IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 7 OF 2019

1. SELEMAN S/O MUSSA @ VITUS
2. MODEST S/O KALFAN ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Sumbawanga)

(Mambi, J.)

dated the 23rd day of November, 2018
in
DC. Cons. Criminal Appeals No. 69 and 70 of 2018

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JUDGMENT OF THE COURT

22nd & 24th September, 2021

NDIKA, J.A.:

In the District Court of Sumbawanga, the appellants, Seleman s/o Mussa @ Vitus and Modest s/o Kalfan, were convicted of armed robbery and sentenced to the mandatory thirty years' imprisonment each. Their first appeal to the High Court of Tanzania at Sumbawanga against conviction and sentence was barren of fruit, hence this second and final appeal.

It was the prosecution's accusation at the trial that the appellants, on 20th November, 2016 at Zimba village within Sumbawanga District in Rukwa Region, stole one motorcycle bearing registration number MC678 BKM, Kinglion make, valued at TZS. 2,000,000.00, the property of Falesi Majaliwa

and immediately before or immediately after such stealing, used iron bar in order to obtain or retain the said motorcycle.

The prosecution was built on the testimonies adduced by six prosecution witnesses supplemented by three documentary exhibits. On the other hand, the appellants gave sworn evidence but did not call any witness.

It was not disputed that on 30th November, 2016 at night, Falesi Majaliwa (PW1) was riding his motorcycle to his home in Zimba village from Sumbawanga. The motorcycle, valued at TZS. 2,000,000.00, was red in colour, Kinglion make, with registration number MC678 BKM. On the way, he was attacked by two persons armed with iron bars whom he did not identify. Having beaten him up, they relieved him of his motorcycle and disappeared. PW1 trudged to a nearby home of Paschal Geuza Helandogo (PW2). The matter was reported to the police and later on PW2 took the victim to hospital where he was admitted.

Four months later, on 25th March, 2017 to be exact, PW1 learnt from one Osward Jerome that the stolen motorcycle was spotted in Mpwapwa village. He pursued that lead, an effort that culminated with the arrest in April, 2017 of Florence Kassiano (PW4) who was with the motorcycle. On being interrogated at Mpui Police Station where he was taken, PW4 said he bought the motorcycle on 13th December, 2016 from the appellants vide a duly executed sale agreement (Exhibit P.3). PW1 tendered the registration card on

the stolen motorcycle (Exhibit P.1) and identified the recovered motorcycle (Exhibit P.2) as the one stolen from him.

There was further evidence from PW5 Galus Peter, a resident of Mpwapwa village. He said that on 13th December, 2016, he bumped into the appellants riding a motorcycle which they were offering for sale. He got them to meet PW4 who then struck a deal with the appellants to buy the motorcycle by paying TZS. 500,000.00 upfront with the balance of TZS. 350,000.00 agreed to be paid later. To carry their bargain into effect, PW4 went with the appellants on the same day to the offices of the Village Executive Officer of Mpwapwa village, PW3 Masumbuko Komesha, who drew up and executed a handwritten sale agreement (Exhibit P.3) to attest the transaction. PW3 confirmed the transaction, saying that PW4 paid the appellants TZS. 500,000.00 upfront. It was agreed that the balance would be paid on 4th February, 2017 upon which the appellants would hand over the registration card on the motorcycle to PW4.

It is evident from the sale agreement that the first appellant is mentioned as the vendor and PW4 the purchaser, both of whom duly appended their respective signatures. The second appellant witnessed the sale on behalf of the vendor while PW6 Julius Sechela signed the agreement as PW4's witness. PW3 also appended his signature and embossed his official rubber stamp.

In their defence, the appellants denied wrongdoing. Both narrated that they were arrested on 10th April, 2017 at Mpwapwa village and that they were taken to Mpui Police Station before they were finally transferred to Sumbawanga Police Station. None of them said anything about the motorcycle but each admitted to have signed the sale agreement (Exhibit P.3).

The trial court (Hon. Y. Wilson – RM) found, on the evidence on record, that the charged offence was proved beyond reasonable doubt. He reasoned that based on PW1's uncontroverted evidence, there was no doubt that the alleged armed robbery was committed on him. He also found, particularly based on Exhibit P.3, that the appellants had possession of the stolen property two weeks after the robbery. On that basis, they were the armed robbers who stole the said property from the victim.

On appeal, Mambi, J. was unconvinced. He upheld the conviction and sentence. He was satisfied that the appellants' possession of the motorcycle raised the application of the doctrine of recent possession, the said stolen property having been proven to have been sold by the appellants to PW4 two weeks after PW1 was robbed of it. He took the view that the presumptive evidence against the appellants was not rebutted.

The appeal is predicated on seven grounds of grievance cited in a self-crafted memorandum of appeal, which we have condensed into six complaints as follows: **one**, that the charge was laid under wrong or non-existent

provisions of the law. **Two**, that the ruling on *prima facie* case was incurably irregular. **Three**, that the appellants were not arrested with the allegedly stolen motorcycle. **Four**, that the sale agreement did not comply with the applicable procedure. **Five**, that PW4 was the robber as he is the one arrested with the stolen motorcycle. **Six**, that there was no proper identification of the robbers and that the charged offence was not proven beyond reasonable doubt.

At the hearing of the appeal, the appellants, who were self-represented, adopted their grounds of appeal without highlighting them and urged us to allow their appeal. They reserved their right to rejoin after the respondent's submissions, if need be. For the respondent, learned State Attorney Ms. Safi Kashindi Amani, fervently opposed the appeal.

We have examined the record of appeal and considered the submissions on the grounds of appeal along the authorities relied upon. This being a second appeal, in terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, our mandate is mainly to deal with issues of law, not matters of fact.

We find it of necessity to deal, at first, with Ms. Amani's argument on grounds three, four and five as formulated above. She submitted that these were new grievances, having not been raised before the first appellate court. Relying on the Court's unreported decision in **Godfrey Wilson v. Republic**,

Criminal Appeal No. 168 of 2018, she submitted that the Court is precluded from entertaining such new grounds raising factual contentions, not pure questions of law. Being unacquainted with the thrust of the learned State Attorney's submission, the appellants did not offer any rebuttal, quite understandably.

Indeed, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal – see **Godfrey Wilson** (*supra*) cited by Ms. Amani. See also, **Hassan Bundala v. Republic**, Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016; and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported).

We agree with the learned State Attorney that grounds three, four and five raise no more than mere factual claims in respect of the recovery of the stolen motorcycle and the modus in which the sale agreement was executed at the village office. These claims were not raised to the High Court for consideration and determination. They cannot be raised on a second appeal. In the premises, we abstain from entertaining them.

The first ground of appeal contends that the charge was laid under wrong or non-existent provisions of the law. It is clear from page 5 of the record of appeal that the impugned charge was laid under "section 287A of the Penal Code [Cap. 16 R.E. 2002]" for an act allegedly committed by the appellants on 30th November, 2016. It is the appellants' contention that the said provision ceased to exist on 10th June, 2011, presumably following its amendment by section 10A of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011.

Ms. Amani countered that the charge was properly laid under the law. Citing section 12 of the Interpretation of Laws Act, Cap. 1 R.E. 2002 (now R.E. 2019) ("the ILA"), she said that the catchphrase in the charge sheet "section 287A of the Penal Code [Cap. 16 R.E. 2002]" without indicating the usual phrase "as amended" was sufficient to indicate that the charging provision was section 287A of the Penal Code [Cap. 16 R.E. 2002] as may have been amended. She thus urged us to dismiss the complaint. We agree.

Section 12 of the ILA provides that:

> *"12.- (1) 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.*
>
> *(2) A reference in a written law to a provision of a written law shall be construed as a*

reference to such provision as it may be amended.

(3) [Omitted]."

The above provision is self-explanatory. It obviates the need for adding the phrase "as amended" whenever a statute or statutory provision is cited. Applying the position to the impugned charge, we have no doubt that the phrase "section 287A of the Penal Code [Cap. 16 R.E. 2002]" in the statement of the offence without the expression "as amended" was sufficient to mean that the charge was laid under section 287A of the Penal Code as amended by law including the amendment presumably referred to by the appellants, that is, section 10A of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011. The expression "as amended" is certainly a handy phrase but it is not an indispensable catchphrase in view of the import of section 12 of the ILA. Accordingly, the ground one fails.

The second ground, positing that the learned trial Judge's ruling on *prima facie* case was incurably irregular, is plainly beside the point. The appellants did not expound on their complaint in this ground, but Ms. Amani referred us to page 33 of the record, contending that the procedure under section 231 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) ("the CPA") was followed to the letter.

Having perused page 33 of the record of appeal, we agree with Ms. Amani. It is unmistakable that after the learned trial Resident Magistrate had ruled, at the close of the prosecution case, that a *prima facie* case had been made out against the appellants to require them to make their defence in terms of section 231 of the CPA, he addressed them on their rights and invited each of them, in terms of subsection (1) (a) and (b) of section 231, to elect on the manner he would make his defence. It is evident that both appellants elected to adduce defence on oath without calling any witness. In the premises, the appellants' complaint is palpably misconceived. We dismiss it.

Finally, we deal with the sixth ground of appeal. We begin with its first limb, a contention that the appellants were not properly identified as the robbers and that no identification parade was conducted. This argument is patently flawed and it was fully answered by the learned State Attorney. She rightly argued that in the circumstances of the case, visual identification had no application. With respect, we agree. This is so because PW1 said that he did not identify at the scene any of the two assailants who robbed him. Thus, the need for the police to conduct an identification parade did not arise. An identification parade, it should be noted, is by itself not substantive evidence but it is only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness – see, for example, **Moses Deo v. Republic** [1987] T.L.R. 134; and **Mussa Hassan Barie & Another v.**

Republic, Criminal Appeal No. 292 of 2011 (unreported). In this case, an identification parade was clearly uncalled for.

The second limb questions whether the armed robbery was proven beyond reasonable peradventure. Ms. Amani correctly argued, on this issue, that the appellants' convictions were based upon their undisputed possession of the motorcycle which they sold to PW4 two weeks after the robbery and that they did not offer any explanation suggesting that they had acquired it innocently. She underlined that since PW1's evidence was unchallenged that the motorcycle sold by the appellants to PW4 was the one robbed from him, the doctrine of recent possession was rightly invoked to found the convictions against the appellants who offered no rebuttal.

Settled is the rule of evidence that an unexplained possession by a suspect of the fruits of a crime freshly after it has been committed is presumptive evidence against the person in such possession not only for the charge of theft but also for any other offence however serious – see **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992; **Joseph Mkumbwa & Another v. Republic**, Criminal Appeal No. 94 of 2007; and **Mussa Hassan Barie & Another v. Republic**, Criminal Appeal No. 292 of 2011 (all unreported). The doctrine is applicable if it is proved that, **one**, the stolen property was found with the accused; **two**, that the recovered property was positively identified to be that of the complainant; **three**, that the property

was recently stolen from the complainant; and **four**, the property constitutes the subject of the charge.

Based on the evidence on record, it is without dispute that the stolen motorcycle was possessed by the appellants who then sold it to PW4 two weeks after the robbery and that they admitted to have signed the agreement (Exhibit P.3). Further, PW1 positively identified the motorcycle (Exhibit P.2) as his property as per the registration card (Exhibit P.1), that it was the one stolen from him on the fateful night and that it was the subject of the charge at the trial. In view of the nature of such property not changing hands easily, we entertain no doubt that it was rightly deemed to be "recently stolen property" on the evidence that the appellants sold it to PW4 only two weeks after it was robbed. On these facts, the presumption of guilt against the appellants arose and that it could be rebutted had they given an exculpatory explanation on how they came by its possession.

As indicated earlier, the appellants were tight-lipped on how they acquired the motorcycle while admitting to have appended their signatures to the sale agreement (Exhibit P.3), implying that they admitted being the ones who sold the stolen property to PW4. We are cognizant that based on the testimonies of PW3, PW4 and PW6 as well as Exhibit P.3, the first appellant was depicted as the owner of the stolen motorcycle while his supposedly confederate, the second appellant, was portrayed as his witness to the sale. It

is, however, clear from the evidence of PW5, who got the appellants to meet the eventual buyer of the motorcycle, that both appellants were working in cahoots with each other looking for a buyer in pursuit of a common criminal venture. Like his co-appellant, the second appellant did not disown possession of the motorcycle at any stage in his defence. He cannot be left off the hook. That said, the final ground of appeal fails.

In sum, we find it ineluctable that the appellants' convictions were soundly based upon their unexplained possession of the stolen motorcycle to trigger the invocation of the doctrine of recent possession. The sentence of thirty years' imprisonment against each of them, being the statutory minimum, was properly levied. The appeal, in the premises, is unmerited. We dismiss it in its entirety.

DATED at **MBEYA** this 23rd day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 24th day of September, 2021 in the presence of the Appellants in person and Ms. Safi Kashindi Amani, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL