

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

CRIMINAL APPEAL NO.14 OF 2020

(From the Judgment of Tanga District Court in
Criminal Case No. 88 of 2018)

BAKARI ALLY @ KULANGWA APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

MKASIMONGWA, J.

In the District Court of Tanga one Bakari Ally @ Kulangwa (Appellant) stood charged with two alternatives counts namely; Theft contrary to Section 258 (1) and 265 of the Penal Code [Cap 16 R.E 2002] and Being in possession of goods suspected of being stolen or unlawfully acquired contrary to Section 312 (1) (b) of the Code. He was found guilty of theft hence convicted and sentenced to five (5) years imprisonment. The Appellant was dissatisfied by both the conviction and sentence. He therefore preferred this appeal against the two. In the Petition of Appeal filed, the Appellant listed five grounds.

On the date the appeal was placed before the Court for hearing, the Appellant appeared in person whereas Ms. Elizabeth Mhangwa (SA) appeared on behalf of the Respondent Republic. The two made submissions in support of their respective cases. Before showing what the parties had submitted, let

expounded in the case of **DPP v. Joachim Kombo** (1984) TLR 213. The court did so upon being satisfied that the accused (Appellant) was on 19/05/2018 met in possession of a mobile phone stolen from PW1 on 11/05/2018 at 20:00hrs and that he did not offer explanation as to how he came into possession of the same.

Coming back to the submissions made by the parties, the appellant adopted all grounds of appeal in his submission. As regards to the fifth grounds of appeal, the appellant stated that **Exhibit P3** was not read to the court after it had been admitted as exhibit. This denied him an opportunity of knowing what the exhibit was all about. The appellant invited the court that on the basis of the grounds of appeal, the appeal be allowed.

On the other hand, Ms. Mhangwa, agreed with the Appellant in respect of the first ground of appeal that Colman Mbando (PW1) did not properly identify the thief there at the scene of crime. His (PW1) testimony as to identification of the accused did not meet the necessary requirements for a proper visual identification as were well narrated in the case of **Amani Waziriv. R.** (1980) TLR 250.

As to the allegation that the complainant (PW1) did not prove ownership of the phone as the evidence that PW1 was the owner of the alleged stolen mobile phone was not supported by a receipt he was provided by the seller when purchasing it, Ms. Mhangwa submitted that production of the receipt was not the only way to prove the ownership. Ownership of a property can also be proved by

the fact that the victim of theft properly identified the properly stolen. In the case at hand PW1 identified the mobile phone by its appearance and even by mentioning its IMEI Number. The phone and its box were tendered in evidence and the appellant did not object production of the same hence was admitted as exhibit. This clearly evidenced that the appellant was admitting that he committed the offence and the fact that he did not cross examine the witness in respect of that evidence, rendered the testimony of PW1 nothing but the truth. Ms. Mhangwa cemented her view by citing the case of **George Maili Kemboge V. R:** Criminal Appeal No. 327 of 2013, CAT (unreported).

Regarding to the Doctrine of Recent Possession Ms. Mhangwa referred the Court to the case of **Manazo Mandundu and Others V. R** (1990) TLR 92 and **Hassan Rashid Gomela v. R** Criminal Appeal No. 271 of 2018, CAT (unreported) where the doctrine is well expounded. In the later case the Court set conditions for application of the doctrine which conditions, she said were all met in the case at hand that: the appellant was met in possession of a property; that the property was identified to be that of the complainant; that the property was recently stolen and that the property was the subject of the charges.

Ms. Mhangwa argued further that under the fourth ground of appeal, the appellant faulted the decision of the lower court on ground that it did not ascertain the issues of the Certificate of Seizure alleged to have been signed by the Appellant. Ms. Mhangwa submitted that during trial of the matter, the

Appellant did object production of the Certificate of Seizure prepared when he was searched and found in possession of the alleged stolen mobile phone. The objection was heard and determined by the Court. As such the court below could not be faulted on ground of failure to ascertain the certificate. Regarding to the contention that the Court did not comply with the provisions of Section 75 (1) (2) and (3) of the Evidence Act [Cap 6 R.E 2002], Ms. Mhangwa submitted that the powers that are conferred to the Court in terms of the Section are discretionary ones. Failure by the Court to invoke the powers therefore cannot be blamed.

Last,as far as the Cautioned Statement is concerned, Ms. Mhangwa submitted that although the appellant's cautioned statement was not tendered to the Court, the evidence on record proved the case against the appellant beyond reasonable doubt that he stole the phone, the property of PW1. The witnesses PW1 to PW5 did show in evidence the chronological events which led the Court to a finding that the appellant stole the phone the subject of the charges in the case at hand. The learned State Attorney invited the Court that it finds no merit in the appeal and the same should be dismissed in its entirety.

The appellant had nothing to submit by way of rejoinder and that marked the end of the submission.

I have attentively considered the submissions along with the records of the case. There is ample evidence on record that on 11/05/2018 at 20:00hrs at Country Coffee Bar a person stole from Colman Mbando (PW1) a mobile phone

make Samsung Galaxy S8. Even if PW1 saw the person stealing the phone, it was not, in the circumstance, favoring proper visual identification. It was proper therefore when the Court held that the Appellant was not properly identified at the scene of crime when committing the alleged offence. In the premise, I find even the first ground of appeal of no essence. The same is also for the sixth ground of appeal under which the appellant faults the judgment of the Court alleging that the cautioned statement alleged to have been made by the appellant was not tendered in court. The judgment was not based on the statement.

As it is pointed out earlier, the case before the trial Court was determined based on the doctrine of recent possession which dictates that if a person is found in possession of a recently stolen property and gives no explanation depending on the circumstances of the case, the Court may legitimately infer that he is a thief, breaker or guilty of receiver (see **DPP v. Joachim Komba** case supra). In **Ali Bakari and Pili Bakari v.R** (1992) TLR 10 the Court explained it that for the doctrine of recent possession to apply, it must be shown that the found property was a subject of the charge against the appellant and that it was positively identified by the victim of theft or robbery. In respect of the doctrine the Court in the case of **Joseph Mkumbwa and Samsom Mwakagunda v. R** Criminal appeal No. 94 of 2017, CAT (unreported) stated as follows:

"Where a person is found in possession of a property recently stolen or unlawful obtained he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for 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 fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements..."

As pointed out earlier that the evidence shows that a mobile phone with IMEI No.355090089946984 was stolen from Colman Mbando (PW1). There is ample evidence that on 19/05/2018 the appellant was arrested suspected of the theft of the Colman phone. It is from the fact that the appellant was found in possession of the phone, he was charged with this offence. The issue to be determined is whether the phone with which the appellant was alleged met in possession of was properly identified to be the property of the complaint. To that effect, I have first considered the testimony of ASP Jumanne Njoka (PW5) that after he had seized a mobile phone following search he conducted against the Appellant, he prepared a Certificate of Seizure and that the certificate was admitted in evidence and marked **Exhibit P3**. Part of **Exhibit P3** reads as follows Kiswahili:

"Mimi ASP Jumanne Njoka ... nimefanya upekuzi ndani ya begi la Bakari Ally @ Kulangwa wa SahareTanga. Katika upekuzi huo na orodhesha vitu/nyarakaz ilizopatikana /chukuliwa kwenye upekuzi huo kwa ajili ya upelelezi:

1. Simu moja aina ya Samsung S8 rangi nyeusi, ikiwa ndani ya begi".

The evidence is also to the effect that on 21/05/2018 ASP J.R. Njoka (PW5) handed over one phone make Samsung S8 to PW1 which transaction was reduced in writing. The Handing over paper which was admitted to the Court to be exhibit, marked **Exhibit P2**, partly reads as follows in Kiswahili.

"Mimi ASP J.R Njoka ambaye ni Mkuu wa upelelezi Wilaya ya Tanga leo tarehe 21/05/2018 nina mkabidhi ndugu Colman S/O Mbando Simu 01 Samsung S8 Jalada la Polisi TAN/IR/1497/2018 kosa la wizi kwa masharti ya kutoiiza, kubadilisha kitu chochote ikiwemo umiliki, rangi. Kinaitaka panapo hitajika iletwe bila kipingamizi"

When he was testifying before the Court, Colman Mbando tendered to the Court to be exhibits a mobile phone's box, a mobile phone make Samsung Galaxy S8 and a cover of a mobile phone which were accordingly admitted in evidence and marked **Exhibit P1** collectively. Before tendering the exhibits, the witness was heard and recorded saying: ***"This is the phone which was stolen from me. It is Samsung Galaxy S8. The IMEI number in the box are there here"***.Particulars of the offence stated in the charge sheet clearly mentioned the IMEI number of the stolen mobile phone as being

355090089946984. The question is whether the mobile phone found possessed by the suspect was positively proved to be the property of the complainant. It is clear from the evidence adduced, the complainant identified his phone by an IMEI number which is unique, and its appearance, that it was blank and thin, and it had an egg structure and that it had a crack on the left side in its front and that it had a cover which had the colour of military combat. The witness stated further that: "***He ordered me to bring its charge. It is when I submitted and he also ordered me to bring the box of the phone so that he could compare the IMEI which was in the box ...***". I have considered the fact that **Exhibit P3** (certificate of seizure) did not mention the features enabled identification of the phone by PW1. This is again a case in respect of the phone's Handing over Certificate (**Exhibit P2**). Despite the fact that the same was prepared after the complainant had duly identified the phone to be his stolen one, **Exhibit P2** is plainly silent as any of identification marks and if the Appellant was present when the phone was handed over to PW1. In that premise, it is doubtful if the mobile phone met possessed by the appellant was the same the Police had handed over to PW1. It is even doubtful if the phone PW1 was handed over by the Police was the same he tendered to Court to be exhibit. As such it cannot be said without doubt that the phone the Appellant was met in possession of was properly identified to be the same stolen from PW1. Therefore

Date: 01/06/2021

Coram: E. J. Mkasimongwa, J

For Appellants:

For Respondent:

C/C: Alex

Court: Judgment delivered in chamber this 1st of June, 2021, in the presence of the Appellant in person and in the absence of the Respondent's counsel.

Right of appeal is explained.




E. J. Mkasimongwa
JUDGE
01/06/2021