IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 290 OF 2017

HASSAN TWAHA @ RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Sumari, J.)

dated the 3rd day of July, 2017
in
Criminal Appeal No. 75 of 2016

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JUDGMENT OF THE COURT

20th & September 1st October, 2021

KIHWELO, J.A.:

The appellant, Hassan Twaha @ Ramadhani was convicted by the District Court of Hai at Hai of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E 2002 (now R.E 2019) ("the Penal Code") and sentenced to thirty years imprisonment.

Briefly stated, the prosecution case was as follows: On 16th March, 2015 at around 22:44 hours at Isanja play grounds in Nasai village within Siha District and Kilimanjaro Region, the appellant did steal one motor cycle make KINGLION with registration No. MC 608 AFL valued at Tshs. 1,825,000 the property of Silvester Vicent @Silayo and immediately before

that stealing did use a weapon make panga to cut one Juvenal Jackob on his face who was the rider of the said motor cycle in order to obtain the said property.

In its endeavor to establish the case, the prosecution featured four witnesses: Juvenal Jacob (PW1), Silvester Vicent (PW2), E 8070 D/Cpl Paul (PW3) and H 91 DC Hamidu (PW4). Apart from that, the prosecution tendered a motorcycle (Exhibit P1) as well as a machete (Exhibit P2). On the part of the appellant, he gave affirmed evidence but did not call any witness.

PW1 who was a bodaboda rider at Sanya Juu bus stand gave his evidence on how he was hired by the appellant and another person who was not identified, on the fateful night at 22:45 hrs so that he could ride them from Kibo to Kikwe village and upon negotiating the price he took them and on arrival at Sanya chini he was to leave the appellant and the other person. However, to his surprise the appellant and the other passenger did not descend from the motorcycle and suddenly they grabbed him by the neck but luckily PW1 was able to save himself and threw the keys of the motorcycle. In the course of fighting back for his life he was cut

by the machete on the right side of his ear. He was also cut by the fist and ankle. His attackers managed to get the keys of the motorcycle and took off with the motorcycle. Terrified, PW1 managed to walk to PW2 the owner of the motorcycle to report the incident whereby they went to hospital and also reported the matter to the police. The next day he gave the police further particulars of the motorcycle and they were later informed that the motorcycle was recovered at Same.

PW2 did not witness the robbery but said that immediately after the robbery PW1 reported the matter to him and together with PW1 informed the police. He testified further that, PW1 was his employee who was riding his motorcycle which was seized by the police at Same and brought back to Sanya Juu.

PW3, the police detective stationed at Same police station, said that on 16th March, 2015 around midnight while conducting routine patrol at Mkomazi area in Saweni they arrested the appellant who was riding a motorcycle along with another person who managed to escape. It was further PW3 telling that, at first the appellant attempted to escape but he was overpowered by the police. They found the appellant with a sharp

machete and Compact Discs (CDs) players. Upon further questioning by PW3 and other police officers, the appellant admitted that the motorcycle was stolen at Sanya Juu and police at Same were able to verify that information. PW3 said that later on the motorcycle was handed over to the police at Sanya Juu.

PW4, the police investigator, on 16th March, 2015 was assigned to investigate a case of armed robbery and was later informed that a suspect was arraigned at Same as such he was sent to take the appellant and exhibit P1 from Same to Sanya Juu. According to PW4, the appellant was also questioned on terrorism allegations at Arusha.

In his defence, the appellant totally denied the accusations against him. He said that the case was fabricated because of grudges between the police and the group he belonged to which was training on fighting techniques and the police were unhappy that the group declined to train them at the Police College on fighting techniques. He also denied having met or known PW1 prior to the case or at all.

At the conclusion of the cases for the prosecution and the defence, the learned trial Resident Magistrate, after considering the evidence placed

before him, found the prosecution proved the case to the hilt and therefore convicted the appellant and sentenced him accordingly as hinted earlier on. The finding and sentence of the trial court, were upheld by the first appellate Judge, in the High Court. Still undaunted, the appellant has come to this Court in a second appeal, premising his grievances on five grounds namely:

1. *That the first appellate Judge erred in law when she relied on the doctrine of recent possession principle in upholding the conviction and sentence meted out to the appellant despite the fact that the elements of the principle laid down were not adhered to.*
2. *That the first appellate Judge erred in law by upholding the conviction and sentence meted out to the appellant based upon the evidence of identification while the conditions for identification were not favourable.*
3. *That the first appellate Judge erred in law by upholding the conviction and sentence meted out to the appellant based upon the evidence of exhibits whose chain of custody was not established.*
4. *That the first appellate Judge erred in law by upholding the conviction and sentence meted out to the appellant based upon the evidence of PW1 which was incredible,*

inconsistent and that PW1 failed to give description of his attacker at the earliest opportunity moment.

5. *That the first appellate Judge erred in law by upholding the conviction and sentence meted out to the appellant despite the fact that the case was not proved to the hilt.*

At the hearing of the appeal on 20th September, 2021 the appellant appeared in person, and had no legal representation. Upon being invited to address us on the grounds of appeal, he implored us to adopt the grounds of appeal in the way they appear in his memorandum of appeal as well as the written statement of his arguments in support of the appeal and urged us to consider them in determining the appeal. He also opted to let the respondent Republic respond to his grounds of appeal, but retained the right to rejoin if need would arise.

On the adversary side, the respondent Republic was represented by Ms. Veredina Peter Mlenza, learned Senior State Attorney along with Ms. Grace Kabu and Ms. Nitike Emmanuel both learned State Attorneys who gallantly resisted the appeal.

Ms. Kabu began her submission by addressing ground one which she felt could suffice to cover the rest of the grounds. She contended that the

doctrine of recent possession was sufficiently proved as the appellant was found in possession of exhibit P1 which was stolen shortly after the incidence. She referred to page 16 of the record where PW1 testified how he was robbed the said motorcycle on 16th March, 2015.

However, upon being probed by the Court on whether the first appellate court sufficiently analysed the elements of the doctrine of recent possession, Ms. Mlenza, took over and conceded that the first appellate court did not analyse the doctrine of recent possession which omission was, according to her, erroneous. She argued further that, since this is a matter of law, this Court can hold that the first appellate court omitted to re-appraise the evidence adduced at the trial and as a way forward, she implored us to step into the shoes of the first appellate court and re-evaluate the evidence of the trial court and come up with our own findings on whether the doctrine of recent possession was appropriately invoked in the circumstances of the present case.

In further submission she argued that, the evidence on record proves the doctrine of recent possession because the motorcycle was stolen on 16th March, 2015 at 22:45 hrs and the appellant was found in possession of

the said motorcycle at midnight at Mkomazi in Same. According to her, PW2 identified the motorcycle belonging to him and the said motorcycle constituted the charge before the trial court. To amplify her submission the learned Senior State Attorney, referred us to the case of **Mwita Wambura v. Republic,** Criminal Appeal No. 56 of 1992 (unreported).

Arguing the second ground, Ms. Mlenza, was fairly brief. She submitted that the evidence of visual identification in the instant appeal was absolutely not watertight and therefore, she contended that the appellant was undeniably right in challenging both the trial as well as the first appellate courts in regards to this evidence. She thus said that, this ground has merit.

In response to the third ground, the learned Senior State Attorney submitted that the chain of custody in this case is not in question since a motorcycle is a kind of a property which cannot easily change hands or be transferred without first ascertaining its ownership through registration card or even executing a sale agreement. To facilitate the appreciation of her proposition she referred us to the case of **Rashid Omary Kibwetabweta v. Republic,** Criminal Appeal No. 254 of 2016 at page 11

and **Chacha Jeremiah Murimi and 3 Others v Republic,** Criminal Appeal No. 551 of 2015 at page 24 (both unreported).

In rounding up her submission in respect of this ground the learned Senior State Attorney, submitted that this ground has no merit too.

Moving to ground four and five, in relation to contradictions and inconsistences as complained by the appellant, the learned Senior State Attorney contended that there was no proper identification of the appellant as the victim did not name the appellant at the earliest opportunity. However, Ms. Mlenza, was of the strong opinion that the totality of the evidence on record and particularly, based upon the doctrine of recent possession, the prosecution proved the case beyond any reasonable doubt.

Upon being probed on whether the two courts below considered the defence case, the learned Senior State Attorney, readily conceded that the trial court as well as the first appellate court did not adequately consider the defence case and implored upon us in terms of section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) to step into the shoes of the first appellate court and consider the defence case which in her opinion did not shake the prosecution evidence though.

The learned Senior State Attorney concluded by stating that the appeal was without merit and should be dismissed.

When offered the opportunity to rejoin to the respondent's Republic submissions, the appellant was very brief. He objected to the contents of the submissions by the respondent Republic and reiterated his submissions he earlier on lodged in court. He argued further that, the case against him was not proved and therefore the appeal should be allowed.

We have anxiously considered the submission of the learned Senior State Attorney in line with the grounds of grievance as well as the written statement of arguments in support of the appeal which were lodged by the appellant and adopted by this Court. We propose to discuss the grounds of appeal in a pattern preferred by the learned Senior State Attorney, beginning with the first ground on recent possession.

It is common ground that the trial court grounded the conviction against the appellant mainly on the basis of the doctrine of recent possession and this was upheld by the first appellate court.

Although ordinarily the first appellate court is entitled to re-evaiuate the entire evidence adduced at the trial and subject it to critical scrutiny

before arriving at its independent decision unfortunately, this was not done in the instant case as the appellant rightly complained. A cursory glance at the judgment of the first appellate court, it conspicuously reveals that, in upholding the conviction and sentence by the trial court, stated as follows:

> *"I have carefully gone through the evidence on record. There is no doubt at all that the appellant was arrested by PW3 with the robber (sic) Motor cycle the very night the offence was committed. In convicting the appellant, the trial court relied on the evidence of PW1, who testified to have identified the appellant on the fact that he knew him very well prior to the incident and that is why he did not fear him when he asked PW1 to go and come back.*
> *It is apparent that PW1 also managed to identify not only the motor cycle (exhibit P1) he was robbed but also the bush knife (exhibit P2). PW2, the owner of the motor cycle supported PW1's evidence on the identity of the motor cycle, exhibit P1.*
>
> *With this evidence I find no way I can fault the trial court's decision. Subsequently, the appeal is dismissed for want of merit."*

It would appear to us that, the above excerpt is what the first appellate judge considered to be a re-evaluation of the evidence of the trial

court. However, with due respect, re-evaluation of evidence means more than that, it entails a critical review of the material evidence on record in order to test soundness of the trial court's findings. Indeed, there is a plethora of authorities by this Court emphasizing the need for the first appellate court to subject the evidence of the trial court to critical analysis before arriving to an independent finding. In **Standard Chartered Bank Tanzania Ltd v. National Oil Tanzania Ltd and Another**, Civil Appeal No. 98 of 2008 (unreported) in an analogous situation the Court held that:

> *"The law is well settled that on first appeal, the Court is entitled to subject the evidence on record to an exhaustive examination in order to determine whether the findings and conclusions reached by the trial court stand (**Peters v. Sunday Post**, 1958 EA 424; **William Diamonds Limited and Another v. R**, 1970 EA 1; **Okeno v. R**, 1972 EA 32".*

The first appellate court therefore is expected to exercise its mind in testing the reliability and credibility of each and every piece of evidence on record before it and accord the evidence the deserving scrutiny, and where a given principle of law was applied in the conviction of the appellant like in the instant case, the doctrine of recent possession, then the first appellate

court is expected to subject every element of the principle of law to the evidence on record and put them to test in order to ensure that they all apply. Ordinarily, the first appellate court is not expected to give merely general or sweeping statements while determining the appeal from the lower court. It is one thing to summarize the evidence and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Similarly, it is one thing to consider the evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis. See, for example, **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 (unreported). Indeed, the first appellate court did not re-appraise the evidence in testing the soundness of the trial court before arriving at its own independent finding.

This Court is empowered as rightly argued by the learned Senior State Attorney, to step into the shoes of the first appellate court and re-evaluate the evidence of the trial court. There is unbroken chain of authority in this regard, and one such case is **Hassan Mzee Mfinanga v. Republic** [1981] TLR 167 in which this Court held that:

"Where the first appellate court fails to re-evaluate the evidence and to consider the material issues involved, on a subsequent appeal the Court may re-evaluate the evidence in order to avoid delays or may remit the case back to the first appellate court."

Coming to the gravamen in question in this appeal, the circumstances under which the doctrine of recent possession can be invoked were stated in the case of **Juma Bundala v. Republic,** Criminal Appeal No. 151B of 2011 (unreported) in which we followed our earlier decision in **Mwita Wambura v. Republic,** (supra) in which we expounded these circumstances to be:

"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.
4) The property stolen must constitute the subject of the charge."

We on our part, having examined the evidence on record in line with principles governing the doctrine of recent possession, we are settled in our mind that, the conviction was correctly grounded for the following reasons. **One**, the appellant was found in possession of the stolen

motorcycle. **Two**, the stolen property was positively identified by PW1, the rider who was robbed and PW2 the owner. **Three**, the appellant was found in possession of the stolen motorcycle the same night it was stolen; and **four**, the motorcycle that the appellant was found in possession constituted the subject matter of the charge. The totality of the above leads to one logical conclusion that the appellant is the person who committed the crime in question. We would, therefore, dismiss the first ground of appeal.

Coming to the second ground, we begin by noting the convergence of the submission that, the evidence of visual identification in the instant appeal was absolutely not watertight and therefore could not be the basis of conviction of the appellant. We have in numerous occasions succinctly stated that, evidence of visual identification is of the weakest kind, and no court should base conviction on such evidence unless it is absolutely watertight; and that every possibility of mistaken identity has been eliminated.

In the present case, PW1 said he was able to identify the appellant as he knew him prior to the incident. The trial court believed the evidence

of identification by PW1 on account that PW1 knew the appellant before the incident and that PW1 even bargained the price with the appellant and his colleagues. The first appellate court fell hook line and sinker when it held that the appellant was properly identified by PW1 as found by the trial court. In our considered opinion, this was a misdirection on the part of the first appellate court. For that reason, we are constrained to concur with the concurrent assertions both the appellant and the learned Senior State Attorney that the quality of the identification was not impeccable. The two courts below did not address all the usual safeguards against mistaken identity such as; How long did PW1 have the appellant under observation? What was the distance between them? What was the source and intensity of light given the fact that the incident occurred at 22:25 hrs? The need to subject to careful scrutiny the evidence of visual identification has been well settled. See for example, the case of **Philipo Rukaiza@ Kicheche Mbogo v. Republic**, Criminal Appeal No. 25 of 1994 (unreported) in which the Court was faced with an akin situation and it held:

> *"The evidence in every case where visual identification is what is relied on must be subject to careful scrutiny, due regard being paid to all the*

prevailing conditions to see if in all the circumstances there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has dispelled. There could be mistake in identification notwithstanding a honest belief of the identifying witness."

Furthermore, PW1 did not mention the appellant neither to PW2 nor the police at the very earliest opportunity. The ability of PW1 to mention and describe the appellant at the earliest possible moment is an assurance of his reliability. We have repeatedly restated this principle in a number of decisions. One such decision is the case of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 in which we observed thus:

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."

We took similar position in our other decisions in **Jaribu Abdallah v. Republic** [2003] TLR 271, **Minani Evarist v. Republic,** Criminal Appeal No. 124 of 2007 and **Swalehe Kalonga & Another v. Republic**, Criminal Appeal No. 54 of 2001 (both unreported).

On the basis of the above, we are of the firm view that the second ground has merit.

We now move to discuss ground three on the complaint about chain of custody of exhibit P1 which we feel we should not belabor much. It is a peremptory principle of law that, in order to have a solid chain of custody it is important to follow carefully the handling of what is seized from the suspect up to the time when the exhibit is finally received in court as evidence. This is an assurance that the exhibits seized from the suspect is the one which is tendered in court. In the instant case the complaint is on the handling of exhibit P1. We are decidedly, constrained to agree with the learned Senior State Attorney in that a motorcycle is an exhibit which cannot change hands easily. In the case of **Chacha Jeremiah Murimi** (supra), the Court fully subscribed to its earlier decision in **Joseph Leonard Manyota v Republic,** Criminal Appeal No. 485 of 2015 (unreported) in which the appellant like in the instant appeal was challenging the chain of custody of a motorcycle. In differentiating the chain of custody in respect of exhibits which can change hands easily and those which cannot, this Court stated at stated at pages 18-19 that:

"...it is not every time when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in danger of being destroyed, or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

As we have already intimated, in the upshot, we can safely say that, exhibit P1 is one of the exhibits which cannot change hands easily and therefore the question of chain of custody does not always arise. Every case must be decided upon its own circumstances. On that basis, exhibit P1 was appositely received in evidence. Even if we argue for the sake of argument, that exhibit P1 was irregularly admitted in evidence, which is not the case, the conviction of the appellant was based upon the doctrine of recent possession. As such therefore, this ground of appeal must fail.

The next issue for consideration is grounds four and five which address the complaint that the prosecution evidence was contradictory, inconsistent and therefore the prosecution did not prove the offence charged against the appellant. There are several principles that govern testimony of witnesses which contain inconsistences and contradictions. **One,** the court has a duty to address the inconsistences and try to resolve them where possible, else the court has to decide whether the inconsistences and contradictions are minor or whether they go to the root of the matter-See, for example **Mohamed Said Matula** [1995] TLR 3. **Two,** it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled-See, for example **Said Ally Ismail v. Republic**, Criminal Appeal No. 249 of 2008 (unreported). **Three,** in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence. Minor contradictions or improvements on trivial matters which do not affect the case of the

prosecution should not be made grounds on which the evidence can be rejected in its entirety.

In the present case, the question is whether the alleged contradictions pointed out by the appellant go to the root of the prosecution case. In this case PW1 gave a different version of the story at the police station on 16th March, 2015 in which he did not mention knowing the appellant while in his testimony before the court he said that he knew the appellant prior to the incident. As rightly admitted by the learned Senior State Attorney we find the answer to be yes. However, on the totality of the evidence for the prosecution the offence was proved beyond reasonable doubt. That conclusion disposes the appellant's complaints in ground four and five.

Finally, we have considered the submission by the learned Senior State Attorney who implored upon us to consider the defence case which was not considered by the first appellate court. Indeed, after going through the court record we have observed that the appellant raised a general denial. He said that the entire case was fabricated against him because of the grudges between the police and his group which was teaching fighting

techniques and because they declined to training the police. He further denied having being caught with exhibit P1 and exhibit P2.

We are mindful of the fact that this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence in view of making its own findings. See, for example **Salum Mhando v. Republic,** [1993] TLR 170, **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149 and **Zakaria John & Another v. Republic**, Criminal Appeal No. 9 of 19998 (unreported).

We have examined the evidence on record and have formed an opinion that the lower courts misdirected themselves by not considering the defence raised by the appellant. However, after scrutinizing the appellant's defence which constituted a general denial, we find that such defence does not shake the prosecution case in view of the overwhelming evidence that implicated the appellant. We say so because, the appellant was convicted mainly on the basis of the doctrine of recent possession

which we have found to have been proved on the strength of the evidence on record. The appellant's explanation that the case was framed against him because of the bad blood that existed between his group and the police who wanted to be trained does not sound logical. For those reasons we are of the settled view, that the general denial notwithstanding, the prosecution proved the case beyond reasonable doubt.

In the event and for the foregoing reasons, inevitably, we find that the appeal is patently wanting in merit and accordingly we dismiss it.

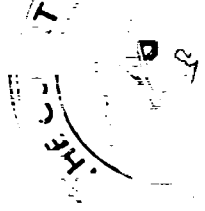
DATED at **ARUSHA** this 1st day of October, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 1st day of October, 2021 in the presence of the appellant in person and Ms. Tusaje Samuel, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
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