**IN THE HIGH COURT OF TANZANIA**
**(IN THE DISTRICT REGISTRY)**
**AT MWANZA**
**HC.CRIMINAL APPEAL NO. 207 2018**

*(Arising from the decision of the District Court of Bukombe at Bukombe in Criminal Case No. 228 of 2014)*

**DAMIAN CHARLES @ ANDREW ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Last Order: 23.04.2020

Judgment Date: 07.05.2020

**A.Z. MGEYEKWA, J**

The appellant, DAMIAN CHARLES @ ANDREW was in the District Court of Bukombe convicted for the offense of armed robbery contrary to section 287A of Penal Code Cap.16 [R.E 2002] as amended by the Act No.04 of 2004. The particulars of the offense are

that it was alleged by the prosecution that on the 21st day of June 2013 at about 00:30 hrs at Nampangwe Village, Bukombe District within Geita Region the accused did steal cash Tshs. 130,000, three mobile phones make Nokia valued at Tshs. 130,000/= all total valued at Tshs. 260,000/- the property of Faida Elias and immediately before and after such stealing did use firearms to obtain and retain the said properties.

The appellant filed a memorandum of appeal which contains six grounds of appeal as follows:-

1. *That, the evidence was at variance to the charge about the date of the incident/crime which is a basic matter for proving case/complaint.*
2. *That, the victim (PW1) didn't state whether or not the said gun was used to threaten her for the Robbery as her testimony which quotes by the Judgment in form of narration than repot.*
3. *That, the alleged possession of the gun was considered and involved illegally by trial Court as there was no seizure certificate and chain its custody from the evidence to avoid its plan in the case.*

4. *That, the alleged doctrine of resenting possession of the bicycle was accepted and used to convict without considering that the victim didn't disclose it features either the said mark before the search and the identification.*

5. *That, the admission of the Ballistic report was illegal as it was not read its contains to the appellant and its maker was not testified without any pay to call him/her.*

6. *That the trial Magistrate was erred to cast the burden of proving the case of the appellant when the prosecution side was fallen to prove its case beyond a reasonable doubt.*

Hearing was conducted via audio conference whereas, the appellant and Ms. Fyelegete, learned Senior State Attorney who represented the Republic were remotely present.

Being a layperson, the appellant had no much to say, he prays this court to adopt his grounds of appeal and set him free.

In reply thereto, Ms. Fyeregete started by supporting the conviction and sentence. Submitting on the first ground of appeal,

Ms. Fyeregete stated that the contradictions between the charge and the evidence on record are immaterial since the prosecution proved the case beyond reasonable doubt that the crime was committed. She urged this court to disregard this ground of appeal.

As to the second ground of appeal, Ms. Fyeregete stated that PW1 evidence was credible; he testified that the appellant invaded his house and he was armed with a gun which he used to hit PW1 on his back and hand. She referred this court to page 8 of the trial court proceedings.

Submitting on the 3rd ground of appeal, Ms. Fyeregete submitted that PW4 searched the appellant and found him in possession of a gun and a bicycle. She added that PW4 prepared a search warrant which was signed by the appellant and the same was tendered in court and admitted as Exhibit PE2. Ms. Fyeregete went to submit that the certificate of seizure is featured on the other side of the search warrant and PW4 recorded all the items which were found in possession of the appellant.

It was Ms. Fyeregete's further submission that the Exh.PE2 was sent to the expert in Dar es Salaam for inspection and PW3 tendered an Investigation Report in court which was admitted and marked as Exh.PE3 and Exh.PE4. She went on submitting that the prosecution evidence was heavy enough to ground conviction.

Concerning the fourth ground of appeal, the learned Senior State Attorney admitted that there was no cogent evidence to prove that the appellant was in possession of the stolen bicycle. She went to submit that PW1 testified that a bicycle was stolen but he did not identify the bicycle by its make and color. Therefore she ended supporting this ground of appeal.

On the 5th ground of appeal, Ms. Fyeregete stated that PW3 tendered the Ballistic Report, gun, and bullets which were found in the appellant's house. Ms. Fyeregete admitted that the report was not read in court, she added that there are a number of Court of Appeal of Tanzania authorities which requires a content of a document to be read over to avail the details and contents to the appellant. Ms. Fyeregete referred this court to page 25 of the trial

court proceedings that PW1 explained the contents of the report and the appellant had no objection thus the Ballistic report was tendered in court and it was admitted and marked as Exhibit PE4. She went on to submit that the appellant had knowledge on what is stated in the said report and he was not prejudiced.

It was her further submission that the person who tendered the Ballistic Report was not a maker but there are several Court of Appeal of Tanzania authorities which explains a person who can tender an exhibit in court includes the possessor, a person who has the knowledge, actual owner and a custodian. Ms. Fyeregete fortified her submission by referring this court to the case of **DPP v Baktusi and 3 others** Criminal Appeal No. 493 of 2016 (unreported). She went on to state that any witness who has knowledge or possessed a certain document can tender a document in court. She added that therefore, PW3 was a proper person to tender the said exhibit because he is the one who sent the exhibits to the expert in Dar es Salaam for investigation. She urged this court to disregard this ground of appeal.

With regard to the 6th ground f appeal, Ms. Fyeregete submitted that the prosecution evidence was heavy enough to ground conviction. She went on to state that the exhibits which were tendered in court; Ballistic Report, Search Warrant, Certificate of Seizure, and Investigation Report proved that the cartilages which were found at the scene of the crime were from the gun which was seized at the appellant's house. She concluded by stating that the prosecution proved the case beyond reasonable doubt.

In his brief rejoinder, the appellant insisted that the victim did not prove if he was injured and the prosecution tendered in court only 70 bullets out of 78 bullets. He claimed further that the Ballistic was not called to testify in court instead PW3 testified on his behalf.

In conclusion, the appellant insisted that he is innocent, thus he prays this court t set him free.

Having considered the grounds of appeal and the submissions made by the learned Senior State Attorney and the appellant. I should state at the outset that in the course of determining these

grounds, I will be guided by the canon of the criminal cases which places on the shoulders of the prosecution, the burden of proving the guilt of the appellants beyond all reasonable doubt as it was held in the case of **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda v The Republic** [2006] TLR 395 and in the case of **Daimu Daimu Rashid @ Double D v The Republic**, Criminal Appeal No. 5 of 2018 [4th November 2019 TANZLII].

In determining the appeal before me I will determine the issue of ***whether the appeal by the appellant is founded.***

Using this legal benchmark, the prosecution dutifully, lined up 5 prosecution witnesses also tendered a bicycle (Exh.P1), search warrant (Exh.P2), SMG No. 1960-3n9524, 70 bullets with 7 cartridges and 3 Magazine (Exh.P3) and Ballistic Report (Exh.P4), which in total intended to prove the case to the standard required by law.

As to the first ground of appeal that the evidence was at variance to the charge sheet about the date of commission of the crime. I had to go through the court record and found that the charge sheet read that the alleged crime was committed on 25th June

2013. In the typed court proceeding PW1 testified that the incident occurred on 25th August 2013, I had to peruse the original record and found that PW1 and PW2 testified that the incident occurred on 25th June 2013. Therefore the date appearing on typed proceedings was a typo error. Thus, I have found that this first ground of appeal is demerit.

I find that it pertinent to consolidate the second and third grounds of appeal as both relate to possession of the gun that PW1 did not mention whether the gun was used to threaten him and the appellant complained that the prosecution did not prepare a certificate of seizure. The record reveals that PW1 and PW2 narrated how they were invaded. PW1 testified that the culprits fired the gun and she was shot on her hips and hand and PW2 testified that the culprits fired the gun and hit him. Therefore, the prosecution proved that PW1 and PW2 were injured by the alleged gun. However, I concede the appellant ground that a certificate of seizure was not tendered in court instead the prosecution side tendered a search warrant which was written on one page contrary to what the learned

Senior State Attorney has said that the document contains both the search warrant and certificate of seizure. In the instant appeal, it was vital for PW4 to prepare a certificate of seizure to certify that the gun and bullet were caught in the hands of the appellant since the search warrant (Exh.P2) does not show whether the appellant was caught in possession of the alleged gun and bullets. Therefore, the 3rd ground is answered in affirmative.

In relation to the 4th ground of appeal, I am in accord with the learned Senior State Attorney submission that although PW1 tendered the alleged stolen bicycle in court but he did not prove if the bicycle which belonged to him was the one which was found in possession of the appellant. The victim was required to prove all the three ingredients of the Doctrine of Recent Possession that the alleged recent stolen property was found in possession of the appellant, and to prove that the alleged stolen property belonged to the victim.

After perusing the court records I have found that the Doctrine of Recent Possession was not rightly invoked by the trial Magistrate.

The victim did not satisfactorily identify the bicycle; he was supposed to identify the bicycle by color, make and tender a receipt. Failure to that amounts to mistake of identification since the alleged bicycle is sold in the market and the items can be of the same color and make. As it was stated in the case of **James Kisabo @ Mirango and another v R** Criminal Appeal No. 261 of 2006 CAT (unreported). Contrary to that the Doctrine of Recent Possession was not proved.

In relation to the 5th ground appeal, it is in the record that the Ballistic Report was prepared by an expert and PW3 tendered the same in court. In my view, it was not fatal for PW3 to tender the Ballistic Report although he was not a maker but he was in possession of the report. As it was held in the case of **DPP v Baktusi and 3 others** (supra) However, I have perused the trial court records and I have found that there is a lack of chronological documentation showing how each stage of a holding of the exhibit was supposed to be done from seizure, custody, transfer, analysis up to the exhibition in court. It should be noted that the idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime.

In the instant appeal, it is alleged that the appellant was caught in possession of the alleged gun, magazine, and bullets which was used in the scene of the crime. Now the prosecution had to prove that the said gun and bullet were found in the appellant's house by preparing and tendering a certificate of seizure in court and also the prosecution was required to prove that the gun which was found at the appellant's house is the same gun which was used during crime without being tempered by any other person.

Moreover, in the instant appeal, the evidence on the chain of custody was not elaborated, thus the chain of custody was broken irretrievably, I am saying so because handling process of the exhibits from seizure up to the exhibition in court was not shown taking to account that the items changes hands easily. The records reveal that PW4 testified on 2nd April 2015 that they seized a magazine, firearm, and 78 bullets from the appellant's house then they prepared a search warrant. The record does not show where the said magazine, firearm, and 78 bullets were taken thereafter. The evidence of PW4 is to the effect that on an unknown date he took the exhibits to a

Ballistic in Dar es Salaam without stating if the said items were labelled or marked. The issue remains whether the exhibits which were taken to the Ballistic were the same one which was caught at the appellant's house taking to account that the 78 bullets which were alleged to be seized at the appellant house were not all tendered in court, instead only 70 bullets were tendered in court without any explanation as to why the number was reduced from 78 bullets to 70 bullets. The authenticity of the exhibits becomes questionable the same raises doubt. In the case of **Maliki H. Suleiman v SMZ** [2005], TLR 236 and **Illuminatus Mkoka v Republic** [2003] TLR 245 the Court of Appeal of Tanzania emphasized the needs of the trial courts remaining alive to the importance of proper custody of exhibits and requiring proof of in whose custody the exhibits were kept.

Nevertheless, I have found that the chain of custody was not established, it is nowhere shown where the evidence was kept, from 25th April 2015 when the incident occurred up to 17th December 2015 when the exhibits were tendered in court. As it was held in the case of **Paulo Maduka and Others V Republic,** Criminal Appeal No.

110 of 2007 CAP (unreported), **Director of Public Prosecutions v Shiraz Mohamed Seif** [2006] TLR 427. In the instant appeal, the prosecution ought to ensure that the alleged exhibits (gun and bullets) were found on the appellant's house on 02nd May 2013 are the one that was tendered in court after two years on 17th December 2015. But the prosecution failed to maintain the chain of custody of the seized exhibits the same has consequences on the credibility of the evidence of exhibits itself and raises doubts. In the case of **Abuhi Omary Abdallah and 3 Others v R** Criminal Appeal No. 28 of 2010 CAT at Dar es Salaam (unreported) held *inter alia* that:-

> " *Where there is any doubt, the settled law is to the effect that in such a situation an accused person is entitled as a matter of right to the benefit of doubt or doubts."*

Based on the above authority, it is without a doubt that in this instant case the chain of custody was broken. In light of the doubt created by the broken chain of custody, I shall resolve the doubt in the appellant's favor. Given the above circumstances, the 5th ground of appeal is answered in affirmative.

On the 6th ground of appeal, the appellant is complaining that the prosecution side did not prove the case beyond reasonable doubt, I concede with the appellant's ground of appeal that the prosecution failed to prove the case beyond reasonable doubt, PW3 failed to demonstrate where he kept the gun and bullets which were seized at the appellant's house and the cartilages which were seized at the victims' house. Also, PW3 failed to testify how he handled the seized item; the same was supposed to be kept for safe custody. PW3 was supposed to testify where the items were kept before transporting the same to the investigator in Dar es Salaam. Consequently, PW3 was supposed to prepare and tender a handling note and a dispatch to show that the items changed hands from PW3 to the Ballistic. Likewise, PW3 was supposed to explain how he received the Ballistic Report.

For the foregoing reasons, I am satisfied that there was no substantial evidence to prove the case against the appellant. Therefore, I allow the appeal, quash the conviction, and set aside the

sentence. I order the immediate release of the appellant from prison unless he is lawfully held for other lawful purposes.

Order accordingly.

DATED at Mwanza this 7th May 2020.

A.Z MGEYEKWA

**JUDGE**

07.05.2020

Judgment delivered on 7th May 2020 and both parties were remotely present.

A.Z MGEYEKWA

**JUDGE**

07.05.2020