

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 250 OF 2015

**1. ATHUMAN IDD
2. LADISLAUS ONESMO.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khaday, J.)

**dated the 27th April, 2015
in
Criminal Appeal No. 34 of 2012**

JUDGMENT OF THE COURT

11th & 16th February, 2016

KILEO, J.A.:

Athuman Idd and Ladislaus Onesmo were arraigned before the District Court of Ngara at Ngara for the offence of armed robbery contrary to section 287A of the Penal Code. They were convicted and sentenced to the mandatory sentence of thirty years imprisonment. Initially another person had been charged along with them with an alternative count of receiving and retaining stolen property contrary to section 311 of the Penal

Code but at the end of the trial he was found not guilty and he was acquitted.

The appellants were unsuccessful in their appeal to the High Court and have preferred separate appeals before the Court on a number of grounds. Basically though, the appeals revolve under the application of the doctrine of recent possession.

We find it befitting at this juncture to rephrase, albeit briefly, the facts leading to the appeal before us.

On the date of the incident, i. e. 18.05.2011 at about 8.45 pm, the complainant, Msinzi Sebabili (who testified as PW1) was riding his motorcycle (exhibit P1) on his way home when he was allegedly stopped by the appellants who asked for a lift from him. At first he declined but later obliged after he was promised he would be paid 8,000/- for the ride. In the course of the ride the appellants turned on him, stabbed him on his chest and made away with the motorcycle. Following the injury he sustained in the course of the attack, the victim was admitted in hospital for six days. The case for the prosecution further showed that the day following the incident the appellants took the motorcycle to PW2's place for custody with the second appellant telling her that it had a defect. Later the

appellants returned with a fundi who repaired the motorcycle and they left with it. In the course of their investigations the police ambushed the house belonging to the appellant's co-accused at the trial where they found the appellants and the motorcycle inside. It was in the evidence of PW3 that the 1st appellant claimed that the owner of the motorcycle was the second appellant while the 2nd appellant claimed that the owner of the motorcycle was the 1st appellant. That each appellant was attributing blame to the other also came out in the appellants' own defence at the trial.

The High Court sustained conviction basing on the doctrine of recent possession. It found that identification at the scene of crime was not water tight.

The appellants filed separate memoranda of appeal. The main complaint that runs through each memorandum is the reliance, by the courts below on the doctrine of recent possession. Also in question was the proof of /or passing of ownership of the motorcycle from the original owner to the victim of the armed robbery. Adequate description of the motorcycle was also questioned. The disparity in the registration card number that was tendered and that which was recorded by the trial magistrate to be an exhibit was pointed out as having weakened the case for the prosecution.

At the hearing of the appeal the appellants appeared in person and had no legal representation. The respondent Republic was represented by Mr. Athumani Matuma, learned Senior State Attorney. When called upon to address the Court on their appeal, the appellants opted to have the learned Senior State Attorney address the Court first.

Mr. Matuma vehemently resisted the appeal averring that there was ample evidence which established that the appellants were in possession of the stolen motorcycle, the subject of the armed robbery. The learned Senior State Attorney further argued that the appellants along with the motorcycle were found in the house of their co-accused who was acquitted. The learned Senior State Attorney submitted that actually the appellant's defence furthered the case for the prosecution. As for the disparity in the card numbers that appear on the record, the learned Senior State Attorney argued that it must have been a slip of the pen and that the Republic as well as the victim of the crime should not be denied justice on the basis of the court's inadvertence.

The first appellant on his part argued that the case for the prosecution was not proved because the original owner of the robbed motorcycle did not give evidence in court and moreover no local authority official testified with regard to their being found in possession of the motorcycle. The appellant also claimed that the registration card which they did not object to was not the same one that was tendered in court. The second appellant reiterated his innocence asserting that nothing was found in his house and that in any case there was no evidence that the motorcycle allegedly found in their possession was the same one that was stolen from the complainant.

There is no dispute that PW1 was robbed of his motorcycle on 18th May 2011. Though the question of proof of ownership was raised we are however of the settled view that PW1 sufficiently explained, and he was believed that he had bought the motorcycle from one SalumKhalifan but at the time of the commission of the crime he had not formally transferred ownership into his name. The question of ownership need not detain us in the circumstances. The appellants also questioned the disparity appearing in the record between the registration number of the card that was tendered by the witness as an exhibit and the number that the trial

magistrate recorded as an exhibit. We can quickly dispose of this one. The trial magistrate ought to have recorded the number that was mentioned by the witness. However, the fact that he recorded a different number alone cannot be the basis of absolving the appellants of culpability in view of other circumstances connecting them to the commission of the crime.

The major question in this case is whether it was proved that the appellants were found with the motorcycle that was robbed from PW1 a short time after PW1 had been robbed.

The motorcycle was stolen on 18. 5.2011. It was recovered on 20.5.2011 which was hardly two days following the robbery incident. There was evidence that at first the two appellants approached PW2 whom they asked to keep their defective motorcycle. Later they returned with a fundi and had the motorcycle removed from PW2's compound. Thereafter they proceeded to the house of the co-accused where the motorcycle was recovered. The two appellants were arrested at the premises of the co-accused at the time of recovery of the motorcycle. This came out from the evidence of PW3 (D/Sgt. Oscar, PW5 DC Dickson and PW4, Alfred Liziga (the chairman of sub-village of Ngundusi where the appellants' co-accused lived). There was also the evidence of the appellants' co-accused who

testified as DW3 that it was the two appellants who took the motorcycle to his house. To cap it all, the appellants were throwing the blame at each other in connection to possession of the stolen motorcycle. Towards that end we ascribe to Mr. Matuma's submission that the defence case actually advanced the case for the prosecution.

Without much ado we are satisfied that though the appellants were not identified at the scene of crime there was ample evidence to establish that they were jointly and together found in possession of the motorcycle belonging to PW1 shortly after it was robbed from him. They gave no explanation how the motorcycle came into their possession other than through the robbery that was perpetrated against PW1

All the ingredients of the doctrine of recent possession as laid down by this Court in a number of authorities were established in this case. One such authority is **Fidelis Mliwilo v. Republic**, Criminal Appeal No. 239 of 2010 (unreported). In that case the following ingredients all of which have been established in this case were listed:

- (i) The property is found with the accused person;
- (ii) The property is positively identified as that of the complainant;

- (iii) The property was recently stolen from the complainant;
- (iv) The property must relate to the one in the charge sheet.

In the end we find no reason to fault the findings of the High Court and the trial court in their application of the doctrine of recent possession in the present case. We find the appeals by Athuman Idd and Ladislaus Onesmo to be lacking in merit and we accordingly dismiss the same.

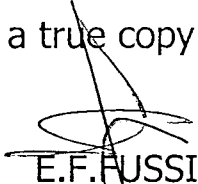
Dated at Bukoba this 15th Day of February 2016

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL