IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 183 OF 2015

KADUMU GURUBE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Gwae, J.)

dated 13th day of April 2015
in
Criminal Appeal No. 72 of 2014

JUDGMENT OF THE COURT

23th & 26th May, 2017

MUSSA J.A.:

In the District court of Tarime, the appellant along with four others were arraigned for armed robbery, contrary to section 287A of the Penal c Code, Chapter 16 of the Revised Laws. On the indictment, the appellant stood as the first accused, whereas his co-accused persons were, namely, Chacha Chandi, Amos Mgusuhi, Magabe Charles and Marwa Mang'o who were, respectively, the second to fifth accused persons.

The appellant and the co-accused persons denied the charge but, after a full trial, it was the appellant alone who was found guilty and convicted. Upon conviction, he was handed down the statutory minimum sentence of thirty (30) years imprisonment. His appeal to the High Court was dismissed in its entirety (Gwae, J.), hence the present second appeal.

For a better appreciation of the points of contention in this appeal, it is desirable to explore the factual background giving rise to the arrest arraignment and ultimate conviction of the appellant.

The case for the prosecution was comprised of four witnesses and two documentary exhibits. From the totality of the prosecution version, it was common ground that on the 19th March, 2013 around 2.00 am or so, the residential house belonging to Karen Akinyi (PW1) had two bandits for visitors. The intruders made their way into the residence by breaking the entrance door, following which they immediately confronted Karen in a frenzy of assaults. The bandits dispossessed PW1 of her sum of Shs. 300,000/= in cash and a Nokia mobile phone. Upon demanding for more, Karen advised them seek the money from the residence of her son, namely, Haji Elias (PW2) which was in the neighborhood. She, actually,

walked them to Haji's residence but, upon opening the door, the bandits immediately slashed him on his knee with a machete. According to PW1, his son could not endure any longer, whereupon he ran away beyond the reach of the intruders who tried to pursue him.

Both PW1 and PW2 were later treated for injuries at Kinesi Dispensary. As regards the identity of the assailants, PW1 claimed that she recognized the appellant who was previously known to him with the aid of a kerosene lamp. The witness elaborated further that the lamp lighting was bright and that the appellant was clad in a black shirt and a pair of black jeans trousers. Nonetheless, she could neither recognize nor identify the other bandit who was in the company of the appellant. On his part, Haji also claimed that, with the aid of moonlight, he recognized the appellant who was previously known to him as a village mate. According to PW1, in the aftermath of her medical treatment, she gave a report of the episode to the chairman of the Village. Not insignificantly, however, PW1 did not clarify as to exactly when she made this report.

The Village Chairman, namely, Hamisi Katali Bakari, actually, gave testimony as prosecution witness No. 3 and, in effect, confirmed the Karen

residence robbery episode. Upon visiting the scene, Karen, whom he referred to as "Mama Baraka," told him that he identified the appellant to have been among the culprits. In response, PW3 claimed to have summoned the Village Security Committee where names of seven suspects, including the appellant, were discussed. The suspects were allegedly interrogated and, next, this is what PW3 told the trial court:-

> *"...on search in the house of first accused we find one phone mobile, under the mattress, being having no battery, no line, then we sent them to police and brought to this court ..."*

From the foregoing testimony, we hasten the remark that, apparently, PW3 did not wish to disclose the date when the appellant and company were apprehended by the village authorities and, neither did he wish to tell the date when the appellant and company were handed over to the police. But if the evidence of Thomas Opeli (PW4), the hamlet chairman, is anything to go by, the appellant was apprehended and searched by the village authorities around 10.00pm on the 5th April 2013, that is, more than two weeks after the robbery episode. In the search, a mobile phone was retrieved. According to PW4, upon the mobile phone

being retrieved at the residence of the appellant, a battery was inserted on it and, after it was switched on, the mobile phone displayed the name of "Mama Baraka," The same was identified by PW1 at the police station as being stolen from the robbery episode and, incidentally, she was the one who tendered it as an exhibit. This detail concludes the version which was unfolded by the prosecution during the trial.

In reply, the appellant was fairly brief in his complete disassociation from the prosecution accusation. He did not, however, dispute PW4's detail about being apprehended by the village authorities on the 5th April, 2013. Upon arrest, he said, he was incarcerated at the village office till when he was handed over to the police on the following day. In the course of his testimony the appellant denied each and every claim advanced by the prosecution witnesses including the detail about being found in possession of the mobile phone which was identified by PW1.

On the whole of the evidence, the learned trial Magistrate (Kilimi, R.M.) was fully satisfied that the prosecution established its case against the appellant to the hilt. In the result, the appellant was found guilty, convicted and sentenced to the extent we have already indicated. Again,

as we have hinted upon, the first appellate court found no cause to vary the trial court's verdict which was upheld. The appellant seeks to impugn the verdict of the first appellate court upon a lengthy memorandum of appeal which is comprised of five points of grievance. Added to it, is a verbose supplementary memorandum of appeal which enjoins five other points of grievance. We should remark, however, that some of the grievances are raised repetitively.

At the hearing before us, the appellant entered appearance in person, unrepresented, whereas the respondent Republic had the services of Mr. Juma Sarige, learned Senior State Attorney, who was being assisted by Ms. Dorcas Akyoo, learned State Attorney. As it were, the appellant fully adopted the memorandum of appeal but deferred its elaboration to a later stage, if need be, after the submissions of the Republic.

The learned Senior State Attorney commenced his address by fully supporting the appeal. In his submissions, the alleged identification of the appellant by PW1 and PW2 was suspect and hardly worth of belief. In this regard, Mr. Sarige had in mind the two witnesses' account that the appellant was previously known to them as their village mate and, yet, the

appellant was not apprehended in the immediate aftermath of the episode. The learned Senior State Attorney also attempted to tie the evidence of visual identification of the suspect with the evidence of identification of the mobile phone by PW1 which, he said, was manifestly inadequate. Mr. Sarige, accordingly, advised us to allow the appeal, quash the conviction and sentence with an order setting the appellant at liberty. Having heard the submissions of the learned Senior State Attorney, the appellant fully supported him and did not wish to make any rejoinder.

On our part, we have no cause to doubt the prosecution contention that there was, indeed, a robbery occurrence at the residence of PW1 on the alleged fateful day and time. The issue of contention is much narrower and the same pertains to the identity of the robber (s). It is noteworthy, in this regard, that the appellant is implicated upon two separate strands of evidence. The first set of such evidence relates to claims of visual recognition at the scene by PW1 and PW2, whereas the second set of evidence seeks to implicate him on account of the doctrine of recent possession for being found in possession of the mobile phone.

We are however, keenly aware that this is a second appeal and that both courts below made positive and concurrent findings with respect to both strands of evidence and thus, in our approach, we will be guided by what was stated in the unreported Criminal Appeal No. 28 of 2001 – **Shabani Daudi Vs. The Republic**:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction, this court must, in the interests of justice, interfere."*

As we shall shortly demonstrate, in the matter at hand, there was a material misapprehension by both courts below with respect to the nature and quality of the implicating evidence which justifies our intervention.

As already revealed, the evidence of PW1 and PW2 was to the effect that they recognized the appellant at the scene of the crime. To express at once, PW2's claim carries less weight the more so as he did not elaborate

on the intensity of the light coming from the moonlight which was his only source of recognition. Furthermore, going by the account of his mother (PW1), this witness took to his heels soon after opening the door and, in the circumstances, he could hardly have had the time to observe and recognize the bandits. As for PW1, granted that her account was that her source of recognition was a bright kerosene lamp and that she even described the attire of the appellant. But, the most disquieting factor in her testimony is the question as to whether or not she promptly named the appellant to the village authorities to whom she reported the episode.

From the testimony of PW4, it is beyond question that the disclosure, if there was one at all, came much later and led to the apprehension of the appellant more than two weeks after the occurrence. As regards the day of the occurrence, this is what the witness said:-

> *"On 19/3/2013 when incident (sic) I heard an alarm I attend (sic) the scene, but I did not see the culprits".*

In the unreported Criminal Appeal No. 6 of 1995 – **Marwa Wangiti Mwita Vs. The Republic,** the Court made the following observation:-

"The ability of witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."

To say the least, we are unable to comprehend PW1's claim that she promptly named the appellant with the fact that the latter was, actually, arrested more than two weeks after the occurrence. Undoubtedly, the delayed disclosure ultimately undermines her claim that she recognized the appellant and, in the light of this circumstance, we think that the recognition of the appellant was not beyond the pail of doubt.

We now turn to the evidence of being found in possession of the allegedly stolen mobile phone. It is elementary that a court may presume that a man in possession of stolen goods, soon after the theft, may be implicated for theft on the doctrine of recent possession. The law on the subject is well settled and, in the unreported Criminal Appeal no. 56 of 1992 – **Mwita Wambura Vs. The Republic,** this Court laid down four prerequisites for the invocation of the doctrine:-

"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 must constitute the subject of the charge."

Applying the foregoing instructions to the situation at hand, it should be recalled upon a search conducted in the appellant's residence a Nokia mobile phone was retrieved therefrom and according to PW4, after the phone was switched on, the same displayed the words "Mama Baraka" which corresponds to the name of PW1. Thereafter everything was taken for granted and that is exactly where the problem started. The phone was handed over to the police from where PW1 identified it on account that the same displayed her name and, apparently, the police casually allowed her to take possession of the phone. At the trial, PW1 simply gave a nondescript assurance that the phone was hers and was allowed to tender it in evidence. With respect, the proper procedure of identification of property in court was briefly but succinctly prescribed in the High Court

case of **Nassoro Mohamed 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 he was able to identify it."*

The foregoing statement of principle was referred and authoritatively adopted by the Court in the unreported Criminal Appeal No. 99 of 2000 **Abdul Athuman @ Anthony Vs. The Republic.** Thus, in the perculiar setting of the matter at hand, the prosecuting officer ought to have led PW1 to explain how and when she installed the name "Mama Baraka" in her telephone device. Additionally, she ought to have been led to physically demonstrate the detail to the effect for the court's viewing. To the extent that the alleged detail that the phone displayed PW1's name was not physically exhibited in court, the claim that the phone was PW1's belonging is not of any material significance. Unfortunately, this ailment was not the only disquieting feature of the case for the prosecution with respect to the mobile phone.

As was correctly formulated by the learned Senior State Attorney, PW1 did not tell the trial court as to how she became seized of the mobile phone, the more so as, in accordance with the evidence on record, the same was dispossessed of her during the robbery and later retrieved by PW4 at the appellant's residence. In more than one occasion, this Court has underscored the dire need, at the level of investigations, to abide by the provisions of section 38 (3) of the Criminal Procedure Act, which stipulates:-

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises and the signature of witnesses of the search, if any."*

If this requirement is complied with, a full proof "**chain of custody"** would have, thereafter, been set in motion. As was succinctly laid down in the unreported Criminal Appeal No. 110 of 2007 – **Paulo Maduka and Four others Vs. The Republic:-**

*"By **"chain of custody"** we have in mind the chronological documentation and or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic, The idea behind recording the chain of custody, it is stressed, is to establish the alleged evidence is in fact related to the alleged crime- rather than, for instance, having been planted fraudulently to make someone appear guilty."*

Thus the **"chain of custody"** requires that from the moment a piece of evidence is seized or collected, its every handling, custody or transfer must be documented up to the time of its production in Court as an exhibit. Indeed, such handling would allay fears against there being any possibility of tempering with the exhibit in the process (See **Majid John Vicent @ Mlindangabo and Another Vs. The Republic** – Criminal Appeal No. 264 of 2006 – unreported).

Unfortunately, in the situation at hand, this salutary principle pertaining to criminal investigations was not heeded to. As a result, it is not known as to when and how PW1 accessed the mobile phone before its tendering in court. To say the least, the doctrine of recent possession was

improperly invoked with respect to the mobile phone which was not properly identified.

All said, in the light of the foregoing considerations, we find merit in this appeal which is allowed. Accordingly, we quash the conviction and set aside the sentence. The appellant should be released from prison custody forthwith unless he is otherwise lawfully held.

DATED at MWANZA this 25th day of May, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL