IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 219 OF 2017

SALUM RAJABU ABDUL @ USOWAMBUZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Arufani, J.)

dated the 05th day of June, 2017
in
Criminal Appeal No. 207 of 2016

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JUDGMENT OF THE COURT

12th & 27th February, 2020

MMILLA, J.A.:

In this appeal, Salum Rajabu Abdallah @ Usowambuzi (the appellant), is challenging the judgment of the High Court of Tanzania, Dar es Salaam Registry, which upheld conviction and sentence that was passed against him by the District Court of Morogoro (the trial court). Before the trial court, the appellant and one Fikiri Ramadhani were jointly charged with the offence of armed robbery contrary to section 287A of the Penal

Code Cap. 16 of the Revised Edition, 2002 as amended by Act No. 3 of 2011. Fikiri Ramadhani was acquitted, while the appellant was convicted and sentenced to thirty (30) years' imprisonment. As earlier on pointed out, he unsuccessfully appealed to the High Court, hence this second appeal to the Court.

The facts of the case were briefly that, on 02.12.2015 Hamisi Salehe (PW4) was travelling from Dar es Salaam to Morogoro in a motor vehicle Reg. No. T. 865 AFT make Mitsubishi – Fuso in which he carried copper wires, switch sockets, lamps, bulbs, among other items. On arrival at Kingolwira area in Morogoro, he noticed that there was a person on board off-loading copper wires and was dropping them on the road. On seeing him, the appellant and his accomplices ran away with the copper wires and threatened to cut him if he pursued them. Un-intimidated, PW4 raised an alarm and began chasing them. A lot of people responded to the alarm raised and joined him in the chase of the bandits. While his colleagues managed to escape, the appellant was not that lucky. He was arrested, and the stolen copper was recovered. The incident was reported to the police; they arrived at the scene and formerly arrested him.

The appellant and his colleague were interrogated by No. F. 3360 D/Cpl. Daniel (PW2). This witness testified that both of them admitted involvement in the commission of the said crime. He recorded the appellant's cautioned statement (exhibit P1).

Another witness was No. F. 129 Cpl. Samwel (PW3) who was among the policemen who had rushed to the scene of crime. He testified that on arrival at the place where the appellant was being held after his apprehension, he was shown the copper wires allegedly stolen and a panga with which the appellant had threatened PW4 and his turn-boy. The copper wires and the said panga were tendered in court as exhibit P3 collectively.

The appellant's defence was very short. He denied to have committed the alleged crime. He contended that he was arrested at a bus stand at which he was waiting to board a bus in order to return home. He called his wife as a witness.

In her testimony before the trial court, the appellant's wife, Mariam Juma (DW2), stated that on 2.12.2915 she escorted him to the bus stand, but left him there and she was not there when he was arrested.

As earlier on pointed out, the trial district court was satisfied that the prosecution proved the case against the appellant beyond reasonable doubt. After conviction, he was sentenced to thirty (30) years' imprisonment. The trial court's decision was upheld by the first appellate court, a decision which aggrieved further the appellant, hence the present appeal.

On the date of hearing this appeal, the appellant appeared in person and was not represented. He filed a six point memorandum of appeal, followed at a later stage with eight (8) supplementary grounds of appeal. We deem it proper to reproduce them as follows:

(a) SUBSTATIVE GROUNDS:

1. That, your lordships the learned first appellate judge erred by sustaining conviction and sentence meted out to the appellant based on a charge sheet which did not disclose the owner of the properties alleged to be robbed.
2. That, the first appellate judge grossly erred by holding to un-credible and un-reliable visual identification of PW4 against the appellant during and after the occurrence of the offence

whereby he mentioned the source of light while being cross examined which renders his stance an afterthought.

3. That, the learned first appellate judge erred by holding to the trial court decision where properties allegedly retrieved by the appellant up to his apprehension as exemplified by PW4 were not tendered to directly connect him to the offence.
4. That, the learned first appellate judge erred by holding to Exh. P2 and Exh. P3 where the sequence of events involving their collection and movement (principle of chain of custody was not adhered to.
5. That, the learned first appellate judge grossly erred by holding to un-justified corroborated prosecution evidence as basis for the appellant's conviction.
6. That, the learned first appellate judge erred by holding that the prosecution proved their case against the appellant beyond reasonable doubt as charged.

(b) SUPPLEMENTARY GROUNDS:

1 That, your lordships, the learned first appellate judge erred in fact and law by holding that the prosecution evidence is

sufficient to convict the appellant on the doctrine of recent possession as the appellant alleged to steal and found with copper wire without any adduced evidence to prove the said stolen copper wire belong to whom contrary to procedure of law.

2 That, the learned first appellate judge grossly erred in fact and law after failure to evaluate and observe the evidence adduced by PW4 has to how they recover the said stolen properties since the appellant is said to be the one who hid the said stolen properties at the same time was chased and red handed arrested.

3 That, the learned first appellate judge erred in fact and law after holding the evidence adduced by PW1 who is neither mention to see the Appellant with the said Panga after his arrest nor identifying the said stolen copper wires before the court during he testified in court contrary to procedure of law.

4 That, the learned first appellate judge erred in fact and law by holding the evidence adduced by prosecution witnesses and convicting the appellant without drawing an adverse inference against that evidence since the prosecution fail to tender the said motor vehicle alleged to transit the said stolen properties or to summon the said Turn-boy to testify before the court to cement their case contrary to procedure of law.

5 That, the learned first appellate judge erred in fact and law by upholding the conviction of the appellant as he (Appellant) not mention how he was found with the alleged stolen copper wires while the trial magistrate failed to address properly the appellant in the ruling of a *prima facie* case contrary to procedure of law.

6 That, the learned Appellate judge erred in fact and law by upholding the conviction of the appellant who was convicted in a double standard judgment after the trial magistrate to base in the repudiated cautioned statement (Exh. P1) of the appellant to convict him (appellant) and acquit the appellant's

co- accused whose alleged to be mentioned on the same repudiated Exh. P1, which is contrary to procedure of law.

7 That, the learned first Appellate judge erred in fact and law by holding the conviction of the appellant while convicted by the trial court's magistrate without observing the appellant's detention in police custody over the period prescribed by law and there is no any tendered certificate from the court to permit police to extend the said period contrary to procedure of law.

8 That, the learned first appellate judge erred in fact and law by holding the appellant's conviction while had been convicted by the trial court's magistrate who disregard the defence of DW1 and DW2 which succinctly raised sufficient reasonable hypothesis irresistibly casting doubt about the connection of the appellant in that offence as established by the prosecution side contrary to procedure of law."

The appellant's oral submission before us was very short. He urged us to re-evaluate the evidence which formed the basis of his conviction

with a view of making a finding that it was weak and unreliable. He pressed us to allow his appeal.

On the other hand, the respondent/Republic enjoyed the services of Mr. Emanuel G. Medalakini and Justus Ndibalema, learned State Attorneys. Although Medalakini intimated at first that they were supporting the appeal, he changed stand in the course of his submission and supported conviction and sentence.

Mr. Medalakini submitted in the first place that many of the appellant's grounds of appeal have been raised before the Court for the first time. He mentioned grounds 1, 3 and 4 in the substantive list, likewise grounds 2, 3, 4, 5, 7 and 8 in the supplementary list. Mr. Medalakini contended that except for the first ground in the supplementary list which is on a point of law, the Court has no jurisdiction to hear and determine all the other new grounds. He urged us to strike them out.

As regards the first ground in the substantive list, Mr. Medalakini supported at first that the charge was defective because it did not mention the owner of the properties allegedly stolen. Upon being referred by the Court to section 258 (2) (a) of the Penal Code, he admitted that the driver

of the motor vehicle who was mentioned in the charge sheet was indeed the special owner of the allegedly stolen copper wires. He thus urged the Court to dismiss that ground.

The second ground of appeal complains that the evidence of visual identification given by PW4 was unreliable on account that the conditions at the scene of crime were not conducive for correct identification. At first, Mr. Medalakini said he was in agreement with the appellant that he was not properly identified by PW4. Upon Court's probe however, he conceded that there was evidence to show that PW4 and the good Samaritans chased the appellant as he attempted to flee from the scene of crime and arrest him, hence that the question of identification is irrelevant. He asked the Court to dismiss this ground too.

On whether or not the prosecution had proved the case against the appellant beyond reasonable doubt as complained in the fifth and sixth grounds of appeal, Mr. Medalakini submitted that there was sufficient evidence to establish that the appellant committed the charged offence. He pressed the Court to dismiss these grounds too.

There are two other grounds in the supplementary list which Mr. Medalakini addressed, the first and sixth grounds. He began with the sixth ground which he said is misconceived because it challenges the applicability of the evidence constituted in the cautioned statement long after it was expunged by the first appellate court. He urged us to strike it out.

On the other hand, the first ground in the supplementary list alleges that the doctrine of recent possession was improperly invoked in the circumstances of this case. At first, Mr. Medalakini supported the appellant's contention in that regard, but realized at a later stage that since the appellant was found with the copper wires which were the subject of the charge, and because they were recently stolen from the motor vehicle which was being driven by PW4, and since the appellant did not offer any plausible explanation how he came to possess them, it is obvious that the doctrine was properly invoked. He asked us to dismiss this ground too. In the final analysis, he requested us to dismiss the appeal in its entirety.

We have carefully considered the competing arguments of the parties. We wish to start with the observation made by Mr. Medalakini that

many of the grounds presented in this Court were not in the first place raised before the first appellate court.

We have compared the grounds of appeal raised by the appellant in this Court to those which were raised by him before the first appellate court featuring at page 63 of the Record of Appeal. We agree with Mr. Medalakini that grounds 1, 3 and 4 in the substantive list and grounds 2, 3, 4, 5, 7 and 8 in the supplementary list are new because they were not initially raised before the first appellate court. Mindful that the Court hears appeals from the High Court or a subordinate court exercising extended jurisdiction powers, it becomes obvious that where any ground of appeal was not raised and addressed by such courts, this Court have no jurisdiction to determine them. This position has been emphasized by the Court in a number of cases, including those of **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 and **Juma Manjano v. The DPP,** Criminal Appeal No. 211 of 2009, CAT (both unreported). In the circumstances, except for ground No.1 in the substantive list which is on a point of law, the rest of them, that is grounds 3 and 4 in the substantive list and 2, 3, 4, 5, 7 and 8 in the supplementary list found to be new, are hereby struck out.

We now turn to consider the first ground in the substantive list which queries that he was wrongly convicted because the charge in that regard was defective since it did not mention the owner of the properties allegedly stolen.

As already pointed out, Mr. Medalakini had at first supported the appellant's concern that the owner of the stolen property was not mentioned, but he changed his stand upon a reflection that PW4 was the special owner of the stolen copper wires. We sincerely agree with him.

The charge sheet appearing at page 1 of the Record of Appeal reads as follows:-

"CHARGE

STATEMENT OF OFFENCE

ARMED ROBBERY: *Contrary to Section 287A of the Penal Code [Cap. 16 R.E. 2002] as amended by the Act. No. 3 of 2011.*

PARTICULARS OF OFFENCE

SALUM RAJAB ABDUL @ USO WA MBUZI *and* ***FIKIRI RAMADHANI****, on the 02nd December, 2015 at Kingolwira Central Line area within the*

District of Morogoro in Morogoro Region, stole copper wires, switch sockets, down light lamps, bulbs which were in transit in a motor vehicle make, Mitsubishi Canter with Registration Number T865 AFT all total valued at Tshs. 5,450,000/= and immediately before such stealing, threatened ***KHAMIS SALEH and ABDUL SUDI*** *who are the driver and conductor respectively with panga and knife in order to obtain the said stolen properties."*

From the above, it is certain that the owner of the stolen property has not been specifically mentioned in the particulars of the offence, but it is clear that the threat was directed at one Hamisi Saleh and Abdul Sudi, who were respectively the driver and the turn-boy of the motor vehicle in which the stolen items were loaded. The question therefore, becomes; whom does our law contemplate to be the owner under the provision creating the offence under consideration?

In our considered view, resolve to the concern raised by the appellant lies under section 258 (2) (a) of the Penal Code. That section provides that:-

"(2) A person who takes or converts anything capable of being stolen is deemed to do so

fraudulently if he does so with any of the following intents, that is to say–

an intent permanently to deprive ***the general*** *or* ***special owner*** *of the thing of it."* [The emphasis is ours].

But then; who are general and special owners?

Unfortunately, the expressions "**general owner** and **special owner"** are not defined in our laws. Neither the Penal Code nor the Criminal Procedure Act or any other statute in our jurisdiction has ventured to define them. We however, consulted **Black's Law Dictionary, Seventh Edition, Bryan A. Garner, St. Paul, Minn**., 1999 whereof the expression "**general owner"** is defined at page 1130 as:-

"One who has the primary or residuary title to property; one who has the ultimate ownership of property."

On the other hand, the expression "**special owner"** is defined at page 1131 as follows:-

"One (such as a bailee) with a qualified interest in property."

Guided by this definition, it is obvious that the driver of the motor vehicle from which the copper wires were stolen, one Hamisi Salehe (PW4), was the special owner of the stolen property because throughout the journey from Dar es Salaam to Morogoro, those items were under his control. This explains why he came in defence of it after realizing that it was under threat. In the circumstances, the first ground of appeal in the substantive list is baseless and is accordingly dismissed.

As afore-pointed out, the second ground of appeal challenges that the evidence of visual identification which was given by PW4 was unreliable on account that the conditions at the scene of crime were not conducive for correct identification.

Surely, there are a number of reasons why, in a fit case, the evidence of visual identification should be relied upon with great caution. This is often attributed to poor lighting conditions at the scene of crime, presence of obstacles between the suspect and the identifier, bad weather or the distance between the witness and the person alleged to have been identified – See the case of **Waziri Amani v. Republic** [1980] T.L.R. 250, **Chalamanda Kauteme v. Republic**, Criminal Appeal No. 295 of 2009, **Ally Fumito v. Republic**, Criminal Appeal No. 36 of 2008, CAT, and

Moris Jacob @ Ombee & another v. Republic, Criminal Appeal No 220 of 2012, CAT (both unreported).

The alert expressed in the above cases however, does not apply to the circumstances in the present case because here, after spotting him stealing the said copper wires, PW4 snubbed the threat which was exhibited by the appellant and his colleagues and gave a chase. He simultaneously raised alarm which attracted several other people who joined him in the chase and succeeded to apprehend the appellant. They never lost sight of him, and were lucky that they even recovered the stolen copper wires. Under such circumstances where a culprit was chased and apprehended without losing sight of him, the question of mistaken identity does not at all arise. Consequently, this ground too lacks merit and is hereby dismissed.

The fifth and sixth grounds of appeal in the substantive list are on whether or not the prosecution had proved the case against the appellant beyond reasonable doubt. We felt that it was convenient to tackle them together with the first ground in the supplementary list which alleges that the doctrine of recent possession was improperly invoked in the circumstances of this case. However, before we may discuss them, we

would like to dispose of the sixth ground in the supplementary list which challenge the applicability of the evidence constituted in the cautioned statement.

We hasten to point out that the sixth ground of appeal in the appellant's supplementary list is misconceived because the cautioned statement which was attributed to him and admitted during trial as an exhibit (P3), was expunged by the first appellate court on the basis that apart from the fact that it was not cleared for admission, the said document was not read in court. That being the position, this ground is ignored.

We now turn to the fifth and sixth grounds of appeal in the substantive list on whether or not the prosecution had proved the case against the appellant beyond reasonable doubt, and the first ground in the supplementary list which alleges that the doctrine of recent possession was improperly invoked in the circumstances of this case.

There is no doubt that PW4 was the star witness in this case on whose evidence the appellant's conviction largely depended. As was underscored by both courts below, after realizing that the copper wires

were being dropped out from his motor vehicle, PW4 stopped to inquire what was happening. It was then that he saw people, the appellant inclusive; stealing the said copper wires. Despite the threats from the appellant, PW4 and his turn-boy raised alarm and pursued the appellant who was running away. With the help of good Samaritans who responded to the alarm, they succeeded to arrest him and recovered the copper wires he had stolen. As reflected at page 30 of the Record of Appeal, the evidence of PW4 stated that:-

> *"After the stopping of the lorry I found the first accused (the appellant) holding the panga and copper wire and persons were running away towards the bush. I managed to identify the accused person he was dropping languages (sic: luggage) from the lorry. The accused was holding a panga and he was threatening me with a panga. I decided to make any alarm so as to get assistance."*

The complainant's evidence was corroborated by that of Masanja Ugoi (PW1). He was the one who contacted the police because the angry mob could have killed the appellant. The fact that the appellant was apprehended and the copper wires recovered from him, explains why the

first appellate court upheld the trial court's finding that the doctrine of recent possession was applicable.

As often emphasized, the doctrine of recent possession is applicable where it may be established that the accused person was found in possession of a recently stolen property and did not give plausible explanation on how he came to possess it, of course conditional upon the fact that the said property was the subject of the charge against him. It is similarly necessary to point out that the said property must have been positively identified by the victim of the robbery – See the cases of **The Director of Public Prosecutions v. Joachim Komba** [1984] T.L.R. 213, **Ali Bakari and Pili Bakari v. Republic** [1992] T.L.R. 10, and **Joseph Mkumbwa & Samson Mwakagenda v. Republic,** Criminal Appeal No. 94 0f 2007 (unreported). In **Joseph Mkumbwa & Samson Mwakagenda** the Court expounded that:-

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved,* ***first,*** *that*

the property was found with the suspect, ***second,*** *that the property is positively proved to be the property of the complainant,* ***third,*** *that the property was recently stolen from the complainant, and* ***lastly,*** *that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements . . . ."*

In the present case, all those factors featured. The appellant was found with the said copper wires which were recently stolen from the motor vehicle of PW4 with Reg. No. T. 865 AFT make Mitsubishi – Fuso, but he did not give plausible explanation on how he came to possess it. Also, the said property was the subject of the charge against him, and it was positively identified by PW4 as being the very copper wire he had carried in his motor vehicle. Thus, we have no flicker of doubt that both courts below justifiably invoked the doctrine of recent possession in the circumstances of this case. As such, the prosecution had proved the case against the appellant beyond reasonable doubt. Consequently, the fifth and sixth grounds too lack merit and we dismiss them.

For reasons we have assigned, we are satisfied that the appeal is devoid of merit and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 25th day of February, 2020

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 27th day of February, 2020 in the presence of Appellant appeared in person and Ms Debora Mcharo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL