**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MUSSA, J.A., MUGASHA, J.A. And LILA, J.A.)**

**CRIMINAL APPEAL NO. 204 OF 2008**

**1. RASHID AMIRI JABA**
**2. SAIDI AMIRI JABA .....APPELLANTS**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)**

**(MUSHI,J.)**

**dated the 08th day of April, 2008**
**in**
**HC. Criminal Appeal No. 84 of 2005**

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## JUDGMENT OF THE COURT

2nd & 16th April, 2019

**LILA, J.A.:**

The appellants and five others were charged with the offence of armed robbery contrary to section 285 and 286 of the Penal Code as amended by Act No. 10 of 1989. They pleaded not guilty to the charge. The trial ensued and at the end of the prosecution case, two of them were acquitted for no case to answer. Ayubu Salum Mwananga (then 2nd accused) jumped bail and the hearing of the case proceeded in his absence under section 226(1) of the Criminal Procedure Act. At the conclusion of trial, the appellants and three others, were found guilty, convicted and each sentenced to serve a jail term of thirty (30) years. However, the 2nd and 5th accused persons were not present on that day

consequent upon which the trial court ordered that they would start serving their respective sentences upon their arrest. Aggrieved, the appellants unsuccessfully appealed to the High Court. Still protesting their innocence, they preferred the present appeal.

It was alleged in the particulars of the offence that on 16th January, 1996 at about 10.00 hours along Kilombero street Upanga, within Ilala District in Dar es Salaam Region, the appellants did steal various items to wit, one motor vehicle Reg. No. MG 5368 make Toyota Crown with Engine No. IG-0875706, Chasis No. GS120 – 717082 valued at Tshs. 2, 3000, 000/=, cash Tshs. 50,000,000/=, Passport No. P157186 of Mr. Wichai Sangwan, Resident Permit No. 00057941 for Mr. Wichai Sangwan, Passport No. G13536663, temporary work permit for Mr. Werner Spalternestin clothes and documents all total valued at Tshs. 70,400,000/= the property of Thom Mine (T) Ltd and immediately before such stealing did use actual violence to Mr. Werner Spalternestin,, Wichai Sangwan and Chatchatman Sangwani to wit they threatened to shoot them with four pistols in order to obtain the said properties.

The material facts as gleaned from the record are that on 16/1/1996 at about 10.00 am the motor vehicle with registration No. MG 5368 was ambushed by thugs at the junction of Kilombero and Umoja

wa Malaifa road by thugs who successfully made away with items listed in the charge sheet which belonged to two Thailand citizens who were on the way to Tunduru. The matter was reported to Jackson Lyamba (PW1) an administrative Officer with the Tom Mine Limited who then reported the matter to the Selander Police Station. In court, PW1 did not tell the type of weapon used or the stolen items. The police mounted a serious search for the thugs and stolen items and acting on the information from an undisclosed informer that the offence was committed by Mark Charles, Said Jaba, Rashid Jaba and Ally Moza and that the stolen items were distributed at Rashid Jaba's house at Mkwajuni, C 8272 D/Cpl Charles (PW3) with other police officers went to Magomeni where he arrested Mark Charles but Said Jaba ran away. They handed him to Msimbazi police and went to arrest Rashid Jaba who was found in possession of a wallet wherein there was an identity card belonging to one Thailand man, Tshs. 60,000/= and one Thailand bank note and he said he was given them together with Tshs. 500,000/= by Said Jaba and Mark Charles. PW2 one C2206 D/Sgt Yohana recorded the cautioned statement of Said Amir Jaba but the same was objected from being admitted as exhibit on the ground that the same was involuntarily taken because the accused was beaten and forced to sign the same. No enquiry was conducted to test the

voluntariness in taking it but it was nevertheless received by the trial court as exhibit P4. PW2 said, both Mark Charles and Rashid Jaba were arrested on 18/1/1996. Abdallah Zombe (PW4) said he led the team of policemen who went to search at Mark Charles' house at Temboni and he recovered three jeans trousers, one jeans shirt and other documents which no body claimed. C 6510 D/C Sgt Jumanne (PW5 wrongly typed as PW7) took the statement of Ayubu Salum who objected the same from being received in court on the ground that the signature in it was not his, it was recently taken and that it did not comply with sections 10(3)(B), 50(1) and 51(1) of CPA 1985. All the same, it was admitted for identification. C 8647 D/Sgt Nicolas (PW6 wrongly referred as PW7) led the team of police which traced and found the stolen car abandoned at Jangwani area but there was nobody in it. Like PW3, he went on to state that they went to Kimara whereat they arrested Rashid Amir Jaba who on being searched was found having in his pocket Tshs 60,000/=, one Thailand bank note and an identity card belonging to one European which was identified by Jackson Lyamba (PW1) as being the property of Wichard, a Thailand man. That Rashid Amir Jaba (1st respondent) said they were among the properties he stole from the Thailand people. That a Thailand worker identified one brief case in which the stolen Tshs 50,000,000/= were kept. He said that, thereafter, Getan and Mashaka

Tadeo were arrested in connection with the offence. He added that, the a motor vehicle Registration No. TZB 5479 make starlet, allegedly involved in the robbery incidence which was found in possession of Mr. Mwengela, learned advocate, was surrendered and taken to police station.

In their respective defences, both appellants vehemently denied committing the offence. The 1st appellant said that he was arrested at Kimara, taken to police whereat he was beaten and hurt on his head and he produced a PF3 for identification. He said PW1 did not identify any of the accused persons to have been involved in the robbery incident and that nothing was produced to prove that they were identified in the identification parade. He said the prosecution evidence was hearsay. For his part, the 2nd appellant said that he was arrested at Kibaha on accusation of being in possession of bhang and was taken to Kibaha police. That after being convicted of that offence by the court and being fined, he was arrested and taken to Central Police Station in Dar es Salaam and charged with the present offence. He denied writing the cautioned statement.

In its ruling for case to answer, as alluded to above, two of the accused persons namely Rajabu William Siwiti and Mashaka Thadeo

Nzunda were acquitted for no case to answer and the rest were convicted and sentenced as indicated above.

On appeal, the High Court (Mushi J.), dismissed the appellants appeal. The High Court was satisfied that the appellants were found in possession of an identity card belonging to a Thailander, Thailand currency note, some articles and documents belonging to the Thailanders and a driving licence of the said Wichal Sangwan and that the appellants failed to give reasonable explanation on how they came by them. It was of the view that the doctrine of recent possession was properly invoked by the trial court in the circumstances of the case and that the appellants were properly convicted. In respect of the retracted cautioned statement by the 2nd appellant, the learned judge held that it was not necessary to hold a trial-within –trial as the same is held by the High Court not by the Magistrates courts where there is no exact procedure to be followed but can hold inquiry. It went further to hold that the evidence contained in the appellants' cautioned statement corroborated in detail the direct testimony of the prosecution witnesses and it enhanced quite a lot the evidence of recent possession that some of the items and properties stolen during the robbery incidence were found in their possession.

Aggrieved by the High Court decision, the appellants lodged a joint memorandum of appeal constituting of four grounds that; **one**, the case was tried by a district magistrate who wrongly sat in the Resident magistrates court, **two**, the judge relied on a retracted confessional statement (exhibit P4) without having held an inquiry, **three**, the exhibits tendered by PW7 were not properly identified by PW1 and, **four**, the case was not proved beyond reasonable doubt.

When the appeal was called on for hearing before us the appellants appeared in person and fended for themselves, whereas the respondent Republic had the services of Ms. Anita Sinare who was assisted by Mr. Gabriel Kamugisha, both learned State Attorneys.

Both appellants adopted their joint memorandum of appeal and urged the Court to consider the grounds contain therein without more. They then opted to respond after the learned State Attorney has argued the appeal.

Ms. Sinare, arguing the first ground of appeal, pointed out that the record is clear that the case was tried at the District Court of Ilala hence that ground of appeal had no merit.

Ms. Sinare then proceeded to argue the appeal generally and she did not hesitate to support the appeal basically on two points of

complaints. One, that the procedure adopted in admitting the cautioned statement (exhibit P4) was improper on account of it being read before it was admitted in evidence and as it was retracted no inquiry was conducted to verify its voluntariness at the time it was taken. In bolstering her contention she referred us to the case of **Robinson Mwanjisi and Three others vs. Republic**, [1994] TLR 2003 and **Selemani Abdallah and Two Others Vs. Republic**, Criminal Appeal No. 384 of 2008 (unreported). She contended that the judge erred in holding that it was unnecessary to hold an inquiry. She urged the Court to expunge exhibit P4 from the record.

Ms. Sinare also argued that the doctrine of recent possession was improperly invoked by both courts below to convict the appellants. She argued that the items recovered after the search which was conducted at Magomeni were neither tendered as exhibit nor identified to be those stolen in the robbery incidence at Upanga.

In view of the above evidence, Ms. Sinare contended, there is no evidence incriminating the appellants with the committed offence. She therefore prayed that the conviction be quashed and the sentence be set aside.

After our careful examination of the record we are, like the learned State Attorney, satisfied that the case was tried at the District Court of Ilala. In that accord, ground one of appeal lacks merit and is dismissed.

In respect of the other grounds of appeal, we entirely agree with the learned State Attorney that the appellants' convictions were tainted with procedural flaws.

As rightly argued by the learned State Attorney, page 27 of the record of appeal shows that when PW2 who recorded the statement of Said Amir Jaba (2nd appellant) sought to tender it in court, Mr Mwengela, learned advocate for the 2nd appellant, objected its admissibility on account that he did not consent to its being taken, he was beaten, the same was taken in the presence of seven other police officers and there was no certificate that it was properly taken. The record further shows at page 30 that the trial magistrate ordered that cautioned statement be read out in court and the same was read out as reflected at page 31 of the record. Thereafter, the record shows, Mr. Mwengela reiterated his earlier grounds for objecting its admissibility. Then after the ruling on the matter, the cautioned statement was admitted as exhibit P4. This was a clear violation of the settled position that any documentary exhibit will be read out after it is admitted in evidence. That position was restated in the cited case of **Robinson Mwanjisi Vs. Republic** (supra)

in which the court outlined the three stages to be observed before a document is admitted in evidence as being clearing, admitting and reading out when it categorically stated that:-

> *"...Whenever it is intended to introduce any document in evidence,* ***it should first be cleared for admission****, and* ***be actually admitted****, before it can* ***be read out****..."*
> (Emphasis added)

We, in the circumstances, agree with the learned State Attorney that exhibit P4 was read out before it was admitted in evidence hence it was improperly admitted in the evidence and the same is hereby expunged from the record. Besides, the voluntariness in the taking of the cautioned statement was at issue. The record shows that the trial court did not make any attempt to satisfy itself that the cautioned statement was voluntarily made. This is a requirement under section 27 of the Tanzania Evidence Act, Cap. 6 R. E. 2002 and there is a plethora of authorities of the Court to the effect that before a confession is admitted in evidence the prosecution must prove beyond doubts that the same was voluntarily made. For instance in the case of **Twaha Ally and Others Vs. Republic**, Criminal Appeal No. 78 of 2004

(unreported) which is cited in the case of **Selemani Abdallah and 2 others Vs. Republic,** (supra) the Court insisted that:-

> *"If the objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

On the authority above it is evident that the confession statement of the 2nd appellant (exhibit P4) was wrongly admitted in evidence. It is expunged from the record.

In respect of whether the doctrine of recent possession was properly invoked in the circumstances of this case, we, again agree with the learned State Attorney that it was wrongly invoked. The conditions to be conjunctively observed before the doctrine is invoked were succinctly stated in the often cited case of **Joseph Mkubwa and**

**Samson Mwakagenda Vs. Republic**, Criminal Appeal No. 94 of 2007 (unreported) where the Court stated that:-

> *"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 constitute the subject of the charge against the accused..."*

In the instant case, the charge indicated that some of the stolen properties are Passport No. P157186 and Resident Permit No. 00057941 of Mr. Wichal Sangwan, Passport No. 613536663 and Temporary Work Permit of Mr. Werner Spalternestin and that immediately before such stealing actual violence was used to Werner Spalernestin, Wichal Sangwan and Chatchatman Sangwani. According to the evidence on

record, when PW7 sought to tender one wallet, one identification card for Thailand people, one Thailand note and Tshs 60,000/= as exhibit, Mr. Mwengela, the learned advocate, objected and the same were admitted for identification purposes (D1). They were not tendered as exhibit. The law is settled that any physical or documentary evidence marked for identification only and not produced as an exhibit does not form part of the evidence hence have no evidential value. (see **Samson Elias @ Michael Vs. Republic**, Criminal Appeal No. 283 of 2012 and **Udaghwenga Bayay and 16 Others Vs. Halmashauri ya Kijiji cha Vilima Vitatu and Another**, Civil Appeal No. 77 of 2012 (Both unreported).

It is incomprehensible that in the present case neither of the owners of the allegedly stolen items testified in court. In fact, all those who were in the ambushed motor vehicle from which the properties listed were stolen did not testify in court. All that was said by PW1 was hearsay for he was not at the scene and he narrated in court what he said he was told by the complainants. Those who were in the ambushed motor vehicle had the duty to testify in court so as to tell the kind of violence deployed in the course of stealing, the stolen items as well as identify the recovered ones. Without such evidence, it cannot be said, with certainty, that the offence of armed robbery was committed. More

so, the allegedly stolen items were not identified by the owners. On the whole, failure by the complainants to testify fatally affected the prosecution case. The significance of the complainant testifying in court was well elaborated by the Court in the case of **Leonard Zedekia Marate Vs. Republic,** Criminal Appeal No. 86 of 2006 (unreported) which was cited in the case of **Justine Kakuru Kasusura @ John Laizer Vs. Republic**, Criminal Appeal No. 175 of 2010 (unreported) where the Court stated that:-

> *"In our view, from the charge sheet, it was expected that the prosecution would lead evidence to prove that the appellant stole the above sum of money the property of Peter Zakaria and that immediately before such stealing he fired two bullets in order to retain the money. In the circumstances, we are of the view that Peter Zakaria ought to have given evidence to show that his sum of money amounting to Tshs 4,375,000/= was actually stolen by the appellant. Aftet all, being the owner of the money in issue, evidence from him ought to have been forthcoming to the effect that his money was actually solen. As it is, in the absence of his evidence it is not certain*

*whether the above sum of money actually belonged to him. As already stated,* ***we are of the settled view that there was failure of justice in that the identified owner of the money did not testify. In the absence of his evidence, it is therefore easy to to say with certainty that Peter Zakaria, being the owner of the stolen money, was deprived of the said money, thereby constituting "theft" within the above definition of "theft".*** (Emphasis added)

Like in the above case, in the present case those who were allegedly robbed of the charged properties did not testify in court. It cannot therefore, with certainty, be said that the prosecution sufficiently established that the offence of armed robbery was committed, the properties listed in the charge sheet were stolen and they not only belonged to those who were allegedly robbed but were also connected with the offence.

In the upshot, the cumulative effect of the above shortfalls is that, it was not established that the stolen properties belonged to the complainants and were positively identified by the complainants as being theirs. The doctrine of recent possession could not therefore apply. And,

since this, together with exhibit P4 which we have expunged from the record, formed the basis of the appellants' conviction, then there remains, as rightly argued by the learned State Attorney, no evidence incriminating the appellants with the offence charged.

In the circumstances, we agree with both the learned State Attorney and the appellants that the charge was not proved beyond doubts. We accordingly allow the appeal, quash the appellants' conviction and set aside the sentences meted by the trial court and maintained by the first appellate court. We order the appellants be released from prison forthwith unless held therein for any other lawful cause.

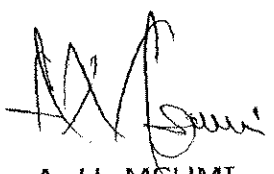
**DATED** at **DAR ES SALAAM** this 12th day of April, 2019.

K. M. MUSSA
**JUSTICE OF APPEAL**

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

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

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



A. H. MSUMI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**