IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A, MWARIJA, J.A And MKUYE, J.A.)

CRIMINAL APPEAL NO. 515 OF 2015

JACKSON JOHN..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mruma, J.)

Dated 2nd day of April, 2015

In

DC Criminal Appeal No. 206 of 2013

JUDGMENT OF THE COURT

14th & 18th August, 2017

MKUYE, J.A:.

The appellant Jackson John and another (former 3rd accused) were charged with an offence of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002] which was instituted on 25/10/2011 in the District Court of Kahama at Kahama vide Criminal Case No. 319 B of 2011. It was alleged that on 24/8/2011 at about 10:00 hrs at Busenda Village in Kahama District at Shinyanga Region they did steal one motorcycle with Registration No. T. 881 BLL make Sunlg valued at Tshs.

1,850,000/= the property of one Fabian Joseph and immediately before or immediately after such stealing they did use bush knife to intimidate Samwel Bahati, who was the rider of the said motorcycle in order to obtain the said property.

On the second count, one Mashauri Manyanda (2nd accused) was charged with an offence of receiving the said stolen property on 31/8/2011. In the trial court the appellant was found guilty, convicted and sentenced to thirty (30) years imprisonment while the other accused persons were acquitted for lack of evidence. The appellant was aggrieved. He appealed to the High Court but his appeal was dismissed in its entirety. Still protesting for his innocence, he has brought this second appeal to this Court.

In this appeal the appellant had earlier on 13/11/2015 filed a nine (9) grounds memorandum of appeal which was followed by a supplementary memorandum of appeal filed on 6/04/2016 with six (6) grounds of appeal. The grounds boil down around two major contentions namely: that **one**, the identification evidence by PW4 was not watertight for failure to give detailed description of the suspect at

the earliest possible time or to the police. **Two,** as the alleged stolen motorcycle was not found in his possession, the doctrine of recent possession did not apply to him.

The prosecution evidence during trial is this;

Samwel Bahati was employed by Fabian Joseph (PW1) to ride his motorcycle for hire. On 24/8/2011 during the day he ferried a passenger to Chona. PW4 testified that as he was about to return to his station, two passengers hired him to take them to Busenda area. He carried both passengers and when they reached at a forest he was ordered to stop by both of them while threatening him with "pangas". They disappeared with the motorcycle after tying his hand with ropes. PW4 managed to untie the ropes with the help of other motorist and he reported the incident to the police. The police informed Fabian Joseph (PW1), the employer of PW4 that his motorcycle was stolen. A search for the stolen motorcycle commenced and PW4 found it at one Mohamed (PW5)'s garage who then told them it was brought by the appellant. WP 6072 D/C Tiho (PW3) instructed MG 289409 Jacob Kisendi (PW2) to collect the

said motorcycle from PW5 and eventually the appellant was arrested and taken together with the motorcycle to the police.

Since the appellant had jumped bail he did not enter any defence. The two co-accused persons completely disassociated themselves from the claims against them.

As hinted earlier on, from the evidence adduced before the trial court, the 2nd and 3rd accused persons were acquitted while the appellant was found guilty, convicted and sentenced accordingly.

At the hearing of the appeal before us, the appellant fended for himself, unrepresented whereas the respondent Republic had the services of Mr. Iddi Mgeni learned State Attorney. The appellant adopted his memorandum of appeal and he opted to first hear the submission of the respondent with a view of rejoining later, if need would arise.

On his part, Mr. Mgeni did not support the conviction and sentence and we think rightly so, for two main reasons. **One**, the visual identification evidence of PW4 was not watertight. He contended that though at pages 47 and 69 of the Court record it is shown that the appellant was identified by PW4 by face, the witness did not offer

explanation on how he identified him. He referred us to the case of **Waziri Amani v. Republic** (1980) TLR 250. He contended further that PW4 ought to have offered such description as was stated in the case of **Raymond Francis v. Republic** (1994) TLR 100. **Two**, Mr. Mgeni pointed out that in order for the evidence of recent possession to be invoked, ownership of the stolen property must be proved. He contended that Fabian Joseph (PW1) did not prove ownership because after purchasing the motorcycle from one Makoye he did not transfer it in his name. He still had the Registration Card in Makoye's name. He referred us to the case of **Kashinje Julius v. Republic** Criminal Appeal No. 305 of 2015 at page 16. For that matter Mr. Mgeni submitted that one Makoye ought to prove his former ownership of the alleged motorcycle. The case of **Emmanuel Maghembe & Others v. Republic** Criminal Appeal No. 264 of 2012 was cited in support.

The learned State Attorney went on to submit that the chain of custody as shown at page 25 of the Court record was broken. Though PW2 and PW3 recovered the alleged stolen motorcycle, it was tendered by PW1 who was not involved in its recovery and the case of **Makoye Samwel @Kashinje & Others v. Republic** Criminal Appeal No. 32 of

2014 page 10 was cited to bolster his argument. Mr. Mgeni finally, urged the Court to allow the appeal.

The appellant agreed with what was submitted by the learned State Attorney and had nothing to add.

Having carefully gone through the judgments of the two courts below we are of the considered opinion that this appeal hinges on the visual identification and doctrine of recent possession. But before considering the appeal on its merits we wish to point out from the outset that this is a second appeal in which we can only interfere with the concurrent findings of facts of the courts below if it is shown that there is misdirection or non-direction on evidence or completely misapprehension of the substance, nature and quality of evidence resulting in unfair conviction (see **DPP v. Jafari Mfaume Kawawa** (1981) TLR 149; and **Salum Mhando v. Republic** 1993 TLR 170). In the case of **Salum Mhando** (supra) the Court held:

> *"If as in this case both courts completely misapprehend the substance, nature and quality of*

the evidence, resulting in an unfair conviction, this Court must in the interests of justice intervene."

The law relating to visual identification is now well settled in that it is of the weakest kind and very unreliable. No court is, therefore, to act on it unless all the possibilities of mistaken identity are eliminated and the evidence is absolutely watertight. (See **Waziri Amani** (supra). The case of **Kasim Said & 2 Others v. Republic** Criminal Appeal No. 208 of 2013 (unreported) laid down a number of tests for the guidance of trial courts on the issue relating to visual identification including description and the terms of description of the accused. The Court stated in item (viii) thereof that:

"in *every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest importance of which evidence ought to be given, first of all of course by the person who gave the description or purports to identify the accused, and then by the person to whom*

the description was given ***(R.V.M.B. Allui [1942] EACA 72).***"

This position was reiterated in the case of **Raymond Francis** (supra) where it was stated:

"Since the witnesses admitted seeing the appellant for the first time during the incident it was necessary in their evidence of identity to describe in detail the identity of the appellant when they saw him at the time of the incident."

In the present case the two courts below were satisfied that the appellant was sufficiently identified at the scene of crime and when he was arrested. We, however, with respect do not agree with the lower courts finding regarding identification evidence. We say so because though PW4 testified to have identified the appellant, he did not state whether he knew him before or not; he did not mention or describe him to the police where he reported the incident or to PW5 where he recovered the stolen property. On top of that he did not explain at all as to how he come to identify him because even the duration of the

incident or familiarity with the appellant was not explained. The circumstances show that since PW5 informed PW4 about the person who brought the motorcycle to him and went to purchase spare parts, then it was very easy for him (PW4) to point a finger to the appellant to be among his assailants. Had he offered description of the appellant before seeing him, then the identification evidence would have been reliable. We, therefore, agree with the learned State Attorney that the identification evidence is not watertight.

The other evidence which was relied upon to convict the appellant was that he was found with a motorcycle which was recently stolen. It is trite law that a person may be convicted on the basis of the doctrine of recent possession and this may extend as far as to a person charged with the offence of murder. (see **Kashinje Julius** (supra). And in order for the doctrine of recent possession to apply there are factors which the Court has to satisfy itself that they are proved. These were stated in the case of **Joseph Mkubwa & Another v. Republic** Criminal Appeal No. 94 of 2007 (unreported) where the Court stated thus:

"For the doctrine to apply as a basis for conviction, it must positively be proved, first that the property was found with the suspect, second that the property is positively the property of the complainant, and last that the stolen thing in possession of the accused constitutes the subject matter of the charge against the accused. It must be the one that was stolen during the commission of the offence charged."

Again in the case of **Juma Bundala v. Republic** Criminal Appeal No. 151B of 2011 while quoting with approval the case of **Mwita Wambura v. Republic** Criminal Appeal No. 56 of 1992 (both unreported) the Court laid down clearly the prerequisite conditions for the invocation of the doctrine of recent possession and it stated:

"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;

4) The property stolen must constitute the subject of the charge."

In the instant case at page 47 of the Court Record the trial court found the appellant to be in possession of the motorcycle which was recently stolen. The first appellate court also relied on it as it is shown at page 69 of the record when it stated as follows;

"I agree with the learned State Attorney. As observed earlier, the motorcycle was robbed from PW4 on 24th August, 2011 and it was found in appellants possession six (6) days later (i.e. 31/8/2011). He had no explanation of how it came into his possession and instead he escaped from ...it is therefore easy to link the two incidents, namely the robbing of the motorcycle from PW4 and the possession of the same motorcycle by the appellant. Here is where I think the learned trial court got it right."

However, with respect, we do not agree. We say so because, **one,** the stolen motorcycle was found at PW5's garage where it was alleged to have been taken by the appellant for repair. Strictly speaking it was not found in possession of the appellant himself. Even PW2 who arrested him did not explain the connection of the appellant and the motorcycle. He said that when the appellant arrived they arrested him and took him to the police.

Two, the alleged motorcycle with Registration No. T 881 BLL make Sunlg red in colour was tendered in the trial court by PW1 who was alleged to be the owner of the same and admitted as Exh. P2. When PW1 testified in the trial court he confessed that he purchased it from one Makoye Makelemo and was given the Registration Card and Purchase Receipt (Exh. P1) which were in the name of the said Makoye as he was yet to transfer them in his name. Unfortunately, the said Makoye was not called to prove his former ownership before selling it to PW1. On top of that there were no special marks on the motorcycle shown by PW1. The colour alone was not enough. And when it was recovered it had no plate number. In this regard, the evidence of

ownership of the motorcycle is still wanting. It was not established as to who was the really owner of the said motor cycle.

Yet in his further submission, the learned State Attorney argued that the chain of custody of the stolen motorcycle was broken. PW2 and PW3 had testified that after the appellant was arrested he was taken together with the motorcycle to the police. At pages 24-27 of the Court record it is shown that the stolen motor vehicle with Reg. No. T.881 BLL make Sunlg red in colour was tendered by PW1 who was alleged to own it and was admitted as Exh. P2.

We wish to state that the issue of chain of custody is a creature of law which seeks to put in place a system of proper handling of the seized property. Section 38 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 is pertinent in this regard. It requires a person who seizes anything to issue a receipt acknowledging the seizure of the thing, by affixing a signature of the owner or occupier of the premises or his near relative or other person who for the time being is in possession and the signature of witnesses of the search, if any.

In the case of **Paulo Maduka & 4 Others v. Republic** Criminal Appeal No. 110 of 2007 while faced with similar occasion this Court had this to say:

> *"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 that the alleged evidence is in fact related to the alleged crime rather than, for instance, having been planted fraudulently to make someone appear guilty."*

Admittedly, in this case this requirement was not complied with. The record of appeal is silent as to the chain of custody from when the alleged motorcycle was seized from PW5's garage, to the police and to PW1 who tendered it in court. Apart from the very weak evidence of PW2 and PW3 that the said motorcycle was taken to the police after it was seized, it is not shown as to how it was taken to the police and

kept; and how and when PW1 come to possess it up to the time of tendering it in Court. Under such circumstances, the doubt on the evidence relating to the crime cannot be overruled. For reasons we have endeavored to explain we agree with the learned State Attorney that the doctrine of recent possession was not properly invoked.

In view of the aforesaid we find the appeal to be meritorious and we allow it, quash the conviction and set aside the sentence imposed against the appellant. We further order that the appellant be released from prison unless otherwise held for other lawful reasons.

DATED at **TABORA** this 17th day of August, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSITCE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL