IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: JUMA, C.J., MZIRAY, J.A., And MKUYE, J.A.)

CRIMINAL APPEAL NO. 336 OF 2017

ALEXANDER MGUNDA @ CHECKNORIS .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Feleshi, J.)

dated 11th day of August, 2017
in
Criminal Appeal No. 04 of 2017

JUDGMENT OF THE COURT

23rd & 30th August, 2019

MZIRAY, J.A.:

The appellant who is interchangeably known as Alexander Mgunda @ Checknoris, Juma, Alex Mgunda, Alex, Juma @ Alex Mgunda together with three other accuseds who were subsequently acquitted, appeared in the District Court of Iringa on 23/1/2015 facing two counts of armed robbery contrary to section 287 A of the Penal Code, Cap. 16 R.E 2002. In the same charge, there was a third count of having possession of goods

suspected of having been stolen or unlawfully acquired contrary to section 312(1)(b) of the Penal Code facing one Kulwa Marambo, (PW3). She pleaded guilty and upon conviction on 18/5/2015, she was absolutely discharged under section 38(1) of the Penal Code. In the trial the prosecution summoned her and she testified as PW3.

In the trial which ensured, the trial court acquitted the appellant in the first count, but for the second count he was convicted and sentenced to thirty years imprisonment. At the trial court it was alleged that the appellant together with three others, on 13/10/2014 at Nduli area within the District and Region of Iringa stole cash Tshs. 550,000/=, vodacom credit vouchers, two mobile phones make Tecno, all properties of Happy Ignas Lubagala and at the time of stealing threatened her with clubs, machetes and a shotgun in order to obtain and retain the said amount of money and properties.

A total of eleven witnesses testified for the prosecution. The exhibits which were tendered had no connection with the charge facing the appellant. The prosecution case in the trial court can be put in this compass. On 13/10/2014 at around 8.00 pm while PW1 Happy Ignas Lubagala was in her shop paying PW5 Isaya Ngunda for soft drinks he had

delivered in her shop, some bandits armed with machetes, clubs and firearm stormed in her shop. They threatened PW1 with the arms and in the course took cash, credit vouchers and a cell phone make Tecno T. 340. This cell phone had IMEI code number, red and black colours and a special mark 'H'. She used the cell phone to facilitate her Tigo Pesa and M-Pesa business. This incident was reported to police. Some days later she was called at Police to identify her recovered cell phone. According to her, she easily identified it by the special marks she inserted and the IMEI code number.

Through the efforts of PW8 D/C Said from the Cyber Crime Unit of the Police Force, PW1's cell phone was recovered. He was tipped that the appellant was one among the suspects. He started to track the appellant but the process was difficult and tedious because the appellant used to change SIM cards. In the SIM cards he was changing, all showed that he was within the locality of Makambako. In the course of his investigation he was given the contact number of the stolen Tecno cell phone. He forwarded it to telephone companies with its IMEI number. Vodacom company responded by informing him that the IMEI number of the stolen cell phone submitted was registered in the name of PW3 Kulwa Marambo

and it showed that it was in use at Makambako. He tracked it electronically and on 16/1/2015 he apprehended PW3 in possession of the stolen cell phone. On being questioned PW3 immediately named the appellant as the one who passed that cell phone to her after exchanging with her Nokia cell phone. PW3 said she agreed to the exchange after the appellant had tricked her into believing that he was getting some difficulties to operate Tecno cell phone. The exchange was made in the presence of PW4, Districk Mpwepwa who in his testimony agreed to have witnessed the transaction. This witness stated that the exchange took place at a distance of 250 paces away from the shop he served as a shopkeeper.

Then efforts were made to nab the appellant. According to PW8 it was difficult to net him because he kept on hiding. It became like a game of hide and seek but finally they managed to arrest him. On interrogation the appellant admitted the offence and named his accomplices who were charged jointly with him but were later on acquitted.

In his defence the appellant challenged the evidence which incriminated him to be false. He also complained that there were no street leaders to where PW1 resides who were called to testify on the alleged

offence. He criticized the evidence of PW1 about the description she gave were insufficient for a proper identification of the stolen Tecno cell phone. He then turned to the evidence of PW3 and challenged it to be false and contradictory. He pointed contradictions in the evidence of PW3 and PW4 in respect of the exchange transaction. On the evidence adduced by PW8 he challenged it to be lacking expertise in electronic communication, hence it should not be accorded any weight. Having discredited the prosecution evidence, he proceeded to speak about the defence of alibi he raised that on 13/10/2014, the date of the alleged offence, he was at Dapori in Songea where he had gone for a short errand. His alibi is supported by DW3 Nazareno Mdunda and DW4 Michael Romanus.

In its decision, the trial court was of the view that, given the circumstances under which the cell phone was recognized, the doctrine of recent possession was applicable and the appellant was duty bound to offer a reasonable explanation as to how he came into possession of the stolen cell phone which he subsequently exchanged it with PW3. The trial court found that as there was no reasonable and plausible explanation given by the appellant on how he came into possession of the stolen cell phone, it proceeded to convict and sentenced him to thirty years

sentence. On appeal, the High Court endorsed the findings of the trial court and affirmed the conviction and sentence imposed.

Armed with two memoranda of appeal, the appellant has come to this Court in a second appeal, inviting us to fault the findings of the High Court. He filed the first memorandum of appeal containing eight grounds of appeal on 2/11/2017 and the second (supplementary memorandum of appeal) was filed on 28/1/2019, containing four grounds of complaint. Upon carefully going through the grounds of appeal raised in the two memoranda, we find that some grounds overlap and strictly speaking, the supplementary memorandum of appeal introduced completely new grounds which unless they raises points of law, which is not the case here, cannot be entertained for want of jurisdiction. (See **Abed Mponzi V.R** Criminal Appeal No. 476 of 2016 (unreported). In a nutshell the memorandum of appeal filed on 2/11/2017 raises four grounds of complaint. **One**, the evidence adduced at the trial court was insufficient to ground a conviction. **Two,** the High Court wrongly disregarded the appellant's defence of alibi. **Three,** the High Court erred in law for holding that the doctrine of recent possession was properly invoked by the trial court. **Four,** the prosecution failed to prove the case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Ms. Margareth Mahundi, learned State Attorney. The appellant opted to initially hear the submission of the learned State Attorney but reserved the right to reply.

Submitting on the evidence as a whole, the learned State Attorney argued that the evidence adduced by the prosecution side was sufficient to ground a conviction. According to her, PW1 identified the recovered stolen cellphone by the special mark of letter "H" she had inserted and the colour which was black and red. She submitted that as the cell phone was identified there was no need, to call an expert witness as demanded by the appellant. She admitted the presence of minor discrepancies in the evidence of PW3 and PW4 but in her view, such discrepancies did not affect the merit of the prosecution case. As to the controversy raised by the appellant in respect of the distance of 250 paces to where the exchange of cell phones took place, she submitted that there is no such controversy as the evidence of PW4 who was an eye witness to the exchange is very precise that the exchange took place at a distance of 250 paces away from the shop he served as a shopkeeper and not otherwise.

On the complaint in respect of the defence of alibi, the learned State Attorney while referring us to page 162 of the record was brief and direct to the point that the High Court discussed it and came to the conclusion that it was unmeritorious. She prayed for this ground be dismissed.

Discussing on the complaint in respect of the doctrine of recent possession, the learned State Attorney submitted that it was properly invoked by the two courts below. Referring to the evidence adduced, she stated that the only reason which made the appellant to be convicted based on the doctrine of recent possession was the cell phone stolen at the scene of the crime and found in possession of PW3. She said, when PW3 was interrogated she revealed that she exchanged it with the appellant in the presence of PW4. This cell phone was identified by PW1 as one among the stolen property in the robbery which occurred at her shop. With that evidence, the learned State Attorney was convinced that the doctrine of recent possession was properly invoked taking into consideration that time had not elapsed from the period of the commission of the offence to the time the item was recovered. She concluded and maintained that the case for the prosecution was proved beyond reasonable doubt, hence the appeal should be dismissed.

On the part of the appellant he reiterated what he raised before the trial court when he was called upon to give his defence. His first point was that the seized cell phone was not properly identified by PW1. His second point was that the street leaders were not called to testify on the alleged incident. Thirdly, he submitted that there was no expert called from Vodacom Company to explain what IMEI number of a cell phone is all about. In this regard, it appears that he is challenging the evidence of PW8. Fourthly, the evidence of PW3 and PW4 materially contradicted and for that reason, he invited the Court to resolve the said contradictions in his favour. Fifthly, he argued that his alibi defence was not considered. Lastly, he prayed for the Court to consider all the grounds of appeal in his favour and allow the appeal.

In arriving at our decision, we propose to discuss the four grounds of appeal generally but in doing so we will be able to cover each of the complaints raised in this appeal.

There is no dispute that the shop of the PW1 was broken into on 13/10/2014 at around 8.00 pm. There is no dispute also that in the course of the investigation, a cell phone make Tecno was recovered from PW3

who stated that she got it from the appellant. The appellant has heavily criticized that the recovered cell phone was not the one stolen from PW1. We have revisited the evidence of PW1 before the trial court. From that evidence we are satisfied that PW1 managed to identify her stolen cell phone not only by its colour but also through her special mark "H" and the IMEI number. This evidence of the recovery of the cell phone was believed by the trial court and on our part we have no reasons to fault the said findings which apparently were accepted by the High Court.

Still on the evidence, we are satisfied that the evidence of PW8 materially corroborated the evidence of PW1 who stated that the stolen cell phone was of make Tecno T. 340 and had an identity mark "H" and had its unique digit code number called IMEI number which through it he electronically tracked and detected that the phone was on use and was later on found with PW3. This evidence was not controverted and on our part we find that it heavily implicated the appellant with the charged offence.

Given the circumstances under which the cell phone was recovered it was proper as rightly found by the trial court and confirmed by the High

Court to invoke the doctrine of recent possession. In law, the appellant was duty bound to offer reasonable explanation as to how he came into possession of the cell phone which he exchanged with PW3. Considering that the appellant didn't challenge that evidence by giving reasonable explanation, it was proper as per the decision of the trial court which was confirmed by the High Court for an inference be drawn that he committed the armed robbery. We endorse that finding.

In Ramadhani Ayub V.R, Criminal Appeal No. 122 of 2004 (unreported) the Court gave the ingredients constituting recent possession to include that: (1) the property should be subject of stealing; (2) it should be found with the accused; (3) suspect failure to give reasonable explanation (4) circumstances regarding the transfer of the property; (5) circumstances on its recovery and the conduct of the possessor.

We find as observed also by the trial court and the High Court that those ingredients features also in the instant case and heavily incriminates the appellant because the cell phone had passed hands from him to PW3. Additionally, the appellant's conduct as per the evidence of PW3 was suspicious and the exchange occurred immediately after the commission of

the offence where PW1's evidence is clear that before the incident the cell phone was with her. It is at this stage we agree with the High Court that the exchange of the cell phone between the appellant and PW3 was aimed at concealing the truth. Not only that but also his conduct of changing SIM cards and keeping hiding demonstrated what type of a person he was. Definitely it tainted his character and credibility.

On the discrepancies pointed by the appellant, we agree with the submission of the learned State Attorney that they were minor and did not in any how vitiate the evidence for the prosecution.

Coming to the defence of alibi raised by the appellant, we share the same view with the trial court and the High Court that it was untenable because the evidence of DW3 Nazareno Mdunda and that of DW4 Michael Romanus did not support it because the dates they cited ie 12/10/2014 was one day before the commission of the offence and 16/10/2014 was three days after the commission of the offence which would not have prevented the appellant from participating in the commission of the offence on 13/10/2014. We therefore dismiss the complaint in respect of the defence of alibi.

All in all therefore, for the foregoing reasons, we find no merit in the appeal. It is dismissed in its entirety.

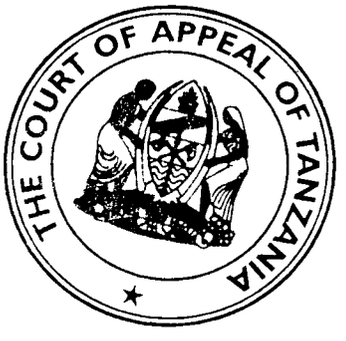
DATED at **IRINGA** this 29th day of August, 2019.

I. H. JUMA
CHIEF JUSTICE

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

This Judgment delivered this 30th day of August, 2019 in the presence of the Appellant in person and Mr. Alex Mwita, learned State Attorney, for Respondent/Republic, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL