

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

**(CORAM: LUANDA, J.A, LILA, J.A. And MKUYE, J.A.)**

**CRIMINAL APPEAL NO. 254 OF 2016**

**RASHID OMARY KIBWETABWETA .....APPELLANT  
VERSUS  
THE REPUBLIC .....RESPONDENT  
(Appeal from the decision of the High Court of Tanzania  
at Songea)**

**(Chikoyo, J.)**

**dated the 9<sup>th</sup> day of May, 2016  
in  
DC Criminal Appeal No. 11 of 2016**

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**JUDGMENT OF THE COURT**

1<sup>st</sup>& 7<sup>th</sup> June, 2018  
**MKUYE, J.A.:**

This is a second appeal. The appellant Rashid Omary Kibwetabweta and 4 others were, before the District Court of Songea at Songea, charged with two offences: namely, armed robbery contrary to section 287A of the Penal Code, Cap 16 RE 2002 (the Code); and conspiracy to commit the offence of armed robbery contrary to section 384 of the same Code.

On the first count it was alleged that on 24/2/2013 at Bombambili area within the Municipality of Songea in Ruvuma Region the appellant and

those 4 others did steal a motorbike with Registration No. T. 592 CEG, Chasis No. LBRSPJB58C9017076, Engine No. 12946710 from Amiry Yasin, and immediately before stealing did assault Amiry Yasin by using a knife in order to steal the said motorbike.

On the second count, it was alleged that on 24/2/2013 at Bombambili area within the Municipality of Songea in Ruvuma Region, the appellant and 4 Others did conspire to steal a motorbike with Registration No. T 592 CEG, Chasis No LBRSPJB58C9017076, Engine No. 12946710 form Amiry Yasin. During the trial the 5<sup>th</sup> accused was discharged following a *nolle prosequi* which was entered in the trial court by the State Attorney.

At the conclusion of the trial, the appellant and 3 others were found guilty, convicted and each was sentenced to thirty (30) years imprisonment for the first count; and seven (7) years imprisonment for the 2<sup>nd</sup> count. Aggrieved, the appellant appealed to the High Court where the appeal against the conviction and sentence on the 2<sup>nd</sup> count was allowed and the appeal against the 1<sup>st</sup> count was dismissed and the sentence of 30 years imprisonment was upheld. Still protesting for his innocence, the appellant has brought this appeal to this Court.

At this juncture we feel appropriate to give albeit briefly the facts leading to this appeal. They are as follows:

On 24/2/2013 at about 22:00hrs Amiry Yasin Nyoni (PW1) who was riding a motorcycle owned by Nizai Ndembo @ Raphael (PW2), with Registration No. 592 CEG, make SANLG red in colour, Chasis No. LBRSPJB58C9017076 and Engine No. 12946710 for hire, was at Bombambili area around Kadogoo stand. As he was there a certain passenger who came to be identified as the appellant approached him and requested to be taken to Bombambili Secondary School. After they had agreed on a fare to be paid they left. When they reached at Tembo Primary School in Bombambili area, the appellant, started swinging at his passenger's seat from one side to another. When PW1 turned back to see as to what was happening, to his astonishment, he saw the appellant pointing a knife on his mouth and injured him. PW1 decided to drop down the motorcycle and took to his heels while raising alarm. Meanwhile, he saw four persons emerging from the bush to join the appellant. Two of them went straight to assist the appellant while the two others pursued him (PW1) though after sometime they surrendered and went back to join their fellows. The motorcycle was stolen. PW1 informed his fellow

motorcyclist who also informed others. PW1 also phoned PW2. Later, in the same night the motorcyclists from Bombambili stand, PW2 and the Police officers arrived at the scene of crime. After PW1 had narrated to them the whole episode they took him to the Songea District Police Station where he was issued with a PF3 and went to the hospital for treatment.

On the following day, that is on 25/2/2013 at about 06:00 hrs, the appellant was seen by Miraji Abdul @ Mbiro (PW5) at Mbangamawe Village while pushing a motorcycle because its fuel had run down, and was looking for a temporary job so that he can get money to purchase fuel for it. The appellant said that he was coming from Songea and heading to Njombe. PW5 informed Paschal Umbu (PW3) about his suspicion on the appellant. PW3 asked him to go to the Ward Executive Officer, one Selemani Wabu (PW6). When they arrived at PW6's office PW3 explained about the appellant's encounter the fact which led PW6 to interrogate him closely. Following his unsatisfactory explanation on how he possessed the motorcycle, PW3 communicated with militiamen and they arrested him (appellant) while in possession of the said motorcycle. They kept him at PW3's office where upon the police officers came and took him to the

Songea Police Station at about 23.45 hrs. Thereafter, he was charged together with his colleagues whom were mentioned by appellant himself.

The appellant has filed a memorandum of appeal consisting 3 grounds which can be condensed as follows:

*1) The court erred in convicting the appellant basing on the doctrine of recent possession while a long time (8 hours) had lapsed and the type of property stolen (a motorcycle) could nowadays exchange hands within a short time after it has been robbed.*

*2) The offence of armed robbery was not proved beyond reasonable doubt since the PF3 was not tendered in court and the knife which was admitted as exhibit did not prove the offence of armed robbery.*

At the hearing of the appeal the appellant appeared in person and unrepresented; while the respondent Republic enjoyed the services of Mr. Hamimu Nkoleye, learned State Attorney.

When the appellant was availed an opportunity to argue his appeal he opted to hear from the State Attorney first and reserved his right to respond later if need arises.

On his part, Mr. Nkoleye resisted the appeal. Submitting in relation for the doctrine of recent possession he contended that it was properly invoked since the appellant was found red-handed with the stolen motorcycle within a short span of time after it was stolen. He elaborated that the motorcycle was stolen on 24/2/2013 at Bombambili at about 22.hrs. and the appellant was arrested on 25/2/2013 at 07.00 hrs. at Mbangamawe within Songea Municipality while in possession of the motorcycle and looking for temporary job so that he could purchase fuel which had run down. Even when he was asked as to how the motorcycle came into his possession, he did not give sufficient explanation on how he possessed it. To bolster his argument he referred us to the cases of **Mussa Omary Vs Republic**, Criminal Appeal No. 83 of 2000 pg. 4 (unreported); and **Manazo Mandundu Vs Republic**, (1990) TLR 92 at Pg. 94. Mr. Nkoleye submitted further that a motorcycle is not an item which could easy change hands within 8 hours given the fact that its

transfer would involve proof of ownership by a Registration Card thereof or even executing a contract of sale.

As regards the second complainant that the case was not proved beyond reasonable doubt for failure to tender the PF3 and lack of proof of the knife, Mr. Nkoleye submitted that though the PF3 was not produced in court, the evidence of PW1 who was a credible witness proved the offence of armed robbery. He added that, the evidence relating to the knife which was within the definition of armed robbery in terms of section 287A of the Code also proved the offence of armed robbery. He concluded with a prayer to the Court to uphold the lower courts decisions and dismiss the appeal.

Mr. Nkoleye also brought to the attention of the Court about the appellant's defence of *alibi* which, he said was not considered by the two courts below. He contended that, though the appellant did not comply with section 194(4) of the CPA, the trial court ought to have considered it under section 194 (6) of the CPA.

In rejoinder, the appellant had nothing useful to add but he stressed to the Court to consider his grounds of appeal and set him free.

Two issues emerge for the consideration by this Court. One, whether the doctrine of recent possession was properly invoked; and two, whether the prosecution proved its case beyond reasonable doubt.

From the outset we wish to point out that it is common ground that the two courts below grounded the conviction against the appellant on the basis of the doctrine of recent possession.

The circumstances under which the doctrine of recent possession can be invoked were stated in the case of **Juma Bundala Vs. Republic**, Criminal Appeal No. 151B of 2011 when the Court quoted with approval the case of **Mwita Wambura Vs Republic**, Criminal Appeal No. 56 of 1992 (unreported) in which the Court expounded them as hereunder:-

*" 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.*

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



In this case, in upholding the conviction and sentence by the trial court, the High Court stated as follows:-

*"...there is sufficient and strong evidence from the prosecution side to prove the offence of armed robbery beyond reasonable doubts by virtue of the doctrine of recent possession. I say so because, the court record are (sic) very clear that the appellant was arrested and found with the stolen motorcycle of PW2 from PW1 next day from the date of the incident at Mbangamawe village, and when asked to explain on how he came in possession of that item, the appellant failed to give out reasonable explanation on that account. This was witnessed by PW3 and PW5. In my view, the instant circumstances reveal that, the appellant was the one who is responsible for the alleged offence.*

*This is because, the court record reveals that, on 25/2/2013 PW5, a resident of Mbangamawe village saw the appellant pushing the motorcycle which had no fuel, the PW5 then he informed PW3, later PW3 met the*

*appellant with the said motorcycle, and since he became suspicious, PW3 informed the militiamen "mgambo askari" to arrest the appellant, where the appellant was sent by PW3 to PW6 Ward Executive Officer. All the time the appellant had not managed to give out a sufficient explanation as on how he came in possession of the said motorcycle, then the matter was reported to the police and upon their investigation, the said motorcycle, was discovered and identified to be the property of PW2 via Registration Card which was admitted as Exhibit P1 which (the said Motorcycle) was stolen on 24/4/2013 while it was under possession, of PW1. In my view, under those circumstances, I find that the court was correct to convict and sentence the appellant regarding to armed robbery as far as the first count is concerned under the doctrine of recent possession."*

On our part, after having examined the above quotation we are of the settled view that the conviction was correctly grounded on the doctrine of recent possession. We say so because, the appellant was found red-

handed with the stolen motorcycle at Mbangamawe on 25/2/2013 at 07.00hrs which was within a short span of time of 8 hours from the time it was stolen at Bombambili area on 24/2/2013 at 22.00hrs. Though the appellant claimed that it could change hands within a short span of time, we do not agree with him since the motorcycle is a kind of a property which cannot easily change hands or be transferred without first ascertaining its ownership through a Registration Card or even executing a contract for sale. All such actions could not have been done within such a span of time and during the night. In spite of that, the stolen motorcycle was identified by PW2 who was the real owner after producing the Registration Card showing its Registration No. T 592 CEG, Chasis No LBRSPJB58C9017076 and Engine No. 12916710 (Exh. P1) which particulars tallied with those stated in the charge sheet laid at the appellant's door. But again, the appellant failed to give a satisfactory explanation as to how he acquired or had in possession of the motorcycle. At one time he said he was coming with it from Mbinga and was heading towards Njombe. At another stage he said he was coming from Songea heading to his uncle to Madaba village. And, the circumstances under which the appellant was found in possession of the said motorcycle while pushing it without fuel

and looking for a temporary job so that he could buy fuel leave a lot to be desired. It is surprising as to how the appellant had to arrange such a long journey from Songea to Njombe without having sufficient fuel for the journey.

All these factors can lead to only one conclusion that he was involved in the commission of the offence as was stated in the case of **Mwita Wambura** (supra) that failure by the accused to explain his possession of the fruits of a crime recently after it has been committed is a presumptive evidence against the accused not only on a charge of theft or receiving with guilty knowledge, but any aggravated crime like murder as well, when there is reason for concluding that such aggravated and minor crimes were committed in the same transaction.

Regarding the complainant that the offence of robbery could not be proved in the absence of the PF3 and knife being tendered in court, we think, if all things were equal, they ought to have been tendered. However, despite being not tendered there is a strong evidence from credible witnesses PW1,PW2,PW3,PW4,PW5, PW6 and PW7 which proved that the offence of armed robbery was committed by none but the appellant on the basis of the doctrine of recent possession we have

discussed hereinabove. We are increasingly of the view that, as was found by the two courts below, the case was proved beyond reasonable doubt that the appellant committed the offence of armed robbery as was charged.

We have also considered the observation relating to the defence of *alibi* raised by Mr. Nkoleye. Indeed, after going through the court record we have observed that the appellant raised a defence of *alibi*. He said that on the date of incidence he was at Mafinga Town to pick a cargo of Readers Boss Double Punch alcohol made in Malawi in order to sell it at Songea. He said, he was arrested at Mbangamawe on 25/2/2015. Unfortunately as stated by Mr. Nkoleye the two lower courts did not consider it.

It is, however, trite law under section 194 (4)(5) and (6) of the CPA that if the accused wishes to rely on the defence of *alibi*, he must give a notice before hearing begins. If he fails he must furnish the prosecution with particulars of *alibi* at any time before the closure of prosecution case. If the accused still fails to meet the above requirements the court is permitted to accord no weight to such evidence. The said provision provide as follows:

- (4) *Where an accused person intends to rely upon an alibi in his defence, **he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.***
- (5) *Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, **he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed.***
- (6) *If the accused raise a defence of alibi without having first furnished the prosecution pursuant to this section, **the court may in its discretion accord no weight of any kind to the defence.***"[Emphasis added]

In this case, the appellant did not give any notice to the trial court and to the prosecution on his intention to rely on the defence of *alibi* before the

trial commenced as per section 194 (4) of CPA or even furnish the particulars of *alibi* to the prosecution before the case for the prosecution closed as per subsection (5) of that section. No reason was given for such stance. The appellate court when analyzing the defence evidence based on the appellant's general denial to commit the offence. There is nowhere in the judgment where the appellate judge considered the defence of *alibi* raised by the appellant that he was not at the scene of crime when the offence was committed. Obviously, failure of the trial court and first appellate court to consider the defence of *alibi*, in our view, was irregular. They ought to have considered it even if it meant according no weight to it. (See **Festo Komba V. Republic**, Criminal Appeal No. 77 of 2015).

We are aware that this is a second appeal. Under normal circumstances, we would not interfere with the concurrent findings of facts of the lower courts if there are no mis-directions or non-direction on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence in view of making its own findings. (See **Salum Mhando V. Republic**. (1993) **DPP Vs. Jaffari Mfaume Kawawa** (1981) TLR 149; **Zakaria**

**John & Another V. Republic,** Criminal Appeal No. 9 of 1998 (unreported).

We have examined the evidence on record and have formed an opinion that the lower courts misdirected themselves by not considering the defence of *alibi* raised by the appellant. However, after having scrutinized the appellant's defence of *alibi*, we find such defence of *alibi* does not have legs to stand on in view of overwhelming evidence which implicated the appellant. We say so because the offence of armed robbery was committed on 24/2/2013 at Bombambili area at about 22:00 hours and eight hours later on 25/2/2013 at 07:00 hours the appellate was found by PW5, PW3 and PW6 pushing the stolen motorcycle without fuel at Mbangamawe within the Municipality of Songea. The motorcycle was identified by PW2 who owned it after having proved it through the Registration Card revealing all the particulars stated in the charge sheet. The appellant failed to offer credible explanation on how he came to possess the stolen motorcycle. We think, so long as the evidence of PW1, PW2, PW3, PW5 and PW6 is credible, the defence of *alibi* from the appellant did not raise any reasonable doubt to it. For those reasons, we



are of the settled view, that the defence of *alibi* notwithstanding, the prosecution proved the case beyond reasonable doubt.

In the final event, we find the appeal devoid of merits and hence, we hereby accordingly dismiss it in its entirety.


**DATED** at **IRINGA** this 6<sup>th</sup> day of June, 2018.

B.M. LUANDA  
**JUSTICE OF APPEAL**

S.A. LILA  
**JUSTICE OF APPEAL**

R.K. MKUYE  
**JUSTICE OF APPEAL**

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

  
P.W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**