IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 242 OF 2017

MASHAKA BASHIRI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Maghimbi, J.)

dated the 13th day of April, 2017
in
DC Criminal Appeal No. 129 of 2016

JUDGMENT OF THE COURT

15th & 19th February, 2021.

KEREFU, J.A.:

In the Resident Magistrate's Court of Manyara at Babati, the appellant, Mashaka Bashiri @ Msuya was charged with armed robbery contrary to sections 287A of the Penal Code, Cap 16 R.E. 2002. It was alleged that, on 23rd January, 2016 at Maisaka B area within Babati District in Manyara Region the appellant stole a handbag valued at TZS 30,000.00 and TZS 120,000.00, total valued at TZS 150,000.00 the properties of one Naomi

Siay and immediately before stealing he used a *panga* to threaten her to obtain and retain such properties.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of four witnesses and tendered two exhibits. The appellant relied on his own evidence as he did not call any witness.

The material facts giving rise to the appellant's arraignment and subsequent conviction can be briefly stated as follows: On 23rd January, 2016 at about 06:00 hours when Naomi Siay Matlle Fatu (PW2) was going to the Babati Bus Stand and upon arriving at a Petrol Station area, three people approached her. One of them threatened her with a bush knife (*panga)* and robbed her handbag. In her testimony, PW2 testified that the said handbag contained TZS 120,000.00, two ATM cards, voter's ID, four keys and baby clothes. She said that she raised an alarm and two motorcycle riders responded and went to the scene. PW2 narrated the incident to them and they traced the robbers, arrested the appellant and reported the matter to Babati Police Station.

Emmanuel Lema @ Musa (PW3) testified that on the fateful date in the morning, when he was with his fellow motorcycle riders, he heard the

alarm raised by PW2 and upon making a follow up, they saw PW2 who told them that her handbag was robbed by robbers who had run away. PW3 said that they called other people including the street chairperson, Issa Mnyaturu (PW4) and started to trace the robbers. A moment later, they found the appellant hiding in a hole and he then led them to a place where he kept the other stolen items. PW3 said that upon reaching at that place, they found ATM and ID cards together with PW2's purse. PW3 added that they arrested the appellant and took him to Babati Police Station. PW4's testimony in respect to his encounter with the appellant dovetailed, in many aspects, with that of PW3, although he said that the matter was reported to him by PW2 at around 05:45 hours.

G.3942 D/C Innocent (PW1), the investigation officer testified that, he was involved in the investigation of the incident and visited the scene of crime. He prepared a sketch map of the scene of crime, interviewed the appellant and recorded his statement. PW1 tendered one handbag, two ATM cards, voter's ID card, clothes and a *panga* which were collectively admitted in evidence as exhibit P1. He also tendered the sketch map of the scene of crime which was admitted in evidence as exhibit P2.

In his defense, the appellant who testified as DW1 stated that he was arrested by the motorcycle riders while on his way to the bus stand, claiming that he had stolen a woman's handbag. He said, they took him to PW4 and left him there and came back with a handbag and took him to police. He denied any involvement in the alleged offence. However, after a full trial, he was found guilty, convicted and sentenced to thirty years imprisonment.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still undaunted, the appellant has preferred the present appeal. In the Memorandum of Appeal, the appellant raised five grounds which can be paraphrased into the following grounds of complaints; **one**, that the prosecution case was not proved beyond reasonable doubt as the doctrine of recent possession was improperly applied; **two**, that there were substantial discrepancies between the charge and the evidence on record; **three,** that prosecution witnesses were not credible; **four**, the certificate of seizure of the alleged stolen properties was not tendered before the trial court; and **five**, that the prosecution failed to establish chain of custody of the properties alleged to have been stolen.

At the hearing of the appeal, which was conducted through video conferencing facility linked to Arusha Central Prison, the appellant appeared in person without legal representation. On its part, the respondent Republic was represented by Mr. Mutalemwa Kishenyi, learned Senior State Attorney assisted by Mr. Lameck Mugeta, learned State Attorney.

Submitting in support of the first ground of appeal, the appellant argued that the doctrine of recent possession was improperly applied by the lower courts as the properties alleged to have been stolen were tendered by PW1 who was the investigation officer, and admitted in evidence, without being identified by PW2 who was alleged to be the owner of the same. It was his argument that since PW1 was not the owner of the alleged properties, the same were required to be first identified by PW2, prior to its admission in evidence. The appellant also challenged the evidence of PW2 by arguing that, in her testimony, she only stated in general terms that the alleged stolen handbag had combination of many colours without specifying the same.

On the second ground, the appellant argued that there was variance between the particulars of the offence indicated in the charge sheet and

the prosecution evidence. He said that, while the particulars of the offence indicated that the stolen items were a handbag and TZS 150,000.00, in her evidence, she said they were a handbag, spray purse, two ATM Cards, Voter's ID, Keys and clothes. He said that evidence adduced by all prosecution witnesses does not support the charge laid against him, hence the charge was not proved to the required standard. In this regard, the appellant relied on the decision of the Court in **Killian Peter v. Republic,** Criminal Appeal No. 508 of 2016 (unreported).

In respect of the third ground, the appellant pointed out some inconsistencies in the testimonies of prosecution witnesses which he claimed that had weakened its case. He said that, whereas PW2 testified that the incident occurred at 06:06 hours, PW4 claimed that PW2 informed him about the incident at 05:45 hours. He argued that all these discrepancies create doubts which should be resolved in his favour. To support his proposition, he cited the case of **Potian Joseph v. Republic**, Criminal Appeal No. 200 of 2015 (unreported).

On the fourth and fifth grounds, the appellant argued that the certificate of seizure on the items alleged to have been stolen was not tendered to show how the same were seized. He said that, it is even not

clear as to under whose custody the seized items were kept, because PW1 did not testify on that aspect. He thus questioned the chain of custody of the alleged stolen items and said, the same was not established by the prosecution. To support his argument, he cited **Zainabu Nassoro @ Zena v. Republic,** Criminal Appeal No. 348 of 2015 (unreported) and concluded that the prosecution case was not proved to the required standard. Finally, the appellant impressed on us to allow the appeal, quash the conviction and set aside the sentence imposed against him and set him at liberty.

On his part, Mr. Kishenyi resisted the appeal by fully supporting the conviction as well as the sentence meted out against the appellant. Responding to the first ground, Mr. Kishenyi argued that the doctrine of recent possession was properly applied by the lower courts because after the incident, the appellant was immediately arrested by PW3 and PW4 and he lead them to where he kept the stolen properties and the same were identified by PW2. He added that the said doctrine was complemented by the appellant's oral confession.

On the second ground of appeal, although Mr. Kishenyi conceded that there was variance between the charge sheet and the prosecution evidence on the stolen properties, but he strongly argued that the same did not

water down the prosecution's case. According to him, the handbag was mentioned as an umbrella because all other stolen items were inside it and it was not possible to itemize all of them. On the pointed-out contradictions in the witnesses' evidence, Mr. Kishenyi argued that the same was only minor discrepancies which do not go to the root of the matter. To bolster his argument, he cited the case of **Shihobe Seni and Another v. Republic** [1992] T.L.R 330.

In respect of fourth and fifth grounds of appeal, Mr. Kishenyi argued that, in the nature of the case and the manner the appellant was apprehended there was no need of certificate of seizure. He clarified that the appellant was arrested by PW3 and PW4 who were civilians and there was no search conducted by the police officers in terms of section 38 (3) of the Criminal Procedure Act, [Cap. 20 R.E. 2002]. The learned Senior State Attorney also argued that, even the issue of chain of custody does not arise as the appellant was the one who showed PW3 and PW4 where he kept the stolen properties. He cited the case of **Geofrey Kitundu @ Nalogwa and Another v. Republic,** Criminal Appeal No. 96 of 2018 (unreported) and urged us to dismiss the appeal in its entirety for lack of merit.

We have carefully considered the submissions made by the parties in the light of the record of appeal before us and the grounds of complaint, the main issue for our determination is whether the Prosecution case was proved to the required standard.

Before dealing with the above issue, we find it crucial to state that this being the second appeal, we are, under section 6 (7) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019], 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 plethora of other decisions that followed, the Court can interfere with concurrent findings of fact by the lower courts if there has been a misapprehension of the nature and quality of evidence and other recognized factors occasioning miscarriage of justice. See also **Mussa Mwaikunda v. Republic** [2006] TLR 387; **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 and **Omary Lugiko Ndaki v. Republic**, Criminal Appeal No. 544 of 2015 (both unreported). Therefore, in determining this appeal, we shall be guided by the above stated principle.

We find it appropriate to start with the second ground of appeal which is on the variance between the charge and prosecution evidence in respect of the alleged stolen properties. We have noted that both parties are at one on this point but took different approach on its consequences. While the appellant submitted that the said variance has weakened the prosecution case as the evidence adduced is not compatible with the particulars of the offence, Mr. Kishenyi argued that the same did not water down the prosecution case. Therefore, in determining this ground, we find it appropriate to reproduce the particulars of the offence as per the charge sheet found at page 1 of the record of appeal, which reads as follows: -

PARTICULARS OF THE OFFENCE

MASHAKA S/O BASHIRI @ MSUYA on the 23rd day of January, 2016 at Maisaka B area within Babati District in Manyara Region, did steal handbag valued at thirty thousand (Tshs. 30,000/=) and cash money Tshs. 120,000/= total valued at Tshs 150,000/= the properties of NAOMI D/O SIAY and immediately before and after such stealing did use a panga to threaten her in order to obtain and retain such properties."

From the above extracted particulars of the charge sheet, it is clear that the alleged stolen properties were the handbag and TZS 150,000.00.

There is no doubt that this is at variance with the evidence adduced by prosecution witnesses. In her evidence, PW2, among other things, at page 10 of the record of appeal listed the alleged stolen properties as: -

> *"...handbag with spray purse inside, cash Tshs 120,000/=, two ATM Cards, one Postal Bank and another for NMB and Voter's Identification Card all were mine written Naomi Matlle. The bag was with keys and clothes."*

Furthermore, PW3 at page 13 of the same record testified that: -

> *"The accused took us to the place where he hid other stolen things. We found ATM Card, ID Card and purse. These articles were the properties of Naomi Siay and clothes. We arrested the accused and took him to Police Station Babati."*

From the above extracts, it is clear that the two ATM cards, voter's ID, purse, four keys and baby clothes mentioned by PW2 and PW3 as part of the stolen items were not listed in the charge sheet. Pursuant to section 234 (1) of the CPA when such a situation happens, the charge should be amended. The said section states that: -

> *"Where in any stage of the trial it appears to the court that the charge sheet is defective, either in substance or*

in form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or additional of new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merit of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this sub section shall be made upon such terms as the court shall seem just."

The above provision provides for the steps to be taken when there is variance between the charge and the evidence. It confers powers on the trial court to allow amendment of the charges to meet the pertaining circumstances. Therefore, in the case at hand, after the prosecution had noted that there is variance between the charge and evidence in respect of the alleged stolen items, it was required to seek leave to amend the charge, but that was not done. We have also noted that, the said variance started with the facts of the case read over and explained to the appellant on 17th March, 2016 during the preliminary hearing as paragraph 3 of the said facts found at page 5 of the record of appeal reads thus: -

"...The accused took handbag which was with NMB ATM Card, cash money TZS 120,000.00, Postal Bank ATM Card, voter's ID card and keys..."

It is therefore evident that, even at this initial stage, the prosecution did not seek leave to amend the charge to include all the alleged stolen properties therein. The failure to amend the charge sheet is fatal and prejudicial to the appellant hence leads to serious consequences to the prosecution case as it was stated by this Court in various cases some of which have been cited to us by the appellant. We however wish to add more cases such as **Mohamed Juma @ Mpakama v. Republic,** Criminal Appeal No. 385 of 2017, **Noah Paulo Gonde and Another v. Republic,** Criminal Appeal No. 456 of 2017 and **Issa Mwanjiku @ White v. Republic,** Criminal Appeal No. 175 of 2018 (all unreported). Specifically, in the latter case, when the Court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the type of properties which were alleged to have been stolen from the complainant PW1, it stated that: -

> *"We note that,* ***other items mentioned by PW1 to be among those stolen*** *like, ignition switches of tractor and Pajero* ***were not indicated in the charge sheet.*** *In the prevailing circumstances of this case,* ***we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove***

the charge to the required standard." *[Emphasis added]*

We entertain no doubt that in this case there was variance between the charge and the evidence on the items alleged to have been stolen from PW2. The prosecution case, as rightly argued by the appellant, was not proved to the required standard. In the circumstances, we find the second ground to have merit.

Our determination of the second ground would have been sufficient to dispose of the appeal. However, we find it necessary to also consider the first ground on propriety or otherwise of the lower courts invoking the doctrine of the recent possession in this case. It is common ground that the two courts below grounded the conviction against the appellant on the doctrine of recent possession. Specifically, in upholding the conviction and sentence by the trial court, the first appellate court at page 48 of the record of appeal stated in general terms that: -

> *"...Therefore, even if there was no proper identification, but basing on evidence that the appellant was found in possession of stolen properties immediately after the crime, that evidence proves that the appellant was involved in commission of the crime of armed robbery."*

The circumstances under which the doctrine of recent possession can be applied were stated in the case of **Juma Bundala v. Republic,** Criminal Appeal No. 151B of 2011 (unreported). In that case, the Court cited the case of **Mwita Wambura v. Republic,** Criminal Appeal No. 56 of 1992 (unreported) in which the circumstances were stated as hereunder: -

> *"1) The stolen property must be found with the suspect;*
> *2) The stolen property must be positively identified to be that of the complainant;*
> *3) The property must be recently stolen; and*
> *4) The property stolen must constitute the subject of the charge."*

In the case at hand, the appellant was, in the first place not found in possession of the alleged stolen properties. This is in accordance with the evidence of PW3 and PW4 found at page 12 to 15 of the record of appeal. Furthermore, in her testimony, PW2 gave a general description of the alleged stolen handbag by stating that *"...it was a combination of many colours,* without even specifying the said colours or mentioning other symbols or special marks of the said handbag. The said handbag being an item of general nature which did not have any distinct marks to

differentiate it from others of similar category, cannot be safely vouched that it was positively identified by PW2. It is also on record that the same was tendered in evidence by PW1 without being first identified by PW2, the alleged owner of the same. In **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2015 (unreported) this Court stated that: -

> *"In such cases, description of special mark to any property allegedly stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

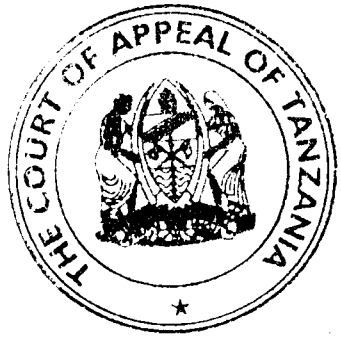
Given the general descriptions stated by PW2 on the alleged stolen handbag and the fact that other alleged stolen properties did not constitute the subject of the charge, it was unsafe for the two courts below to invoke the doctrine of recent possession. We therefore, with respect, find the submission made by Mr. Kishenyi on this aspect to be unsound. As such, we also find the first ground of appeal to have merit.

The totality of the foregoing leads us to the conclusion that the prosecution case was tainted with doubts which in our criminal jurisprudence requires us to resolve in favour of the appellant. In our settled view, the two grounds of appeal suffice to dispose of this appeal

and we thus find no useful purpose to consider the remaining grounds of appeal raised by the appellant.

In the event, we allow the appeal and accordingly quash the conviction and set aside the sentence imposed on the appellant. Consequently, we order for immediate release of the appellant from prison unless he is being held for some other lawful cause.

DATED at **ARUSHA** this 18th day of February, 2021.



A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 19th day of February, 2021 in the presence of the Appellant in person through video conferencing facility linked to Arusha Central Prison and Mr. Mutalemwa Kishenyi, learned Senior State Attorney assisted by Mr. Lameck Mugeta and Mr. Petro Ngassa, learned State Attorneys for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL