IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

APPELLATE JURISDICTION

DC CRIMINAL APPEAL NO. 5 OF 2013
(From Original Criminal Case No. 182 of 2011 in the District Court of Sumbawanga)

STEVEN KACHEZA ..... APPELLANT
Versus
THE REPUBLIC ..... RESPONDENT

17th December, 2014 & 22nd January, 2015

JUDGMENT

MWAMBEGELE, J.:

The appellant Steven Kacheza was arraigned in, and convicted of the offence of armed robbery 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 by the District Court of Sumbawanga and sentenced to a prison term of thirty years and twelve strokes of the cane. It was alleged that on 19.07.2011 at Kipeta Village the appellant did steal a motor cycle make Maestro Registration No. T 553 BBM valued at Tshs. 1,900,000/=, one mobile phone make Nokia 1110 valued at Tshs. 50,000/= and cash Tshs. 104,000/= the properties of a certain Uchura Haonga. Aggrieved by the conviction and sentence, he has come to this Court to protest his innocence by way of appeal.

At the hearing of this appeal on 17.12.2014, the appellant appeared in person under custody of the prison officers and unrepresented. He thus had to paddle his own canoe in this appeal. The respondent Republic had the noble services of Ms. Lugongo, learned State Attorney.

In arguing the appeal the appellant chose to adopt and rely on the reasons advanced in the seven ground memorandum of appeal he earlier filed as his arguments. On the other hand, Ms. Lugongo, learned State Attorney for the respondent Republic, refrained from supporting the appellant's conviction and sentence. She was of the view that the appellant was convicted, mainly, on two pieces of evidence – being found in unlawful possession of the motor cycle which was allegedly recently stolen and the cautioned statement he allegedly made before the police.

On the cautioned statement, the learned State Attorney submitted that the record is silent if the accused person was asked before it was tendered and admitted in evidence. This, the learned State Attorney submitted, was inappropriate. And despite the foregoing ailment, even if it was properly admitted in evidence, the document does not have any detail suggesting that the appellant admitted to have committed the offence he was charged with. What can be gleaned from the cautioned statement, the learned State Attorney submitted, is that on 19.07.2011 at 0900 hours he was at Kawile village when he was given the motor cycle by a certain Gogo who had a passenger and asked him to ferry that passenger to their destination. On his way back, the motorcycle broke down at Sololo village. He thus had to push it to Mkusi village and left the same at the

residence of his relative and went to fetch a motorcycle mechanic. On his returning with the mechanic, he was arrested and subsequently prosecuted for this offence. It is shown nowhere in the cautioned statement, the learned State Attorney added, where the appellant admitted to have committed the offence.

The learned State Attorney submitted further that the appellant gave a reasonable explanation as to how he came into possession of the allegedly recently stolen motorcycle. That is the reason why she supported the appellant's appeal. To support this argument, she cited and availed to court an unreported decision of the Court of Appeal of ***Epson Michael & Another Vs R***, Criminal Appeal No. 335 of 2007.

The appellant rejoined that what the learned State Attorney stated depicted what actually transpired. He thus asked to be left free by allowing his appeal.

Let me start with the improper admission of the cautioned statement in evidence. As rightly pointed out by the learned State Attorney, the appellant was not asked whether or not he conceded to the cautioned statement being tendered in evidence. What the record has is that when No. F 4960 D/Sgt Philbert PW3 wanted to tender the cautioned statement, the trial court, without asking the accused person, proceeded to admit the same in evidence as exhibit. Let the record paint the picture:

"[PW3]: I would like to tender them before this court

Court: Admitted

Sgd. (Mwanjokolo)

RM

6/12/2011

Accused: I admitted

Sgd. (Mwanjokolo)

RM

6/12/2011".

What transpired in court on that date is clear that the accused person; the appellant herein, was not consulted before the cautioned statement he allegedly made before PW3 was admitted in evidence. And the words "I admitted" which are recorded to have been said by the accused person are not clear if the accused meant to tell the court that he admitted to have committed the offence or to have told PW3 the episode as appearing in the cautioned statement. In circumstances, as the present one, where the record of the trial court is not clear, the conclusion which must be arrived at must be one which will not be to the detriment of the appellant. What the trial court ought to have done was to ask the appellant, before the exhibit was admitted in evidence, whether or not he had any objection. The trial court would admit the same in the manner it did only if the accused person did not object to its being tendered. However, if the accused person would object, the trial court would have to stop everything and go into conducting an Inquiry with a view to finding out whether the

cautioned statement was admissible in evidence or not – see ***N. V. Lakhani Vs R*** [1962] 1 EA 644 which has been consistently followed by the Court of Appeal in a good number of cases some of which are unreported cases of ***Twaha Ali & 5 Others Vs R***, Criminal Appeal No. 78 of 2004, ***Juma Bushiri Vs R*** Criminal Appeal No. 485 of 2007, ***Selemani Abdallah & 2 Others Vs R*** DSM Criminal Appeal No. 384 of 2008 and ***Makumbi Ramadhani Makumbi & 4 Others Vs R*** Criminal Appeal No. 199 of 2010, to mention but a few.

To admit the cautioned statement without consulting the accused person before admitting it, as happened in the instant case, offended the ends of justice. In the premises, the cautioned statement made by the accused person before PW3, is discounted from evidence. It is also important to underline here that every exhibit must be marked after being admitted in evidence. This would simplify reference to it especially in situations where there is more than one exhibit in the case. Reference in the judgment to the exhibit as Exh. P1 was therefore a misnomer, for the proceedings and the cautioned statement itself show that the document was not given any mark.

And without prejudice to the foregoing discussion, to argue the point further, just for the sake of it, even if the cautioned statement was properly admitted, the contents thereof did not implicate the appellant to the commission of the offence he was charged with. What the appellant is said to have told PW3 is that on 19.07.2011 at 0900 hours he was at Kawile village when he was given the motorcycle by a certain Gasto Joseph

@ Gogo who had a passenger and asked him to ferry that passenger to a destination at Milepa village. That passenger was his maternal clan member, so, as it was already dark, he allowed that passenger to sleep at his residence and ferried him there on the following morning. On his way back, at Sololo village, the motor cycle broke down. He thus had to push it up to Mkusi village and left it at the residence of his relative, a certain Geoffrey Marco @ Baba Galus and went to fetch a motorcycle mechanic in the village one Leonard Mwaruanda. He returned with the mechanic only to be arrested and subsequently prosecuted for the offence the subject of this appeal. No details are available in the cautioned statement suggesting the appellant admitted to have committed the offence.

Having discounted the cautioned statement from evidence, there remains the testimony of the prosecution witnesses and the relevant witness for the prosecution appear to be PW3. This witness gave an account of what the accused told him and what eventually culminated into the just expunged cautioned statement. The account which appellant gave PW3 as to how he came into possession of the allegedly recently stolen motorcycle is the one appearing in the expunged cautioned statement above. For clarity, I find it compelling to repeat at this juncture which repetition I find necessary but now as testified to by PW3. The appellant told him that he was given the motorcycle and a passenger to ferry to Ilemba village by one Gogo. He took that passenger to his destination but on his way back, the motorcycle broke down at Nkusi village. He left the same at his relative and went to look for a mechanic. His relative, suspecting that the motorcycle might have been stolen as it had no plate number, he took it to

the Village Chairman, one Robin for custody. On the accused person returning with the mechanic, he was arrested.

The account given by the appellant when he was interrogated by PW3 as to how the motorcycle came into his hands was the very episode given to No. E 7490 P/C Salehe PW4; a police officer who arrested the appellant the moment he returned with motorcycle mechanic.

Given the testimony of PW3 and PW4 as to what the appellant told them as to how the recently stolen motorcycle came into his possession, I am quite satisfied that the account given was more than satisfactory. The appellant discharged enough burden; on a balance of probabilities, that he was not a party to the armed robbery he was later charged with and, therefore, the doctrine of recent possession was not rightly brought into play in the instant case. The gist of the doctrine of recent possession, as was held in ***DPP Vs Joachim Komba*** [1984] TLR 213, is that if a person is found in possession of recently stolen property and gives no satisfactory explanation, depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or guilty receiver. The same was the statement of the law in the ***Espon*** case (supra); a case cited to me by the learned State Attorney. In such circumstances, the burden shifts on the accused person to explain to the satisfaction of the court how he came into such possession. That this is the law was stated in ***Kiondo Hamisi Vs R*** [1963] EA 209, at 211 in the following terms:

> "Once the accused has been found in possession of property which may reasonably be suspected of having been stolen or unlawfully obtained, then the burden shifts on him of satisfying the Court as to how he came by the same. But the burden is not a heavy one."

The foregoing passage in ***Kiondo Hamisi*** was quoted with approval by this court (Masanche, J.) in ***Maruzuku Hamisi Vs R*** [1997] TLR 1, at page 2.

Having stated what I have endeavoured to hereinabove, I am of the settled mind that the evidence adduced by the prosecution at the trial fell short of proof of the case against the accused person beyond reasonable doubt. I find merit in this appeal and allow it. I consequently order that the appellant Steven Kacheza should be released from prison forthwith unless detained there for some other offence. Order accordingly.

DATED at SUMBAWANGA this 22nd day of January, 2015.

J. C. M. MWAMBEGELE
JUDGE