

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 174 OF 2020

(Originating from the Resident Magistrate's Court of Mbeya at Mbeya
in Criminal Case No. 143 of 2017)

ALEX S/O DANIEL NZOWA----- APPELLANT

VERSUS

THE REPUBLIC -----RESPONDENT

JUDGEMENT

Date of Last Order: 24.08.2021

Date of Judgement: 12.11.2021

EBRAHIM, J:

Initially, the appellant herein was charged with three counts of armed robbery contrary to **section 287A of the Penal Code, Cap 16 RE 2002 as amended by section 10 of the Written Laws (Miscellaneous Amendment Act) No. 3 of 2011**. It was alleged by prosecution that the appellant on 14th April 2017 at White Giraffe Guest House situated at Stereo area within the City of Mbeya stole

from one Veronica Balama cash and mobile phones worth Tshs. 4,130,000/-, Julieth Mwakikoti cash and mobile phones worth 305,000/- and Christina Msangi a mobile phone worth 1,280,000/-. Immediately before and after stealing from the above mentioned people, the appellant used clubs and machetes to threaten and retain the said properties. In this case, the appellant was found guilty and convicted on the 3rd count and accordingly sentenced to a mandatory sentence of 30 years imprisonment.

The Appellant filed eleven grounds of appeal which are based on the main complaint that prosecution case was not proved beyond reasonable doubt. The complaints are on identification that no one identified the appellant at the scene and that the trial court erred to believe that PW4 sold Samsung J7 (exhibit P1) to the appellant whilst there was no receipt tendered. Other complaints are that the appellant was not arrested with the weapon alleged to have been used during the commission of the offence; cautioned statement was not tendered; PW2 did not produce receipt of ownership and that the trial court was biased. The appellant

complained also that the trial court did not adduce reasons for the decision and that defence evidence was disregarded.

In this appeal, the appellant appeared virtually in person whilst in Ruanda prison and the respondent was represented by Ms. Xaveria Makombe, State Attorney.

Submitting in support of the appeal, the appellant prayed to adopt his grounds of appeal and for the court to consider his appeal.

Ms. Xaveria opposed the appeal and argued the 1st, 2nd, 8th, 9th and 10th grounds of appeal together on the complaint that the case was not proved beyond reasonable doubt. She contended that on all three counts that the appellant was charged with, one Christina Msangi explained how she was invaded and her mobile phone Samsung J7 was stolen. She argued therefore that it was the phone that connected the appellant with the crime after being traced through mobile networks. On that, the appellant sold the phone to PW4 witnessed by PW5. She contended further that PW4 admitted before PW3 to have committed the crime.

Responding on the defence by the appellant, she said that the appellant only raised the defence of alibi but did not explain how he came to have the contact with the phone. She contended further that the appellant was not identified at the crime scene but was found with the stolen property without explanation. Responding further that there was no receipt of sale, Ms. Xaveria said that PW4 and PW5 said the appellant promised to bring a receipt. She responded also that the appellant was not found with the weapon because the incident occurred on 14.04.2017 and the appellant was arrested on 01.06.2017. Citing the case of **Dawson Athanaz V R**, Criminal Appeal No. 285 of 2015, pg 12-13, she said that a person must explain how he came to have the stolen property otherwise he is assumed to be the perpetrator. She further referred to the case of **Martin Misara Vs The Republic**, Criminal Appeal No. 428 of 2016 pgs 7-9, in stressing a point that a defence raised by the appellant that the case was planted on him was an afterthought as he did not cross examine PW3, PW4 and PW5.

On the issue pertaining to oral confession, she cited the case of **Geoffrey Sichizya Vs DPP**, Criminal Appeal No. 176 of 2017. She also

cited the case of **Goodluck Kyando Vs R**, [2006] in arguing that no number of witnesses is required to prove a fact at issue. She contended also that in proving ownership, the victim explained how the phone looks like. He finalized by saying that the defence evidence was considered at pg 14-18 of the judgement. She prayed for the appeal to dismissed.

Re-joining briefly, the appellant stated that there was no print-out to confirm that he used the phone and that the phone mentioned by the witness is different with what was brought in court. He said the phone brought in court was Samsung Galaxy with a broken screen.

I have gone through the rival submissions as well as the grounds of appeal. It is clear that the conviction of the appellant was pegged on the doctrine of recent possession. The trial magistrate found out that the appellant was found in possession of the stolen mobile phone make Samsung J7 (**exhibit P1**) hence connecting him directly with the charged offence of armed robbery. Therefore, in

this case there is no issue of identification as claimed by the appellant on his 3rd ground of appeal.

Thus, the bone of contention here 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 10 to 15 of the typed judgement made a finding that the Appellant was mentioned by PW4 one Ezekia Ngoya who was found with the stolen mobile phone make Samsung J7. While PW4 managed to give explanation as to how he got the phone, the Appellant could not give any defence on how he obtained the said phone.

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: -

*"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, on 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 PW1, PW2, PW3, PW4 and PW5 would shade some light.

PW1, Rose William Mwajunga, Guest House attendant, testified at lengthy that on 14.04.2017 while at White Giraffe Guest House they were invaded by robbers around 0400hrs. She said there were about five people and they masked. They stole properties of the customers who had come from Dar Es Salaam for Church matters. Together with the victims and their boss, they reported the matter to the police where they were interrogated. Her testimony matched with the testimony of **PW2, Christina Msangi** was among those visitors coming from Dar Es Salaam. She testified that on 14.04.2017 at around 0310 hours people kicked the door to her room at White Giraffe Guest House cut the mosquito net with a panga, beat her and forced her to give them money. She told them she had no

money and she took them to reception where money is kept. Eventually those people left with her mobile phone make Samsung J7, black in colour with Tigo line no. 0655808430.

PW3, D5517 D/sgt Daniel, works at Cyber Crime department and in charge of anti-robbery department testified that on 15.04.2017 in his investigation traced the cell-phone of one of the victim that was stolen during the raid. The make of the said cell-phone was Samsung 7 with **IMEA No. 858011507408060** and it read that it was being used by a person with mobile no. 0753112400 and the sim card was registered to Alex Nzowa (PW4). He said it showed that the said cellphone was available at Itepula- Igamba, Mbozi District. He testified further that the said cell-phone was used by that person until end of April when the sim card changed to Vodacom number 0755175170 registered to Ali (PW5) of Itepula –Igamba –Mbozi District. After five days the sim card changed again to a Vodacom number 0769313471 registered to Ezekia. A trap was made Ezekia and Ali were apprehended and told the police that Ezekia bought the phone from Alex Nzowa, the appellant. He said that the appellant admitted to have invaded a Guest House with his colleagues and

robbed mobile phones among other things. I would address the issue of oral confession to the police later. **PW4, Ezekia Ngoya**, in his testimony said he knows the appellant as a fellow youngster in their village. At the end of April 2017, he sold him mobile phone Samsung G7 black for Tshs.100,000/- and the transaction was witnessed by Ali, (PW5). PW4 (076213471) had no small chip therefore Ali started using the phone to test it and after five days, PW4 obtained a small chip and continued to use the phone until they were arrested. He said he bought the mobile phone because the appellant told him that it was his phone and he promised to bring a receipt. **PW5, Ali Mwamwezi** testimony corroborated the testimony of PW4 that after PW4 bought the phone from the appellant, he put his sim card as PW4 had no small sim card. His mobile number is 0755175170 as mentioned by PW3 as per his investigation. He testified further that after PW4 bought the phone, the appellant promised to bring the receipt but he did not. He testified also that after being apprehended by the police they looked for the appellant and when they found him they notified the police who apprehended him.

As intimated before, the principles of application of the doctrine of recent possession are cumulative. Going by the evidence of the five witnesses above i.e. PW1, PW2, PW3, PW4 and PW5 I would easily say that the Appellant was found with the said mobile phone. The above testimonies of the witnesses' state clearly how after investigation by PW3, the stolen mobile phone said to be the property of PW2 was found with PW4 who had explanation as to how the said cell-phone came into his hands. The acquisition of the said phone was corroborated by PW5.

The question now comes as to whether the mobile phone was **positively identified** as the property of PW2 and that it has been recently stolen.

PW2 in her testimony said that on the fateful day the robbers took her cell-phone Samsung J7 black in colour. She said the phone had a Tigo line no. 0655808430. When they reported the matter to the police, the cybercrime department traced the said phone and discovered that it has **IMEI No. 858011507408060** which he later gave an explanation on the mistake on reading that the actual IMEA

numbers are 358015/07/**408040/5**. PW3 said that he could not properly see number 3 which he thought as 8 and he saw number 1 as number 11. However, from the explanation and correction what would have been expected is that the correct number would read 358015/07/**408060** and not **358015/07/408040/5**. The difference in the last numbers is so conspicuous and no explanation offered. The mobile phone that was found with PW2, its last seven digits did not match with the numbers said by PW3. The question now comes, could the said Samsung Black J7 with the said IMEA No belong to another person? When PW3 was cross examined by the appellant, he said that he requested the IMEA No. from the mobile phone number of PW2 from Vodacom. He said Vodacom told him that the said cell-phone was being used by a certain number. He did not say what was the exact number that he was given by Vodacom with **IMEA No. 358015/07/408060**. He also responded in cross examination question that the first line to be used in the stolen mobile phone was 0753112400 and according to his testimony that mobile phone used had **IMEA No. 358015/07/408060** (which he previously mistaken as IMEA No. 858011507408060). In considering that there were no other

salient features that were offered by PW2 on her phone apart from being black in colour and Samsung J7, IMEA No. 358015/07/**408060** is quite different with IMEA No. 358015/07/408040/5 which was the correct version as per PW2's testimony and said to be found with PW4. I can certainly say here that, there was no positive identification of the said stolen property as the property of PW2.

The evidence shows that the appellant sold a mobile phone to PW4 which going through the evidence of DW1, he had no explanation of how it came into his possession. However, the same prosecution evidence shows that the phone found with PW4 does not have IMEA No. said to be the property of PW2. In short, the IMEA Nos. are different. In applying the principle as per the cited cases of **Joseph Mkumbwa & Another V Republic** (supra) and the case of **James Kisabo@Mirango**, it must be proved that the property was positively identified and it was recently stolen. Following the fact that the IMEA No. of the mobile phone of PW2 as read in the Court are different from what PW2 said he was given by Vodacom from the respective PW2's phone. Thus, as per the principle set by the case law, exhibit P1 was not positively identified as the property of PW2

and it cannot prove that it was recently stolen. Whatever mobile phone that was sold to PW4 could as well be stolen but so far there is no complainant and it does not constitute the subject of the charge against the appellant to be linked with the third count that he was charged with. That being said, prosecution have failed to prove the offence under the doctrine of recent possession against the appellant. Further, the position of the case law as stated in the case of **Alhaj Ayub @ Msumari & Others V R**, Criminal Appeal No. 136 of 2009 (Unreported) is 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 drawn inspiration from the quoted position of the Court.

Counsel for the respondent has insisted that the case was proved through oral confession of the Appellant to PW3. She relied on the case of **Godfrey Sichizya Vs DPP (supra)** and argued that oral confession can be used to form a conviction. The same position was also taken by the trial court. Nevertheless, the circumstances of the

cited case are distinguishable with the instant case on the basis that in the cited case, the Appellant was said to have had confessed before a civilian, PW1. However, as for the testimony that the accused admitted the offence before PW3, the law requires that since PW3 was a police officer, unless he had tendered the cautioned statement of the accused, the contents of the Appellant admission would not be orally admitted in court. Once the accused admits the offence before the police officer, the provisions of **section 57(1) and (2) of the Criminal Procedure Act, Cap 20 RE 2019** requires the said police officer to immediately reduce such admission into writing. This position has been extensively illustrated by the Court of Appeal in the case of **The DPP V Sharifu Mohamed@ Athumani and 6 Others**, Criminal Appeal No. 74 of 2017 when discussing the similar situation and cited with approval the case of **Mashaka Pastory Paulo Mahengi@ Uhuru and 5 Others V Republic**, Criminal Appeal No. 49 of 2015 (unreported). The Court of Appeal held that:

From the above position of the law, PW3 cannot give evidence as to the admission of the offence by the Appellant unless after he had tendered the cautioned statement of the accused and the

same was admitted into evidence. In the circumstances therefore, I expunge from the record the testimony of PW3 on saying that the Appellant admitted to have robbed the Guest House with his colleagues.

On the other hand, I would have no difficulty in disbelieving the appellant's defence of alibi like the trial court because the same did not defeat PW4 and PW5 testimonies. However, the same would be true if prosecution would have managed to prove the stolen property as the property of PW2 which has been recently stolen and forms subject matter of the charged offence.

From the above, I find that the doctrine of recent possession was not rightly invoked. I therefore allow the appeal and order appellant's immediate release from prison unless otherwise lawful held.

Ordered accordingly




R.A. Ebrahim
Judge

Mbeya

12.11.2021