IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HC. CRIMINAL APPEAL No. 341 OF 2018

(Original Criminal Case No. 159 of 2016 of the District Court of Bukombe)

MATESO NJIMULA .....APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

22nd & 27th July, 2020

TIGANGA, J.

Before the District Court of Bukombe at Bukombe, the Appellant stood charged with five others, who are not party to this appeal with one offence of Armed Robbery Contrary to Section 287 A of the Penal Code (Cap 16 R.E 2002) as amended by Act No. 3/2011, (Now R.E 2019). The offence was alleged to have been committed at a place called Mzambarauni in Mbogwe District, in Geita Region and in the course of committing the offence they used machetes in order to obtain and retain various properties all total value Tshs. 905,000/= the property of Mawazo Ezekiel.

After a full trial which involved four witnesses, all accused persons were found guilty of the offence and were convicted as charged. After such

conviction all were sentenced to a mandatory sentence of thirty years in jail.

Having been dissatisfied the appellant appealed against both the conviction and sentence. That was after his fellows have appealed successfully against the said Judgment before this court i.e Honourable Bukuku, J.

In this Appeal the appellant filed a total five grounds of appeal namely;

1. That the charge was not proved beyond reasonable doubt as the person (accomplice who was alleged to have been purchased the stolen property) was not summoned before the trial court to testify and be cross examination.
2. That the identification of the alleged stolen properties was so general and they were insufficiently identified. This is contrary to the principle announced in **David Chacha and 8 others Vs. R,** (unreported) CAT, AR, Appeal No. 12/1997 - Mwanza.
3. That the conviction of Armed Robbery was wrongly found by the trial RM (sic).
4. That the identification parade was unlawfully conducted contrary to the case of **Simon Msoke vs Republic** (1958) E.A 715 CA sat the procedure to be followed in identification of the culprit (sic).
5. That the caution statement tendered before the trial court was not voluntary found (sic).

At the hearing which was conducted orally, the appellant had nothing to add, he asked the court to adopt his grounds of appeal and decide on that base.

The respondent Republic represented by Miss. Mwaseba State attorney supported the appeal on one main ground. The reason given was that, there was poor identification. She submitted further that PW1 who was the key witness did not state how he identified the appellant, the evidence show that he identified them on dock.

It is her submission that he was required to say whether he knew them before, in short the criteria for visual identification as established in the case of **Waziri Amani's** case was not met.

She submitted further that even the description of the appellant was too general imputing the probability that probably the appellants are the ones who invaded the PW1.

Furthermore, she submitted that the evidence based upon was the doctrine of recent possession, however, that doctrine requires the witness to have given the description of the items, before purportedly identifying them. She in the end submitted that the evidence was in sufficient for the court to find the appellant guilty and convict him. That marked the arguments by both parties, hence this judgment.

Now having summarised the contents of the grounds of appeal, I will go straight to consider the merits and demerits of the appeal by adopting the manner adopted by the learned State Attorney in arguing the appeal. It is true in this case, from the record that the evidence upon which a charge against the appellant and his fellows was predicated based on two types of

doctrinal evidence; the first one is that of visual identification while the second one, is the doctrine of recent possession.

As correctly submitted by Miss. Mwaseba, for the evidence on visual identification to be relied upon the principle established in the case of **Waziri Amani Vs The Republic** (1980) TLR 250 must be met. In that case the Court of Appeal of Tanzania held *inter alia* that;

> *"The evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water fight. Before relying on such evidence the trial court should put into consideration, the time the witness had the accused person under observation, the distance at which he observed him, if there is any light, then the source of light and intensity of light and whether the witness knew the accused person before"*

These principles have also been reiterated in the case of **Gozibert Henerico Vs. The Republic**, Criminal Appeal No. 114 of 2015 - CAT (unreported)

To be precise, the prosecution need to bring evidence stating and establishing the following factors before the court relies upon such evidence.

i. The time the witness had the accused person under observation.
ii. The distance at which he observed him.

iii. The condition in which such observation occurred, for in stances, whether it was day or right, (whether it was dark, if so was there moon light or hurricane lamp).

iv. Whether the witness knew or had seen the accused person before.

In this case looking at the prosecution evidence generally, these criteria were not established, thus making the evidence of visual identification unreliable.

Regarding the evidence of recent possession, it is true as submitted by Miss. Mwaseba that for such evidence to be reliable, the witness must have, in the statement recorded at police station given description of the stolen properties. In this case neither PW1 nor PW2 gave description of special marks of those allegedly stolen properties.

Under the circumstances the doctrine of recent possession was not properly invoked by the trial court.

As correctly held by my sister Hon. Bukuku, J in Criminal Appeal No. 268 of 2017, **Paschal Isangijo and Stephen Thomas** (who were the co accused of the appellant) **Vs. Republic** High court Mwanza at page 10 under *which she held inter alia;*

> *" The Doctrine of recent possession can only be invoked if it is shown through evidence to the satisfaction of the court that, first that the property was found with the suspect, secondly that the property is positively the property of the complainant, and lastly, that the property* **was recently stolen from the**

complainant. (See Alhaji Ayub Msumari and others Vs *Republic,* *Criminal Appeal No 136 of 2009 (CAT - unreported)"*

In this case there is no evidence led by the prosecution to that effect. Even after the prosecution had alleged the said properties to be of the victim, without prior description, no receipts were tendered to prove that the same were the properties of the victim.

It is important to note that, the alleged properties are common items, therefore the complainant ought to have given adequate description as to show how they identified them, something which was not done as required by the authority in the case of **David Chacha and 2 others Vs The Republic,** Criminal Appeal No. 12 of 1997 CAT unreported).

That said, the Appeal is allowed, the conviction is quashed, and sentence of 30 years is set aside. Consequently I direct that this Appellant be immediately released from prison.

It is so ordered.

DATED at **MWANZA**, this 27th day of 2020

J.C. Tiganga

Judge

27/07/2020

Judgment delivered in the presence of the accused on line while in prison and Miss. Mwaseba learned State Attorney.

J.C. Tiganga

Judge

27/07/2020

Right of Appeal explained and guaranteed.

J.C. Tiganga

Judge

27/07/2020