IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A. And KITUSI J.A.)

CRIMINAL APPEAL NO. 574 OF 2017

WATSON MAHANGA.....APPELLANT

VERSUS

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

[Appeal from the Judgment of the High Court of Tanzania at Iringa

(Feleshi, J.)

dated the 27th day of September, 2017
in
Criminal Appeal No. 84 of 2016

JUDGMENT OF THE COURT

14th & 22nd August, 2019

KITUSI, J.A.:

Before the District Court of Mufindi at Mafinga, the appellant was charged with and convicted of Armed Robbery Contrary to Section 287A of the Penal Code [Cap 16 R.E. 2002]. He was sentenced to 30 years imprisonment, a sentence he is serving to date because his first appeal against the conviction and sentence to the High Court, Iringa Registry, was unsuccessful. This is the second by the determined appellant.

At the trial it was alleged that on 26th August 2015 at Usokami Village in Mufindi District, Iringa Region the appellant stole a motor vehicle make Toyota Noah Registration No. T. 285 DCN worth Tshs. 12,500,000/= the property of Frida Kinyamagoha and two cellphones make Tecno worth Tshs 260,000/= and HUWAWEI worth Tshs 130,000/= property of one Selestine Komba the driver of the above mentioned car. The total value of the stolen property was Tshs 12,890,000/=. It was further alleged that immediately before and after the stealing the appellant used actual violence by stubbing the driver with a knife in order to retain the said property.

When the appellant pleaded innocence, the prosecution brought witnesses who told the following story; Selestine Komba (PW1) was employed by Frida Raphael Kinyamagoha as a driver of the motor vehicle earlier mentioned, which she was operating for commercial purposes. In the course of those duties, PW1 was approached by the appellant who told him that he had lost a relative so he wanted to hire the vehicle to Usokami to pick the body of his said deceased relative. The two agreed to drive to Usokami the next day, that is, on 26th August, 2015.

On the agreed day (26th August, 2015) they set off for Usokami, but had to stop on the way to fix a flat tyre. They managed to fix it after receiving assistance from Kisari Mnuo Palangyo (PW3) who offered his jerky to be used by PW1. When they resumed the journey, the appellant instructed PW1 to pull at a spot where he produced a knife with which he attacked him. He stubbed PW1 on his hands and chest and PW1 jumped out of the car and ran for his life as the appellant chased him. After some distance the appellant gave up and returned to the car. PW1 narrated the incident to an old man he ran into, and that old man listed assistance of other people. However, before the team could do anything, another man arriving from the direction where the car had been left, told them that the car was still there with no sign of any one around. This was confirmed by PW1 and the villagers who had turned up to help. According to PW1 there was indication that the appellant had unsuccessfully tried to drive the car off.

A report of the matter was made to the Ward Executive Officer (WEO) but since he was not around, it was the village executive officer (VEO) who wrote for PW1 an authorization for him to receive medical treatment. After receiving medical treatment, PW1 drove back to Mafinga

town. In the evening of the same day he received a call from the hamlet Chairman of Mwitasi Village who demanded him to describe his assailant, and PW1 described the fugitive and the mobile phones. The said local leader told him that they had spotted a man who answered to the description and advised PW1 to get police assistance.

PW1 got four police officers with whom he drove to Mwilasi village where they found the appellant under restraint. PW1 identified his mobile phones which the appellant had stolen earlier that day. The police booked the appellant and transmitted him to Mafinga Police Station where D/Corporal Pendo (PW2) recorded his statement. According to PW2, the appellant confessed to have committed the alleged robbery. After an inquiry the cautioned statement was admitted in evidence as Exhibit P4.

On his part, PW3 confirmed PW1's story that he found him along the road with a flat tyre and gave him assistance. He was positive that PW1 was with the appellant.

In defence the appellant was initially non-committal and alleged fabrication. He faulted the prosecution for not adducing evidence of the local leader who allegedly effected his arrest. He also took his time in

demonstrating that the cautioned statement ought not to have been admitted in evidence despite the inquiry which he also considered invalid for having allowed the same officer (D/CPL Pendo) to testify. He wondered why would the trial court believe the prosecution that he escaped on foot instead of using the vehicle, if he intended to steal it.

During his response to cross – examinations however, the appellant admitted to have been in PW1's motor vehicle as a passenger from Mafinga. He also stated that there was a fight between him and PW1 but that the reason for that fight was a demand for the balance or change from the payment he had made. The appellant stated that the wounds that PW1 showed to the court during his testimony were old scars, meaning that he did not cause them.

The trial Senior Resident Magistrate concluded from the evidence that the appellant was in PW1's car and the two had a fight. She posed one main issue namely whether the appellant had intended to steal the car, which she answered in the affirmative. How she arrived at that conclusion is better we reproduce:-

> " *Now one may ask, if not aim of stealing the vehicle what would be the other reason for the accused person*

to stub the driver and try to move the vehicle? Clearly the accused person's aim was stealing using force all along being together on the way to Usokami and to Mwitas village".

The learned trial magistrate proceeded to refer to the cautioned statement that the appellant allegedly made and found it as supporting the prosecution case because it mentioned the same incident of stubbing on the same parts of the body as narrated by PW1. She was satisfied that the appellant's guilt had been established beyond doubt and convicted him as charged.

The appellant's first appeal was unsuccessful because the High Court took the view that the doctrine of recent possession and his cautioned statement nailed him to the cross. The learned Judge cited the decision of this Court in **Ramadhani Ayoub V. Republic,** Criminal Appeal No. 122 of 2004 (unreported) where it was held that for the doctrine of recent possession to operate, there must be established the following:-

(1) the property should be subject of stealing

(2) the accused must be found in possession of it

(3) the suspect must have failed to give reasonable explanation

(4) the circumstances of transfer of the property should be established

(5) the circumstances of the recovery and conduct of the possessor should be established.

As regards the cautioned statement the first appellate Judge had this to say in conclusion:-

> *"The appellant's confession thus complements the direct evidence adduced by PW1 (immediate victim of crime) which is corroborated by PW3 (owner of the robbed motor vehicle). The appellant's confessional statement (Exhibit PW4) recorded by PW2 (Police officer) provides full account on how he committed the offence."*

He went on to observe that the court could convict on the appellant's confession alone, and dismissed the appeal.

The appellant's appeal before us raises seven grounds which in summary may be stated thus; **one**, the charge was not proved beyond reasonable doubt; **two**, the appellant was convicted on a charge that was drawn under a non existent provision of law; **three,** that the hamlet Chairman of Mwitasi did not testify to prove that he found the appellant in

possession of the mobile phones; **four**, that there was no proof that PW1 was injured and given medical treatment; **five** that the cautioned statement was incorrectly admitted based on PW2's uncorroborated evidence; **six**, the High Court erred in not considering the doubts in the prosecution's case; **seven**, the High Court failed to consider the defence case.

At the hearing of the appeal Ms. Kasana Maziku, learned Senior State Attorney who appeared for the respondent Republic resisted it and argued in support of the conviction. The appellant appeared without legal representation as had been the case before the two courts below. He opted to let the Senior Attorney address us first, retaining the right to rejoin.

Ms. Maziku prayed to begin with ground 2 on to the 7th ground and concluded with the first ground, a general one that alleges that the charge was not proved beyond reasonable doubts. We found that approach correct and we wish to add that the sixth ground is materially the same as the first.

Arguing ground number two concerning alleged defects in the charge Ms. Maziku submitted that although the charge did not cite Act No. 3 of 2011, that omission did not prejudice the appellant because he knew that he was being charged with Armed Robbery contrary to Section 287A of the Penal Code. The learned State Attorney submitted that Act No. 3 of 2011 deleted the old section 287 and replaced it with the new section 287A, but the omission to cite Act No. 3 of 2011 is curable under Section 388 of the Criminal Procedure Act, Cap 20 R.E 2002 hereafter the CPA.

As regards the 3rd ground that complain against the prosecution's failure to call the village leader who arrested the appellant, Ms. Maziku submitted that the evidence of PW3 was sufficient to cover the omission. She submitted that PW3 testified that he went to the village and found the appellant under arrest while holding the mobile phones. Submitting on the fourth ground of appeal the learned Senior State Attorney pointed out that proof of PW1's injuries could be in the photographs which were tendered in exhibit.

In the fifth ground of appeal Ms. Maziku justified the admission of the cautioned statement having been preceded by an inquiry but then went on

to submit that the learned first appellate Judge's conclusion was not solely based on that statement. In the seventh ground Ms. Maziku submitted that the High Court Judge considered the defence case but concluded that the appellant had failed to explain how he came by the stolen mobile phones.

The learned Senior State Attorney wound up by submitting that from what she had submitted on the 2nd to 7th ground, the case against the appellant was proved beyond reasonable doubts.

On his part, the appellant repeated his complaint that the same witness who forced him to confess testified in proof of voluntariness in the recording of the cautioned statement, which to him was wrong. Then he submitted that he was not found in possession of the mobile phones and wondered how would the Court believe that story in the absence of testimony from the person who arrested him.

As regards the injury on PW1, he reiterated his complaint that there was no medical evidence, neither were the weapons tendered in evidence.

After considering the evidence on record, the findings of the two courts below and the submissions for and against this appeal we find no

dispute in the fact that the appellant was aboard PW1's vehicle from Mafinga to Mwitasi village and the two had a fight at a spot before arriving at Mwitasi village. The appeal in our view turns on the following issues:-

(i) whether the fight was intended by the appellant to obtain anything from PW1

(ii) whether the appellant was found in possession of the mobile phones

(iii) whether the doctrine of recent possession was properly applied by the High Court.

In dealing with the first issue we start with the trial magistrate's conclusion that the fight could not have been for any other cause but robbery.

We think that conclusion was unjustified because the appellant had stated that the fight was over the money which he was claiming from PW1 as balance or change. The trial magistrate had a duty to consider this piece of evidence even if at the end of the day she would have rejected that version, but she did not. This is so because it is settled law that failure to consider the defence case is fatal to the ultimate decision. [See, **Ally Juma V. Republic** Criminal Appeal No. 219 of 2014; **Stephen Simon Mollel V. Republic,** Criminal Appeal No. 240 of 2016 and,

Leonard Mwanashoka V. Republic, Criminal Appeal No. 226 of 2014 (All unreported).

We note that the learned first appellate Judge did not deal with that issue of failure by the trial Magistrate to consider the defence case although it was raised in the 6th ground of appeal. The 6th ground of appeal before the High Court was couched thus:

> *"That the trial Magistrate erred in law point and fact when she convicted the appellant by disregarding his defence".*

We think it was imperative for the first appellate Judge to pronounce himself on this ground, and we are certain that if he had done so, he would have found the trial magistrate's conclusion on the point unmaintainable. The learned Judge approached the appeal from a different angle which we shall allude to later.

We now turn to the second issue whether the appellant was found in possession of the mobile phones. Appellant's major complaint both before the first appellate court and before us is the omission to call to the witness box the Chairman of Mwitasi village to prove that at the time of arresting

him he found the appellant in possession of the mobile phones. It was the first ground at the first appeal and the third ground before us.

Interestingly, Mr. Mwenyeheri, learned State Attorney who stood for the respondent Republic at the High Court supported this ground. He submitted that there was no link between the appellant and the mobile phones. We have found it pertinent to ask ourselves whether the fact that the appellant was found in possession of the mobile phones was proved, considering the duty under Section 112 of the Evidence Act, Cap 6 RE 2002 to prove an allegation. We think in the absence of the testimony of the person who arrested the appellant, this fact was not proved considering that PW1 and PW3 found the appellant already under arrest. Further we are compelled to draw an adverse inference for the prosecution's omission to call the person who arrested the appellant. The case of **Azizi Abdallah V. Republic** [1991] T.L.R 71 which has been followed by many other decisions is relevant on the point that the Court may draw an adverse inference where an important witness who is within reach is not called to testify. See also **Seketo Lemlela v. Republic**, Criminal Appeal No. 111 of 2011 (unreported).

The third issue is whether the doctrine of recent possession was properly applied. With respect, we agree with the learned High Court Judge on the factors that must be established before relying on the doctrine of recent possession as stated in the case of **Ramadhani Ayoub V. Republic** (supra). However, those factors only come into play after it has been proved that the culprit was indeed found in possession of the stolen property and not before. In the instant case, this issue is straight forward in view of the position we have taken in the second issue. For the doctrine to apply there must be among other conditions, proof that the culprit was found in possession of the stolen items. In this case, we are afraid, there is no such proof and it is our conclusion that the doctrine was not properly applied.

Lastly, we wish to consider the approach that was taken by the High Court Judge in disposing of the appeal before him, as earlier promised. He based his finding on the doctrine of recent possession and on the appellant's cautioned statement. Since we have discussed the doctrine of recent possession, we shall only consider the cautioned statement in order to determine its evidential value, skipping the issue as to its admissibility. We are firmly of the view that for a cautioned statement to be of some

evidential value, a part from being voluntarily made, it must speak the truth about the allegation. This is supported by our decision in Michael **Lembeni Msolwa @ Michael Platin and 4 Others Vs. The Republic**, Criminal Appeal No. 282 of 2005 (unreported). In the case under our consideration, part of the statement says:

> *"Baada ya kupora gari niliendesha na kwenda kulificha porini....Nikiwa hapo nyumbani majira ya saa 20.00 HRS ndipo nilikamatwa na M/Kiti na Mwatasi MATEMA S/O KISINI akiwa na raia wengine ambao siwafahamu kwa tuhuma hizo za wizi wa gari pamoja na simu mbili. Waliponikamata walinikuta na zile simu mbiii za TECNO na HUAWEI ambazo nilimpora yule dereva, baada ya hapo nilihojiwa na hao raia ndipo nilipoamua kwenda kuwaonyesha mahali nilipoficha hiio gari. Ndipo walipiga simu polisi kutoa taarifa."*

In order to test whether that part of the statement is true or not we have decided to compare it with what PW1 stated under oath. According to PW1, the car was instantly recovered during the day, it was along the road and that the appellant had not driven it. After the comparison of the two statements it is clear now that either PW1 was truthful, which would make

the cautioned statement untruthful, or conversely that the cautioned statement is true and PW1's testimony would be rendered untruthful.

We are undoubtedly of the view that the two statements are materially contradictory of each other, and had the High Court Judge approached the same in the way we have done, he would not have accepted both as true.

For the reasons we have shown, it is finally our judgment that the first appellate judge erred in dismissing the appeal before him based on the doctrine of recent possession and appellant's cautioned statement. Accordingly, we allow the appeal by quashing the conviction and setting aside the sentence. The appellant's liberty should be immediately restored if he is not lawfully held for some other cause.

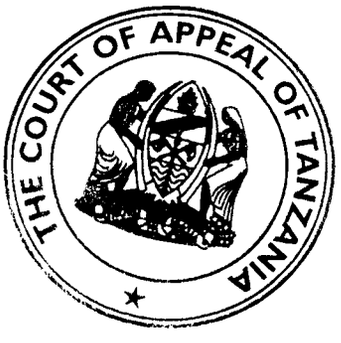
DATED at **IRINGA** this 21st day of August, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of August, 2019 in the presence of Mr. Adolf Maganda, learned Senior State Attorney counsel for the Respondent and in the presence of the applicant in person, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL