IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO. 169 OF 2020

(Arising from Criminal Case No. 59 of 2019 of the District Court of Ilemela, District at Ilemela before Hon. P. P. Kubaja (RM))

RAMADHANI HASHIMU SWEDI @ BRYTON..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last Order: 11/11/2020

Date of Judgement: 14/12/2020

F. K. MANYANDA, J.

The appellant in this appeal was sent behind the bars for a period of 30 years following a conviction of armed robbery, contrary to section 287A of the Penal Code, [Cap. 16 R. E. 2019]. He is aggrieved by that sentence; hence, he has come to this Court in this appeal against both the conviction and sentence on the following grounds of appeal: -

1. *That, the charged offence was not proved to the standard requiement (sic) of law thus not proved beyond reasonable doubt to sustain conviction against the appellant to wit (sic).*

2. *That, the evidence of PW1, Zaituni Khamis, was doubtful, unreliable and untruthful which cannot assist the trial court to implicate the appellant in committing the offence of armed robbery.*
3. *That, the cautioned statement, exhibit P5, was required to be expunged in evidence (sic) for reasons that the appellant was not a free agent when he recorded the conference (sic) also was taken contrary to section 50(1)(a) and 57(1)(2) of the Criminal Procedure Act, [Cap. 20 R. E. 2002].*
4. *That, the trial magistrate grossly and incurably erred both in law and in fact for failure to note that exhibit P5 was wanting corroboration, but corroboration of the prosecution was suspect and week (sic) it could not corroborate.*
5. *That, neither the search warrant nor the certificate of seizure was witnessed either by appellant or any one from the Miembeni Bar during the appellant being arrested with Exhibit P4, mobile phone, make INFINIX NOTE 5, worse enough no anyone from Miembeni Bar, the place where the appellant was arrested with the said Exhibit P4, appeared for cross examination in Court involving the appellant to be arrested (sic) with Exhibit P4 as per evidence of PW3.*

6. *That, the exhibit P1, P2 were not linked with the appellant in the offence (sic) also the identification parade was required to be conducted basing on weake and shallow identification made by PW1 during her testimony in Court.*
7. *That, PW1 told the Court that the appellant used a pistol in committing the offence but the said pistol was never tendered in Court as exhibit, also, PW1 did not inform the police that information (sic) during recording of her statement in police.*
8. *That, the prosecution witnesses failed to prove the case beyond reasonable doubt so the case against the appellant was fabricated and cooked up, which should not be trusted and the appellant ought to be benefited (sic) from the doubts made by prosecution witnesses.*

The background of this appeal is that, the victim Zaituni Khamis who testified as PW1, on the fateful day 08/05/2019 met the appellant while at her working place Sunshine Pub in the City of Mwanza at Kitangiri Area in Ilemela District. The appellant approached PW1 at the night of about 21.00 hours in pretence of seducing her for sex purposes he seduced her for having sex on the same night introducing himself to her as a soldier

called Brighton residing at Kitangiri TPDF Barracks. A guard of the Sunshine Pub, one Masumbuko John, who testified as PW2, assured PW1 that he knew the appellant. From this assurance, PW1 promised the appellant to leave with him to his home after closure of the Pub at 24.00 hours for having sex.

The appellant followed PW1 at the promised time about 24.00 hours and the two left for Kitangiri TPDF Barrack by a motor cycle, commonly known as bodaboda. Things turned sour against PW1 when they were near the said barrack as she was terrorized by the Appellant and ordered, at gun point, to undress and sit down. Moreover, the appellant while pointing a pistol at her, ordered her to surrender everything including her hand bag, clothes, a watch Rolex make and smart phone Infinix Note 5 make. She was put under terror of the appellant until about 05.00 hours when he let her go. The Appellant took her handbag and all her belongings in it including the Rolex wrist watch and the Infinix Note 5 smart phone.

In the morning of the 09/05/2019 around 09.00 PW1 went to the Kitangiri Barack and narrated to TPDF Officers what befell her the last

night. The said TPDF officers denied knowing any TPDF Officer with the name of Bryton.

It was fortune that on 10/05/2019 at about 18.00 hours she was called by her friend that one person was seen at Katoro in Geita Region, selling a smart phone make Infinix Note 5 which had her particulars including her photographs and other details. PW1 confirmed that it was her smart phone Infinix Note 5 make which was robbed from her by the appellant. The appellant was arrested and his photograph was WhatsApped to PW1 who identified him as a person who robbed her on the fateful day. She had ample time on the fateful night when the appellant was seducing her for sex at Sunshine Pub and later on put under terror by the appellant the whole night.

The appellant was taken to Ilemela Police Station where he was interrogated and gave a cautioned statement in which he was alleged to have confessed. PW1 identified the Infinix Note 5 phone because she had a cover box which contained the IMEI number and the purchase receipt. The appellant was charged with the offence of armed robbery to which he pleaded not guilty. After full trial he was convicted and sentenced to serve

the mandatory minimum sentence of 30 years imprisonment. He was aggrieved hence he filed this appeal on the grounds listed above.

At the hearing, the appellant argued the appeal unrepresented while the Republic was represented by Ms. Lilian Meli, learned State Attorney.

Being a lay person, the appellant had nothing of assistance to the Court other than denying to have committed the offence of armed robbery, adopting his grounds of appeal in the petition and leave it to the Court to decide.

On her side, Ms. Meli supported the conviction and the sentence. Moreover, as the grounds of appeal are interwoven, Ms. Meli argued them generally.

Meli submitted that in this appeal the appellant was charged in the trial Court with an offence of armed robbery which he was alleged to commit to Zaituni Hamis Issa (PW1) and stole a mobile smart phone, Infinix Note 5 make, a wrist watch, Rolex make, cash TSh. 50,000/= and other items as listed in the charge sheet. He used a pistol to threaten

Zaituni Hamis Issa immediately after stealing the said items in order to retain them.

Ms. Meli argued that the conviction was based on the doctrine of recent possession. In the evidence on record, PW1 identified her mobile smart phone Infinix Note 5 beyond all reasonable doubts. She identified it to the exclusion of any other person's ownership. She had the box cover which had the IMEI number that matched with the IMEI number of the phone. She also had the purchase receipt of the phone. Moreover, when switched on the mobile phone revealed details of PW1 Zaituni Hamis Issa including her photographs.

Ms. Meli argued further that the appellant was found with the mobile smart phone Infinix Note 5 ready handed selling the same and he had no any explanation than denying possessing it. The State Attorney added that both the seizure certificate and the said mobile phone make Infinix Note 5 were tendered and admitted in evidence as exhibit P1 collectively without objection.

Ms. Meli added that the witnesses PW1, PW2 and PW3 are credible witnesses whose evidence is reliable. PW1 in her testimony described her robbed mobile smart phone Infinix Note 5; and in her testimony, she explained how the appellant robbed her.

The State Attorney added that, PW2 a watchman at Sunshine Pub, testified as to how the appellant approached him at 21.00 hours in pretence of needing PW1 for sex purpose and left with her at 24.00 hours. PW3 a police Officer at Katoro testified that he arrested the appellant after been informed by his secret informer that the appellant was selling the mobile smart phone Infix Note 5 in issue.

Ms. Meli was of the view that the offence of armed robbery against the accused was proved to the required standard of proof of beyond all reasonable doubts. She cited the case of **Chacha Mwita and others vs. Republic,** Criminal Appeal No. 302 of 2013 (unreported). In this case the Court of Appeal of Tanzania gave the elements of the doctrine of recent possession to apply.

Ms. Meli argued that the doctrine of recent passion as elaborated in the case applies squarely in this case on reasons she gave that: the phone

was proved to belong to PW1 to the exclusion of any other person; that PW1 produced in evidence the box cover which had IMEI number that matched with the mobile smartphone, the phone contained details of PW1; and she had a purchase receipt. Meli stated that the Appellant simply denied to have been found with it, but the evidence clearly and unambiguously establishes the appellant was found with the phone read handed selling the same.

Ms. Meli rightly discarded the evidence of confession in the cautioned statement which was admitted after a successful trial within trial because the same was not read aloud in court after its admission in evidence, hence reducing its evidential value to nothing.

Also, Ms. Meli commented on the failure to conduct identification parade at police, she argued that there was no need of conducting such a parade as PW1 had not described her assailant before the investigating police officers.

Basing on the doctrine of recent possession, Ms. Meli concluded that the offence of armed robbery was proved and urged this Court to dismiss the appeal in its entirety.

The appellant again in rejoinder simply said PW1 gave contrary evidence as to the date of incident between 0805/2019 and 09//05/2019. According to the appellant it was on 08/05/2019 but PW1 reported to police on 10/05/2019 and questioned how could PW1 use a phone while her mobile phone was stolen. Upon been probed by this Court if he cross examined her on this issue, the appellant had nothing to say. He repeated his prayer of leaving the matter to the hands of this Court to decide.

The principle in the doctrine of recent possession is that a person who is found with recently a stolen thing and who fails to give reasonable explanations on he got into possession of that stolen thing is presumed to have stolen the thing. The doctrine has been developed by case laws.

In the case of **Twaha Elias Mwandungu vs. Republic** [2000] TLR 277, the Court of Appeal of Tanzania curved the doctrine of recent possession from section 122 of the Evidence Act, [Cap. 6 R. E. 2019] in the following words: -

> *"In our opinion, this is a proper case in which to invite the presumption created by section 122 of the Evidence Act, 1967 (the Act) which reads:-*

'122. The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case'

The presumption under this section embodies inter alia, the well-known doctrine of recent possession which is to the effect that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession by giving explanation which may reasonably be true."

Earlier this Court (Hon. Msumi, J as he then was) had given a thorough explanation on how the doctrine of recent possession is all about in the case of **Director of Public Prosecution vs. Joachim Komba** [1984] TLR 213 that:-

"i. the doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanations, depending on the circumstances of the case, the Court may legitimately infer that he is a thief, a breaker or guilty receiver;

ii.an inference under the doctrine of recent possession may be drawn to uphold any offence however penal it may be including the offence of murder; and

iii. there is no general principle for determining the period of time which is recent enough to justify the application of the doctrine of recent possession."

With that elaboration of the doctrine what are its applications. Again, the Court the Court of Appeal gave the tests for application of the doctrine of recent possession in the recent case of **Chacha Mwita and 2 others vs. Republic,** Criminal Appeal No. 302 of 2013 (unreported). The Court of Appeal citing with approval the case of **Joseph Mkumbwa and Another vs. Republic** Criminal Appeal No. 94 of 2007 (unreported) listed the tests that:-

"Where a person is found in possession of property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place where from 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 was recently stolen from the complainant and lastly, that the stolen thing constitutes the subject of the charge against the accused".

Applying the tests in **Chacha Mwita's case (supra)**, one the subject matter is a mobile smart phone Infinix Note 5 make. The particulars in the charge reveal that among the items stolen from the complainant by the appellant was the mobile phone.

Two, whether the said mobile phone was found with the appellant. The evidence on record is clear that PW3 arrested the appellant at Katoro Township ready handed with the mobile phone while in the process of selling the same. The seizure certificate together with the mobile phone were admitted in evidence un objected by the appellant. The appellant did not even cross examine on this important fact implicating him. Moreover, the appellant failed to give any explanation as to how he came into its possession other than mere denial of possession the same.

As PW3 was a reliable and credible witness. The appellants denial without reasonable explanation on how he came into possession of the mobile phone implicates him.

The mobile phone was found with the appellant two days after the armed robbery. Hence likelihood of exchanging hands is lacking. The chain is unbroken. It could have been broken had the appellant given any

explanation, let's say, he received it from any other person or that he purchased the same from another person. In this matter the appellant doesn't have any explanation.

Three, whether the mobile phone was positively identified by the complainant. The evidence is very clear also that PW1 identified the mobile phone conclusively by tendering a cover box bearing the IMEI number which match with the mobile phone IMEI number. PW1 also produced a receipt. Moreover, it contained details of PW1 its memory including her photographs.

This Court is satisfied that the tests in the case of **Chacha Mwita (supra)** were adequately met. It is a fit case to invite the application of the doctrine of recent possession and found a conviction. The complainants by the appellant in the grounds of appeal he raised in the petition of appeal are afterthoughts.

In the upshot, and for reasons stated above, this Court finds the appeal as void of merit. I do hereby dismiss it in its entirely. The conviction and the sentence of 30 years imprisonment is upheld. Order accordingly.

F. K. MANYANDA
JUDGE
14/12/2020