IN THE HIGH COURT OF THE UNITED REPUBLIC

OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 16 OF 2020

(C/f Criminal case No. 100 of 2018, in the District Court of Mwanga at Mwanga)

ELIA ESSAU.....1st APPELLANT

RAMADHANI HASSANI.....2nd APPELLANT

GIFT KAWAU.....3rd APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

26th July & 17th August, 2021

JUDGMENT

MKAPA, J.

The appellants herein together with another accused person named Alfan s/o Athumani @ Rashid were jointly charged before the District Court of Mwanga at Mwanga (trial court) with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R.E 2002].

The factual brief of the case is that on 2nd July, 2018 at about 19:45 hours at New Mwanga within Mwanga District, Kilimanjaro

Region, the appellants stole one mobile phone make Samsung, ten thousand shillings cash (Tshs. 10,000/=) two wallets, driving license, voters registration card, door security card and office keys of NMB bank all properties of PW1. That, the said incident occurred outside NMB Bank premises when PW1 was heading home from the office. Suddenly, two among the appellants appeared while riding a motorcycle, grabbed her handbag and in the process they threatened her with a knife in order to obtain the said items. At the trial court the all the accused pleaded not guilty to the charge and in the end the appellants herein were convicted and sentenced to 30 years imprisonment while Alfan Athumani @ Rashid was acquitted. Dissatisfied with the decision of the trial court he has appealed to this court on the following grounds;

1. That the learned trial magistrate erred in law and fact in allowing PW2 to read aloud the content of Exhibit P2, (Certificate of Seizure) prior to the same being cleared for admission.
2. That, the trial magistrate erred in law and fact in failing to note the allegations made by PW1 and PW3 on the motor cycle number plates were not reported at Mwanga Police station when they first reported the matter.

3. That, the trial magistrate erred in law and fact in failing to note that the doctrine of recent possession was inapplicable as the criteria were not met.
4. That, the trial magistrate erred in law and fact in not affording some of the accused a chance to object in the process of tendering Exhibit P2 i.e. Certificate of Seizure
5. That the trial magistrate erred in law and fact in convicting the appellants basing on the poor investigation.
6. That the trial magistrate erred in law and fact in failing to analyse the evidence adduced and consider defence.
7. That, the trial magistrate erred in law and fact in holding that the prosecution case was proved beyond any shadow of doubt as required by the law.

The hearing of the appeal was proceeded by way of filing written submission. The appellants appeared in person and fended for themselves, while Mr. Ignus Mwinuka, learned State Attorney represented the respondent /Republic.

Submitting in support of the first ground of appeal the appellants submitted that, at page 15 of the trial court's typed proceedings, PW2 testified that he would have identified the certificate of seizure he had prepared because it would bear his handwriting and signature then he said "I have the said seizure, I pray to read the content". The appellants argued that the court record is silent as to whether the witness did identify the said certificate.

It was the appellant's contention that this was a procedural error by the trial court allowing PW2 to read aloud the said exhibit prior to identifying it. In support of their contention the appellants placed reliance on the case of **Robinson Mwanjisi** and **Three Others V R, Criminal appeal No. 154 of 1994 TLR 203** and **Walii Abdallah Kibutwa & Two Others V R, Criminal appeal No. 181 of 2006** (CAT) DSM at page 8, in which the court held;

> *"Whenever it is intended to introduce any document in evidence it should be cleared for admission and be actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial"*

Arguing on the 2nd ground of appeal, the appellants contended that the criteria for doctrine of recent possession was not properly invoked as laid down in the case of **Joseph Mkubwa Samson Mwakagenda V R, Criminal Appeal No. 94 of 2007** (unreported), where the court observed;

> *"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 person or place where from the property was obtained for the doctrine to apply as basis of conviction it must be proved first that the*

property of the complainants third that the property was recently stolen from the complainants and lastly that the stolen thing constitute the subject of the charge against the accused was found with the suspect second that the property is positively proved to be property was recently stolen thing constitute the subject of the charge against the accused"

Furthering their argument the Appellants argued that In the instant matter PW2 testified to have conducted the search and seized the said properties. However, the said search was illegal for failure to summon any witness to prove the fact that, the said properties were indeed found in possession of the appellants. More so, as the allegedly stolen items were recovered from the appellants the doctrine of recent possession would not have applied.

Lastly, the appellants had raised an issue that the learned magistrate did not analyze the defense evidence in arriving at her decision. That, the trial magistrate had a duty to analyze defence case and give reasons thereof. They finally prayed for the Court to allow the appeal, quash and set aside the trial court's decision and them set free.

Responding, Mr Mwinuka conceded the fact that, they did not support the conviction and sentence. That the evidence adduced in court does not meet the criteria for the doctrine of recent possession. That, PW2 D. 6401 CPL Bakari narrated that exhibit P1 was found in the house of one Said who was not arraigned in court. The learned state Attorney further submitted that PW2 did not state categorically that the said exhibits were found in possession or in custody of the appellants instead they only signed the certificate. It was Mr. Mwinuka's view that, signing certificate of certificate of seizure and being found in possession of the exhibit are two different acts.

Learned state attorney referred the Court to the case of **Ally Bakari and Another V R (1992) TLR 10,** where the Court held;

> *"For the doctrine to apply as basis of conviction, it must be positively 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, the property was recently stolen from the complainant and lastly, that the stolen thing in the possession of the accused constitutes the subject of charge against accused. It must be the one that was stolen/obtained during the commission of the offence charged".*

Mr. Mwinuka further submitted that, the fact that the appellants did not claim to be owners of the property does not relieve the prosecution of their obligation to prove the above elements. More so, as correctly argued by the appellants, Mr Mwinuka submitted that it is on record at page 16 of the trial court's proceedings that, the certificate of seizure was read out prior to its admission contrary to the requirement of the law. That although the trial court did not rely on the same in convicting the appellant it was not worth arguing on the same. He conclusively supported the appellants' appeal. No rejoinder was preferred.

Having considered the parties submissions and carefully perused the trial court's record, it is undoubtedly the fact that the learned magistrate misdirected herself in allowing PW2 to read aloud the contents of exhibit P2 prior to its admission as required by the established principle of the law. The decision in the case of **Robinson Mwanjisi** (*supra*) underscored the requirement for any document to be cleared for admission and be actually admitted before it can be read out.

Guided by the above case law, I am in agreement with appellants that reading out of Exhibit P2 prior to its admission was incurably fatal.

The second ground upon which the appellants were convicted was on the doctrine of recent possession. In the case of **Julius s/o Justino & 4 Others V The Republic**, Criminal Appeal No. 155 of 2005 CAT at Mwanza held that;

> *"Explained in simple language this doctrine is to the effect that the court may presume that a man who is found in possession of stolen goods soon after the theft is either the thief or has received them knowing them to have been stolen, unless he can satisfactorily account for his possession of the same. But as the courts have consistently held, the application of this doctrine must be made with care. This is not only because the presumption is rebuttable, but as was held in the case of* ***George Edward Komowski V. R.*** *(1948) 1 TLR 322:-*
>
> *"... it is not so strong as to displace the presumption of innocence to the extent of throwing on the accused the burden of giving legal proof of the innocent origin of his possession. He has merely to give a reasonably probable explanation of how his possession originated and if he gives such an innocent explanation he is entitled to an acquittal unless the prosecution can disprove his story. Even if he gives an explanation which does not convince the court of its truth he need not necessarily be convicted. The true test is whether his story is one which might reasonably be true and if that is the case, it follows that the crown has not discharged the onus which lies continuously on it in this as in*

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other criminal cases, to prove the accused's guilt beyond reasonable doubt".

*It is clear from the aforesaid authorities that in order for the doctrine of recent possession to be established the following criteria has to be met, **First,** the property must be found with the suspect, **second,** that the property is positively proved to be the property of the complainant, **third,** the property must be recently stolen from the complainant and **lastly,** that the stolen thing in the possession of the accused constitutes the subject of charge against accused.*

It is plain clear from the evidence adduced the fact that the appellants were not found in possession of the motorcycle. As per PW2's testimony the said motorcycle was found with one Said who was never arraigned before the court. More so, it was established that PW2 did not state categorically that the said exhibits were in possession or custody of the appellants. Thus I am satisfied that the doctrine of recent possession was not established.

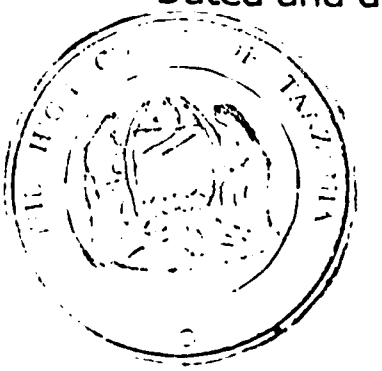
On the basis of the foregoing analysis and as conceded by the learned State Attorney, the respondent, the case against the appellants was not proven as per the required standard.

In the event, I allow the appeal. Consequently, the conviction against the appellants is quashed and sentence set aside. I

further order the released forthwith of the appellants from custody unless therein held for lawful cause.

It is so ordered.

Dated and delivered at Moshi this 17th August, 2021.



S.B. MKAPA

JUDGE
17/08/2021