IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 466 of 2015

MASUMBUKO CHARLES @ KEMA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Makaramba, J.)

dated the 22nd day of September, 2015
in
HC. Criminal Appeal No. 109 of 2014

JUDGMENT OF THE COURT

27th June & 4th July, 2018

MUGASHA, J.A.:

This is a second appeal originating from the District Court of Geita, whereby the appellant and two other persons namely; Mandela s/o Bernado and Mayovu s/o Matata were charged with Armed Robbery contrary to section 287A of the Penal Code [CAP 16 R.E. 2002]. At the end of the trial, Mayovu s/o Matata was acquitted whereas the appellant and Mandela Mayovu were convicted as charged and sentenced to imprisonment for thirty years with 12 strokes of the cane.

The prosecution evidence was briefly as follows: On 4/12/2012 at 2.00 a.m. a robbery took place at the house of MWITA RYOBA (PW1) whereby, the robbers armed with bush knives demanded to be given a sum of tshs. 2,000,000/= or else his child be slaughtered. Scared of the threat, he showed the robbers the cellular phones beneath the bed and they took the two phones, tshs. 128,000/= and disappeared. Apart from PW1 testifying that the robbers were strangers, he recalled to have identified them with the aid of the lantern lamp which he had lit in order to attend his sick child. He recalled to have seen at the scene of crime the appellant who took the money (Tshs.128,000/=) wearing a black jacket and a blue trouser. The 2nd accused wore a black coat and the 3rd accused wore a black coat with torn hands.

On the following day that is, 5/12/2012, the matter was reported to the Central Police Station in Geita. On the same day, GEOFREY OUKO LUO (PW6) a phone mechanic at Katoro received a mobile phone for resetting but opted to inform PW1 after having suspected that the mobile phone belonged to PW1. PW1 informed the Police at Geita and the appellant was arrested on 5/12/2012 at Katoro by F.1707D/SGT JOSHUA (PW4) who recounted to have

found the appellant in possession of one black phone make Nokia Lumia. The appellant was ferried to Geita Central Police and on 6/12/2012 at 8.00 a.m. in the identification parade conducted by ASST. INSPECTOR ABINA WEGORO (PW5), PW1 identified the appellant to be among the three culprits involved in the robbery incident. F.2642 DC BONIPHACE (PW2), the investigator who interrogated the appellant on 7/12/2012 and recorded his caution statement recounted that, apart from the appellant admitting to have committed the offence he mentioned other two colleagues who were pursued and arrested and one of them was found with the Nokia 1280. Later, the appellant and two others were formally charged.

The appellant and two others all denied to have committed the robbery. They all told the trial court to have been arrested on diverse dates and places and accused of having committed different offences.

The learned trial Principal District Magistrate, in convicting the appellant and another person preferred the prosecution version that they were identified at the scene of crime and positively so at the identification parade. He as well, invoked the doctrine of recent

possession believing that, the complainant had given proof of ownership of the stolen phone at the robbery incident and found in possession of the appellant and another person. Lastly, the trial court also relied on the cautioned statement to convict the appellant.

The appellant's first appeal before the High Court was dismissed for almost similar reasons.

Aggrieved by the decision of the High Court, the appellant has lodged this appeal. In the Memorandum of Appeal, he has raised five grounds which we have conveniently condensed into four namely: **One,** that he was not properly identified at the scene of crime. **Two,** the doctrine of recent possession was wrongly invoked to ground the conviction due to the complainant's failure to establish ownership of the phone. **Three,** the chain of custody was broken commencing from the recovery of the phone to its being tendered in the evidence at the trial. **Four,** the charge was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person unrepresented. The respondent Republic was represented by Ms. Angelina Nchalla, learned Senior State Attorney, and Ms. Magreth

Mwaseba, learned State Attorney. The appellant adopted the grounds of appeal and opted to initially hear the submission of the learned Senior State Attorney.

At the outset, the learned Senior State Attorney supported the appeal arguing that, the conviction of the appellant was based on the evidence which did not prove the charge beyond reasonable doubt. She pointed out that, since the robbers were strangers to PW1 in the robbery which was committed at night, the conditions were not favourable for the proper identification of the appellant. She thus submitted that, during the said robbery, neither the intensity of light from the lantern lamp nor its location in the room where the banditry occurred was mentioned by PW1. As such, she argued that, the appellant was not properly identified at the scene of crime as alleged by PW1. In this regard, she was of the view that, since the identification of the appellant was doubtful, this weakened the status of the identification parade which was conducted by PW5 in terms of the extract of the Identification Parade Register (Exhibit P5)

Furthermore, the learned Senior State Attorney submitted that, the doctrine of recent possession was wrongly invoked to

convict the appellant. She pointed out that, apart from there being no seizure certificate to establish if the appellant was found in possession of the stolen phone, PW1's description fell short of establishing ownership.

Moreover, the learned Senior State Attorney faulted the chain of custody with regard to the recovery of the stolen phone, its storage and the ultimate tendering at the trial. She pointed out that, since it is PW4 who arrested the appellant with the stolen phone, the record is silent as to its preservation and how it landed in the hands of PW1 who tendered it as exhibit P1 at the trial. Such trend, she argued, weakened the prosecution evidence and it cannot be ascertained if the phone which was stolen at the robbery incident and recovered at Katoro is the same which was tendered in the evidence at the trial.

On being probed by the Court on the reliance of the cautioned statement of the appellant by the courts below, the learned Senior State Attorney submitted that, it was wrongly acted upon having been recorded beyond the statutory prescribed time.

She concluded her submission by urging the Court to allow the appeal and set the appellant free.

The appellant had nothing useful to add apart from supporting the submission of the learned Senior State Attorney and he urged us to allow the appeal and set him free.

Having carefully considered the submission of the Respondent Republic and the evidence on record; this being a second appeal, it is trite law that the Court should sparingly interfere with concurrent findings, of the courts below on the facts unless there has been a misapprehension of the evidence, miscarriage of justice or violation of a principle of law or procedure. (See: **DPP VS JAFFER MFAUME KAWAWA** (1981) TLR 149) **FELEX KICHELE** and **EMMANUEL TIENYI @ MARWA VS. REPUBLIC**, Criminal Appeal No. 159 of 2005 (unreported).

It is also a settled principle of law that, a first appeal is in a form of rehearing. Thus, it is incumbent on the first appellate court to re-evaluate the entire evidence on trial record by subjecting it to a scrutiny and if need be arrive at its own conclusions of fact (See **D.R. PANDYA VS. REPUBLIC** [1957] E.A. 336.

At page 57 of the record are grounds of appeal in which the appellant requested the first appellate court to re-evaluate the certainty of the evidence of PW1 on: **One,** the propriety or

otherwise of visual identification considering that the appellant was a stranger to the identifying witness and the unfavourable conditions in a horrifying robbery incident. **Two,** the propriety of the identification parade not conducted soon after the arrest of the appellant. **Three,** the trial magistrate erroneously invoked the doctrine of recent possession of Exhibit P1 whereas PW1 did not give sufficient proof to be the owner of the stolen phone.

We have found that, there was a misapprehension of the evidence at the trial which was not remedied on the first appeal which necessitates our intervention as we shall demonstrate.

We begin with the issue of visual identification evidence of PW1. It is settled law that visual identification is of weakest character and most unreliable and as such, the courts should be cautious on acting upon such evidence. The Court must be satisfied that, the evidence is watertight and that all possibilities of mistaken identity are eliminated. We reiterate what we said in the case of **WAZIRI AMANI VS. REPUBLIC** (1980) TLR 250 as follows:

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seemed clear that the issue of*

identification would not be properly resolved unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried... for example.... questions such as the following ... The time the witness had the accused under observation; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."

Moreover, when such identification is alleged to have been made at night by the aid of light, evidence on sources of light and its intensity is of paramount importance and must be clearly stated by the identifying witness. (See **SAIDI CHALLY SCANIA VS. REPUBLIC**, Criminal Appeal No. 69 of 2005 and **ISSA MGARA @ SHUKA VS. REPUBLIC**, Criminal Appeal No. 37 of 2005 (both unreported).

The question to be answered is whether the evidence of PW1 in respect of the identification of the appellant was watertight. Our answer is absolutely in the negative. We say so because although

PW1 claimed to have been aided by lantern lamp, he fell short of stating the intensity of the light considering that, the assailants including the appellant were strangers to him. Therefore, there is hardly any evidence of visual identification on record to connect the appellant with the offence charged as the possibilities of mistaken identity were not eliminated.

In the absence of watertight evidence on visual identification the identification parade was as good as useless. Moreover, there is no evidence of PW1 having mentioned the appellant when he reported the robbery incident to the police and before he saw the appellant after his arrest. What prompted the parade is fortified by the evidence of PW5 who at page 23 testified to the following:

> *"On 6/12/2012 at about 8.00 a.m. I was at Geita Central Police on duty. While there I was directed by the OCCID Geita District that there was need for identification parade to be conducted for three suspects who were in the lock up who were facing an armed robbery offence."*

On the record, we found no indication of any clue given by PW1 on the description of the appellant and two others who were acquitted. This leaves a lot to be desired on how PW5 managed to pick those who composed the identification parade.

In our considered view the choice if any, was irrational in the absence of any description from PW1. We are fortified on that accord because the identification parade was conducted on 6/12/2012 before the interrogation of the appellant. This is contrary to the evidence of PW2 the investigator who testified that, the arrest of the other two culprits was made possible following the interrogation of the appellant who mentioned them in the course of making the caution statement. This scenario clouds the prosecution case with a shadow of doubt and as such, the first appellate judge should not have casually treated appellant's complaint in relation to and the evidence on the identification parade as pointed out earlier.

We thus agree with the learned Senior State Attorney that the appellant was not properly identified be it at the scene of crime or at the identification parade. Thus, the conviction of the appellant on the basis of visual identification was highly unsafe and his complaint is merited.

It was the evidence of the prosecution that the appellant was found in possession of the stolen phone which he took to the mechanic for resetting. He was arrested by PW4 and taken to Central Police in Geita. As rightly submitted by the learned Senior

State Attorney, there is no iota of evidence by the prosecution to prove that the stolen phone was seized from the appellant. This was a result of fatal failure by the investigators to comply with the mandatory provisions of section 38 (3) of the Criminal Procedure Act [CAP 20 RE.2002] which provides:

> *"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, bearing 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 to the search, if any."*

If this mandatory provision had been complied with, the stolen phone would have been recorded in the seizure form and the appellant and the independent witnesses would have appended their signatures thereon and each retained a copy. At this juncture the proof of chain of custody would have been set in motion since it requires, from the moment the evidence is collected, its transfer from one person to another must be documented and that it be

provable that nobody else could have accessed it. The rationale behind recording the chain of custody 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. [See **PAULO MADUKA AND 4 OTHERS VS REPUBLIC**, Criminal Appeal No 110 of 2007 (unreported)].

In the case at hand, with the broken chain of custody it cannot be safely vouched if the phone tendered in the evidence is what was stolen from PW1 and recovered at Katoro.

We now turn to the question as to whether or not the doctrine of recent possession was correctly invoked to convict the appellant.

The position of law pertaining to the doctrine of recent possession in our jurisdiction was well articulated by the Court in the case of **JOSEPH MKUMBWA & ANOTHER VS. REPUBLIC**, Criminal Appeal No. 94 of 2007 (unreported) as follows:

> *"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 the basis of conviction, it must be positively proved,* ***first,*** *that the property was found with*

*the suspect, **second,** that the property is positively the property of the complainant, **third,** the property was recently stolen from the complainant, and **lastly,** that the stolen thing in possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen/ obtained during the commission of the offence charged. The fact that the accused does not claim to be owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

[See also **JOHN BENARD AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 129 of 2011, **ACLEY PAUL AND RUMUL VS REPUBLIC,** Criminal Appeal No.110 of 2008 and **DAUD PANYAKO AND ORS VS REPUBLIC,** Criminal Appeal No. 127 of 2011(all unreported)]

We asked ourselves if the Nokia mobile phone 610 had been sufficiently identified as the one stolen from the complainant (PW1). In addressing the issue, we wish to reiterate what we stated in **MAJULI LONGO AND JUMA SALUMU@MHEMA VS REPUBLIC,** Criminal Appeal No. 261 of 2011 (unreported) as follows:

"The law is that, properties suspected to have been found in possession of the accused persons should be

identified by the complainants conclusively. In a criminal charge, it is not enough to give a generalised description of property. And a proper identification in court is that the complainant should describe the property before it is shown to him so that when it is eventually tendered and the description confirmed, it can be clear to the court whether or not the identification was impeccable."

PW2 was the investigator in the case. At page 14 of the record of appeal he testified that after being assigned the matter, received the report that the appellant was arrested at Katoro village in a bid to swap a phone. At page 16 PW2 is on record to have testified as follows:

"The phone which the 1st accused was found with was Nokia Lumia 610 which when examined it had email messages and it had photos of PW1 and his family, the phone was a black one. And the other one was a black one. And the other phone which was with the 2nd accused was black with white colours make Nokia 1280 which were identified by the complainant (PW1)".

On the part of the complainant in his testimony at page 10 of the record made the following description of the stolen phone:

> *"The Nokia is Lumia a black colour and is touch screen and has no buttons, the phone used a min sleep or out line. This is my recovered phone which has photograph or my picture and of my wife I pray to tender the phone make Nokia Lumia as exhibit"*

Looking at the above description, can it be safely vouched that this was sufficient proof of complainant's ownership of the stolen phone? While Nokia Lumia 610 is a mere brand name, the law requires more specific description of the stolen items such as, the serial number embodied in the body of the particular phone which is unique and different from other Nokia Lumia 610 phones. We agree with the learned Senior State Attorney that the complainant miserably failed to tender impeccable, conclusive identification to the police and in court which rendered proof of ownership doubtful.

As earlier stated, both courts below relied on the appellant's caution statement to ground the conviction. With respect, in our considered view the caution statement was taken beyond the

prescribed four hours after the restraint of the appellant and no extension was sought and obtained contrary to sections 50(1) (a) (b) and 51 of the CPA.

In the present matter the appellant who was arrested on 5/12/2012, his caution statement was taken two days later on 7/12/2012 according to the evidence of the investigator PW2. Apparently, justifying on the delay to take the statement at the High Court the Judge remarked as follows at page 84:

> *"The 1st accused person could not be interviewed and taken his caution statement in time because he was assisting and accompanying the police in the process of arresting the 2nd and 3rd accused. Thus, the delay is justifiable."*

With due respect, we found this narration not backed up by the evidence on record because PW2 told the trial court to have interrogated the appellant on 7/12/2012 and not before that. Moreover, the delay to take the caution statement was not an issue at the trial because its admission was not objected to by the appellant. Thus, since the statement was taken beyond the prescribed time, it was illegally obtained and wrongly admitted at

the trial. In the same vein the appellant's complaint on the admissibility of the statement was merited and not an afterthought as concluded by the first appellate court at page 86 of the record of appeal. Thus, both the trial and first appellate courts wrongly acted on the caution statement (exhibit P4) to convict the appellant and we accordingly expunge it.

In view of the aforesaid, the prosecution failed to prove its case against the appellant. We accordingly allow the appeal in its entirety; quash the conviction set aside the sentence of imprisonment and 12 strokes of the cane. We order the immediate release of the appellant unless he is otherwise lawfully held.

DATED at **MWANZA** this 2nd day of July, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL