IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 325 & 327/2014

1. **MUHONI CHACHA @ NGW'ENA**
2. **ISACK MAGAU @ MENG'ANYI KISIRI ....APPELLANTS**

VERSUS

THE REPUBLIC..RESPONDENT

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

(De – Mello, J.)

dated the 08th day of September, 2014
in
Criminal Appeal No. 26 of 2014

JUDGMENT OF THE COURT

16th & 18th May, 2016

MBAROUK, J.A.:

The appellants were arraigned before the District Court of Tarime at Tarime on 9-1-2013, and charged with the offence of Armed Robbery contrary to Section 287A of the Penal Code Cap. 16 of the laws as amended by Act No. 3 of

2011. They were convicted as charged and sentenced to thirty (30) years imprisonment each. Aggrieved, they unsuccessfully appealed to the High Court (De-Mello, J.). Still dissatisfied, the appellants have preferred their appeal to this Court to challenge the findings of the lower courts.

The evidence which is the basis of conviction of the appellants at the District Court was to the effect that on 3-1-2013 at about 18:00 hrs Selestine Omaye (PW1) testified that he was coming from Nyabisanga village to Sirari. When he arrived at his home, he received a phone call that he was required at Nyamurege Street. On his way, he reached Machinjioni area where he saw a young man standing at the center of the road and identified him as the second appellant. Before reaching the place where the second appellant stood, he said, he was stopped by the first appellant who hit him on his head by an iron bar and started to bleed profusely. PW1

further testified that after he was beaten, the appellants took his bicycle, one mobile phone – Nokia gray colour, a torch, a batch of keys and shoes. He then reported the incident at Sirari Police Station and next morning he was called at the Police Station to identify his stolen items. PW1 said, he managed to identify his bicycle, mobile phone, a torch and his shoes. PW1 further testified that he was able to identify the appellants, because they used to stay in one village and he knew the second appellant since his childhood. He also said that, he mentioned the appellants' names at the police station. PW2 E.2132 D/CPL Haji testified to have arrested the appellants with an iron bar which he tendered and was admitted as Exhibit P.5 at the trial court. Whereas, PW3 E.5258 Dssgt. Julius testified to have written a cautioned statement of the second appellant.

In their defence, the appellants denied to have committed the offence charged against them. The 1st appellant testified to have been arrested on 29-12-2012 at about 4:00 p.m and taken to police station. He further testified that on 1-1-2013, he was taken by the police to Nyamongo in one "boma" to search for a gun but nothing was found. Thereafter, he said, on 5-1-2013 he was severely beaten and sent to a nearby cell and forced to sign on a paper which he did not know its contents.

On his part, the 2nd appellant testified that on 4-1-2013 at about 06:00 hrs while on his way to his work place, he passed at one woman's "Boma" to take a local liquor called "Gongo". While enjoying his drink, police officer ambushed and joined him with others. He further testified that on 5-1-2013, he was told by police officers that he will be locked up until he is going to be identified in connection with a criminal

incident. Thereafter, he said, on 6-1-2013 he was forced to sign something after having been severely beaten. He then produced a PF3 to prove the beating.

In this appeal, each appellant preferred a memorandum of appeal which contained eight grounds of complaints. However, they can conveniently be centred in one ground that the prosecution side failed to prove their case against the appellant beyond reasonable doubt.

At the hearing, the appellants appeared in person unrepresented and opted to allow the learned State Attorney for the respondent/Republic to reply to their grounds of appeal and if the need arises they will respond thereafter.

On her part, Ms. Maryasinta Lazaro, learned State Attorney who represented the respondent/Republic, from the outset indicated to support the appeal. Her reason for doing

so was to the effect that, the evidence adduced by the prosecution witnesses was not sufficient to prove the case against the appellants beyond reasonable doubt. In support of her contention, she said that, PW1's evidence on identification was very weak as he failed to state the actual distance which allowed him to identify the appellants. Also, she said that, even if PW1 testified that she knew the appellants by their names, but there was no where on record PW1 to have stated their names. She added that, even the police officer who recorded PW1's statement at the police station was not called to testify and confirm that he mentioned the names of the appellants.

Furthermore, the learned State Attorney submitted that the complaint did not show any special mark to prove that the tendered exhibits were the very ones which were stolen from PW1. In addition to that, she said, the record is silent as to

where exactly the exhibits were found and by whom. The learned State Attorney urged us to find that for those reasons, the doctrine of recent possession relied upon by the lower courts to convict the appellants was wrongly applied.

On our part, we fully agree with the learned State Attorney that, **One**, the evidence on identification of the appellants at the scene of crime was not sufficient enough to avoid mistaken identity. This is because, even though the incident occurred during day light, it was expected for PW1 to state the approximate distance from where he was and the place the appellants stood, but no such distance was stated. Also, it was expected that as PW1 knew the appellants before, he should have stated the names of the appellants when he testified in court, but he failed to do so. Even the police officer to whom PW1 mentioned the appellants' names was not called to testify.

Two, in addition to that, PW1 failed to give special marks of those allegedly stolen items, and it was also not shown exactly where those allegedly stolen items were found and by whom. We fully agree with the learned State Attorney and we are increasingly of the view that under those circumstances the doctrine of recent possession was not properly invoked by both courts below. In support of our contention, this Court in the case of **Ally Mbelwa v Republic**, Criminal Appeal No. 109 of 2015 (unreported) stated as follows: -

> *"The doctrine can only be invoked if it is shown through evidence to the satisfaction of the court, inter alia, the place where the alleged stolen property was retrieved, in whose possession was found, the complainant to positively identify the*

> *property by special marks as opposed to bare assertion."*

The position was amplified in **Alhaji Ayub Msumari and Others v Republic**, Criminal Appeal No. 136 of 2009 (unreported) where it was held that:

> *"... before a Court of law can rely on the doctrine of recent possession as a basis of conviction in Criminal Case, ... it must positively be proven,* ***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 complaint, 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 only discredited evidence on the same cannot suffice, no matter from how many witnesses."

In the instant case, as pointed out earlier on all the conditions stated in the above cited cases were not found in the evidence adduced by the prosecution witnesses. For the foregoing reason, we are constrained to find that the doctrine of recent possession was wrongly invoked by the lower courts. In addition to that, we are also of the view that, the cumulative discrepancies shown herein above leads us to find the case against the appellants was not proved beyond reasonable doubt.

Having said that, we are of the view that, our analysis on that ground of complaint alone is enough to dispose of the appeal. We therefore allow the appeal, quash the conviction

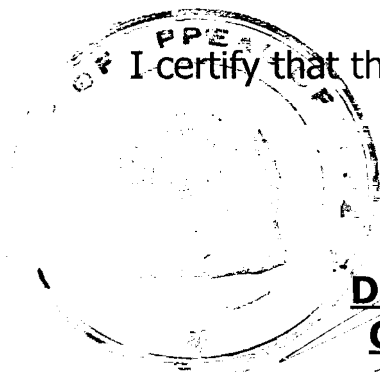
and the sentence imposed on each appellant. We further order that the appellants be released from custody immediately unless they are held for some other lawful cause.

DATED at **MWANZA** this 17th day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL



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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL