

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

(CORAM: MWARIJA, J.A., LILA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 239 OF 2017

YUNUS HABIBU
APPELLANT

VERSUS

THE REPUBLIC
RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania at
Arusha)**

(Moshi, J)

Dated 25th day of January, 2016

in

(Criminal Appeal No. 26 of 2015)

JUDGMENT OF THE COURT

29th November & 6th December, 2018

LILA, J.A.:

This is a second appeal by the Appellant. He was aggrieved by the decision of the High Court in Criminal Appeal No. 26 of 2015 which was delivered on 25/01/2016. Initially, the Appellant was arraigned before the District Court of Monduli for the offence of armed robbery contrary to section 287A of the Penal Code Cap 16 R.E. 2002. He was tried, convicted and sentenced to a prescribed minimum jail term of thirty (30) years. He was aggrieved by both conviction and sentence. He

unsuccessfully appealed to the High Court, hence the present appeal.

Before the trial court, it was alleged that on 08/04/2014 at Jangwani Magomeni Simba- Mto wa Mbu, within Monduli District in Arusha Region, the appellant did steal two motorcycles with registration numbers T 635 CGM make Bajaj Boxer and T 574 BWZ make Yamaha the property of Fausta w/o Joseph and immediately before and after such stealing did use knife, machete and sword to threaten her in order to obtain and retain the said property.

The appellant filed a memorandum of appeal consisting of seven grounds of appeal seeking to fault the decision of the High court. As we shall be referring to them in the course of this judgment we think that we should recite them. They are:

“1. That, the first Appellate Court erred in law and in fact for basing/sustaining the conviction of Armed Robbery on contradictory inconsistent and implausible evidence of PW.1, PW.2 and PW.7 which did not prove the charge.

2. *That, the first Appellate Court erred in law for failing to notice the discrepancies between the charge sheet and the evidence on record.*
3. *That, the first appellate Court erred in law and in fact when it failed to realize that PW.1 was not a reliable witness.*
4. *That, the failure by the prosecution to summon the owner of the said room as a witness the trial Court ought to have drawn an adverse inference on the part of the prosecution.*
5. *That, both the trial Magistrate and the first appellate court erred in law and in fact when they failed to inquire about the certificate of seizure and since the same was not tendered in Court as an exhibit.*
6. *That, the first appellate Judge misdirect herself in law and in fact when she relied on her speculative ideas which turned the first appellate Court to be a witness and hence it influenced her judgment.*
7. *That, the doctrine of recent possession was not properly invoked by the first appellate*

Court in sustaining the appellant's conviction."

In opposition, on 26/11/2018, the Respondent Republic lodged a notice of preliminary objection which was, however, withdrawn when the appeal was called on for hearing on 29/11/2018. That paved the way for hearing of the appeal to proceed.

As was the case before the trial court and before the first appellate court, the appellant appeared in person before us without legal representation. The Respondent Republic had the services of Ms. Sabina Silayo, learned Senior State Attorney.

In order to have a clear picture of the ordeal from which the present appeal emanated, we find it apposite that we give, albeit in brief, the background of the case.

On the night of 8/4/2014 at around 03.00 Hrs a gang of bandits armed with machete and bush knife stormed into the house of Fausta Joseph (PW1) who was sleeping alone in one of the rooms of their house. Happiness Ramadhani (PW2) and Mary were in another room. The bandits went straight into PW1's room and asked for money. PW1 told them that she had

no money. The bandits, using the torch they had flashed, resorted to other things in the cupboards, which exercise took them about ten minutes. PW1 said she managed to identify the appellant who was wearing a jacket which did not cover his face. She said that she recognized him on account of being a person she knew well before as her client in her grocery where he frequently visited to buy goods. The bandits did not get money, so they left. Shortly thereafter, PW2 and Mary went to PW1's room and told her that the bandits went to their room and threatened to kill them if they shout and then took two motorcycles make Boxer Bajaj and Yamaha which belonged to Emanuel George (PW7). PW2 said further, that, by the aid of electricity light outside the house she identified the appellant as one the bandits who robbed the motorcycles. PW1 and PW2 said they were afraid hence they slept till the next day when they reported the matter to the police. We find it worth noting here that neither PW1 nor PW2 named the appellant at the police station as being one of the bandits who invaded their house that night.

PW1 further said, upon learning that the appellant was involved, she communicated with him and the appellant

pressed to be given shs.300,000/= so that he could give her the motorcycles. That she sent him shs.180,000/=. Unfortunately, no further proof was availed particularly the alleged recorded conversation. Upon a hint by an informer that the appellant was at Manyara Kibaoni, CPL Emanuel (PW3) and CPL Gasto (PW4) went there, arrested him and locked him up. On 29/4/ 2014 the appellant took them to the house of Katarina Masha (PW4) and showed the police a room which, on being broken into, one motorcycle, make Boxer was found. That room belonged to Augustino Anthony. PW4 said it was Augustino Athony who knew well how the motorcycle reached there. Augustino Anthony did not testify. The other motorcycle was found by PW7 at Panone shell where it was left by an unknown person. The two motorcycles were taken to police station and PW1 was called to identify them.

In his sworn defence, the appellant distanced himself from the charged offence. He said he was arrested by police on 19/4/2014 at his residence and his various belongings were taken. He attributed his arrest to PW1's grudges against him for constructing a business hut close to her grocery which would have adversely affected her business by losing customers. He

raised his concern that, if he admitted having the motorcycle why his cautioned statement was not taken and produced before the court. In respect of the search, he claimed that it was conducted in the room belonging to Augustino Anthony but there is no evidence showing that he was seen taking the motorcycle there or that he was staying in that room.

In its judgment, the trial court found that the conditions that obtained during the robbery incident were unfavourable for a proper and unmistakable identification. It therefore found that the appellant was not properly identified. However, relying on the evidence that it was the appellant who showed the police the room in which the stolen motorcycle was hidden and the same was really found therein, the trial court invoked the doctrine of recent possession and held him responsible for the robbery that was committed in PW1's house. It then proceeded to convict and sentence him as indicated above.

On appeal, the High Court agreed with the trial court that the appellant was not properly identified at the scene of crime. Like the trial court, the High Court, citing the case of **Ackley Paul and Another Vs. R**, Criminal Appeal No. 110 of 2008 (unreported) which adopted the principles enunciated in the

case of **Joseph Mkumbwa and Samson Mwakagenda Vs. R**, Criminal Appeal No. 94 of 2007 (unreported), was of the firm view that the doctrine of recent possession was properly invoked by the trial court to convict the appellant. The appeal was dismissed in its entirety.

At the hearing of the appeal, the appellant adopted his grounds of appeal and urged the same be considered by the Court in determining the appeal. He then proceeded to elaborate the grounds of appeal generally.

The first onslaught on the High court decision was directed to the variance between the charge and evidence regarding ownership of the two motorcycles allegedly stolen in the robbery incident. He contended that the charge alleges that the motorcycles belonged to Fausta Joseph (PW1) while PW1 herself, in her testimony, said the owner was Emanuel George (PW7). He said PW7 confirmed so in his testimony.

The appellant also argued that the owner of the room in which one of the two motorcycles was recovered belonged to one Augustine Anthony who was a crucial witness but was not

called by the prosecution to testify. He urged the Court to consider this anomaly legally.

With respect to identification, the appellant maintained that the conditions were unfavourable for a proper and unmistakable identification. We think we must at this juncture observe that both courts below were clear that the bandits were not identified at the scene of robbery. We therefore see no reason why the appellant decided to pursue this complaint which did not even form one of his grounds of appeal.

In opposing the appeal, Ms. Silayo opted to argue grounds 1 and 3, 2 and 4, jointly and grounds 5 and 7 separately.

Arguing in respect of grounds 1 and 3 concerning inconsistencies in the testimonies of PW1, PW2 and PW7, and unreliability of PW1, Ms. Silayo submitted that it is not true that there were serious contradiction and that the witnesses are unreliable. She said PW1 and PW2 ably explained what transpired during the robbery incident. She also said that at the time of the robbery the motorcycles were in her house but they belonged to PW7. She, however, conceded that they were not reliable on how they identified the appellant as being one of the

bandits who stormed into their house. She agreed with the two lower courts' findings that neither of the bandits was identified during the robbery incident.

Ms. Silayo disagreed with the appellant's contention that there existed variance between the charge and evidence in respect of who was the owner of the stolen motorcycles. She contended that, at the time they were stolen, they were in possession of PW1 who, in law, constructively owned them. It was therefore not irregular to indicate in the charge that Fausta Joseph was the owner, she insisted. So as to bolster her argument she referred the Court to the decision in the case of **Simon Ndikulyaka Vs. Republic**, Criminal Appeal No. 231 of 2014 (unreported). She therefore prayed that grounds 2 and 4 be dismissed.

The learned Senior State Attorney also resisted ground 5 of appeal contending that the record of appeal is clear at page 43 that the record of search and certificate of seizure were jointly tendered and collectively admitted as exhibit PIII.

Ms. Silayo was also emphatic that the doctrine of recent possession was properly invoked to convict the appellant

because there is ample evidence that the appellant led PW3, PW4, PW5 and PW6 to where one of the stolen motorcycles was hidden and that he failed to advance acceptable explanation on how he came by it.

When we sought explanation why one Augustino Anthony in whose room the stolen motorcycle was recovered was neither charged nor called as a prosecution witness, Ms. Silayo hastened to state that despite the trial court issuing arrest warrant the prosecution failed to trace him. She agreed that his failure to testify entitled the trial court to suspect him as being the one who stole it or draw an adverse inference on the prosecution evidence.

We start by commenting that neither the appellant nor the learned State Attorney addressed us in respect of ground 6 of appeal. We are entitled to assume that the appellant abandoned it. Even without doing so, we have taken pain to thoroughly examine the judgment complained of and we are unable to note any speculative ideas employed by the first appellate judge.

We now proceed to determine the grounds of appeal in the manner the learned State Attorney conveniently argued them except grounds 4 and 7 which we shall consider them together. Ground 2 will therefore be considered alone. In grounds 1 and 3, the appellant's major complaint is that the evidence by PW1, PW2 and PW7 was contradictory. He also complains that PW1 was not reliable. We are in agreement with the learned Senior State Attorney that, save for the evidence on identification of the appellant, PW1 and PW2 gave a clear picture of the robbery ordeal and we are satisfied that robbery incident occurred and two motorcycles were stolen. We also agree with Ms. Silayo that the findings of the two courts below were proper that the appellant was not identified at the scene due to failure by the prosecution to explain on the sufficiency of light and also existence or otherwise of shock and panic linked with the robbery.

With regard to ownership of the stolen motorcycles, we are alive that robbery is aggravated theft in that during stealing or after stealing violence is deployed for the purpose of threatening the owner in order to either obtain or retain the thing stolen. Section 258 of the Penal Code Cap. 16 R. E. 2002

which defines theft, recognizes fraudulent taking of anything capable of being stolen from either the general or special owner. It therefore makes no difference if one steals from either the general (actual owner) or from the one who has possession of it (special or constructive owner), the offence committed remains to be theft. The Court faced an identical scenario in the case of **Joseph Severin Mtega @ Zungu Vs. Republic**, Criminal Appeal No. 60 of 2012, (CAT Iringa) (unreported) where one Dominicus Msanga (PW1) who was operating transportation business using a motorcycle not belonging to him was robbed of it by Severin Mtega @ Zungu whom the latter had hired to take him from Mlangali to Madope. Amidst their journey, the appellant assaulted PW1 using a bush knife he had and made away with the motorcycle. Severin Mtega @ Zungu was charged with the offence of armed robbery. He was convicted and was sentenced to thirty years imprisonment and his appeal to the High Court was unsuccessful. On appeal to the Court the appellant raised as a ground that **ownership of the motorcycle was not proved**. The Court held that the appellant stole the motorcycle from PW1 who was in possession of it hence was a special owner and

that what the appellant did constituted theft as defined in section 258 (1) of the Penal Code. The Court went further to state that;

"We agree with Mr. Nchimbi to the effect that it was immaterial whether the motorcycle was owned by the mission or not. As PW1 was the one who possessed the motorcycle at the time of robbery, it was immaterial to prove ownership."

In the present case the motorcycles were stolen from PW1 who had possession of them but they belonged to PW7. PW1 was, then, a special owner or constructive owner. Indication of PW1 as owner in the charge did not therefore affect its validity and the mere fact that the evidence showed PW7 as owner cannot be said to be at variance with the charge. We therefore agree with the learned Senior State Attorney that at the time of robbery the motorcycles were in constructive ownership of PW1 as defined in the cited case of **Simon Ndikulyaka's** case (supra). Ground 2 of appeal lacks merit and is dismissed.

Without much ado, ground 5 of appeal is without any merit. As rightly argued by the learned senior State Attorney, pages 43 and 44 of the record of appeal speak it all that, the

record of search and the certificate of seizure were tendered and admitted as exhibit PIII collectively.

We now turn to consider grounds 2 and 7 of appeal. We are clear in our minds that the conviction of the appellant was grounded on the doctrine of recent possession. The compelling circumstances that led to the invocation of that doctrine is the allegation that the appellant led the police to the room in which one of the stolen motorcycles was kept and that he failed to give an account of how he came by it.

The issue here is whether the doctrine of recent possession was, in the circumstances of this case, rightly invoked.

In resolving the above issue, we wish to begin by restating the factors to be proved for the doctrine of recent possession to apply. The Court in **Joseph Mkumbwa's** case (supra) promulgated the requisite factors which must be proven for the doctrine to apply thus:

“Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom

*the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, **first, that the property was found with the suspect, second,** that the property is positively proved to be the property of the complainant, **third,** that the property was recently stolen from the complainant, and **lastly,** that the stolen thing constitutes the subject of the charge against the accused...”* (Emphasis added).

The Court went ahead to caution the prosecution that:

“The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements...”

Thus, in view of the above legal position, in the present case, the prosecution is obliged to prove, among other matters, that the stolen motorcycle was found in possession of the appellant. The record speaks loudly that PW3 and PW4 were told by the appellant that he was ready to lead them to where he had hidden the stolen motorcycles. The appellant’s statement to that effect ought therefore to have been taken. For unexplained reasons, that was not done. Even assuming that PW3 and PW4 were witnesses of truth, the room allegedly

pointed by the appellant did not belong to him, but Augustino Anthony. It was not proved that he was living therein. Augustino Anthony, a person in whose room the stolen motorcycle was recovered, did not testify. He was a crucial witness to explain how the motorcycle reached there. The fact remains, therefore, that the appellant was not found in possession of the stolen motorcycle. The motorcycle was found in the room belonging to Augustino Anthony. Failure by the prosecution to call him as a witness entitled both courts below to draw an adverse inference on the prosecution case against the appellant.

Similarly, doubts hinge on the appellant's involvement in the commission of the charged offence. We, as did the learned Senior State Attorney, entertain doubts on the role played by Augustino Anthony in the whole ordeal. In the circumstances, unlike both lower courts, we are of the firm view that the doctrine of recent possession was not properly invoked to convict the appellant. Ground 4 and 7 have merits and we allow them.

Since the appellant's conviction was grounded on the invocation of the doctrine of recent possession which we have

held that it was not properly invoked, the appellant's conviction cannot be sustained. We therefore accordingly allow the appeal, quash his conviction and hereby order his immediate release from prison unless otherwise lawfully held.

DATED at ARUSHA this 5th day of December, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL