IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 322 OF 2016

JULIUS MWANDUKA @ SHILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)
(Mwingwa, J.)

dated the 23rd day of June, 2016
in
DC Criminal Appeal No. 40 of 2015

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JUDGMENT OF THE COURT

1st & 10th April, 2019

NDIKA, J.A.:

In the District Court of Hai, the appellant herein, Julius Mwanduka, and another person, namely, Emil Thomas @ Kelvin Kamchape, were jointly tried for armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002 as amended by Act No. 4 of 2004. It was the prosecution's accusation that the appellant and his co-accused, jointly and together, on 7th September, 2012 at about 21.00 hours at Ngarenairobi Village within Siha District in Kilimanjaro Region, did unlawfully steal TZS. 200,000.00 in cash along with an assortment of goods including a video camera, mobile handsets and airtime recharge vouchers all worth TZS. 8,840,000.00 the

property of Lucas s/o Moses Kweka and that in the course of stealing they used a gun in order to obtain or retain the said property.

While the appellant was convicted of the offence and sentenced to thirty years' imprisonment, his co-accused was acquitted of the offence. Being unhappy with the outcome of the trial, the appellant appealed to the High Court of Tanzania at Moshi challenging both conviction and sentence. The appeal came to naught; it was dismissed in its entirety. Undaunted, the appellant has lodged this second appeal.

We find it apt, at the beginning, to provide abridged facts of the case on both sides.

The substance of the prosecution case was built around the evidence adduced by six prosecution witnesses. PW1 Lucas s/o Moses Kweka owned a shop retailing phone accessories at Ngarenairobi. He was at his shop with his wife, PW5 Leah w/o Lucas, on 7th September, 2012 at about 21:00 hours when the appellant and his co-accused arrived. He and his wife knew the appellant and his co-accused very well; they lived in the same village with them and used to frequent the shop. PW1 chatted briefly with his two customers but then he told them that he wanted to close the shop for the day. There and then, the appellant shouted "*Luka upo chini ya ulinzi*" and

took control of the shop whereupon a group of bandits, armed with a gun and machetes, stormed into the shop. The appellant drew a machete from his coat and hit PW1 with it. In the end of the incident lasting about five minutes, the bandits made away with money in cash, a digital camera, sixty-four Techno mobile handsets and airtime recharge vouchers.

According to PW1 and PW5, the shop was well illuminated with light from electric bulbs with which they recognized the appellant and his co-accused. PW1 was particularly surprised by the turn of events because before the bandits stormed into the shop he was having a friendly chat with the appellant.

PW4 John s/o Assery Martin, a neighbour, adduced that he saw the appellant and four other persons walking towards PW1's shop in the fateful evening. Shortly thereafter, he ran to the scene of the crime in response to the screams coming from PW1's shop. At the scene he spotted the appellant withdrawing from the scene.

Shortly thereafter, the matter was reported to the police with the appellant and his co-accused being named as the robbers recognized at the scene. According to PW2 E.7071 D/Sgt. Yona and PW6 Juma Kitori (former OC-CID for Siha District), the wheels of investigations culminated in the

arrest of the appellant on 19th September, 2012. He was found in possession of a *Tecno* mobile handset (Exhibit P.1) which PW1 identified to be one of the items stolen from his shop. PW6 recorded the appellant's cautioned statement (Exhibit P.3) on 20th September, 2012 in which he confessed to the offence and implicated his co-accused. The appellant repudiated the statement but it was admitted rather irregularly without an inquiry into its admissibility being conducted by the trial Resident Magistrate. On the part of the appellant's co-accused, it was adduced by PW3 D. 7175 D/Cpl. Juma that he arrested him on 12th September, 2012 and that he recorded his cautioned statement (Exhibit P.2) on 20th September, 2012. That confessional statement was admitted, again without any inquiry being conducted into its admissibility, even though its alleged maker repudiated it.

In defence, the appellant and his co-accused refuted the prosecution's accusation. The appellant denied being at the scene of the crime in the fateful evening. He adduced that he was arrested on 12th September, 2012, not 19th September, 2012. That he was tortured by policemen but did not make any confessional statement. His co-accused, too, took the same stance and produced a medical examination report (PF.3) – Exhibit D.1 as proof of the severe beatings he received at the hands of the Police as they attempted to extract a confessional statement from him.

In convicting the appellant, the trial court relied upon the evidence of PW1 and PW5's evidence of recognition and the claim that he was found with one of the stolen *Tecno* mobile handsets, which, presumably led to the application of the doctrine of recent possession.

Beginning with visual identification, the trial court took account of the evidence that the scene was well illuminated by electric bulbs and that the two witnesses knew the appellant very well before the incident. However, the court had doubts as regards Emily Thomas. The learned trial Resident Magistrate reasoned that PW1 and PW5 could not see and recognize Emily Thomas because, at the command of the appellant, they lay down and were "under such pressure and fear" that they could not see and recognize the said Emily clearly.

On the claimed possession of the recently stolen *Tecno* mobile handset, the trial court reasoned that the appellant was arrested:

> *"with the phone Tecno, and PW1 had stated its serial number at the Police and when they arrested him they found him with the phone Tecno with the same serial number .... Though the phones ... are many but with different serial numbers this court is in [no] doubt that the serial number stated at the Police and*

the one found with the 1st accused person being the same ... with this phone, and is of the view that ***perhaps*** *the phone obtained was the one for the victim which were (sic) stolen."* [Emphasis added]

In the first appeal premised upon seven grounds of complaint, the learned appellate Judge concurred with the trial court's findings and dismissed the appeal.

The present appeal is predicated upon eight grounds of appeal which can be condensed into the following complaints: **one**, that the conviction was grounded on a charge whose particulars of offence were deficient; **two**, that the evidence of visual identification was not watertight; **three**, that the chain of custody of the allegedly recently stolen *Tecno* mobile phone was not established; **four**, the doctrine of recent possession was not properly applied; and, **finally**, that the cautioned statement (Exhibit P.3) was not properly scrutinized.

Before us, the appellant appeared in person and prosecuted his appeal on his own. For the respondent Republic, Mr. Kassim Nassir Daudi, learned State Attorney, entered appearance.

Before addressing the Court on his grounds of appeal, the appellant, with the leave of the Court, abandoned the ground of appeal raising the

complaint that the cautioned statement allegedly extracted from him (Exhibit P.3) was not properly scrutinized. Indeed, that was the proper course to be taken because the applicant's conviction was not founded upon that confessional statement. However, we wish to interject two observations, albeit very briefly, on the manner this piece of evidence was admitted and treated by the courts below: first, we find it disquieting that the trial court admitted this confessional statement (as well as that one allegedly made by Emily Thomas – Exhibit P.2) without conducting an inquiry into its admissibility even though it was repudiated and objected by the appellant. In consequence, without such an inquiry Exhibit P.3 (as well as Exhibit P.2) could not be relied and acted upon to found a conviction: see, for example, **Seleman Abdallah and Two Others v. Republic**, Criminal Appeal No. 384 of 2008; and **Kulwa Athumani @ Mpunguti and Three Others v. Republic**, Criminal Appeal No. 29 of 2005 (both unreported).

Secondly, neither the trial court nor the first appellate court directed its mind to Exhibit P.3 in their respective judgment as if it was not on record. Perhaps, the trial court might, at some point, have realized the error it had made in admitting the statement and failed to own up its mistake but we expected the learned appellate Judge to point out this salient error even if it had no bearing on the outcome of the appeal before him.

Adverting to the present appeal, we think, in view of the submissions of the parties, that the outcome of this appeal hinges on two issues: first, whether the appellant was positively recognized at the scene; and secondly, whether the doctrine of recent possession was properly applied to found conviction.

In addressing the question of visual identification, the appellant referred to page 119 of the record of appeal saying that the trial court clearly indicated that the evidence of identification was weak but went ahead to hold in the contrary that he was positively identified at the scene. He faulted the first appellate court for confirming the trial court's finding on visual identification. As regards the evidence of recent possession of the mobile handset, he criticized both the trial court and the first appellate court for not holding that the phone was not fully described and identified by PW1. That no receipt was tendered to establish PW1's alleged ownership of the phone. On this issue, the appellant relied on the decision of the Court in **Joseph Mutua and Another v. Republic**, Criminal Appeal No. 166 of 2011 (unreported).

On the other hand, Mr. Daudi supported the appellant's conviction and sentence. Referring to the testimonies of PW1 and PW5, he submitted that

the appellant was positively recognized at the scene as one of the bandits. On the authority of this Court's decision in **Vuyo Jack v. The Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (unreported), he urged us to refrain from interfering with the trial court's finding on visual identification based on what the trial court found to be credible and uncontroverted evidence of PW1 and PW5. In **Vuyo Jack** (*supra*), the Court recalled the principle that credibility of a witness is the monopoly of the trial court. However, in responding to a question posed by the Court, Mr. Daudi conceded that the said two witnesses' accounts were to a certain extent contradictory and that this Court would be justified in reviewing the evidence and making its own conclusions.

As regards the allegedly recovered *Tecno* mobile handset, Mr. Daudi submitted that the phone was sufficiently identified by PW1 as a unique object in that it had a unique serial number by which PW1 identified it. On this point, he relied on the Court's decision in **the Director of Public Prosecutions v. Sharif s/o Mohamed @ Athuman and Six Others**, Criminal Appeal No. 74 of 2016 (unreported). He further argued that when PW1 tendered the handset in evidence, it was admitted without any demur or any cross-examination by the appellant. Citing the decision of the Court in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010

(unreported), he contended that the appellant's failure to cross-examine on the handset meant the acceptance of the truthfulness of the whole evidence on the handset. However, on being probed by the Court, the learned State Attorney conceded that there was no indication that PW1 described the *Tecno* mobile handset when he reported the matter to the Police. He insisted, nonetheless, that the handset was admitted at the trial without any protest from the appellant.

Having summarized the submissions of the parties, we are now in a position to delve into the two issues we framed earlier while mindful that this being a second appeal, we are, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141 RE 2002, mandated to deal with matters of law only but not matters of fact. However, on the authority of the decision of the Court in the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149 and a host of decisions that followed, the Court can intervene where the courts below misapprehended the evidence, where there were misdirections or non-directions on the evidence, where there had been a miscarriage of justice or violations of some principle of law or practice – see also **Joseph Mutua** (*supra*) cited by the appellant.

To begin with, we deal with the cogency and reliability of the evidence of visual identification adduced by PW1 and PW5. On this ground, we think it is pertinent that we refer to the guidelines on visual identification as stated in our seminal decision in **Waziri Amani** (supra), also relied upon by the trial Court. In that case, the Court cautioned, at pp. 251 – 252, that:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.***"
> [Emphasis added]

Then, the Court stated, at p. 252, that:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions***

as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; 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. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

It is common cause that the appellant used to frequent PW1's shop and that both PW1 and PW5 knew him very well. That might be so but, as we held in **Boniface s/o Siwingwa v. Republic**, Criminal Appeal No. 421 of 2007 (unreported):

> *"... where it is shown, as is in this case, that the conditions for identification are not conducive, then* ***familiarity alone is not enough to rely on to ground a conviction****. The witnesses must give details as to how he identified the assailant at the scene of crime as the witness might be honest but mistaken."* [Emphasis added]

Undoubtedly, both PW1 and PW5 adduced that the attack was carried out at night when the shop was illuminated with light from electric bulbs. While PW1 said that the shop was lit up by energy saving bulbs, PW5 was explicit that there were some bulbs burning from outside the shop. Both witnesses claimed to have recognized the appellant and his co-accused from close proximity. At one point, the appellant attacked PW1 with a machete. Besides, PW4 saw the appellant pass by his home on way to the scene of the crime shortly before the incident and that he saw and recognized him again when he ran to the scene in response to the alarm raised by PW1. At that time the appellant was hurriedly withdrawing from the scene. What is more is that PW2, PW3, PW4 and PW6 confirmed that PW1 named the appellant as one of the robbers at the earliest opportunity.

Nonetheless, when the foregoing evidence is examined along with the rest of the evidence the possibility of mistaken identification is not fully eliminated. In the first place, we think that the evidence adduced by PW1 and PW5 was pertinently contradictory. While PW1 adduced that the appellant and his co-accused came to the shop and chatted with him in the fateful evening before the attack on the shop unfolded, PW5 testified that:

"On 7/9/2012 at about 21:00 hours I was in my shop with my husband. We were about to close the shop. The 1st accused person came to my shop and stood in front of the shop. ***He did not talk to us anything.*** *Thereafter,* ***when my husband was getting into the shop he told PW1 that 'upo chini ya ulinzi' at the meantime the second accused person was present****. It was dark. But the shop had electrical light outside so I saw them clearly. I stood not far from where they stood .... They took inside the shop PW1 and asked us to lay (sic) down.* ***I [saw] only these two persons due to the movement I sensed when I lay down."*** [Emphasis added]

From PW5's account above, there is no tale that her husband briefly chatted with the appellant and his co-accused before they took control of the shop. By that testimony, the robbery took place shortly after the twosome arrived at the scene meaning that there was no chat from which PW1 could have observed and recognized the robbers. More significantly, PW5 never said if a group of bandits descended upon them once the appellant had accosted PW1 and taken control of the shop. We wonder why she missed out this key detail. Besides, we find it highly improbable that the appellant went to the scene without any attempts to hide his identity to the victims who knew him very well. In our view, these disquieting aspects and contradictions

question the credibility and reliability of the testimonies given by the two witnesses.

The above apart, we find it extremely disturbing that while the trial Resident Magistrate disbelieved PW1 and PW5's account that they recognized Emily Thomas (the appellant's co-accused) on the reason that they were "under such pressure and fear" that they could not see and recognize Emily, no reason was assigned why in the same conditions they were able to see and recognize the appellant. We think this is another manifest error on the part of the trial magistrate; one arising from a reflexive application of double standards in convicting the appellant and acquitting his co-accused – see **Sokoine Range @ Chacha & Another v Republic**, Criminal Appeal No. 198 of 2010 (unreported).

In view of the above misdirections, we are enjoined to interfere with the concurrent findings of the courts below on the issue of visual identification. We think that the evidence on record was not watertight for a firm and positive identification of the appellant as one of the perpetrators of the armed robbery.

Next, we deal with the issue whether the doctrine of recent possession was properly applied to found conviction.

It bears restating that it is a settled rule of evidence that an unexplained possession by a suspect of the fruits of a crime freshly after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft but also for any other offence however serious – see the Court's decisions in **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992; **Ally v. Republic**, Criminal Appeal No. 47 of 199; and **Mussa Hassan Barie and Another v. Republic**, Criminal Appeal No. 292 of 2011 (all unreported). For this doctrine to be applied, it must be proved that, **one**, the stolen property was found with the accused; **two**, that the recovered property must be positively identified to be that of the complainant; **three**, that the property was recently stolen from the complainant; and **four**, the property must constitute the subject of the charge – see, for instance, **Mussa Hassan Barie** (*supra*); and **Joseph Mkumbwa and Another v. Republic**, Criminal Appeal No. 94 of 2007 (unreported).

As stated earlier, the trial court grounded the said doctrine on the evidence that that the appellant was found in possession of a *Tecno* mobile handset (Exhibit P.1) which PW1 identified, on the basis of its unique serial number T330 8672920099978760, to be one of the items stolen from his shop.

According to PW2 and PW6, the appellant was arrested and found in possession of Exhibit P.1 on 19th September, 2012, which was twelve days after the incident had occurred. Even though the said handset was exhibited at the trial and tendered in evidence by PW1 after he had identified it as one the items stolen from his shop, we think that PW1's testimony is pointedly flawed. In the first place, while we agree that each mobile handset has a unique number, there was no link between PW1 and the allegedly recovered handset. We so hold on the ground, conceded by Mr. Daudi, that there is no evidence that PW1 mentioned the unique number of the phone when he reported the incident to the Police. Indeed, it seems mentioning to the Police serial numbers of the phones would have been a tall order for him as it is on record that sixty-four handsets were stolen in that fateful evening from his shop. At the trial he did not produce any receipt to evidence the serial number. Even then, it is on record that PW1 did not look at the mobile handset at the trial after tendering it in the presence of everybody and then matched the numbers in the said handset with the number that he claimed to be the handset's number. As a result, there is no guarantee that Exhibit P.1 was necessarily the one robbed from PW1. In this regard, we find it instructive to refer to the decision in **Joseph Mutua** (*supra*), where the Court underlined that:

"It was not enough for the witnesses to say that the phones bore the numbers appearing in the receipts without more. In the absence of clear evidence to that effect, it was possible that the mobile phones that were produced and admitted in evidence were not necessarily the same as those which were robbed from PW1 and PW2."

Above and beyond, we find it baffling as to how PW1 ended up taking possession of the recovered handset and then tendering it in evidence. No explanation was given at the trial on that matter. Ideally, that handset ought to have been produced by either PW2 or PW6 who claimed to have retrieved it from the appellant when they arrested him and that PW1 only had to identify it in court. Again, as held in **Joseph Mutua** (*supra*):

"If that had been done it would have been easy to say with a certain amount of certainty that these were the same phones that were eventually identified by PW1."

We think it is significant that even the trial magistrate himself doubted the link between the recovered phone and PW1 as he held, rather mutedly, that *"**perhaps** the phone obtained was the one from the victim which was stolen."*

In view of the foregoing deficiencies in the evidence upon which the doctrine of recent possession was grounded, we think that the said doctrine was wrongly invoked.

The upshot of the matter is that for the reasons we have stated the appeal has merit. Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is held for other lawful causes.

DATED at **ARUSHA** this 9th day of April, 2019

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL