IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL.....NO.12.....OF..... 2013

(Originating from SONGEA DISTRICT COURT CRIMINAL CASE NO. 235 OF 2011)

HERBERT.....MSEMBELE.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 19th June, 2013

Date of Judgment: 11th September, 2013

JUDGMENT

FIKIRINI, J:

The appellant Herbert Msembele was charged with three counts namely: burglary contrary to section 294 (1) (a) and (2); stealing contrary to section 265 and receiving stolen property or suspected to have been

unlawfully acquired contrary to section 311 of the Penal Code, Cap 16 R.E. 2002. The particulars of the offence were that on 3rd day of December, 2011 at Lizaboni Kiblang'oma area within the Municipality of Songea in Ruvuma region, did break and enter into the dwelling house of one Moris Chembele and steal therefrom two television sets, 21 and 18 inches of Hitachi make valued at Tzs. 360,000/=, a Sony deck valued at Tzs. 70,000/=, a Vodafandone handest valued at Tzs. 30,000/= and cash Tzs. 20,000/=. All totaled Tzs. 480,000/= the property of Moris Chembele. In alternative, the appellant was charged with being found in possession of one mobile phone of Vodafone make while knowingly that it has been stolen or unlawfully obtained.

The appellant denied the charges and the prosecution side called a total of two (2) witnesses. Based on their testimony the court convicted the appellant of the burglary and stealing counts and discharged him on the third count of receiving or found in possession of property believed to have been stolen or unlawfully obtained. The appellant was sentenced to fourteen years for burglary and five years for stealing. The sentences were to run concurrently. Aggrieved by the decision dated 20th September, 2012

the appellant appealed to this court having a total of ten (10) grounds. Those grounds were narrowed into two namely:

1. That the prosecution failed to prove its case beyond all reasonable doubts.
2. That the trial magistrates misdirected in convicting the appellant on the 1st and 2nd counts he was charged.

The prosecution in order to prove its case before the Songea District court summoned a total of two witnesses PW1- Moses Chembele and PW2- Denis Nyoni. PW1's evidence is that during the night of 2nd December, 2011, he woke up to attend to the call of nature and noticed that the main house door broken. He woke up PW2 and together they noticed a 21 inches television set and a receiver for the sitting room missing, another 18 inches television set which was in PW2's room also missing. A receiver, VCDS and a mobile phone of Vodafone make also missing. The matter was reported to the Ten cell leader who directed them to the Street chairman who redirected them to the Madizini Police station. They had their statements recorded on 3rd December, 2011.

At around 10.00 hours on the same day (3rd December, 2011) PW1 received a call from one Akili who asked him to go to Lizaboni but in the meantime PW2 informed him that he has seen the accused person with the

stolen mobile phone. PW2 confirmed the mobile phone as the one stolen from him after going through the messages in that phone. PW2 then summoned his relative one Aloyce Nyoni and eventually called the police. The accused person was then arrested. Upon interrogation by police, the accused person claimed to have been given the phone by a person whom PW1 could not remember his name.

On cross examination PW1 denied knowing the accused before but claimed the phone to have been identified as that of PW2 due to the sticker and messages served in that phone. One of the messages read "Fomu ya ustawi wa jamii Kibona, kwanini uyoga uoshwe wakati chanzo chake ni mzoga." After the arrest, the appellant named who gave him the phone. He even tried to call him but the person was not reachable. The phone was tendered and admitted as exhibit P_1 by the court despite the appellant's protest to its tendering.

In his defence the accused denied the charges and claimed the phone was his and tendered a receipt which was admitted and marked as D_1. The defence case was closed. The court decided to call its own witness CW1- Masudi Alim Kipande and CW2- Mashauri Mjaka. CW1 is a businessman

owning a phone shop. This court witness refuted the claim that the accused bought his phone from the said shop. And that the receipt produced was illegally obtained from his shop and receipt book.

Based on the above evidence the trial magistrate convicted the appellant on the 1st and 2nd counts and acquitted him on the 3rd count. The appellant was sentenced to fourteen years (14) years imprisonment for the 1st count and five (5) years for the 2nd count. The sentences were to run concurrently. Aggrieved by the decision, the appellant appealed to this court.

At the hearing the appellant had no much to say except asked the court to adopt as part of its proceedings all the grounds of appeal as filed. Reacting to the appeal Mr. Mwamwenda Senior State Attorney, discounted the fourth and sixth grounds as being weak. As for the rest of the grounds of appeal, Mr. Mwamwenda argued them together under the tenth (10) ground that of whether the prosecution has proved its case beyond reasonable doubt. According to him both the 1st and 2nd counts were not proved beyond reasonable doubt.

It was his further submission that the trial magistrate relied on the doctrine of recent possession merely because it was alleged the appellant was found in possession of the stolen phone. Under this doctrine, the complainant must prove without leaving any doubt that the phone or anything alleged stolen was his or hers. In the instant case, the complainant was called and was informed that his phone has been found. However, when given opportunity to identify, he could not identify the property without leaving any doubt. The prosecution did not examine him on how he could specifically identify the phone as his if shown. The complainant just told the court that the phone had sticker on it and messages without further description. The phone was not switched on so as to view the alleged messages if they were indeed in that phone. Mr. Mwamwenda referred the court to the case of **Joseph Mbelwa V. R Criminal Appeal No.228 of 2010 (Unreported).**

Further in his submission Mr. Mwamwenda submitted on the fact that the defence case was not considered. The appellant denied all the charges preferred against him and maintained his position. Furthermore, he objected to the tendering of the phone as an exhibit contending that it was

his. However the court did not consider those arguments and make any ruling to that effect. That was a serious omission.

Similarly, the court instead of leaving the prosecution to prove its case, it took charge of calling its own witnesses including the one alleged to have sold the appellant the said phone. By so doing the court shifted the burden to the defence which is not what the law says. Against the above the respondent did not oppose to the appeal lodged.

It is a cardinal principle that in criminal cases the prosecution has a duty of proving its case beyond all reasonable doubt. This is so unless otherwise stated. The same principle applies to this case as well. After careful perusal of the trial court record, I am without a doubt in agreement with the respondent that this appeal has merits. Starting with the doctrine of recent possession which was in my view applied and relied on by the trial magistrate to convict the appellant. In order for the doctrine of recent possession to prevail, the following as stated in the case of **Juma Marwa V. R Criminal Appeal No. 71 of 2001 , Mkubwa Mwakagenda V. R Criminal Appeal No. 94 of 2007** and **Joseph**(supra) must be proved.

In the **Marwa** case (supra) the Court of Appeal stated that:

"The doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, then court may legitimately presume that he is a thief or guilty receiver."

Borrowing that principle and applying it to the present appeal, it is clear that it did not fit well. This is because, though the alleged retrieved phone was recently stolen, but upon being confronted the appellant gave an explanation that the phone was his and went even to the extent of producing a receipt to that effect-exhibit D_1. That is in my view a reasonable doubt raised and the application of the doctrine was thus misplaced.

Apart from that also the way the phone description process was handled by police left a lot to be desired. The complainant is not recorded to have given the description of his alleged stolen phone prior to being summoned and informed by the police that his phone was one of the three phones retrieved by the police. The description given at the police station and later before the court in my view was not specific enough to distinguish the phone as that of the complainant and not of the appellant. The alleged stolen phone was not switched on to confirm the messages claimed to be in there were indeed there.

And to add fuel to an already burning fire the trial court jumped in, I believe to rescue the prosecution case by volunteering to call the phone shop owner CW1- Masoud Alim Kipande and CW2-Mashauri Mjaka a shop attendant. **First,** the court did not state as to why it was calling these witnesses. **Second**, the witnesses did not give any evidence which I would consider to have discredited the appellant's case. For CW1 to deny to have sold the appellant the said phone or issue a receipt while admitting the said receipt was from his shop left a lot to be desired. Of course he was insinuating tempering of the receipt book at his shop. This was not only strange but also it shifted the burden of proof from the prosecution to the defence which is not what the law says.

Another thing which is raised by the respondent in support of the appeal and of course noted by this court is that the defence case was not considered. On this one this what I would say, that it is a duty of the trial court to consider the case before it as a whole before arriving at its decision and not in isolation and leaving the other piece unattended. In the instant appeal there was no evidence that the appellant was seen by any one breaking into the dwelling house of the complainant and steal

therefrom. Again there was no sufficient evidence that the phone found in his possession was indeed that of the complainant. The appellant disputed the phone to be that of the complainant but his and produced a receipt in support.

At the hearing the appellant objected to the tendering of the phone as an exhibit. The trial magistrate did not consider the objection and make a ruling but continued admitting the phone as an exhibit. That was a serious omission, as pointed out by the respondent and supported by this court relying on the decision in the case of **Dickson Elia Nsamba Shapwata & Another V. R. Criminal Appeal No. 92 of 2007** (unreported). Though the case was in relation to a trial within a trial whereby there was a submission by one side and a response or reply by the other which would then called for the court to make a ruling. In the present situation likewise, the court was supposed to rule out on the objection but it did not.

The trial magistrate cited a number of cases such as **Mazengo Magale V. R (1969) H.C.D 156** to prove asportation. I have no problem with that but I have a problem on how did she concluded beyond any shade of doubt that the appellant was the culprit, in the absence of being seen by

anyone when committing the crime. She as well cited the case of **Michael Mhuto V. R (1975) LRT 18** when applying the doctrine of recent possession. My take on this is had the trial magistrate considered the appellant's explanation she would have concluded otherwise. This is because the appellant in my view raised a reasonable doubt, that the phone was his and produced a receipt in support. It was therefore the prosecution duty to discredit that evidence by bringing more compelling evidence and not for the court to jump in by calling CW1 and CW2.

The trial magistrate as well cited the case of **Said Mkuyu V. R (1972) HCD 41,** as the other cited cases above they were all relevant but in my view not to the present situation. The appellant could have been found in possession of the alleged stolen phone but that alone could not have been sufficient to convict the appellant. **First,** the alleged stolen phone was not properly identified as required by the laid down principles in relation to identification of stolen property. **Second**, the appellant gave an explanation which I considered reasonable in the present situation. **Third,** he was asked to call the person who gave him the phone. He tried to call but the person was not reachable. It is not known how the prosecution and

later the court treated that, was that taken as a lie or not and why. **Fourth**, the court's record does not reflect if the phone was switched on and the alleged messages were indeed found to be there. To me these were reasonable doubts and ought to have been considered by the court, but were not.

As stated earlier I am of the strong view that this appeal is meritorious and hence proceed to allow it by quashing the conviction in both counts and set aside the sentence and any other order made by the court. The accused person should be released forthwith, unless lawfully held for other reasons. It is so ordered.

Judgment Delivered this 11th September, 2013 in the presence of Herbert Msembele the appellant and Mr. Mwamwenda – Senior State Attorney for the respondent.

P.S.FIKIRINI

JUDGE

11th SEPTEMBER, 2013