IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 450 OF 2016

DANIEL MATIKU.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mchome, J.)

dated the 20th day of July, 2005
in
Criminal Appeal No. 50 of 2003
.....

JUDGMENT OF THE COURT

29th November & 3rd December, 2019.

MUGASHA, J.A.:

In the District Court of Mwanza at Mwanza, the appellant along with four (4) others were charged with armed robbery contrary to sections 285 and 286 of the Penal Code [CAP 16 RE. 2002]. In the same matter, the appellant was additionally charged with two other counts of receiving stolen property contrary to section 311 (2) of the Penal Code. They all pleaded not guilty and totally denied the charges. At the end of the trial, they were all convicted of the count of armed robbery and sentenced to imprisonment for thirty (30) years with twelve (12) strokes of a cane.

Aggrieved, the appellant and another person unsuccessfully appealed to the High Court whereby their appeal was dismissed and conviction and the sentence sustained. Still undaunted, the appellant has preferred a second appeal with seven grounds which we have conveniently condensed into four main grounds as follows: -

1. That, the High Court did not consider the grounds of appeal in first appeal.
2. That, both courts below erred to convict the appellant having relied on the doctrine of recent possession.
3. That, the improper cautioned statement of the appellant was wrongly acted upon to convict the appellant.
4. That, the appellant was not properly identified at the scene of crime.

At the hearing of the appeal before us, the appellant appeared in person, unrepresented whereas the respondent Republic had the services of Mr. Castus Ndamugoba, learned Senior State Attorney. Before disposing of the appeal, it is crucial to narrate briefly what culminated to the apprehension, arraignment and conviction of the appellant from which this appeal arises.

The prosecution case hinged upon five prosecution witnesses and two documentary exhibits namely: Police Form No. 3 (PF3) Exhibit P 1, the

cautioned statement of the appellant (Exhibit P 8) along with four physical exhibits which included an assortment of household items namely: a television screen; a head of sewing machine; a bag and sundry clothes, Exhibits P1 to P5 respectively. It was the prosecution account that on 7/12/1999 around midnight at 02.00 a.m while at his residence with the family, Selemani Ngunda (PW1) was attacked by armed bandits who used a bush knife to cut several parts of his body. This was flanked by his wife Gaudencia Boniphance (PW3) who confirmed on the occurrence of the said robbery and that he had to accompany his injured husband to the hospital after the robbers had disappeared. Recounting on who were the assailants, while PW1 apart from giving a general description of one of the bandits he saw at the scene of crime, PW3's account was to the effect that, aided by lights which were on, she clearly saw the bandits at the scene of crime. However, none of them testified to have known any of the bandits before the fateful incident. In addition, PW3's account is silent on the terms of description of the bandits she saw. Moreover, PW3 recalled to have checked the missing items and availed a respective list to the police and later she was summoned at the police where she identified the items stolen at the robbery incident. This was after PW2 and PW5 had claimed to have found the appellant in a taxi holding a television set and the head of a

sewing machine and that upon interrogation, the appellant had volunteered and led the police at the scene of crime which happened at the residence of PW1 and PW3 where the robbery had occurred. In that encounter, PW4 recalled that, apart from the appellant confessing to have committed an offence, he mentioned other colleagues in the cautioned statement.

The appellant denied each and every detail of the prosecution account. He told the trial court to have been arrested at Nyakato after exiting from a restaurant. Pursuant to his arrest and having refused to give a tip to the Policemen, was taken to the police station and his money TZS. 126,000/= taken by the Police. After having inquired about his money, he was beaten and forced to make the cautioned statement.

At the hearing, from the outset, the learned Senior State Attorney supported the appeal arguing that, the charge of armed robbery was not proved beyond reasonable doubt against the appellant. In addressing the second main ground of complaint, he submitted that, the doctrine of recent possession was wrongly invoked in the absence of the certificate of seizure evidencing the stolen items retrieved from the appellant which rendered the chain of custody broken. He added that, while PW2 and PW5 claimed to have searched the appellant while in a taxi, the driver of the motor vehicle in question was not paraded as a witness in order to establish if

those items were actually seized from the appellant. Moreover, he argued that, the record is silent if those witnesses had identified any of the stolen items claimed to have been found in possession of the appellant.

Submitting on the third main ground of complaint, Mr. Ndamugoba pointed out that, an inquiry was not conducted by the trial magistrate following the appellant's complaint that he was beaten and forced into the making of the cautioned statement. As such, the learned Senior State Attorney argued that, that statement was wrongly acted upon to convict the appellant. Regarding the identification of the appellant which constitutes the fourth main ground of appeal, Mr. Ndamugoba submitted that the appellant was not properly identified at the scene of crime because the testimonial account of PW1 and PW2 indicates that the bandits were strangers to them. He concluded his submission by urging us to allow the appeal.

On the other hand, the appellant had nothing useful to add apart from asking the Court to allow his appeal and set at liberty.

This being a second appeal, the Court rarely interferes with the concurrent findings of fact by the lower courts except where there has been misapprehension of the nature and quality of the evidence and other

recognized factors occasioning a miscarriage of justice. This was ably emphasised in the case of **WANKURU MWITA VS REPUBLIC,** Criminal Appeal No. 219 of 2012 (unreported) where the Court held:

> *"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

Moreover, since the High Court was the first appellate court, we are aware of a salutary principle of law that a first appeal is in the form of a re-hearing. Thus, the first appellate court, has a duty to re-evaluate the entire trial evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusions of fact. (See **D. R. PANDYA v R** (1957) EA 336). In this regard, we would have expected the High Court in this case, to have re-appraised the evidence in the determination of the appellant's appeal. We shall address this issue at a later stage.

Guided by the stated principles governing the determination of appeals both before the High Court and this Court and having carefully considered the grounds of appeal, the evidence on record and the submission of learned Senior State Attorney we have three crucial issues to decide. **One,** whether the appellant made any confession and if it was made voluntary; **Two,** whether or not the appellant was found in possession of any robbed property and **three,** whether or not the appellant was properly identified at the scene of crime.

A confession made to a police officer, is admissible in evidence because it stands out to be the best evidence in a criminal trial where an accused person confesses his guilt. However, the courts should be very cautious in dealing with confessions because it is upon the prosecution to prove that the confession was made freely and voluntarily, be free from blemishes of compulsion, inducements, promises or even self-hallucinations. See the case of **TWAHA ALI AND 5 OTHERS VS REPUBLIC,** Criminal Appeal No. 78 of 2004 (unreported) whereby apart from categorically stating that, a confession or statement will be presumed to have been made voluntarily until objection to it is raised by the defence, the Court held:

"... if that 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 a trial within trial) into the voluntariness or not of the alleged confession. ***Such inquiry should be conducted before the confession is admitted in evidence****..."*

[Emphasis supplied].

Omission to conduct an inquiry in case an objection is raised, is a fundamental and incurable irregularity because if the confession stands out to be crucial or corroborative evidence, an accused would not be convicted on evidence whose source is doubtful or suspicious. In the present case, after PW4 told the trial court to have recorded the confession statement of the appellant on the fateful robbery incident, and that it was made voluntarily, he prayed to tender it in the evidence and the appellant objected having raised what is reflected at page 14 of the record as follows:

"I was forced to sign it after being severely beaten.
I was issued with a PF3.

This made the prosecutor to pray for a trial within trial which was accepted by the trial court. However, instead of hearing both the prosecution and

the defence in that regard, the trial magistrate heard solely the prosecution account by PW4 and concluded as follows:

> *"Having heard the PW4's evidence, I am of the considered view that the caution statement was voluntarily recorded u/s 27 (1) (2) of the TEA No 6 of 1967 and marked P8."*

Can this be categorized as an inquiry or trial within trial? Our answer is in the negative and we shall give our reasons. This was not an inquiry or trial within trial at any stretch of imagination. Thus, the purported determination on the voluntariness of the cautioned statement was irregular and not based on the law. It follows that, the cautioned statement was wrongly admitted. We are fortified in that account in the light of what we said in the case of **BRASIUS MAONA AND GAITAN VS REPUBLIC**, Criminal Appeal No. 215 of 1992 (unreported) as the Court held:

> *"Once torture has been established, courts should be very cautious in admitting such statements in evidence even when provisions of section 29 of the Evidence Act, 1967 which in our considered opinion was not meant to be invoked in situations where the inducement involved is torture."*

In view of the above, the two courts wrongly acted upon the inadmissible evidence contained in the confession statement of the appellant to convict

him and we accordingly discount it in its totality. This takes us to the propriety or otherwise of invoking the doctrine of recent possession which was relied upon to convict the appellant.

The doctrine of recent possession refers to possession of recently stolen property. It is part of the principles of circumstantial evidence which applies to offences of handling stolen goods and is relevant to proving *mens rea* of the offence. See- **MAKOYE SAMWEL @ KASHINJE VS REPUBLIC,** Criminal Appeal No. 32 of 2014 (unreported) which was relied on the case of **MWITA WAMBURA VS REPUBLIC,** Criminal Appeal No. 56 of 1992 (unreported) where the Court emphasised: **One,** the stolen property must be found with the suspect; **two,** the stolen property must be positively identified to be that of the complainant; **three,** the property must be recently stolen; and **four,** the property stolen must constitute the subject of the charge. In this regard, the presumption underlying the doctrine has to be applied with great caution and it is the prosecution which bears the burden of proof as the presumption of guilt can only arise where there is cogent proof that the item was actually stolen during the commission of the offence charged. See- the case of **ALLY BAKARI AND PILI BAKARI VS REPUBLIC** [1992] TLR 10.

In the instant case the prosecution relied on the Television set and head of the sewing machine found in possession of the appellant in terms of the evidence of PW2 and PW5. Having scrutinized the evidence on record, we have not been able to gather if at all the complainant and his wife positively identified the stolen items. We say so because of PW2's account who at page 12 recalled to have given the respective list of the stolen items to the police. She was then summoned at the Police Station in order to identify the stolen items and the following transpired: -

> *"... In the morning I went there and I was shown various things, I managed to identify the Golden Star screen, one small radio make National 2 band the head of the sewing machine..."*

As for PW1 at page 9 of the record he recounted as follows: -

> *"... when I was discharged I went to the police where I identified some of the stolen properties, the TV screen is mine, the head of the sewing machine makes Butterfly, this radio make National 3 band, this bag which contained clothes, this blanket, this coat, this pair of Kaunda, these two shorts, this mosquito net..."*

Neither PW1 nor PW2 described any of the stated items before being given opportunity to see them at the Police. Besides, none of them

previously mentioned peculiar or special marks on any of the items or produce any purchase receipt to establish ownership. Thus, it cannot be safely vouched if the stolen items were positively identified be it by PW1 or PW3. Moreover, as correctly submitted by Mr. Ndamugoba, neither PW2 nor PW5 recalled to have identified what was seized from the appellant. Seizure is regulated by section 38 (3) of the Criminal Procedure Act [CAP 20 RE.2002] which gives the following directions:

> *"Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

If this mandatory requirement had been complied with, of necessity, what was retrieved from the appellant would have been listed and the appellant and independent witnesses would have appended their signatures and each retained a copy of the seizure certificate so as to put in motion a fool proof of chain of custody. However, this was not the case and in the absence of the certificate of search and seizure the prosecution fell short of establishing beyond any doubt as to what was actually retrieved and seized

from the appellant in order to link him with the robbery in question. Worse still, as correctly stated by Mr. Ndamugoba, the driver of the taxi driver in which PW2 and PW5 claimed to have found the appellant carrying the stolen items was not paraded as a witness to substantiate the prosecution's account. The taxi driver was indeed a material witness and failure to parade him entitles us to draw an adverse inference on the prosecution. See the case of **AZIZI ABDALAH VS REPUBLIC** [1991] TLR 7.

In view of said discrepant prosecution account not establishing that the appellant was found in possession of items stolen from PW1, it was unsafe for the courts below to invoke the doctrine of recent possession to convict the appellant. This leaves us with the issue of the propriety or otherwise of the identification of the appellant at the scene of crime.

Regarding the evidence on visual identification, it is settled law that, it is the evidence of the weakest kind and unreliable and as such, it should not be acted upon by the courts unless all possibilities of mistaken identity have been eliminated. See – **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250 and **RAYMOND FRANCIS VS REPUBLIC** [1994] TLR 100.

In the case at hand, the appellant was a stranger to the identifying witnesses as cemented by the testimonial account of PW1 and PW3. At

page 9 of the record this is what PW1 told the trial court in respect of identification of the bandits: -

> *"... Among the assailant who were about six, one of them was very tall and were all wearing long coats and hats...."*

As for PW3 she recalled what is reflected at page 12 as follows: -

> *"I saw them very clearly as the lights were on so it's very clear, they also tied my husband who was still lying while bleeding."*

Subsequently, after the appellant was arrested, the police made no effort to conduct the identification parade acting at least on the description given by PW1 so as to enable PW1 and PW2 to identify the appellant if they had seen him at the scene of crime. In a nutshell, we agree with the learned Senior State Attorney that, the appellant was not properly identified at the scene of crime and as such, it was wrong for the courts below to act on weak visual identification which did not eliminate possibilities of mistaken identity to convict the appellant.

In view of what we have endeavoured to discuss, before the trial court there was a clear misapprehension of the substance, nature and quality of the evidence; misdirection on the evidence; a violation of legal

principles which occasioned a miscarriage of justice which necessitated the intervention of the High Court at the hearing of the first appeal. That is why in this second appeal, having re-evaluated the trial evidence we find the appeal merited and we accordingly allow it. We thus order the immediate release of the appellant unless if held for another lawful cause.

DATED at **MWANZA** this 2nd day of December, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered this 3rd day of December, 2019 in the presence of the Appellant in person, and Ms. Gisela Alex, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL