IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CRIMINAL APPEAL NO. 17 OF 2019

(From the decision of the District Court of Bariadi, in criminal appeal No. 25 of 2019, Original Criminal Case No.43/2019 Bumera Primary Court)

1. MAJABA LIMBE
2. SITTA TUJU } .....**APPELLANTS**
3. MAGEME HIMA

VERSUS

KULWA MAYALA.....**RESPONDENT**

JUDGMENT

15/7& 21/8/2020

G. J. Mdemu, J.;

This is a second appeal. In the Primary Court of Bumera, the Respondent commenced a criminal case against the three Appellants for stealing Tshs. 10,000,000/= contrary to the provisions of section 265 of the Penal Code, Cap.16.The complaint was lodged by the Respondent on 20th of August 2018. On 29th of April, 2019, the Primary Court found the three Appellants guilt and upon conviction, the 1st Appellant was sentenced to six (6) months' conditional discharge whereas the 2nd and 3rd Appellants each got sentenced to a conditional discharge of twelve (12) months in terms of the provisions of section 37 of the Magistrates' Courts Act, Cap.11.

Facts of the case are such that, on 21st of July 2018 one Michael, a son to the Respondent Kulwa Mayala (SM1) was purchasing cotton from farmers as

it was harvesting season at Ikungulyaza Hamlet. The said Michael had in his bag Tshs. 10,000,000/= for the exercise. According to the complaint, the said money was kept in a room used to store cotton. The Appellants entered to the store through the roof thereby stealing the said money.

It seven days' period, the three Appellants alleged to have chased a thief but did not arrest him. However, the said thief managed to throw the stolen bag which the Appellants took and handed it over to the Respondent. The said bag was opened and it was found to have Tsh. 5,030,000/- and clothes. As the Respondent claimed that the total amount was Tshs. 10,000,000/=, hence this criminal case thus got filed. As stated above, the trial court found the prosecution to have proved the case beyond reasonable doubt thus found the Appellants guilt.

In an appeal to the District Court, the appellate Resident Magistrate dismissed the appeal, again on the same reason that, the Prosecution managed to establish their case. This was on 10th of October 2019. The Appellants were also not happy hence the instant appeal on the following grounds:

1. *That both magistrates of Bariadi District Court and the trial Court erred in law and fact by adjudging in favour of the Respondent without taking into consideration the real and direct evidences which were adduced before the trial court by the Appellants together with their witnesses.*
2. *That both Magistrates of Bariadi District Court and the trial Court jointly erred in law and fact to suspect, arrest, found guilty*

and then sentenced the Appellants without any sufficient evidence which proved the charge beyond reasonable doubt.

3. *That both Magistrates of Bariadi District Court and the trial Court erred in law and fact for not considering that there was no even one person who saw the Appellants when they were robbing the said amount of money, why they refunded tshs. 5,030,000/= to the victim and why the victim gave gifts the Appellants tshs. 100,000/= each if they were thieves? Judgments of both courts are null and void.*
4. *That both Magistrates erred in law and fact to order the Appellants have to pay 4,970,000/= to the Respondents as thieves while the same were assistants and redeemers of Tshs. 5,030,000/= truly hundreds of people in Senani Village are witnesses. Please find annexures marked "P" and "P2" prove the same.*

This appeal was argued on 15th of July, 2020. The Appellants and the Respondent both appeared in person. The 1st Appellant in support of the appeal submitted to have been informed to assist in arresting a thief who escaped and left the stolen bag with them. He submitted also that, when the bag was opened, the said Tshs. 5 million was recovered. It is following that good job that the Respondent awarded each Appellant Tsh. 100,000/=. He thus denied to have participated in stealing the said money.

Both the 2nd and 3rd Appellants associated themselves with what the 1st Appellant submitted. They then thought the Respondent's case was not proved at the trial court, thus prayed their appeal be allowed.

In reply, the Respondent submitted that, the person who committed the offence is related to the Appellants. According to her, the Appellants brought to her a bag with Tshs. 5 million, thus the Appellants should pay the remaining balance of the stolen Tshs. 10,000,000/=. As to how the money got stolen, the Respondent submitted that, someone entered the room where the money was stolen and after almost 10 days, she was informed by Sungusungu regarding escape of the thief. She was later given the bag by the Appellants. It was her further submission that, when the said bag was unzipped, 5 million Tshs. was found in a wallet. She also blamed those at the bus stand on their failure to assist in arresting the escaped thief. She concluded therefore that, the Appellants should return to her the remaining balance.

In rejoinder, all the three Appellants denied to have any relation with the escaped thief and that they just assisted in arresting the said thief; not that they are also involved in the commission of the offence. This was all as submitted by parties.

I have had time to go through the entire record of both courts below and also have heard submissions of the parties for and against the appeal. From the outset, it is not disputed that, the Respondent is not the owner of the stolen bag and that throughout the trial, for reasons apparent not on record, the owner of stolen bag was not assembled in evidence. It is equally on record that, the three Appellants handed over the stolen bag to the Respondent and on being unzipped, Tshs. 5,030,000/= was found thereat. Who then did steal the said bag? The evidence on record should be able to witness this.

In the record of both courts below, there are two competing evidence. As to the prosecution case, which was also the basis of conviction, the Appellant are held responsible because they were the ones who brought the stolen bag to the Respondent and that, their story to have recovered the stolen bag from a person whom to date is at large, was not trusted. In the trial Primary Court regarding this position, it was stated that:

> *"Halikadhalika, kwenye ushahidi utaona wanaeleza walipokuwa wakifanya jitihada za kumshika mtoto huyo alikimbia na kuacha begi, lakini wameshindwa kutoa ushahidi wa ziada kuonyesha kuomba msaada kama kupiga kelele za kumwita mwizi ili kujiondoa kwenye hatia ya kuonekana walimtorosha. Baada ya uchambuzi huo wa wazi utakubaliana na Mahakama kuwa wizi ulifanyika na kuna uhusiano mkubwa kati ya mshitakiwa na mtoto huyo."*

On the other hand, at the appellate level, the learned Resident Magistrate of the District Court observed the following regarding this point:

> *"The evidence from both sides was clear that, it was the accused person who handed the bag to the victim which had some of the stolen money. I was asking myself as if they had no idea that the said bag had stolen goods why did they tried to escape? This shows that, they had knowledge of the stolen money. The accused person was found with some stolen money of which the handed they same to the owner claiming that, the*

said thief ran away. They did not mention the said thief and they didn't even give evidence on how he escaped from them. From the fact that they were found with stolen money and they had a knowledge that the same was stolen releasing away unknown thief, then they were in a position to bring the said thief or otherwise to tell the court on how did they came into possession the stolen goods."

In the two version regarding the findings of the two courts below, there are two legal features deployed in holding the Appellants responsible with the said theft. One is the doctrine of recent possession in that, the Appellant were found with the stolen bag and they did not explain on how they came to acquire the said property. Two, is that, in all, the courts below shifted the burden of proof, thus required the Appellants to prove their innocence.

As to the defence evidence, the Appellants who testified as SU1, SU2, and SU3 together with Maduhu Mlinda, Masunga Dani and Lushinge Masele, SU4, SU5 and SU6 respectively stated to have involved in the arrest of the escaped thief and in no way they took part in commission of the offence. Having this in mind, I am tempted to accept the version of the Appellants in the following reasons:

One, on insufficiency of evidence complained by the Appellants in the 1st ,2nd, and 3rd grounds of appeal, the evidence that the Appellant were the ones who stole the money on account that they handed over the stolen bag to the Respondent cannot be trusted. SU1 was informed by SU5, Sungusungu Commander that, he and others have to arrest a person suspected to have

stolen the money. This evidence has not been contradicted because it has not been disputed that, the Appellant was not in the course of executing orders of Sungusungu Commander. **Two**, conduct of the Appellants to escape stated by SU1 is unreliable because there is no evidence on record indicating that the Appellants were in the course of escaping. No body arrested them. They themselves surrendered the stolen bag to the Respondent.

Three, the doctrine of recent possession deployed by the learned appellate Resident Magistrate won't apply in the instant appeal in that, the explanation that the said stolen property was left by thief who is at large has not been faulted. On this fact, SM1 Kulwa Mayala testified on oath at page 5-6 of the proceedings that:

> *"Tulipogundua ilikuwa na nguo na fedha tshs. 5,030,000/= nilikataa kupokea fedha nusu pale lakini baadaye ilibidi nipokee na nikampigia mtendaji wa kijiji simu niliomba wakamatwe ndipo wengine walikimbia wawili, akapatikana mmoja* ***alihojiwa na ofisi ya mtendaji alisema walileta hizo fedha walikamata mwizi amekimbia****."(emphasis supplied)*

This evidence is corroborated by that of SM3 one Juma Maige Masunga who testified at page 8 of the proceedings that:

> *"Alifika mshitakiwa 1 peke yake na nilimtuma mgambo ili atafutwe* ***na yeye kifupi alieleza tulimwona kijana aliyechukua hiyo fedha na ndiyo tukaerejesha****, na alikabidhi fedha,taa na tochi...." (Emphasis mine)*

Conclusively, in the instant appeal, as the Appellants managed to state that the young man at large left the stolen property, the doctrine of recent possession under the principles stated in the case of **Joseph Mkumbwa and Another V. R, Criminal Appeal No. 94 of 2007**, in the following words, cannot be invoked in the present case: -

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the persons or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second**, that the property is positively proved to be the property of the complainant, **third**, that the property was recently stolen from the complainant and **lastly**, that the stolen thing constitutes the subject of the charge against the accused"*

The Appellants therefore are just suspected to have committed the offence of stealing for a reason that, the person who committed the offence remains at large. This however cannot be the basis because it is trite law that, suspicion, however strong, cannot form the basis of conviction. **(**See **Benedict Ajetu V. R. (1983) TLR 190.** In that stance, the 1st, 2nd, and 3rd grounds of appeal are hereby allowed.

As to the 4th ground of appeal, the main complaint of the Appellants is on the order of the court that they should return the remaining balance of Tshs. 4,970,000/=. Is there any order of that nature? In the record of the trial Primary Court, the learned trial magistrate made the following order:

> *"AMRI (i) watumikie adhabu hiyo chini ya K.37 cha Sheria ya Mahakama za Mahakimu , 1984 iliyorejewa 2002, Sura ya 11 Katika Nyongeza ya Tatu*
> *(ii)Mlalamikaji ana haki ya kufungua madai."*

At the appellate level, the learned appellate Resident Magistrate made the following order after having dismissed the appeal of the Appellants:

> *"From the above point of view, it is my considered view that the appeal has no merit. I dismiss it with costs. I hereby upheld the trial court's decision."*

From the above positions of the two courts below, there was no any order made to the effect that, the Appellants were supposed to pay Tshs.4,970,000/=. What the trial court stated was with respect of the rights of the Respondent to file a claim of that nature.

As already observed, this is a second appeal. Being so, the Court is cautious in interfering with findings of fact by the two lower courts. The Court may only interfere where there are misdirection and non-directions on the evidence (See **the Director of Public Prosecutions v. Jaffari Mfaume Kawawa (1980) TLR 149**. In the instant appeal, there was misapprehension of facts in that, **one**, the two courts invoked the doctrine of recent possession while the Appellants

managed to establish that the stolen property was left by the at large young man. **Two**, that the two courts below misdirected themselves that as the Appellants failed to raise an alarm in arresting the young man at large, then they assisted in his escape therefore they are connected with theft.

This was the reason why I departed from the concurrent findings of the two courts below. Having said all, the instant appeal is hereby allowed. The judgment and order of the two courts below are accordingly quashed and set aside. It is so ordered.

Gerson J. Mdemu
JUDGE
21/8/2020

DATED at **SHINYANGA** this 21st day of August, 2020.

THE HIGH COURT OF TANZANIA

Gerson J. Mdemu
JUDGE
21/8/2020