated that, as a matter of principle, for a proper application of the doctrine of recent possession, it

must be proved that (i) that the property was found with the accused (ii) that the property was the property of the complainant (iii) that the property was stolen from the complainant, and (iv) that the property was recently stolen from the complainant. It is also the law that 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 (See **ALHAJ AYUB @ MSUMARI & OTHERS vs R,** Criminal Appeal No. 136 of 2009 (unreported); **HAMIS MEURE vs R.** (1993) TLR 213.

In the present case, the allegation was that the motorcycle was stolen from one EDWARD MOSES. The first blow to the prosecution case was that the said EDWARD MOSES did not testify. So, all evidence from PW1 about the ownership of the motorcycle, was, but hearsay, and inadmissible. It should therefore be discarded. **Secondly**, it was also established that the motorcycle was not found in the appellant's house but from PW2's. During the search of PW 2's house, the appellant was not there. PW1's claims that he was taken there by the appellant's wife, were refuted by the appellant's wife in her testimony, although she admitted that she was present when the motorcycle was seized from PW2. PW2's testimony that the motorcycle was sent to his house by the appellant on 4/6/2013, does not tally with the

charge that the motorcycle in question was stolen on the 10th June, 2013. If that is so, then, it only means that if the appellant sent the motorcycle there on 4/6/2013 and remained there until 8/6/2013 when it was handed over to PW1, then, it could not have been the same one that was stolen on 10/6/2013 from Edward Moses. If it is true that the motorcycle was stolen on 10/6/2013, then either it was a different one or it was not the appellant who did so, because, according to PW1, the appellant was in the police cell from 8/6/2013 until 10/6/2013 when he was taken to the District Court. All the above pointed discrepancies are meant to demonstrate that the prosecution evidence was so discreditable that it cannot justify the invocation of the doctrine of recent possession. It was therefore wholly wrong for the two courts below to rely on the doctrine to justify the conviction of the appellant. We therefore wholly agree with the grounds of appeal as filed by the appellant and supported by the respondent/Republic.

The above would have sufficed to dispose of the appeal, but for the sake of completeness and the future, we would also like to put on record our following observations.

The first observation is that, there was a clear variance between the charge and the evidence as to the date of the commission of the offence. Whereas the charge alleges that the offence was committed on 10/6/2013,

PW1 said it was 8/6/2013, whereas according to PW2 it was on 4/6/2013 that the motorcycle was sent to his house.

The trial court should have noticed this discrepancy and moved to amend the charge under section 234 of the Criminal Procedure Act Cap 20 R.E. 2002. As we observed in **MAKELELE KULINDWA vs R.** (*supra*) this was a serious omission because as demonstrated by the record, it embarrassed the appellant in his defence as he decided to address the court as to his whereabouts on the 6/6/2013, which was not the date he was alleged to have caused the offence.

The second observation relates to the manner in which the appellant was convicted by the trial court, and confirmed by the High Court. The appellant faced two counts. In its judgment, the trial court just found the accused "guilty of the offence" and convicted him accordingly. However, section 312 (2) of the CPA requires, in case of a conviction....

> *"the judgment should specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted..."*

So, in this case the judgment should have specified the offence(s) and the section(s) of which the appellant was convicted. As presently worded, it

is difficult to tell whether the appellant was convicted of both offences or of, only the offence of theft. This omission is fatal and must, in future, be avoided by trial courts.

The last observation is in respect of the offence of conspiracy to commit an offence which was charged along with the substantive charge of theft.

Although it is not illegal to join a count of conspiracy together with a substantive charge for a specific offence, if the accused would not be prejudiced thereby, it is not usually desirable, and if it is necessary to do so in the interests of justice, it is usually preferred as an alternative count. (See **COOPER AND CROMPTON** (1947) 2 ALL E.R. 701, **MUSINGA vs R.** (1951) 18 EACA 211. **VERRIER vs DPP** (1966) 3 ALL E.R. 568, **KINYANJUI vs R.** (1986 – 1989) 1 EA. 288 (CAK).

In the present case, the appellant faced both counts of conspiracy and theft as substantive charges. Going through his defence, it is difficult to tell whether he paid a deserving attention to that offence. We understand this was so, because in our view, the count of conspiracy added nothing to the effective charge of theft. It merged with the substantive offence, and so, it was really undesirable.

with regard to this count. The presumption is that the appellant was convicted of both offences. But, as Mr. Mukandara, learned State Attorney, has submitted, since the other accused was acquitted, the conviction for conspiracy, if at all entered against the appellant, could not stand.

So, for the major reasons that the doctrine of recent possession was misapplied in this case by the lower courts, this appeal is allowed. The conviction of the appellant is not safe. It is quashed and the sentence is set aside. The appellant is to be released forthwith from custody unless he is held there for some other lawful cause.

DATED at **TABORA** this 21st day of April, 2016.

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL