IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KWARIKO, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 134 OF 2019

CHARLES SIMON ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mongella,J.)

dated 27th day of March, 2019
in
(HC) Criminal Appeal No. 119 of 2018

JUDGMENT OF THE COURT

2nd June, & 5th July, 2021

KWARIKO, J.A.:

Charles Simon, the appellant herein together with Ramadhani Simon @ Makoba Pompo, Naaman Henry Mkuye @ Rasi Naa and Cosmas Orestes @ Gondya @ Cossy, then second, third and fourth accused persons who are not parties to this appeal, were arraigned before the Court of Resident Magistrate of Dar es Salaam at Kinondoni with the offence of armed robbery contrary to section 287A; while the fifth accused Wenslaus Deo Komba was charged with the offence of accessory after the fact to armed robbery contrary to sections 387 (1) and 388; the offences were preferred

under the Penal Code [CAP 16 R.E. 2002; now R.E. 2019]. They denied the charge but at the end of the trial, the rest of the accused persons were acquitted, whilst the appellant was convicted of armed robbery and sentenced to thirty years imprisonment on 23rd January, 2018. The sentence was ordered to run from 20th May, 2016 the date upon which the appellant was arraigned in the trial court and incarcerated in remand custody until his conviction. Aggrieved by that decision, appellant unsuccessfully appealed to the High Court of Tanzania sitting at Dar es Salaam. He is thus before this Court on a second and final appeal.

During the trial, the prosecution paraded a total of eleven witnesses and tendered seven exhibits. That evidence can briefly be recapitulated as follows. Aloyce Barnabas Kavishe (PW1) owned a motor vehicle with Registration No. T 859 DCZ make Mitsubishi Fuso yellow in colour (henceforth "the car"). The driver of the car was one Godfrey Basdidi @ Kavishe (PW2) who lived in the same house with PW1. Usually, the car was being parked at PW1's home and the two witnesses each kept one set of the ignition key. PW2's daily routine with the car would kick off at about 4:00 am but on 14th January, 2016 the two heard the car start at 3:37 am. Following which, PW1 heard PW2 shouting that the car had been stolen,

and that the latter saw the thugs with a gun though could not identify its description. James Ngolomoshi (PW8) who was a watchman at that home said that he saw three people embark on the car and one of them threatened to shoot him with a gun which was already stuck in his neck, if he moved away. However, he whistled and ran into the bush. Efforts to trace the stolen car did not bear any fruits hence information was relayed to the police station where investigation commenced.

As luck would have it, on 20th January, 2016 while at a Petrol Station at Mbezi area, PW1 saw a car with Registration No. T491 ASZ Make Mitsubishi Fuso blue in colour (exhibit PK4), which he suspected to be his stolen car. The driver of the car happened to be the appellant. Thereafter, he reported to the police station where the appellant was arrested by No. D 173 Sgt Simon (PW4) and No. F. 646 Dsgt Alfred (PW5). When the car was searched, PW5 found a copy of a motor vehicle registration card which was admitted in evidence as exhibit PK3. For his part, PW1 tendered a motor vehicle registration card of the stolen car which was admitted in evidence as exhibit PK1. Upon interrogation, appellant claimed that he was only hired by the fourth accused to drive the car to Morogoro at a pay of

TZS. I50,000.00. Thereafter, the appellant led the police to the arrest of the fourth accused.

Shaaban Juma Thabit (PW6) was a house help of one Shakira Allum Khassan (PW7). PW6 adduced evidence to the effect that the third accused who was a tenant in the house of PW7 was a friend of the fifth accused and that the two used to bring motor vehicles and had them repainted. He also testified further that; he had witnessed the car being repainted by the fifth accused which it was subsequently taken away by the appellant.

In the course of investigation, a forensic analysis was conducted by Assistant Inspector Moja Tulawaye Kabange (PW10) who found that the chassis number of the car had been tempered with by welding and replaced its original No. FK629GZ530069 with a fake one No. FK335C-550066 to match the description of the car that was found in possession of the appellant. The forensic report was tendered and admitted in evidence as exhibit PK5.

In his defence, the appellant did not deny that he was found in possession of the car which was positively identified by PW1 as his stolen

property. However, he explained that it was the fourth accused who had hired him to drive it to Morogoro as explained earlier. The fourth accused vehemently refuted that account.

In convicting the appellant, the trial court found that the doctrine of recent possession was proved against him and that his explanation on how he came about the stolen property was contradictory. He was thus convicted of the offence of armed robbery and sentenced as indicated earlier. The first appellate court sustained his conviction and the sentence now challenged in this appeal.

Before this Court, the appellant has raised the following four grounds of appeal:

1. *That, the learned first appellate Judge erred in upholding the appellant's conviction based on a defective charge (Dead law).*
2. *That, the learned first appellate Judge erred in holding that the ownership of the motor vehicle – Exhibit PK4 was proved in the absence of proof from TRA official.*

3. *That, the learned first appellate Judge erred in upholding the decision of the trial court on uncorroborated prosecution evidence.*

4. *That, the learned first appellate Judge erred in holding that the prosecution case was proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant appeared in person without legal representation. On the other hand, the respondent Republic was represented by Mr. Ramadhan Kalinga together with Ms. Brenda Nicky, learned State Attorneys. After adopting his grounds of appeal, the appellant elected for the State Attorney to begin his address reserving his right to rejoin should it be necessary to do so.

Responding to the first ground of appeal, Mr. Kalinga argued that the charge was not defective because the charged offence was armed robbery contrary to section 287A of the Penal Code. He submitted further that the particulars of the offence were proper as they explained the ingredients of the offence which the appellant understood and gave his defence. The learned counsel added that the omission to mention Act No. 4 of 2004 which defined the offence of armed robbery did not prejudice the appellant. Mr. Kalinga submitted that, in terms of section 12 (1) of the

Interpretation of Laws Act [CAP 1 R.E. 2019], reference to a written law includes its amendments.

Despite his stance in respect of the first ground, Mr. Kalinga conceded to the appeal on account of the fourth ground. He argued that the evidence on record did not prove the offence of armed robbery because PW1 said his watchman was not near the scene of the crime and thus he could not have seen what kind of weapon the thieves were carrying. Besides that, PW2 said he was the first one to hear the car starting and the watchman whistled subsequent to his alarm. In addition, PW2 said that he did not identify the armed thug and did not describe the alleged weapon. It was Mr. Kalinga's further argument that PW8 only said that he felt something coid touching his neck but did not see what it was.

When he was probed further by the Court, the learned State Attorney submitted that, though the appellant was found in possession of a stolen property, he was not charged with the offence of being in possession of a stolen property. In any case, he argued, the appellant had accounted on how he came about the stolen car and led to the arrest of the fourth accused who had hired him to drive it to Morogoro. Hence, the doctrine of

recent possession was not properly applied against the appellant, he contended.

As regards sentence, Mr. Kalinga argued rightly so, that the trial court erred to order it to run from 2016 because at that time the appellant had not been convicted.

Following the State Attorney's submissions, the appellant had nothing to add in rejoinder. He left the matter to the Court to decide.

We have considered the grounds of appeal together with the submissions of the parties. The germane issue that we shall decide is whether the preferred charge was proved beyond reasonable doubt against the appellant. However, before we tackle that issue, we would like to reaffirm a settled position of the law that a second appellate court like ours can only interfere with the concurrent finding of facts of the two courts below if there has been a non-direction or misdirection on the same occasioning a miscarriage of justice. This principle of law has been discussed in a number of the Court's decisions among others, **Osward Mokiwa @ Sudi v. R,** Criminal Appeal No. 190 of 2014, **Mbaga Julius v.**

R, Criminal Appeal No. 131 of 2015 and **Paul Juma Daniel v. R** Criminal Appeal No. 200 of 2017 (all unreported).

From the foregoing, we are going to decide whether the two courts below correctly appreciated the evidence on record before they reached to the concurrent findings against the appellant. We shall start with the complaint on the validity of the charge.

As submitted by the learned State Attorney that the offence of armed robbery under section 287A of the Penal Code was created by the amendment done through the Written Laws (Miscellaneous Amendments) Act No. 4 of 2004. This amending law was not cited in this case in the statement of the offence but we do not think its omission vitiated the charge. This is so because reference to a written law includes such written law as it may be amended. Section 12 (1) of the Interpretation of Laws Act [CAP 1 R.E. 2019] stipulates:

> *"A reference in a written law to a written law shall be deemed to include a reference to such written law as it may be amended."*

Likewise, we dismissed a similar complaint in the case of **Karimu Jamal Kesi v. R,** Criminal Appeal No. 412 (unreported) where we stated thus:

> *"Under the circumstances, the prosecution had no obligation to indicate that the appellant was charged under section 287A of the Penal Code as amended by Act No. 3 of 2011."*

We therefore find that; the appellant was not charged under dead law and thus, the first ground fails.

