

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

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

CRIMINAL APPEAL NO. 547 OF 2015

GILBERT REVELIAN @ OMBENI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Conviction and Judgment of the High Court
of Tanzania at Bukoba)**

(Matogolo, J.)

**Dated the 4th day of September, 2015
in**

Criminal Appeal No. 27 of 2015

JUDGMENT OF THE COURT

23rd & 26th February, 2016

MMILLA, J. A.:

The appellant, Gilbert Revelian @ Ombeni was one of the four accused persons who were charged before the District Court of Ngara at Ngara with two counts; burglary contrary to section 294 (1) of the Penal Code and stealing contrary to section 265 of the same Code. The other accused were Jastan Nasho @ Nzotunga, Ibrahim s/o Benjamin @ Mhuzi and Tafuteni Medani. All of them were convicted and sentenced to ten (10) years imprisonment each in respect of the first count and a further term of five (5) years imprisonment each in respect of the second count. The sentences were ordered to run concurrently. It should be noted however,

that the second accused, Justin Nashon @Nzotunga had jumped bail after he had defended himself. He was sentenced in absentia. The other three however, felt aggrieved and appealed to the High Court at Bukoba. The first appellate court allowed the appeals of Ibrahim Benjamin @ Mhuza and Tafuteni s/o Medani, but disallowed that of the appellant. Undeterred, he appealed to this Court.

The brief facts of the case were that on 12.12.2013 at 02.40 hrs, thieves broke and entered into the house of PW2 Baraka Festo and stole from therein one motor cycle make SUN LG with Reg. No. T.557 CLH, red in colour. PW1 raised the alarm and several people responded and rushed to the latter's premises to render assistance, but then the thieves had already vanished. The following morning, the villagers tracked the thieves by following the motor cycle marks which led to the residence of the appellant. PW1 had a remote control of the said motor cycle. Upon finding that the tyre marks ended at the appellant's house, he pressed the remote in consequence of which the motor cycle which was inside got switched and they heard it. The villagers surrounded the house while others entered in the house and recovered the said motor cycle. Among those who were at the appellant's house at the time the motor cycle was

recovered were PW2 Amos Festo who was appellant's neighbor, PW4 Batangimana Ndalombali who was a ten cell leader, PW5 Laulian Ngongwa and PW6 G. 1339 P.C Yusuph. The appellant was taken to police station together with the motor cycle. He was subsequently charged on those two counts as already stated.

The appellant's defence was that the complainant faked the case against him on the basis that he failed to repay him the money he owed him. He had requested the trial court to believe his story and acquit him. As aforesaid, he unsuccessfully appealed to the High Court, hence the present appeal.

Before us, the appellant appeared in person and defended for himself, while the respondent Republic was represented by Mr. Athuman Matuma, learned Senior State Attorney. The appellant opted for Mr. Matuma to submit first, undertaking to make a response later, if necessary.

While admitting that it was difficult to grasp what the first two grounds of appeal all about, he nevertheless suggested to discuss the third ground concerning the doctrine of recent possession on which the entire appeal seemed to revolve. We respectfully agreed with him.

Submitting on that aspect, Mr. Matuma said that the evidence was clear that the said motorcycle was found in the house of the appellant. He contended that PW1 correctly identified it by its registration number and color. He insisted that the two courts below properly invoked the doctrine of recent possession based on the evidence adduced by the prosecution witnesses. He urged the Court to dismiss the appeal.

On the other hand, the appellant insisted that the trial court wrongly invoked the doctrine of recent possession because it failed to consider the fact that the said motorcycle could have deliberately brought inside his house without him being aware. He submitted therefore that the first appellate court improperly upheld that decision. He pressed the Court to allow his appeal.

On our part, we hasten to agree with Mr. Matuma that the determination of this appeal depends solely on the doctrine of recent possession. For that reason, the issue before us is whether or not that doctrine was properly invoked.

We wish to recap that the doctrine of recent possession evolves on the principle that if a person is found in possession of a recently stolen property and gives no plausible explanation, the court may legitimately

infer that he is a thief, a breaker or a guilty receiver – See the cases of **Malik Said Mapululu & Others v. Republic**, Criminal Appeal No. 49 of 2008 CAT, **Nkuba Mangula @ Yohana Julius & Another v. Republic**, Criminal Appeal No. 186 of 2013 and **Ramadhani Ayubu v. Republic**, Criminal Appeal No. 122 of 2004 CAT (all unreported). In the latter case of **Ramadhani Ayubu v. Republic**, the Court stated that:-

"We unreservedly agree with the principles of law as observed by the learned High Court Judge that if a person is found in possession of recently stolen property and he fails to give an explanation or gives one which is unreasonable, depending on the circumstances of the case, the Court may rightly infer that he is either a breaker and thief or guilty receiver. We are minded to add that the Court has to critically analyse the pertaining circumstances in relation to the explanation, if any, given by the person in whose possession the recently stolen property is found. Circumstances may include time between the theft and the actual finding of the property in that person's possession; the nature of the property itself, whether it is of the type that can easily pass hands; the circumstances in which

the possession is discovered including the conduct of the possessor in relation to the property in question. The guilt inference will depend on circumstances and facts of a particular case. Throughout however, the burden of proof does not shift, the prosecution has to prove its case beyond all reasonable doubt. The accused's explanation on possession should simply be reasonable."

We hurry to state that we agree with what was stated in that case.

In the present case PW1 clearly identified his motor cycle, and that it was found hidden in the appellant's house. His evidence was corroborated in material particulars with that of PW2, PW3, PW4 and PW5 who testified in common that the said motorcycle was found in the appellant's house. Also certain is the fact that the appellant neither claimed that he was the owner of that property, nor did he give plausible explanation how it came into his possession. In the circumstances, we find and hold that the doctrine of recent possession was properly invoked in this case. Thus, the appeal was instituted without sufficient reasons, thus we dismiss it.

Before we conclude however, we have found it important to express our views as regards to the sentence imposed on the appellant in respect

of the first count of burglary. The record shows that he was sentenced to serve ten (10) years imprisonment. We were curious to know whether the trial court had such powers to impose such a sentence in respect of the charged offence of burglary. We therefore, *suo motu*, asked Mr. Matuma to air his views.

Mr. Matuma submitted that in terms of section 170 (1) (a) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA), the powers of magistrates is limited to 5 years unless it is forwarded to the High Court for confirmation as per subsection (2) (c) thereof. Since that was not done, he prayed the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap 141 of the Revised Edition, 2002 (the AJA) and set aside the otherwise illegal sentence.

As correctly submitted by Mr. Matuma, our starting point is section 170 (1) (a) of the CPA. That section provides that:-

"170.(1) A subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences—

(a) imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the

Schedules to the Minimum Sentences Act * which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment."

However, we have noted that the present case was tried by a senior resident magistrate who, under the proviso to subsection (2) (c) of the CPA, had discretionary power to impose such sentence. That provision states that:-

"Notwithstanding the provisions of subsection (1)–

(a) a sentence of imprisonment–

(i) for a scheduled offence (as defined in subsection (5), which exceeds the minimum term of imprisonment prescribed in respect of it by the Minimum Sentences Act;

(ii) for any other offence, which exceeds twelve months;

(b) a sentence of corporal punishment which exceeds twelve strokes;

(c) a sentence of a fine or for the payment of money (other than payment of compensation under the Minimum Sentences Act, which exceeds six thousand shillings, shall not be carried into effect, executed or levied until the record of the case, or a certified copy of

it, has been transmitted to the High Court and the sentence or order has been confirmed by a Judge:

Provided that this section shall not apply in respect of any sentence passed by a Senior Resident Magistrate of any grade or rank.” [Emphasis added]

In the circumstances of this case therefore, we are satisfied that the sentence meted to the appellant in the first count was legal, hence that we have no cause to interfere.

Order accordingly.

Dated at Bukoba this 26th 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