IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 245 OF 2020

(Appeal from the decision of the District Court of Bagamoyo at Bagamoyo, before Hon. Makube H.A SRM dated 10th October, 2018)

CHARLES SIMBA @ SHALO.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

7th April, – 3rd May, 2021

J. A. DE - MELLO J;

In the **District Court of Bagamoyo at Bagamoyo,** the Appellant was charged with the offence of **Armed Robbery** contrary to **section 287A** of the **Penal Code Cap. 16, R.E 2002** and, sentenced to thirty (30) years imprisonment. Aggrieved by the said decision, the Appellant filed this Appeal against both conviction and, sentence, on the following grounds;

1. **That, the learned trial magistrate erred in law and fact by holding that Exh. P1 (TV) and Exh. P2 (phone) were recovered from the appellant's room while.**

i. Exh. P3 (Certificate of Seizure) was not read aloud in court hence denying the appellants to know its contents.

ii. There was no independent witness produced to witness the alleged search at the appellant's room.

iii. PW2 (arresting and seizing officer) didn't identify Exh. P1 and Exh. P2 before the court establish whether the same were the same as those allegedly recovered from the appellant's room. (*sic*)

2. That, the learned trial magistrate erred in law and fact by convicting the appellant based on the doctrine of recent possession while the same was wrongly invoked as,

   i. PW1 (Victim) didn't tender any receipts to establish that Exh. P1 and P2 belonged to her.

   ii. PW1 didn't identify the marks alleged on Exh. P1 and P2 and match them before the court to establish that, the same mark existed.

3. That, the learned trial magistrate erred in law and fact by convicting the appellant relying on un – procedurally tendered Exh. P1(TV) and Exh. P2(mobile phone) and the unreliable evidence of PW1 while,

i. PW1 didn't lay foundation as to how the same landed in her possession after she had lost custody of the same on material tendering day.

ii. PW1 failed to mention the serail numbers of the alleged Exh. P1 and P2.

iii. There was failure by experienced police officer to comply with the police general order (P.G.O 229) while seizing Exh. P1 and P2 as they failed to label and seal the same at the locus quo.

iv. The chain of custody in respect of Exh. P1 and P2 were severely broken in terms of their handling movement and storage

4. That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on the un procedurally tendered and admitted Exh. P6 (caution statement) while;

i. The same was not read aloud in court hence denying the appellant an opportunity to know its contents contrary to procedural law.

ii. There was no prayer by PW5 to tender the same as an exhibit before the court.

iii. The trial magistrate failed to determine whether the same was voluntary procured contrary to section 27(1) T.E.A Cap. 6, R.E 2002

iv. The trial magistrate failed to conduct an inquiry as the appellant raised an objection to the same being admitted

5. That, the learned trial magistrate erred in law and fact by relying on the incredible evidence of DW5 against the appellant while,

   i. DW5 was simply exonerating herself from the crime and fact that she was found with Exh. P2.

   ii. DW5 didn't tender any agreement to show that she made a deal with the appellant.

   iii. The appellant wasn't given an opportunity to cross examine DW5

6. That, the learned trial magistrate erred in law and fact by convicting the appellant in a case that was poorly investigated and prosecuted as,

   i. The record is silent as to whether the appellant's room was searched for then alleged offensive weapon used in the commission of the crime.

ii. **No plausible explanation was offered to the prosecution as to where the other items (money, deck, etc) allegedly stollen from the victim disappeared to**

7. **That, the learned trial magistrate erred in law and fact by convicting the appellant in a case that wasn't proved beyond reasonable doubt by the prosecution**

It is the Appellant's prayer now that, the Court allows his appeal quashing and, set aside the both and sentence, respectively, as he enjoys his liberty. On the **30th November, 2020** the Appellant filed supplementary grounds, which many appears to be repetitions except;

1. **That, the learned SRM erred in law and fact by convicting the appellant rely on the charged of Armed Robbery which did not disclose persons or threat was directed at, page 1 of 7 line 19 – 20 (in the judgment) worse still the prosecution summoned PW1 Nyambura Omary at page 11 of 35 to testify contrary to the charge sheet that, "the property of Nyambura Kitwara" but the evidence on the record did not establish the offence because the complainant Nyambura Kitwara, did not testify contrary to the procedural law.(sic)**

5. **That, the learned trial SRM erred in law and fact by convicting the appellant relied on discredited visual**

identification of PW1 at the locus quo as the incident stated to be occurred at night around 10:30 hours while the nature of intensity of Light which enabled PW1 to identify the appellant was not disclosed.

This appeal was disposed by written submissions as moved and, conceded by the Appellant and Respondent, respectively. Arguing the Appeal, the Appellant submitted that, theft was not proved based on the fact that, the complainant, the said Nyambura Kitwara, did not testify, to prove, as the charge sheet stated, that, the stolen property valued at TShs. 1,620,000/=, was stolen or threat to injure, as alleged. This even rendered the charge sheet incurably defective, reflecting error on the face of record, for missing the particulars, as to whom the alleged violence or force was applied, all in total disregard of the essential elements of robbery opposing what **section 132** of the **Criminal Procedure Act, Cap. 20 R.E 2002.**

The Appellant further challenged the manner and, the way a documentary exhibit was tendered and, admitted into evidence, before the presiding officer reads and explains its contents, to be able to keep the accused abased of the facts with full its details, to enable him to align himself for his defence. Nothing was in compliance more so, on the

certificate of seizure Exh. P3, and the caution statement, Exh. P6, citing the case of Robinson **Mwanjisi & 3 Others** vs. **The Republic, (2003) TLR 218.** Furthermore, it is Counsel's view that, the doctrine of recent possession was wrongly invoked, contrary to what the case of **Republic** vs. **Bakari Abdalla (1949) 16 EACA 84.** That, in absence of proof that, the property to be was in possession of the accused, it was insufficiently identified to be that of the complainant, I prerequisite that it must have been recently stolen from the complainant, making it relevant to the charge laid against the accused. This, he contends, was missing and, not proved by **PW1**, as she neither gave a detailed explanation of the TV set make of Samsung 32", one mobile phone make Tecno C9 as Exh. P1 and, P2 particularly serial numbers, nor, production of receipt, much as the Court admitted all as evidence as seen on **pages 11-12** of the proceedings. Facts transpiring from the Police station has it that, the alleged stolen items were picked by **PW2**, without stating as to whom he handed them over to. He neither adduced evidence as to where he kept Exh. P1 and, P2, from the day they were recovered, until when tendered in Court. In absence of proper chain of custody, it leaves open the possibility that, Exh P1 and P2 might not be the same as the ones alleged to have been recovered from the search. On visual identification, the Appellant claims it to be weak and, highly unreliable, of which **PW2**

testified the complainant failed to identify the accused allegedly, owing to sudden invasion, forcing the victims to sleep on the floor. It would have been appropriate and, as required by law for, **PW1** to disclose the distant, time, light intensity of the incident allegedly to have happened at 10:30 hrs. at night

The Respondent the Republic, fully supported the Appeal, admitting failure on their part to comply with the principle guiding Criminal laws. Quite apparent, he further alluded that, irregularities occasioned and, worse even in laws and, facts were basic and, to the root of the case. The manner and, way the exhibits were tendered and admitted, namely; the P1 and, P2 (TV and phone), improperly identified by **PW1** during trial. The case of **David Chacha & 8 Others** vs. **The Republic, Criminal Appeal, No. 12 of 1997 (unreported)** was referred to support the above position. He went further stating that, no tangible receipts and, other evidence were adduced, both at Police or Court to prove possession, thus rendering the admission for both Exh. P1 and, P2 fatal. Similarly, was the Certificate of seizure, exhibit P3, admitted by the Trial Court but, not identified by **PW2** in which **PW3** never read it loud as required by law. What remains is Exh. P1 and, P2 and, owing to the above irregularities have no legs to stand upon, owing to irregular arrest and seizure which were not proved. Counsel conceded to wrong invoking of the doctrine of

recent possession by citing the case of **Stephen Paulo & Another** vs. **Republic, Criminal Appeal No. 455** of **2020, Tanzania Court of Appeal** at page **16** based on the case of **Mkubwa Mwakagenda** vs. **Republic, Criminal Appeal No. 94 of 2007 (unreported)** providing for three conditions to wit; that; the property was found with the suspect, second, it must be the property of the complaint, thirdly, it was recent stolen from the complainant and, lastly, that, the property constitutes the subject matter. From the extract, it is crystal clear that, the set of conditions individually and cumulatively had not been met. He took notice of disregard of the caution statement for lack of corroboration, let alone unprocedural tendered . Counsel prayed for quashing and, setting aside of the conviction and, sentence respectively.

Much as the Republic concedes to the Appeal it is not automatic for the Court to support, unless it is satisfied that, true there existed, on the face of record, glaring procedural and, legal violations. This, other than the grounds of appeal, the submissions by both parties, perusal of the Court file more so in the proceedings for ascertainity. It is apparent that, the offence is supported by visual identification by witnesses ones which the Prosecution has aligned to prove its case. Several and many cases have established and settled for what it takes to be able to rely on the same as was laid down in the case of **Oden s/o Msongela & Others** vs. **The**

D.P.P, Consolidated Criminal Appeals No. 417 of **2015 & 223** of **2018, Court of Appeal Of Tanzania, at Mbeya,** cited **Dadu Sumano's** case as hereunder;

'The Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness's name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it"

In the case at hand, an, based on **PW1's** evidence, one observes contradictions based on the state of victims at the time of invasion. Whether asleep of awake and, forced to lie down or else, is unclear in as

far as page 11 of the proceedings. It was further alleged by this same witness that, one making orders was not among the ones who fleed with the goods, which again raising eyebrows for missing part for observing the whole episode. Matters of voice, distance, light and, description also leaves a lot to be desired. This was observed by the Trial Magistrate in his judgment at page 4 and, I find worth borrowing as follows;

"it obvious then there was armed robbery on the fateful night, however the victim could not identify faces of the bandits as it was night".

If so, then one wonders why did the Trial Magistrate and, coupled with such observation, ended up convicting and, sentencing the accused. Strangely and, quite wanting, is the fact that, **PW1** acknowledged the presence of other perpetrators, ones who did away with the goods. Sadly, while the charge was that of Armed robbery contrary to **section 287 A** of the **Penal Code, Cap 16, R.E 2002,** nothing with regard to weapon or force used had been proved. I also see irregularity on the names of the victim from what, the charge sheet depicts as **Nyambura s/o Kitwara Omary** as opposed to Court proceedings referring **PW1** was one **Nyambura Omary**. The prosecution ought to have brought an affidavit to ascertain on the name, as in law **Nyambura Kitwara Omary** and **Nyambura Omary** are two different persons. What this does exhibit is,

lack of seriousness on the part of prosecution. As this appeal is not opposed and, from my own gathering from record as displayed above, the Appeal has merit and, is allowed. I therefore quash the conviction, set aside the sentence of thirty (30) years for imprisonment as passed by the Trail Court. Let the Appellant be released forthwith unless otherwise lawfully held.

It is so ordered.

J. A. DE- MELLO

JUDGE

3rd May, 2021