Next, we shall determine the fourth ground of appeal as argued by the learned State Attorney as to whether the prosecution case was proved beyond reasonable doubt against the appellant. To establish the offence of armed robbery, the prosecution must prove the following elements: **one,** theft; and **two,** the use of dangerous or offensive weapon or robbery instrument against a person at or immediately after the commission of robbery. Some of the Court's decisions which have underscored this position of the law are; **Shaban Said Ally v. R,** Criminal Appeal No. 270 of 2018, **Dickson Luyana v. R,** Criminal Appeal No. 1 of 2005 and **Kashima Mnadi v. R,** Criminal Appeal No. 78 of 2011 (all unreported).

The question which follows is whether these elements of armed robbery were established in this case. It is not disputed that PW1's car was stolen. However, as rightly submitted by the learned State Attorney, PW2 and PW8 did not prove that at the time the car was stolen there was use of offensive or dangerous weapon namely; a gun and that it was used on any person. On his part, PW2 said that when he heard the car starting, he peeped outside and saw an armed man nearby, but he neither described the alleged gun nor the armed man. Besides, although he claimed that there was electricity at the scene, he did not describe its location given the circumstances that he allegedly retreated inside the house for his safety when he found that there were thieves outside.

Similarly, it is doubtful if PW8 was near the scene when the stealing occurred. This is because PW1 and PW2 said they heard him whistling after they had raised an alarm which signifies that he was not near the scene when the incident occurred. Secondly, his evidence contradicted when he said that he was touched from behind by something cold which he suspected to be a gun and at the same time managed to run away. It is incomprehensible that he would have run away while he was in the danger of being blown up with the alleged gun. Therefore, while PW1 managed to

prove that his car was stolen, the prosecution did not prove that any offensive or dangerous weapon was used in the stealing. That means that the offence of armed robbery was not proved.

The foregoing notwithstanding, it is not disputed that the appellant was found in possession of the car few days after it had been stolen from PW1. The trial court invoked the doctrine of recent possession in convicting him which was upheld by the first appellate court but we do not think the two courts were correct. This is because, for the doctrine to successfully be invoked, the prosecution ought to prove several elements which were succinctly enumerated in the case of **Joseph Mkumbwa and Samson Mwakagenda v. R,** Criminal Appeal No. 94 of 2007 (unreported) thus:

> *"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 a 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; **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...."*

See also: **Hassan Rashid Gomela v. R,** Criminal Appeal No. 271 of 2018, **Salum Rajabu Abdul @ Usowambuzi v. R,** Criminal Appeal No. 219 and **Director of Public Prosecutions v. Orestus Mbawala @ Bonge and Mohamed Hassan @ Said,** Criminal Appeal No. 410 of 2015 (all unreported).

In the instant case, there is no dispute that the car which was recently stolen was found in possession of the appellant and positively identified by the complainant. It is trite law that where the accused offers sufficient explanation on how he came about the stolen property, he deserves an acquittal. For instance, in the case of **Hassan Rashid Gomela** (supra), the Court stated thus:

"However, as already seen, the doctrine will not apply when an explanation is offered which might

reasonably be true even if the trier of fact is not satisfied of the truth."

We have considered the evidence on record and we are satisfied that the appellant offered sufficient explanation on how he came to possess the car. He stated that he was only hired by the fourth accused to drive the car to Morogoro. He led the police to the arrest of the fourth accused and he unreservedly cross-examined him on this issue during the trial. We have also considered the conduct of the appellant when he was found in possession of the car. He did not show any anxiety nor did he try to escape from the police. This is inconsistent with the conduct of a guilty person. Had he been the thief or that he was aware that the car was a stolen property, he would not have cooperated with the police to that extent.

From the foregoing analysis, we are settled in our mind that the doctrine of recent possession was wrongly applied against the appellant. It follows that the prosecution did not prove its case against the appellant beyond reasonable doubt.

In the event, we find the appeal meritorious and hereby allow it, quash the conviction and set aside the sentence meted out against the

appellant. We further order the immediate release of the appellant from prison unless his continued incarceration is related to any other lawful cause.

DATED at **DAR ES SALAAM** this 24th day of June, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 5th day of July, 2021 in the presence of the appellant in person and Ms. Jenipher Masue, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
REGISTRAR
COURT OF APPEAL