IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And KITUSI J.A.)

CRIMINAL APPEAL NO. 443 'A' OF 2019

JOHN NKWABI @ KAKUNGURU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

Dated 12th day of August, 2016

in

Criminal Appeal No. 36 of 2016

JUDGMENT OF THE COURT

28th October & 7th November, 2019

KITUSI, J.A.:

The District Court of Nyamagana at Mwanza convicted the appellant, of the offence of Armed Robbery Contrary to Section 287 'A' of the Penal Code [Cap. 16 R.E. 2002] as amended by Act No. 3 of 2011. This was after evidence adduced before that trial court satisfied it that on 24th August, 2014 at about 20.00 hours at Buhongwa area in Nyamagana District within Mwanza Region, the appellant stole a motor cycle Registration No. T. 317

CQG made SANLG valued at Tshs. 2,000,000/=, the property of one Barnabas Felix and assaulted one Ismail Juma with an iron bar in order to obtain or retain the said property. He was sentenced to 30 years imprisonment, and his appeal to the High Court against the conviction and sentence, was barren of fruits, hence this second appeal.

There was evidence from Ismail Juma (PW1) that he worked for Barnabas Felix (PW2) as a commercial motorcyclist commonly known as "bodaboda", using a motorcycle Reg. No. T. 317 CQG owned by PW2. On 24/8/2014 at about 20.00 hours he carried two passengers from Mkolani area to Buhongwa area. On arrival at Buhongwa when the passengers were disembarking, he was hit by a hard object and lost consciousness, only to find himself at Butimba Hospital later. He testified to have sustained head injuries.

Meanwhile on the same night, Tumaini Petro (PW3) was on night patrol with other members of a vigilant group who happened to be his relatives. At about 02.00 hours they spotted a person moving along bushes with a motorcycle. Suspicious of the man, they stopped him and noted the motorcycle to bear Reg. No. T. 317 Sanlg, red in colour. The person's explanation as to where he was from and where he was heading, did not

satisfy the vigilantes so they kept him under restraint till morning despite the man's pleas and offer to give them some money to secure his release.

In the morning the man, who happened to be the appellant herein, was handed over to the police and it was then learnt that the motorcycle had been stolen from a "bodaboda" of Mkolani area. When cross examined by the appellant as to which police station they took him to, PW3 said it was at Kigongo Ferry or otherwise known as Usagara Ferry Police Station.

Then came the testimony of a No. E 5406 D/CPL Patrick (PW5) to whom the appellant was handed over by the vigilante group who had arrested him. He testified that he was at Kigongo Ferry Police Station in the morning of 24th August, 2014 when the people he referred to as villagers handed over to him and PC Nelson, the appellant and a motorcycle. The said villagers told PW5 the suspicious circumstances under which they found the appellant in possession of the motorcycle and decided to arrest him. Before PW5 could record the appellant's statement an angry mob of motorcyclists arrived at the station and demanded that the appellant be handed over to them so that they kill him. Tear gas had to be resorted to in order to scare away mob justice, and the appellant was whisked away. PW5 tendered in Court the motorcycle Reg. No. 317 CQG as Exhibit P2.

In defence the appellant said he was a victim of random arrests that were effected by the police on 25/8/2014 when he was proceeding to Mkuyuni area from a place known as Mwalo wa Mkaa. The good part of appellant's testimony narrated how he was moved from one police station to another and the treatment he received from the police. This he said, was after those who had been arrested along with him had been released. The appellant challenged PW1 for not exhibiting a driving licence to prove that he was indeed a motorcyclist as alleged.

In convicting the appellant, the trial court was satisfied that the evidence of PW3 who arrested the appellant and handed him over to PW5 who in turn tendered the stolen motorcycle in exhibit, provided an unbroken chain of custody and thus proved the appellant's guilt.

On first appeal to the High Court the appeal was dismissed as the first appellate court took the view that the doctrine of recent possession nailed the appellant to the cross. It relied on the cases of **Joseph Sera Liumire v. Republic,** Criminal Appeal No. 304 of 2013 and **Mwita Wambura v. Republic,** Criminal Appeal No. 56 of 1992(both unreported).

The appellant is challenging that decision on 8 grounds to wit;

1. ***THAT,*** *doctrine of recent possession of the stolen article being the basis of conviction against the appellant was neither established and proved beyond reasonable doubt nor met the standards requirement of law.*

2. ***THAT,*** *there was no any notice of seizure or receipt which was tendered in court as to ascertain who was found in possession of the alleged exhibit P2, motorcycle.*

3. ***THAT,*** *PW3 who purported to apprehend the appellant in possession of an exhibit P2 motorcycle, the same was not shown to him in court as to asset from which apprehended by and what tendered in court.*

4. ***THAT,*** *neither VEO nor WEO from the local area leader come to testify on effect whether or not the appellant was arrested with an exhibit P2 at Nyangomango area at Usagara. Thus, the*

prosecution knew if brought they would exonerate the appellant.

5. ***THAT,*** *the chain of custody of an alleged exhibit P2 was broken and not established to the requirement of the law, from purported sungusungu militia to the police officers in particular PW5.*

6. ***THAT,*** *PW1 alleged motorcyclist exhibit P2 did fail to tender in evidence any driving license to prove his duty work, instead of the court relied on mere statement upon plantation of exhibit against the appellant for prosecution benefit and interest.*

7. ***THAT,*** *Appellant was brutally tortured at police station as he was detained at from 25th August to 9th September, 2014 when brought in court with neither reason awarded, nor certificate from the court to legalize the period deprived.*

8. ***THAT,*** *the appellants defence raised a reasonable doubt but was not considered and given the required weight in that he should be given a benefit of doubt and declared innocent.*

When the appeal was called on for hearing the appellant appeared and prosecuted it in person without legal representation. Ms. Mwamini Yoram Fyeregete, learned Senior State Attorney, acted for the respondent Republic and was opposed to the appeal.

The appellant made the following submissions, reading from a script. That there was no document to establish who was found in possession of the motorcycle. Then, the chain of custody from the arresting person to the police up to the time of tendering the motorcycle in court, was broken. The appellant further submitted that, failure to lead evidence of the Village Executive Officer and Ward Executive officer is fatal to the finding that he was found in possession of the motorcycle, for had he been found in possession of that property, they would have testified. He repeated the complaint that PW1's failure to prove that he holds a driving licence causes a dent to the prosecution case and that in any event, PW1's evidence of identification was nothing more than dock identification without a parade

of identification. The appellant also raised issue with the description of the motorcycle not being sufficient because there was no reference to its engine numbers or chassis numbers. Lastly the appellant alleged fabrication of the case and that the delay in arraigning him in court is proof of that fact.

On the other hand, Ms. Fyeregete started by pointing out that two of the 8 grounds of appeal are new in that they did not feature at the High Court and thus they were not deliberated upon. These are the 6th and 7th grounds, and she made it plain that she was not going to submit on them. Then, she submitted on the remaining grounds, one after the other.

As regards the first ground, the learned Senior State Attorney submitted that the doctrine of recent possession was correctly applied because of the following factors; there was proof that the appellant was in possession of the motorcycle (Page 20 evidence of PW3); there was proof that the motorcycle belonged to PW2 (Pg. 14 – 16); there was proof that the motorcycle had been recently stolen and lastly; the motorcycle is the subject of the charge in this case. She referred us to the case of **Johnson Ashray v. Republic**, Criminal Appeal No. 523 of 2015 (unreported).

Responding to the complaint in ground two, that there was no certificate of seizure, Ms. Fyeregete submitted that s. 38 of the Criminal Procedure Act [Cap. 20 R. E 2002] (the CPA) only empowers police officers to prepare certificates of seizure. In this case however, there could not be any such certificate because the appellant was arrested by PW3, a member of 'sungusungu'. She pointed out that PW3 handed over the motorcycle to PW5 who produced it in court as an exhibit.

In ground 3 the appellant's complaint is that exhibit P2 was not shown to PW3. The Senior State Attorney submitted that even if it is true that PW3 was not made to identify the motorcycle, the evidence is consistent that PW3 had the appellant under restraint throughout the night until he handed him over to PW5 in the morning together with the motorcycle. As for the alleged failure to call the VEO and WEO as witnesses, a complaint under ground 4, Ms. Fyeregete submitted that this ground is without substance because those leaders did not witness the arrest and in any case, no particular number of witnesses is required to prove a fact. Section 143 of the Evidence Act [Cap. 6 R.E 2002] was cited. In ground 5 the appellant raised the issue of chain of custody to which the Senior State Attorney responded that nowhere was the chain broken.

Lastly in ground 8, the Senior State Attorney submitted that the trial Court and the first appellate Court considered the defence case.

In a short rejoinder the appellant reiterated the position he had articulated in the submissions in chief.

We shall start by accepting Ms. Fyeregete's argument that grounds 6 and 7 are new and that they should not be considered. This is a settled position, that this Court will only took into matters that were raised and decided upon by the High Court. [See; **Mustapha Khami's v. Republic,** Criminal Appeal No. 70 of 2016 (unreported)]. Since the 6th and 7th grounds raise matters which were not previously raised at the High Court and therefore not decided upon, we shall not address them.

Next for our consideration is the complaint under ground one, that the doctrine of recent possession was not established to the required standards. We shall consider this ground along with the issues of certificate of seizure (ground 2) and chain of custody (ground 5).

The appellant was found guilty on the basis of the doctrine of recent possession. What is this doctrine all about?. In **Juma Marwa v. Republic**, Criminal Appeal No. 71 of 2001 cited in **Mustapha Maulid Rashid v.**

Republic, Criminal Appeal No. 241 of 2014 (both unreported), the following was said of that doctrine;

> *"The doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is the thief or a guilty receiver."*

In **Chiganga Mapesa v. Republic**, Criminal Appeal No. 252 of 2007 (unreported) the following elaborate statement was reproduced from the decision of the supreme Court of Canada in **R v. Kowlyk** [1988] 2 SCR 59;

> *"The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property,* the trier of fact may but not must – draw an inference *of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. When the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon consideration of all the circumstances to decide which if either, inference should be drawn. The doctrine will not apply when*

an explanation is offered which might reasonably be true even if the trier of the fact is not satisfied of the truth."

Further in the case of **Mustapha Maulid Rashid v. Republic** (supra) it was held that it does not matter whether the accused does not claim to be the owner of the stolen property.

In this case the appellant outright denies to have been found in possession of the motorcycle. The two courts below believed PW3, that while he and colleagues were on night patrol, they came upon the appellant with the motorcycle. As the hour was odd, at 2.00 a.m., suspicion got the best of them, so they put the appellant under restraint, until in the morning when they handed him over to PW5. The two courts below believed PW5 that he received the appellant and the motorcycle from PW3 in that morning.

The question is whether we have basis for interfering with the above concurrent findings of the District Court and the High Court. With respect we see none. We in addition think that PW3 and PW5 are entitled to credence [See **Goodluck Kyando v. Republic**, (2006) TLR 363].

The appellant suggested nothing that would bring the credibility of PW3 and PW5 to question. He did not even challenge PW5's version of how tear gas bombs had to be used to disperse the angry mob that was after his life.

In our settled view, we think the above circumstances explain away the discrepancies regarding the chain of custody. Since PW5's version went unchallenged, we take it to have been established that the appellant's life was in danger. Under the circumstances, it would not have been possible for the police to observe the rule as to chain of custody to the letter. We agree with Ms. Fyeregete that the key factors in the application of the doctrine of recent possession were met.

The foregoing disposes of this appeal, in our view, because the rest of the appellant's complaints such as failure to call the VEO and WEO or that the motorcycle was not shown to PW3, are evidential and need not preoccupy us at this stage. We have to conclude with the oft – quoted phrase in, **Milter v. Minister of Pension** [1947] 2 ALL ER 372 cited in **Chiganga Mapesa v. Republic** (supra):-

> *"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a*

man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least probable" the case is proved beyond reasonable doubt."

We are of the conclusive view that the case was proved beyond reasonable doubt and we decline the appellant's invitation to consider the fanciful and very remote possibilities in his favour.

For the foregoing reasons, this appeal would be dismissed.

However, we have considered another aspect, whether the charge laid at the appellant's door was that of Armed Robbery in view of the available evidence. Armed Robbery under section 287 'A' of the Penal Code connotes use of a weapon. While the charge alleges that an iron bar was used, the evidence of PW1, the alleged victim, does not show that he knew what was used to hit him. There is before us, only evidence of violence in executing the robbery of the motorcycle.

For the reason shown above we invoke our powers under S. 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] and quash the conviction for Armed Robbery and substitute it with that of Robbery with violence contrary to section 285 and 286 of the Penal Code. Accordingly

the sentence is reduced to 15 years from the date of conviction, which is the sentence for Robbery with violence.

The appeal is dismissed but for the substituted conviction and variation of sentence.

Order accordingly.

DATED at **MWANZA** this 6th day of November, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of November, 2019 in the presence of Mr. Robert Kidando, Senior State Attorney for the Respondent Republic and John Mkwabi the Appellant appeared in personal is hereby certified as a true copy of the original.

J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL