

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 120 OF 2020

(Originating from Momba at Chapwa District Court in Criminal Case  
No. 144 of 2016)

SILVANUS HASHIM @ NGOSHA----- APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

*Date of Last Order: 12.07.2021*

*Date of Judgement: 13.09.2021*

**EBRAHIM, J:**

The Appellant herein was charged, convicted and sentenced at the District Court of Momba at Chapwa for the offence of armed robbery contrary to **section 287A of the Penal Code, CAP 16 RE 2019**. The basis of his conviction was on the doctrine of recent possession. The trial magistrate found out that the appellant was found in possession of the stolen mobile phones hence connecting him

directly with the charged offence of armed robbery. The trial court sentenced the Appellant to 30 years imprisonment.

Aggrieved by the decision of the District Court, the Appellant has lodged an appeal in this court raising eight grounds of appeal challenging that no weapon in connection with the offence was tendered, defence evidence was not considered, search was improperly conducted and that he was not identified at the crime scene. Other grounds of appeal are that the doctor did not tender **exhibit P1 (PF3)** contrary to the law, the property said to have been stolen was a common good, it was an error to convict the appellant alone while there were two people in the guest house, and that he was not reminded of the charge on his defence case.

When the case was called for hearing, the appellant appeared in person through virtual court while in Ruanda prison. The respondent was represented by Mr. Davis Msanga who was physically present in court.

The Appellant prayed to adopt his grounds of appeal and prayed to be set free.

In response to the grounds of appeal, the Mr. Msanga told the court that in fact there is no issue of identification as the Appellant was connected to the crime following the evidence of PW8 who was given the phone make Tecno by him. The phone associated the Appellant with the crime was identified by Erick Raphael to be the one stolen at the incident date as he marked it with **Mark E**. He contended further that the Appellant did not deny that it was not his phone nor did he provide explanation as to where he got the said phone. On the ground that the Appellant ought to have been searched by Inspector of Police, he responded that **Section 38 (1) (2) of the Criminal Procedure Act, Cap 20 RE 2019** gives mandate to the police officer in-charge to authorise any police officer to conduct the search. On the issue of PF3, Learned State Attorney responded that in armed robbery what is supposed to be proved is the offence of armed robbery and not the injury of the victim. Responding on the issue of peculiar marks, Mr. Msanga submitted that the witness managed to identify his phone with Mark E on the battery. He insisted that the Appellant was mentioned by PW8 as he was the one who gave him the phone, hence he was supposed to

explain how the stolen phone came to his possession. He lastly responded that there is no law that require him to be reminded of his charge before his defence and more so his was given his right to enter his defence. He prayed for the appeal to be dismissed as the case was proved beyond reasonable doubt.

In brief re-joinder, the Appellant insisted on the absence of the weapon tendered in court as an exhibit and that PF3 was not brought by a doctor. He claimed also that the receipt had no serial number as Techno-Y6 phones are common and letter E could be inserted by any person. He also picked up on the discrepancy that while PW3, PW4 and PW5 said the search was conducted on 06.03.2016, PW8 said the search was conducted on 26.03.2016. He prayed for the appeal to be allowed.

I have followed the submissions and dispassionately gone through the proceedings in record vis-a-vis the grounds of appeal.

As stated by the State Attorney the Appellant's conviction is based on the doctrine of recent possession and it is not on the issue of identification at all as the Appellant claims in his 4<sup>th</sup> ground of

appeal. Thus, in so far as the conviction of the Appellant is concerned, there was no need of identification parade since no one claimed to have identified the Appellant at the crime scene.

In totality, it follows therefore that the bone of contention is whether the doctrine of recent possession was proved in basing the conviction of the Appellant.

After hearing the evidence from both sides and make the analysis and evaluation of evidence, the trial court at page 14 to 15 of the typed judgement made a finding that the Appellant was mentioned by DW2 who was found with the stolen mobile phone make Techno – Y6. While DW2 managed to give explanation as to how she got the phone, the Appellant could not give any defence on how he obtained the said phone **(exhibit P3)**.

I would firstly like to begin with the submission by the appellant that there was a contradiction on the date stated by PW8 that the police went to Family Guest House on 26.03.2016 while PW3, PW4 and PW5 said it was on 06.03.2016. Of-course the date appearing on the typed proceedings is 26.03.2016, but in the handwritten

proceedings, the date recorded is 06.03.2016. Therefore, there is no contradiction but a typing error on the typed proceedings.

Indeed, the Court of Appeal has in a number of cases illustrated the cumulative principles guiding the invocation of the doctrine of recent possession as a base of conviction. In the case of **Joseph Mkumbwa & Another V Republic**, Criminal Appeal No. 94 Of 2007, the Court of Appeal held that: -

*"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 wherefrom 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 of the complainant, **third**, the property was recently stolen from the complainant and **lastly**, the stolen thing constitutes the subject of the charge against the accused". [Emphasis is mine].*

Court of Appeal, in discussing the same issue in the case of **James Kisabo @Mirango and Another V The Republic**, Criminal Appeal No. 261 of 2006, quoted with approval the case of **Alhaj Ayub @ Msumari & Others V R**, Criminal Appeal No. 136 of 2009 (Unreported) which held that for a doctrine of recent possession to apply; *it must be positively proved that the property was found with suspect; property is positively the property of complainant; property stolen from the complainant; and that it was recently stolen.*

It was further held in the cited case above that:

*"In order to prove possession there must be acceptable evidence as to the search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses".*

I am mindful of the fact that this is the first appeal, therefore I am obliged without fail to subject the entire evidence into objective scrutiny in seeing as to whether the doctrine was properly invoked.

Beginning with the first requirement that the property must have been found with the accused (Appellant), the testimonies of PW3, PW4 and PW5 would shade light.

**PW3, WP9476, DC Pendaël** investigated the incident and by using the information received from DW2 who was found with the stolen mobile phone, trapped and arrested the Appellant at Family Guest House, room No. 3 when he was alone. She testified that when the Appellant was searched, he was found with six mobile phones and one power bank under the pillow. During the search, there was a waiter of the said Guest House, Sikujua Manka as an independent person who also signed the search warrant. Responding to cross examination questions PW3 said they found three Tecno mobile phones, two Itel mobile phone, one Huwawei mobile phone and a power bank. PW3 stated also that the Appellant gave two versions of stories that he used to sell mobile phones and when asked again at the police station he said he stole them when committing armed robbery at Ndalambo Village. **PW4 F6960 DC Bashal** was the police officer who received about 6 victims at the Police Station around 0600hours of 12.02.2016. They went to report that they have been



hijacked, beaten and their money and mobile phones stolen. They went to the crime scene and sketched a map which was admitted in court as **exhibit P2**. He testified further that on their investigation, they received information that there are two people who were staying at Family Guest House spending extravagantly. The informer also told them that one of those people was seen giving a mobile phone to the bar maid. The said bar maid, Tulia Mahenge DW2 was arrested on 05.03.2016 by other police officers and on 06.03.2016 at about 1100hrs, they arrested the Appellant. On 08.09.2016 they called the victims who they recognised two mobile phones one being Tecno Y6 which was used by the Appellant and the second mobile phone was Tecno red in colour which was used by DW2 and it was identified by the other victim. He explained further that other mobile phone among those found with the Appellant apart from those two was identified by another victim on another incident at mount Senjele, Mbozi.

**PW5 F7741 D/C Fulgence**, testified that on 06<sup>th</sup> March 2016 together with **PW3**, they were assigned by the in-charge of investigation to go and arrest a criminal suspect reported to have

committed armed robbery. They were accompanied by **Tulia – DW2**, the person who was found with the stolen mobile phone Tecno black and red in colour. They set a trap and arrested the Appellant at the Family Guest House Room No. 3. He testified further that inside the room, they found the Appellant with one Tecno smart phone- Y6 which he used to communicate with DW2. They also found him with two other Tecno mobile phones, two Itel mobile phones, Huwawei mobile phone and one power bank. They filled in a search warrant **(exhibit P3)** and both the Appellant and DW2 signed the form. He said the Tecno mobile phone was recognised by Erick Patael. The six mobile phones including Tecno Y6 and the power Bank were collectively admitted as **exhibit P2**. He also tendered a mobile phone that was being used by DW2 – Tecno black in colour with red lines which was admitted as **exhibit P4**. Responding to cross examinations question, **PW5** said that the mobile phones found with the Appellant and DW2 are the ones that were stolen at the incident involving armed robbery at Ndalambo area and they were identified by two victims of the said incident.

As alluded earlier, the principles of application of the doctrine of recent possession are cumulative. Going by the evidence of the three police officers above who testified to have received the victims, investigated the matter and arrested the perpetrators, I would easily say that the Appellant was found with the properties. The question now comes as to whether the properties were **positively identified** as the properties of the complainants and they have been recently stolen.

**Baraka Mwakalebela PW1**, was one of the victims who testified before the court that on the night of 12.02.2016 around 0200hrs as he was driving a Fuso coming from Sumbawanga, at Ndalambo he found a car parked on the way and the road was blocked. When they stopped, they were invaded with people carrying axes, pieces of wood and machetes. They hit him with the baton and they stole from him Tshs. 30,000/- and two mobile phones make Tecno, one black, Tecno P5 and another one it was red Tecno small in size. After they left together with other drivers from motor vehicles whom they were also hijacked they went to report the matter at Tunduma police station. They were availed with PF3 which was admitted

without objection at the trial as **exhibit P1**. He testified further that he was called by the police on 08.03.2016 and given his red Tecno phone and told that the same was found with DW2. He admitted not knowing the Appellant.

**PW2, Fredrick Augustino Molel** told the court that on the same night of 12/02/2016 at about 0200hrs while driving a CBC Company truck coming from Sumbawanga to Mbeya at Ndalambo together with other two people in his vehicle, they were also hijacked in the same style as PW1. The bandits took from him Huwawei touch screen phone valued at Tshs. 180,000/- and Tecno phone valued 50,000/-. They also took Tshs. 7,000,000/- cash for the sale of the soda. When they were called by the police on 08.03.2016 to identify their properties, he could not identify his mobile phone. It was however a different story for **PW6 Erick Rafael**. He told the court that while in the same vehicle with PW2, they were invaded and the robbers took Tshs.100,000/- cash from him, Tshs. 7,000,000/- sales money for Pepsi Cola and his Tecno Y6 mobile phone. When he was called by the police on 08.03.2016 to identify his properties, he managed to identify his mobile phone Tecno Y6 which was black in colour. He

said he managed to identify it because there were some marks he had put on the phone including a black cover, a glass protector and on the battery of the phone he marked with **alphabet "E"** with a black pen. He said **mark E** is an acronym for Erick that he had put to protect from theft on charging the phones during travel. He tendered a receipt for the purchase of the phone at Makambako at Seven Eleven Shop in 2015. The receipt was admitted without objection as **exhibit P5**. Responding to cross examination questions he said he showed the police officer his mark and it was the accused who told the police officers that he committed armed robbery at Ndalambo. **PW7, Ignas Rafael Mahundi** a driver who was also a victim on the fateful night of 12.02.2016 said he was robbed Tshs. 70,000/- and his phone Tecno T605 but could not identify it at the police. **PW8 Sikujua Manka** testified before the court that she works as a maid at Family Guest House and on 06.03.2016 at around 1100hrs two men went to ask for rooms. They rented rooms no. 2 and 3. She identified the Appellant in court as one of those people who rented room no. 3 and registered his name as Hashim Silvester. She tendered Family Guest House register book which was admitted

without objection as **exhibit P5**. She explained further that after some time the police came and she escorted them to room no. 3. The said police searched the room while she was there and they found the Appellant with about 6 mobile phones under the pillow and a power bank. She said the police filled in a document which she signed. She also identified DW2 as another person who came with the police. **PW9, Frank Mpaka** testified that he was also another victim of the armed robbery incident that occurred at 0200hrs on 12.02.2016 at Ndalambo Village. He said he was taking his fish from Sumbawanga to Mbeya and those people robbed him Tshs.35,000/- and a Tecno mobile phone black in colour with reddish and silver line. He was also called by the police to identify his phone on 08.03.2016. He managed to identify his phone because it had **mark "F"** at the battery which is an acronym for Frank. He identified a Tecno mobile phone black in colour with red and silver lines in **exhibit P4**.

On his defence, the Appellant (**DW1**) mainly talked about the fact that the case was firstly withdrawn and that he was not identified. He challenged the fact that PW6 said his phone had mark

"E" as not enough identification because there are many black Tecno Y6. He also challenged the receipt – **exhibit P5** for not having a serial number of the said mobile phone. He disqualified the search warrant – exhibit P3 for being strike out and inserted something else. He said **PW8** said she was at the door during the search and that other mobile phones were used as exhibits in another case and the same witnesses appeared in another case. He tendered facts of the case in Criminal Case No. 37/2016 at Mbozi which was admitted as "**exhibit D1**". He advanced a defence of alibi that on 12.02.2016 at around 0200hrs he was sleeping at his house at Singida. **DW2 Tuli Mahenge**, testified before the trial court that he met the Appellant on 14.02.2016 at a bar where she was working. There were 4 customers but she got acquainted with the Appellant and they spent a night together. The Appellant gave her a mobile phone make Tecno and his number. They met again on 03.03.2016 at Tunduma and it was on 06.03.2016 when she was arrested by the police and asked where she got the phone. She said she was given by the Appellant. They trapped the Appellant by calling him and found him at Family Guest House room no. 3. At the Family guest

house, the Appellant admitted knowing her and giving her the mobile phone. DW2 said the Appellant was searched and found with Tecno smart phone in his pocket and some mobile phones under the mattress which had no lines. They asked him about the owner of the phones and responded that they were his. She confirmed that when the search was conducted, PW8 was present and observed the whole search.

Having recaptured the evidence of other witnesses, the question comes as to whether, they were positively proved to be the properties of the complainants and were recently stolen from them.

In recapitulating the evidence in record, I noticed that the trial court numbered some of the exhibits with the same numbers that have already been used. I shall refer to the exhibits by the name of the exhibits themselves to avoid confusion.

In proving as to whether the stolen properties were positively identified by the victims, the case laws go further to require description of the properties by their distinctive mark especially when it comes to the common properties like a Tecno phone in our instant



case. This principle has been well discussed in the case of **Ally Bakari and Pili Bakari v R (1992)** TLR 10 cited case in **James Paulo Masibuka & Amir V. R**, Criminal Appeal No. 61 of 2004 CAT (Unreported). PW4 received the victims of the armed robbery PW1, PW2, PW6, PW7 and PW9 who testified in court on how they were injured and robbed their money and mobile phones by a group of armed people on the night of 12.02.2016. Among the mobile phones that formed the basis of conviction in this case are Tecno Y6 – black in colour which was identified by PW6 and Tecno black in colour with red and silver line which was identified by PW9. PW3 and PW5 investigated the case and by using DW2 they managed to arrest the Appellant. They found him at the Family Guest House alone in room no. 3. They searched him and found him with Tecno Y6 and other six mobile phones under the pillow and a power bank. They filled in a search warrant. The fact that the Appellant was found with the reported stolen properties during the search was supported by the testimonies of DW2 co-accused and PW8, the maid of the Family Guest House who tendered in court the register book. I shall discuss the effect of

the testimony of the co-accused and the pointed challenges of the search warrant.

**PW1** said he identified his phone which was Tecno P5 black and another one red small in size. However, his descriptions are so general and not distinctive as the case law requires considering that the Tecno P5 phone or red Tecno phone small in size are common. **PW2** did not identify his phone and it is the same case for **PW7**. However, **PW6** told the court that when he was called at the police on 08.03.2016, he managed to identify his phone Techno Y6 which according to the evidence on record it was found with the Appellant. He said the reason he identified it is the Mark E an acronym for his name Erick which he has put on the battery to avoid theft during the charging of the same. The issue brought by the Appellant that the Mark E is common and it can be written by anybody, was not brought up during the cross examination of PW6 but the Appellant brought it up during his defence which I find it to be an afterthought. As a general rule, failure to cross examine a witness on important fact implies admission of such fact and one would not bring it later as an afterthought – see the case of **Damian**

**Ruhele V R**, Criminal Appeal No 501 of 2007(unreported). Moreover, there was no reasonable explanation as to how the Appellant came about to have that phone. I am therefore of the firm stance that **PW6** identified his phone which was found in possession of the Appellant in his pocket and it was the one that he used to contact DW2 i.e. Tecno Y6- Black in colour with Mark E. The same scenario was for PW9 who identified his phone Tecno black with red and silver lines which he had put a mark "F" on the battery (exhibit P4). The phones had peculiar marks enough for identification. PW9 also tendered a receipt showing where he bought the said phone. The phone identified by PW9 was found in possession of DW2 who told the court that she was given the phone by the Appellant and it was the reason the Appellant was arrested. The Appellant again did not cross examine PW9 at all, meaning he admitted his testimony.

I am abreast of the position of the law i.e. **section 33 of the Evidence Act, Cap 6 RE 2019** that the evidence of the co-accused requires corroboration for the trial court to rely on it. In this case the evidence of DW2 was corroborated by independent testimonies of PW8, PW3 and PW5.

The Appellant in his defence picked an issue that the receipt tendered by PW9 had no serial numbers. However, looking at the receipt of 17.06.2015, the same is endorsed numbers 3523-8882. The similar numbers form part of item 6 of the search warrant (exhibit P3) which recorded the imei no. of Tecno Y6 to be 3523(8807095)8882. That notwithstanding, as intimated earlier, the Appellant did not cross examine PW9 at all and he did not object when the receipt was tendered into evidence. His contention is therefore an afterthought. On the search warrant, the Appellant said there were other inserted information. It is true that the search warrant was struck off on the name of Sikujua Manka and Silvanus. However, it clear that there was a mistake on the signature appended to the names. Sikujua signed at the place of Silvanus and vice versa. Hence the struck off of the names. Moreover, the signatures are clear and placed before each name. This ground is also baseless.

On the issue that PW8 was at the door, the evidence is clear that PW8 was present during the whole search and she was the one who took PW3, PW5 and DW2 to the room where the Appellant was

staying. Even DW2 confirmed to have witnessed the search. This argument is also baseless.

Again, upon visiting the charge sheet, Tecno Y6 property of Erick Raphael and Tecno the property of Frank Mpaka constituted part of the offence that the Appellant was charged with. The evidence of PW1, PW2, PW6, PW7 and PW9 proves the presence of the incident of armed robbery which was reported at the police on the same night of 12.02.2016 and in less than a month the investigation conducted led to the arrest of the Appellant on 06.03.2016.

On the issue that the same phones were used in another case, I visited exhibited D1, there is nowhere even the names of PW6 and PW9 were listed together with their phones. It just shows that the Appellant was involved in a number of incidences where other phones were also stolen as stated by PW3 in his testimony that they found the Appellant with other phones as well.

The Appellant complained on his 1<sup>st</sup> ground of appeal that there were no weapons tendered. This argument is baseless

because firstly the Appellant was not arrested on the date of the incident; and secondly, there is no requirement of the law that the weapon must be produced. The weapon would add more weight to the case upon proof but the proof that the victims were violently robbed at night was enough to prove armed robbery. Furthermore, the victims were injured and they tendered PF3 to show the injuries sustained.

As for the second ground of appeal that the trial court ignored the defence evidence, it is not true. The trial court evaluated the evidence from both sides. As for the defence evidence the trial court found out that the Appellant did not adhere to the requirement of the law in relying to the defence of alibi. I rightly agree with the finding of the trial court. The trial court also dismissed the argument that the phones were used in another case. I also find that the other phones had no connection with this case hence correctly dismissed by the trial court.

As for the argument that the search was improper because it was conducted by the Detective Constable, I hasten to agree with

the Counsel for the Respondent that the law i.e. under **section 38(1) of the Criminal Procedure Act, Cap 20 RE 2019** a police officer in-charge may authorise any police officer to conduct search. PW3 and PW5 testified that they were instructed by their in-charge to investigate the case, hence had the mandate to conduct the search. As for PF3, the same were correctly tendered by the victims to show that they were injured and reported the matter to the police where they were availed with PF3 and they were treated following the injuries sustained.

On the 7<sup>th</sup> ground of appeal, the Appellant claimed that the trial court believed that he was the one who invaded the victims while they said that there were many assailants. While it is true that the victims said that there were many assailants, but it was the Appellant who was found alone in room no 3 at the Family Guest House as testified by PW3, PW5, PW8 and DW2.

Lastly, the argument that the Appellant was not reminded of his charge during defence, **section 231. -(1) of the Criminal Procedure Act, Cap 20 RE 2019** requires the court to explain the substance of

the charge to the accused and inform him of his right. At page 49 of the typed proceedings, it has been recorded that the accused person was addressed in terms of **section 231 of the CPA, CAP 20 RE 2019**. The Appellant accordingly advanced his defence. Thus, this ground of appeal is unmerited.

All in all, from the above background, I find that the doctrine of recent possession was rightly invoked. I therefore dismiss the appeal in its entirety for being unmeritorious.

Ordered accordingly



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim", is written over a circular stamp that is partially visible behind it.

**R.A. Ebrahim**  
**Judge**

**Mbeya**

**13.09.2021**