IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 436 OF 2019

AUGUSTINO MGIMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Matogolo, J.)

dated the 30th day of October, 2019
in
(DC) Criminal Appeal No. 25 of 2019

JUDGMENT OF THE COURT

13th & 20th September, 2021

KWARIKO, J.A.:

This is a second appeal. It is against the decision of the High Court of Tanzania at Iringa District Registry (Matogolo, J.) which dismissed the appellant's appeal. Formerly, the appellant was arraigned before the District Court of Iringa at Iringa with the offence of armed robbery contrary to section 287A of the Penal Code [CAP 16 R.E. 2002; now R.E. 2019].

It was alleged by the prosecution that, on 6th March, 2018 at Mkimbizi Shayo area within the District and Region of Iringa, the appellant being armed along with six other men, stole cash TZS 900,000.00 and various items including four mobile phones the properties of one Clemence Lufumbe and they threatened to use violence to the said Clemence Lufumbe and his family in order to obtain and retain the said properties. The appellant denied the charge.

Subsequently, the prosecution brought a total of eight witnesses to prove the charge; whilst the appellant was the sole witness for the defence.

The background of the case which led to this appeal is as follows. On 6th March, 2018 at 11:00 am, Clemence Lufumbe (PW1) was at his home with his family members namely Faraja, Kuruthum, Kaptain and Furaha. Whilst there, Faraja Lufumbe (PW8) informed PW1 that there were visitors outside who wanted to meet him. He allowed them inside whereupon six people entered some of them clad in Police uniform. Soon thereafter, they ordered PW1 to give them a gun he was said to own illegally but he denied that assertion. They threatened him with a gun, tied him and others with ropes and were ordered to lie down. Following

which PW1 was taken to his bedroom and was forced to give them money. He directed the thugs where he kept money and a total of TZS 900,000.00 and six mobile phones were taken.

When the thugs left, PW8 managed to untie the ropes and broke PW1's window and freed him. Subsequently, PW1 reported the incident to the Police and investigation started. No. E 8741 Det. Cpl. Mrisho visited the scene of crime and drew a sketch map which was admitted in evidence as exhibit P3. In the course of investigation, the police at Tanga reported that those thugs had been located there and one of them who happened to be the appellant had eloped to Iringa. The police cyber-crime unit traced the stolen phones and the appellant was arrested at Iringa Post area by Assistant Inspector Erick Mwangosi (PW3). He was found in possession of two mobile phones and PW1 was called and identified one of them to be his stolen property (Exhibit P1). The appellant was interrogated by PW3 and was said to have confessed to the allegations thus his cautioned statement was recorded. The statement was admitted in evidence as exhibit P4.

Further, according to the evidence, Insp. Joseph Leonard Nyangalahu (PW4) was led by the appellant to his two homes in Isakalilo

and Kalenga and a search of those two houses was conducted. At Kalenga, he was found in possession of TZS 200,000.00, bus tickets to Segerea, Dar es Salaam and Iringa (Exh. P7). At Isakalilo seven pieces of ropes, one bandle, plate number T 643 TLE and a gun bag (Exh. P6) were found. The search warrants were admitted in evidence as exhibits P5. Daina Kadinda (PW5) and Sophia Kinyaga (PW6) witnessed the search of the appellant's Kalenga and Isakalilo houses respectively.

In defence, the appellant denied the allegations but did not dispute that he was arrested at Post area and found in possession of two mobile phones. However, he explained that the phones were his properties which he bought from one Mariam and was using them in business.

At the end of the trial, the appellant was convicted on the doctrine of recent possession of the phone and sentenced to thirty years imprisonment. The High Court upheld that decision.

Before this Court the appellant filed five grounds of appeal which we have paraphrased as follows:

1. That, PW1 did not prove that the phone (Exh. P1) was his property.
2. That, the appellant's defence evidence was not considered.

3. That, the prosecution ought to have charged the appellant together with the alleged co-suspects who were arrested in Tanga.
4. That, the prosecution ought to have charged the appellant with the offence of being found in possession of property suspected to have been stolen instead of armed robbery.
5. That, the prosecution evidence from family members ought to have been corroborated by other evidence of independent witness.

At the hearing of the appeal, the appellant appeared in person, unrepresented; whilst Misses. Blandina Manyanda, learned Senior State Attorney and Alice Thomas, learned State Attorney represented the respondent Republic.

When he was called upon to argue the appeal, the appellant adopted his grounds of appeal and preferred for the State Attorney to begin her address reserving his right of rejoinder should the need to do so arose.

For her part, Ms. Manyanda made her stance of not supporting the appeal. She argued in respect of the first ground that the appellant did not deny that he was found in possession of the phone which had been recently stolen and identified by the owner, PW1. She contended however that the appellant failed to explain how he came about the phone and thus

the High Court correctly upheld the appellant's conviction on the basis of the doctrine of recent possession. In support of her contention, the learned Senior State Attorney referred us to the Court's decision in **Rashid Omary Kibwetabweta v. R,** Criminal Appeal No. 254 of 2016 (unreported).

Arguing the second ground, the learned Senior State Attorney conceded that the trial court did not consider the defence evidence but the High Court stepped in and considered it together with the prosecution case before it decided the appeal. To fortify this argument, Ms. Manyanda relied on the case of **Leonard Mwanashoka v. R,** Criminal Appeal No. 226 of 2014 (unreported).

Ms. Manyanda contended, in respect of the third ground, that the prosecution did not find need to charge the alleged appellant's collaborators in the incident. She argued further that there is no law which oblige the prosecution to charge an accused person jointly with others because what matters is the evidence against the preferred accused person.

In respect of the fourth ground, the learned Senior State Attorney argued that the appellant's conviction was based on the doctrine of recent

possession of the phone which was stolen during the armed robbery incident.

As to the complaint in the fifth ground that PW1, PW7 and PW8 were all family members hence ought to have been an independent evidence, Ms. Manyanda argued that there is no law which obliges the prosecution to bring independent witnesses where family members are involved and that what matters is the competency of a particular witness as provided under section 127 (1) of the Evidence Act [CAP 6 R. E. 2019]. The case of **Simon Emmanuel v. R,** Criminal Appeal No. 531 of 2017 (unreported), was also cited to strengthen this argument.

On being prompted by the Court, Ms. Manyanda submitted that although PW1 explained the identifying marks of the phone during the trial, he did not do so to the police before the hearing date and the marks were not displayed in court. That notwithstanding, basing on her submission, the learned Senior State Attorney urged us to dismiss the appeal for lack of merit.

In rejoinder, the appellant argued in respect of the first ground that PW1 did not explain the alleged marks 'CL' on the phone before he testified in court. He contended that, for his part, he explained to the

police that he bought the phone from one Mariam and had no any receipt just like it was the case for PW1. The appellant contended that because he left the phone with the police after arrest, they could have inscribed the alleged marks 'CL'.

Although the appellant conceded that his defence was considered by the High Court which is the complaint in the second ground, his explanation was that the same ought to have been believed as compared to the prosecution evidence.

In the third ground, the appellant contended that because the police were the ones who said that other suspects were arrested in Tanga, they ought to have charged them jointly with him and failure to do so shows that the alleged incident had never happened.

It was the appellant's contention in respect of the fourth ground that the offence of armed robbery was not proved against him because he was not found in possession of the alleged firearm and police uniform. He went on to argue that the alleged recent possession of the phone was not explained as how short the time was. He argued that the case of **Rashid Omary Kibwetabweta** (supra) is distinguishable since the appellant in

that case was found in possession of a stolen property only eight hours from the time of incident, while in this case it was after eight days.

In respect of the fifth ground concerning independent witnesses, the appellant argued that at least the complainant ought to have informed his neighbours about the robbery incident even before he reported to the police. That as the incident is said to have occurred in broad daylight, it was expected to have been heard by people and because no any independent witness came to testify, it remained that this case was just a frame up.

After having carefully considered the submissions from both parties, we wish to start our deliberation with the first ground of appeal where the appellant is contending that the complainant did not sufficiently identify the stolen phone (Exh. P1). It is common ground that the appellant was convicted on the basis of the doctrine of recent possession having been found with the alleged stolen phone which decision was upheld by the first appellate court. It is trite law that, in order for the doctrine to be applied the prosecution must prove that the accused person was found in possession of the property recently stolen.

Some of the Court's decisions which applied this doctrine include: **Joseph Mkumbwa & Samson Mwakagenda Joseph v. R,** Criminal Appeal No. 94 of 2007; **Abdi Julius @ Mollel Nyangusi & Another v. R,** Criminal Appeal No. 107 of 2009; **Director of Public Prosecutions v. Orestus Mbawala @ Bonge,** Criminal Appeal No. 119 of 2019; **Mohamed Hassan Said v. R,** Criminal Appeal No. 410 of 2015; **Hassan Rashid Gomela v. R,** Criminal Appeal No. 271 of 2018 and; **Julius Mwanduka @ Shila v. R,** Criminal Appeal No. 322 of 2016 (all unreported). In the case of **Mkumbwa Samson Mwakagenda Joseph** (supra), the Court stated 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 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,*** *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...."

The question to be addressed now is whether the above stated requirements of the doctrine were met in the instant case. It is not disputed that the property alleged to have been stolen was found in possession of the appellant; it was alleged that it was recently stolen from the complainant and that it constitutes a subject matter of the charge against the appellant. What is in controversy is whether the complainant positively proved the said property to be his property.

It was the appellant's contention that PW1 did not describe the alleged marks 'CL' on the phone to the police before he showed it to court. At first, the learned Senior State Attorney forcefully argued that PW1 had described the identifying marks before the phone was admitted in evidence, but when she was prompted by the Court, she admitted that PW1 did not describe the marks to the police ahead of his testimony. She also admitted that the trial magistrate did not indicate that the alleged identifying marks were displayed before the court. We are of the considered view that PW1 did not show that he had given the marks of the phone to the police when he reported the incident. Further, there was

no any police officer who testified that PW1 had given the marks before his testimony in court. Not even PW3 who arrested the appellant stated that the phone had the alleged marks 'CL' when he found it with the appellant. In **Julius Mwanduka @ Shila** (supra), faced with the issue of the identity of the stolen property by the complainant, the Court stated as follows:

> *"In the first place, while we agree that each mobile hand set 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...."*

Similarly, in the case of **Mohamed Hassan Said** (supra), the Court had this to say:

> *"The possession by the appellant of the property proved to have been very recently stolen may support the charge. But in order for the principle to apply, the one who claimed ownership of that*

property, must show through evidence that the property belonged to him."

Additionally, PW1 did not prove in any other way like producing a receipt that he was the owner of the stolen property considering that a mobile phone is among common items which can easily change hands. Of course, the appellant who said that he had bought the phone from one Mariam without showing evidence to that effect had no obligation to prove it because that duty lied with the one who claimed that the said property belonged to him.

As indicated earlier, the appellant was convicted on the basis of the doctrine of recent possession of the alleged stolen phone. However, we have found that the complainant did not prove that the stolen property belonged to him which is an essential requirement for the doctrine to successfully be applicable. This ground of appeal thus succeeds.

Now, since the said property was the subject matter of the charge against the appellant upon which he was convicted, we find no any other evidence to hold the appellant responsible for the offence of armed robbery. Thus, having decided the first ground in the affirmative, we find no pressing need to determine the remaining grounds of appeal.

In the event, we are settled in our mind that the prosecution case was not proved beyond reasonable doubt against the appellant. We thus find the appeal with merit and accordingly allow it, quash the conviction and set aside the sentence meted out against the appellant. We finally order the release of the appellant from custody unless his continued incarceration is in relation to other lawful cause.

DATED at **IRINGA** this 20th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 20th day of September, 2021 in the presence of the Appellant in person, Ms. Magreth Mahumbi and Ms. Edna Mwahulumba, both learned State Attorneys represented the Respondent/Republic, is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL