THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(MOROGORO DISTRICT REGISTRY)

AT MOROGORO

CRIMINAL APPEAL CASE NO. 20/22 OF 2021

(Arising from Criminal Case No. 193 of 2019, the Resident Magistrates' Court of Morogoro at Morogoro)

ONESMO DADI NDISAEL ..... 1ST APPELLANT

BRIGHT ISMAIL HELLA.....2ND APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

Hearing date on: 29/03/2022

Judgment date on: 20/06/2022

NGWEMBE, J.

The appellants **ONESMO DADI NDISAEL** and **BRIGHT ISMAIL HELLA** are in this court appealing against their conviction and sentence meted by the trial Resident Magistrate's Court of Morogoro. The two were jointly charged for the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16, R.E. 2002 R.E 2019.

According to the charge laid before the trial court, it was alleged that on 18th December, 2017 at Togo area within Ulanga District in Morogoro region, the appellants robbed Cash money of TZS. 10,450,000/=, 18 parcels of different minerals valued at **USD 5,048**/=,

NMB ATM card with account No. 21910004710, driving licence with serial number 4004369212, Identity Card of Zahera College, two mobile phones make of iPhone 55 Gold and iPhone 65 both valued at TZS. 1,500,000/=. All properties were valued at TZS. 11,950,000/= being the properties of Mohamed Arshath Cassim and Mohamed Saleeth. Immediately before such robbery, the appellants threatened Mohamed Arshath Cassim and Mohamed Saleeth with fire arm in order to obtain the said properties.

Having so arrested they were arraigned in court and charged for armed robbery, at the end of trial, they were convicted and subsequently sentenced to mandatory statutory imprisonment of 30 years. The trial court proceeded to make orders on the exhibits P16, P17 and D1 that should be reverted back to PCCB. Exhibits P18, P19, P20 and P21 were ordered to be returned to Regional Crimes Officer (RCO), while Exhibits P5, P11 and P18 were returned to PW2 (the victim), but P3, P4 and P8 were returned to the appellants.

The appellants were aggrieved by both conviction and sentence, hence filed this appeal. Though the respondents were amused by the conviction and sentence of the appellants, which they supported through out, yet they were aggrieved by the trial courts order dismissing their prayer for confiscation of Exhibit P3 (the Motor vehicle make Alteza bearing registration No. T 595 CFX and the order that, Exhibit P4 and P8 (money found in possession of the appellants) should be returned back to the appellants. For that reason, they filed a Cross Appeal. The appellants grounds of appeal are paraphrased as follows:-

1) The particulars of offence stated in the charge sheet varies with the evidence on record;

i) The Value of the minerals and money alleged to be stolen in the evidence differs with that in the charge sheet.

ii) Some items like wallet and 4 business cards alleged to be stolen from PW2 were not indicated in the charge sheet.

iii) The name of the second victim in the charge differs from the name mentioned by PW2 in evidence.

2) Admission of Exhibits were unprocedural;

i) Exhibits P22, P23, P24 and P25 were admitted before resolving the issues raised in objection.

a) Exhibits were tendered illegally by the prosecutor himself (Exhibits P4 and P5) and the prosecutor and Witness (P15 – 22).

ii) Exhibit P5 (NMB ATM Card, driving licence, 4 business cards and College ID) were not read out after admission.

3) The doctrine of recent possession was wrongly invoked.

a) No evidence that the 1st appellant was found in possession of the items.

b) Appellants did not sign on the certificate of seizure.

c) No independent witness witnessed and testified before the court.

d) PW1, PW2 and PW7 contradicted themselves regarding search and seizure.

e) The jacket alleged to be worn by the 1st appellant was not admitted as exhibit.

f) Items said to be found in the car used by the 1st appellant and not in the 1st appellant's jacket pockets

g) Chain of custody of the stolen items was not established.

4) Visual identification was not watertight;

a) Victim (PW2) did not mention prior description of the appellants at his first report to police officer during interrogation.

b) It is unknown how PW2 managed to identify the appellants when they were arrested, because the appellant's car was flashing towards the police vehicle and PW2 was boarded into it. Another victim was not called to testify.

c) The size of the sitting room, dining room and bedroom of PW2's house was not revealed for the trial court to gauge the light.

d) The distance between the source of light and the appellant also the intensity of the light was not revealed.

e) No cogent evidence that a person who went to PW2's home on 15 & 16 Dec, 2017 was the appellant.

5) The trial court noted that some points were not proved beyond reasonable doubt at pg. 26 to 29.

a) No connection showing money seized from the appellants was part of PW2's money.

b) No evidence that a Pistol Baretta (P16), Shotgun (P17) and cartridges seized at scene of crime are related.

c) In respect of seizure of 18 packets of minerals, there was doubt in favour of the appellants.

d) PW1, PW2 and PW7 contradicted each other on the seizure of the brown envelope in 2nd appellant's room.

6) Prosecution evidence was incredible and unreliable and contradicted between examination in chief and Cross examination;
    a) PW1 (Hassan Selengu) in examination in chief testified that he seized two cartridges at the scene; one of Shotgun and for Bunduki ndefu. While in Cross examination he said he seized three; one of SMG and two of pistol.
    b) PW9 (Chacha Kehita) stated that two guns (Pistol Beretta and Short gun) were handed to the appellants on 18/12/2017, while in cross examination he stated that pistol beretta and short gun were handled to him by PW4 (Gasper Balyomi) on the same date 18/12/2017 of alleged incident.
    c) PW2 (victim) contradicted himself between what was written in his statement and cross examination on the clothes worn by the assailants who invaded him.
    d) PW2 admitted that he didn't know Kiswahili language and was adducing his evidence in English, but in cross examination he admitted that the statement at the Police Station was recorded in Swahili language and he does not understand what was written.
    e) PW13 contradicted himself as to what was found in the appellants' houses during search and seizure as reflected in the seizure certificate in respect of Exhibits P6 and P7.

7) The owner of the money, minerals and other items alleged to be stolen were not proved.
8) No document was tendered to prove ownership of 18 packets of minerals, stolen money, Iphone 5 and Iphone 6 alleged to have been stolen from PW2's home.

9) Crucial prosecution witnesses did not tender their evidence and thus the prosecution case was fatally affected.
    a) Mohamed Saleeth.
    b) Motorcyclist alleged to be the first person to reach the scene and talk with PW2.
    c) OCD of Ulanga District who gave order to PW1 (OCCID).
    d) Shafii whom by then was at Dar es salaam but phoned PW7 and ask him to go at Mohamed Cassim's home.
    e) One Baraka who signed as independent witness when the appellants were searched at arresting place.
    f) Director of Shafii Gems Co. Ltd one Mr. Haisham who is said to have reported the matter to police.
    g) An expert of mineral field to testify if the minerals that were tendered are the same as that brought to him for examination and evaluation.

10) There were material contradiction and inconsistence between prosecution witnesses.
11) Chain of custody of exhibits was not established as per Order 229 of the PGO.
12) The prosecution failed to prove the case beyond reasonable doubt.
13) The trial court's judgment violated section 312 (1) of The Criminal Procedure Act, Cap 20, R.E 2019; for lack of analysis and evaluation of the evidence while disregarding the appellants' defence.
14) That the trial court did not comply with section 210 (3) of the Criminal Procedure Act, Cap 20, R.E 2019.

Basing on the above detailed grounds of appeal, the appellants prayed before this court to allow their appeal and set them at liberty. Also, in their joint petition, they exhibited the intention to appear in court on the hearing of their appeal.

As there was a cross appeal registered as Criminal Appeal No. 20 of year 2021. On 23/03/2022 when the case was called for hearing, the learned State Attorney, prayed the two appeals be consolidated, which prayer was consented by the two appellants, hence the two appeals were consolidated into Criminal Appeal No. 20/22 of 2021.

The Cross Appeal by the Republic comprised two grounds; one, the trial court erred in fact and in law in not holding that exhibits P3 is an instrumentality of crime and hence, liable to forfeiture. Two, the trial court erred in fact and in law in holding that there is no evidence that exhibit P4 and P8 were stolen monies.

On the hearing date of this appeal, the two appellants were unrepresented, while the Republic was advocated by Mr. Edgar Bantulaki, learned State Attorney. In arguing the appeal, the first appellant basically, reiterated what was comprised in a detailed joint petition of appeal, while abandoning ground 14. The Second appellant supported the submission by the 1st appellant.

To recap the appellants' arguments on their grounds of appeal, on the first ground, they argued that, the charge laid before the trial court was not supported by any viable evidence. Specified that, the charge did not specify the type of minerals which were stolen in 18 packets. PW1 at page 42 stated that the minerals were worth TZS. 11,600,000/= while the charge sheet mentioned different value of TZS. 7,000,000/=. The

charge sheet indicated a total amount stolen were TZS. 10,450,000/= while PW2, who was the victim, testified that, the stolen amount of money was TZS. 10,600,000/=(page 67 – 68 of proceedings).

He went further to point out that, PW1 mentioned wallet, business cards and envelope with TZS 30,000/= as among things stolen, but same were not mentioned in the charge sheet. The owner of the properties stolen, on the charge is mentioned as Mohamed Asrat Kasim and Mohamed Sareet, while PW2 at page 67 mentioned Shaffi Gemstone, then asked a valid question of who was the owner among them.

Rightly, the appellants rested in this ground by insisting that, the charge sheet is the cornerstone of any criminal trials. Went further to refer this court to section 234 of Criminal Procedure Act and substantiated it by referring to criminal case of **Salum Ally Kivuke & Another Vs. R, Criminal Appeal No. 59 of 2021; Mashalla Njile Vs. R, Criminal Appeal No. 179 of 2014;** and **Thabit Bakari Vs. R, Criminal Appeal No. 73 of 2019.**

In arguing the second ground, the appellants submitted that exhibits P22, P23, P24 and P25 were wrongly admitted as per pages 118- 124 of the proceedings. Exhibit P5 was tendered by the prosecution instead of a witness and was not read loud in court. Also Exhibits P15, 16 and P22 were tendered both by the prosecutor and a witness. Thus, referred to section 169 of the Criminal Procedure Act, Cap 20 RE. 2019 that it was violated. Thus, prayed same be expunged. Strengthening his argument, by referring this court to the case of

Godfrey Masabu Kabambu Vs. R, Criminal Appeal No. 93 of 2017 (page 22 -24) and others.

Regarding the third ground, the appellants argued that the doctrine of recent possession was wrongly invoked by the trial court. Certain ingredients of the doctrine of recent possession were not established including the fact that the stollen property should be found with the accused and the property must constitute a charge. They denied that those properties were not found with the appellants' possession, while the search was not properly conducted. Supported their argument by referring to the case of **Eluminatus Mkoka Vs. R, [2003] TLR, and Paul Maduka & Others Vs. R, Criminal Appeal No. 110 of 2007**

In establishing ground four, the appellants contented that there was no proper identification of the appellant on the scene of crime during that night. Insisted that PW2 did not mention the appellants' names at the earliest possible time and that the first persons to arrive at the scene of crime were PW1, PW7 and PW8 but there was doubt on their credibility. They referred this court to the good number of cases including the case of **Marwa Wangali Vs. R. [2002] TLR 39.**

In respect to ground Five, he argued generally that, the case was not proved beyond reasonable doubt as the trial court's judgment at page 26 - 27, was found that the money found with the appellants had no connection to the offence and seizure of gemstone was doubtful.

In ground six, the appellant compered the evidences of PW1 in respect to bullets from short gun and SMG while seizure note indicated

three bullets. Also, the evidence of PW9 testified that those guns were handled over to the two appellants on 18/12/2017.

Submitting on ground seven and eight, the appellants referred this court to the case of **Faustine Kasusura Vs. R, Criminal Appeal No. 175 of 2010** in respect to ownership of the stolen properties.

Arguing on ground nine, the appellants pointed out on the failure of the prosecution to call material witness like Mohamed Salit who was mentioned in the charge sheet, Motorcyclist, Shaffi, Baraka and expert of minerals. He reiterated the content of ground nine of the petition that the prosecution failed to call important witnesses and went on to mention those persons. Again, he cited the case of **Hemedi Saidi Vs. Mohamedi Mbilu [1984] TLR. 113; and Azizi Abdallah Vs. R, [1991] T.L.R 71.** among others.

Arguing on ground ten, pointed on inconsistences in the prosecution evidence like the evidence of PW1 was inconsistent with PW2, PW7, PW8, PW10, while PW10 contradicted with PW12 and PW5 and PW8 contradicted PW7. He cited the case of **Ally Miraji Mkumbi Vs. R (supra).**

Submitting on ground 11 they challenged the prosecution that they did not establish the chain of custody of exhibits that were tendered and admitted in court during trial. Pointed that generally the chain of custody was not followed to all exhibits like production of exhibits register numbers. They referred this court to the case of **Paul Maduka Vs. R, Criminal Appeal No. 110 of 2007, CAT, Dodoma.**

He observed that ground twelve was similar to ground 5, which was already argued and went on to submit on ground thirteen that, the trial court considered only the evidence of five witnesses, while disregarded the evidences of other witnesses and the defence evidence was not properly considered. They cited the case of **Amiri Mohamedi Vs. R [1994] TLR. 138** along with others.

Ground fourteen was withdrawn and proceeded to pray for this court to consider all their grounds of appeal, allow the appeal and let them free.

In turn the learned State Attorney Mr. Edgar Bantulaki strongly resisted the appeal by disputing all grounds of appeal and the appellants long and exhaustive submission as irrelevant and unfounded. Proceeded to argue jointly on grounds one and two. Submitted that the appellant tries to challenge the viability of the charge sheet with several authorities but all of them are irrelevant and distinguishable to the appeal at hand.

Went further to argue that in the charge sheet some of the stolen items like business cards were not mentioned, but they are not material. On procedural irregularities in admitting some exhibits, the learned State Attorney, admitted existence of minor irregularities, which caused no injustice to the appellants and never went to the root of the matter. Pointed that exhibit P5 was tendered by a witness as opposed to the allegations of the appellants that same was tendered by a prosecutor.

On procedural irregularity as rightly argued by the appellants, he responded as misconceived because none of them resulted into miscarriage of justice. Even the allegations of not reading loudly the

documentary evidences tendered in court were irrelevant argument because those documents were bank card and driving license. Also, the appellants knew their contents for they defended on them.

The learned State Attorney further conceded that P22, P24 and P25 were admitted during trial, but the trial court did not consider them in the judgement. However, he overruled that ground because the appellants' conviction was not based on those exhibits only, and that there was no miscarriage of justice.

Replying on the doctrine of recent possession and proper identification of the appellants, he insisted that, those facts, led the trial court into conviction of the appellants. Added that the appellants were found in possession of P5 recently stolen from PW2. He referred to the famous case of **Ally Bakari and Pili Bakari Vs. R [1992] TLR. 1.** Further argued on the seizure note, which was not signed by the appellants, but was signed by PW7 an independent witness. Also, PW1 testified on why the appellants did not sign on that seizure note. More so, the appellants did not object on its admissibility when same was tendered in court. The appellants admitted to have found in possession properties recently stolen.

Arguing on identification of the appellants, the State Attorney submitted that they were sufficiently identified and the principles in **Waziri Amani Vs. R [1980] TLR. 250** were adhered to. The witnesses explained all factors leading into proper identification, like intensity of light, proximity between the appellants and the witnesses and time spent by the appellants who were known, and the first appellant went to the victim twice before the event, so there was no

possibility of mistaken identity. PW2 did not know the name of the appellants, but he pointed them when they were stopped by police.

On the issue of contradiction of evidences, the learned State Attorney observed as minor, not material to the prosecution case.

On failure to call material witnesses, he discredited that contention as immaterial because even if they would call them yet no additional evidence they could give and one of the mentioned witness was outside the country and his evidence was similar to that of PW2.

Arguing on the chain of custody, Mr. Bantulaki held a stance that the prosecution produced all witnesses involved on those exhibits. Again, some exhibits, like P5 could not change hands easily. On the issue of ownership, he argued that PW2 testified that, he was the owner of the properties stolen by the appellants. He then prayed this appeal be dismissed and he craved leave of this court to argue on Cross appeal.

Arguing on the first ground of cross appeal, the trial court erred when it ruled that P3 (a motor vehicle make Toyota Alteza) was not instrumentality of crime, therefore, should not be confiscated, while the prosecution had successfully, established that the appellants used P3 to commit crime and to flee from the crime scene. Referred to the testimony of PW1 who proved that the appellants were found with recently stolen properties hidden in their car. PW1 testified that the appellants used that car to run away from police until when were blocked on a road. Thus, P3 was used to commit the offence, hence should be forfeited.

Submitting on the second ground that the trial court erred to rule that P4 and P8 (monies found in possession of the appellants) were not monies recently stolen, while the court applied the doctrine of recent possession to convict the accused/appellants. Urged that the trial court ought to rule that P3, was instrumental to the commission of the offence and the monies (P4 & P8) as among properties recently stolen, same be reinstated to the victim (PW2). Rested by a prayer that the cross appeal be allowed.

In rejoinder, the appellants reiterated to what they submitted in chief, Insisted, that in criminal trials, the cornerstone is a charge sheet. Failure to prove the charge sheet means failure to prove the case beyond reasonable doubt. Prayed to this court to find the appellants innocent and put them in liberty. Also said the chain of custody was not fully followed.

Responding on cross appeal, the appellants advanced time limitation of the notice issued by the Republic contrary to section 361 (1) (a) of CPA. Added that, the notice of appeal was issued on 27/9/2021 while the judgement was delivered on 3/9/2021. Thus out of statutory time required to issue notice of intention to appeal.

Prior to determination of grounds of appeal, which were exhaustively argued by both sides, it is appropriate to dispose of the issue of competence of the Cross Appeal as raised by the appellants. The appellants argued that the notice of appeal issued by the Republic was out of time contrary to section 361 (1)(a) of Criminal Procedure Act. It is true, that notice of appeal in all criminal appeals are regulated by section 361 of CPA, which provide time frame of ten (10) days from the

date of delivery of the judgement, notice must be issued otherwise, an application for extension of time must be sought from a competent court of law.

However, appeals by the Republic through the Director of Public Prosecution are brought under section 378 of CPA and time limitation is set out under section 379 of the same Act. The law is clear like a brightest day light disencumbered by any cloud that time limitation for the DPP to issue notice is thirty (30) days from the date of judgement.

For clarity the section is quoted hereunder:-

Section 379 (1) (a) (b) *"Subject to subsection (2), no appeal under section 378 shall be entertained unless the Director of Public Prosecutions or a person acting under his instructions –*

(a) has given notice of his intention to appeal to the subordinate court within ***thirty days*** *of the acquittal, finding, sentence or order against which he wishes to appeal and the notice of appeal shall institute the appeal; and*

(b) has lodged his petition of appeal within ***forty five days*** *from the date of such acquittal, finding, sentence or order; save that in computing the said period of forty five days the time requisite for obtaining a copy of the proceedings, judgment or order appealed against or of the record of proceedings in the case shall be excluded."* ***(emphasis is mine)***

This section overrules the contention of the appellants on the competence of the Cross Appeal for the notice of cross appeal was filed within time and the cross appeal is valid and kicking before this court.

Considering the grounds of appeal, since they are many, I am determined to decide whether the appeal has merit or otherwise. In so doing, I will treat related grounds jointly, these are grounds 5 and 12 (proof beyond reasonable doubt), grounds 7 and 8 (proof of ownership of the stolen property), and grounds 6 and 10 (inconsistence and contradiction of the prosecution evidences), the rest will be considered separately. In so doing justice will be done to every ground raised by the two appellants. Also I will consider separately on grounds of appeal raised by the Republic in cross appeal.

The gist of the first ground is related to testimonies of the prosecution witnesses which failed to prove the preferred charge against the appellants. Considering on the alleged contradictions on the value of minerals. It is in the charge sheet that the value of minerals were paged into USD 5,048.00 as opposed to TZS. 7,000,000/=. The appellants contended that that minerals were valued to TZS. 7,000,000/= while the charge provided its value was in USD. The evidence of PW2 was in terms of estimated price, which in my view would not in any way be obliged to tally with what the minerals expert has established and same was put in the charge sheet. Therefore, this point was misconceived.

Further, as rightly submitted by the appellants, the wallet and four business cards were not listed among the properties stolen and the name of the second victim in the charge is Mohamedi Saleeth, while the PW2 named him as Mohamed Muadh – Mohamed Saleeth. It is common in many societies; one person may have more than two names.

Even the variance of the amount of money as testified by PW2 that the money stolen was TZS. 10,600,000/= or TZS. 10,400,000/=

among other things as per pages 67 and 68 of the proceedings are minor variances, which did not bring any prejudice to the appellants. The law is clear, minor variations may be ignored unless they touch the root of justice and bring prejudice to either side. This position was well stated by the Court of Appeal in the case of **Sylivester Stephano Vs. R, Criminal Appeal No. 527 of 2016, (CAT Arusha).**

In determining the package of grounds of appeal as provided above, this court has thoroughly gone through the proceedings with a view to grasp the essence of those grounds. I have clearly observed that, when PW10 prayed to tender exhibit registers, the defence counsel objected on the ground that they were photocopies. The objection were argued vigorously by both parties but at the end the trial court ruled *"Having heard the submission made on the objection raised", the said registers is admitted as exhibit P22 & P23"* also the trial court repeated when admitting exhibits P24 & P 25, then proceeded to rule *"however the ruling of this court on the objection raised shall be addressed at the time of evaluating the evidence in record"* Unfortunate, may be by human error, the trial magistrate overlooked to go back and evaluate those objections, when she was composing the court's judgement. I am certain that was an error committed by the trial court. Since the four exhibits were objected but no reason was provided for overruling them, same must be expunged from the record. Accordingly, I proceed to expunge exhibits P22, P23, P24 and P25 for failure to give reasons for overruling those objections.

In regard to exhibit P5 which were black wallet, NMB card, College identity card, driving licence of Zahera College and 4 business cards. All were collectively admitted unopposed as exhibit P5. The appellants of

those cards. Undoubtedly, the law is settled that any documentary evidence tendered in court for court use its contents must be read over loudly. The rationale is to make the accused aware of its content and be able to make proper defence. This position is supported by various precedents including the case of **Robinson Mwanjisi & Others Vs. R, [2003] TLR. 218**. Failure to read out documentary exhibits, such documentary evidence should be expunged.

However, in this appeal the question is whether ATM Cards (Bank card), Driving licence and College ID Card together with business card are documents capable of reading their contents? I have a different view, the nature of exhibits P5 were not required to be read their contents. Obvious, the appellants were fully aware of the contents of Exhibits P5 and were sure that those bank card, driving licence, college ID and business card were not theirs. Thus, no prejudice occasioned to them for not reading their contents.

Equally important to answer the issue rightly raised by the appellants on who tendered exhibits P4 & P5 in court? In answering this issue, I have gone through the hand written proceedings at pages 33 - 41 and found that Exhibits P4 and P5 were actually tendered by PW1 himself but the typed proceedings read otherwise. Since the handwriting proceedings is the original record, then I find no error was committed by the State Attorney. Usually, the prosecution prays for leave of the court to show the witness with the intended exhibit for identification, then after identifying it, the witness proceeds to tender it in court. If there is an objection therein from defence counsel, may do so at that juncture. I know as an ordinary State Attorney may repeat the prayer made by the witness in tendering that exhibit. That alone cannot be said that the

State Attorney tendered the said exhibit. I am well aware on procedural rules that they were made to be followed, but if courts become obsessed on procedural compliance even on minor and trivial procedures, there is a danger of missing the ends of justice, which is the core business of our courts. Having so said, this ground is dismissed forthwith.

The third ground as previously glanced at, is challenging the invocation of the doctrine of recent possession. The appellants believe that the doctrine was wrongly invoked by the trial court because the ingredients were not complete. I have considered some of the legal authorities cited by the appellants on this point. Those authorities contain proper statements of law.

The nature of the doctrine of Recent Possession is that an unexplained possession by an accused person of the fruits or instrumentalities of crime recently after the commission is presumed a thief of the recently stolen item but found in his possession.

There are certain principles which must be proved before invoking the doctrine. First, the property involved therein must be found with the suspect and be positively identified. Second the possession must be recent depending on the nature of the property, surrounding circumstance and the property (thing) stolen; third, the property must be properly identified by the complainant who allege to have been stolen; fourth, the thing recently stolen must constitute the subject of the charge (the list is not closed). This court and the Court of Appeal have endeavored to expound this doctrine in many authoritative precedents. For instance, the Court of Appeal in the case of **Joseph**

Mkumbwa and another Vs. R, Criminal Appeal No. 94 Of 2007, CAT (Mbeya), held:-

"The position of the law on recent possession can be stated thus, 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 a basis of conviction, it must positively be proved, ***first*** *that the property was found with the suspect,* ***second,*** *that the property is positively the property of the complainant;* ***third*** *that the property was recently stolesn from the complainant; and* ***lastly*** *that the stolen thing in possession of the accused constitutes the subject of a charge against the accused"*

The gist of this doctrine from different perspectives can be referred to from **Mussa Hassan Barie and another Vs. R, Criminal Appeal No. 292 Of 2011, (CAT, at Arusha); DPP Vs. Joachim Komba [1984] TLR 213; and Samson Mzamani Vs. R [2002] TLR 79** among other decisions.

In this appeal, the appellants were arrested just an hour after the commission of the offence. Among properties found in their possession were ATM Cards, driving licence and college Identity cards which were positively and properly identified by the owner PW2. Search and seizure were conducted by police and witnessed by PW7 one Said Mohamed Almas, PW1 and PW2 respectively. It is on record that upon arresting the appellants, they had no explanation of how those properties came to their possession immediately after being stolen. Even in their defence

they failed to deny being found with those properties recently stolen. I think justice should be done and seen to be done to the appellant for being found with recently stolen properties. Therefore, I have no iota of doubt, the trial magistrate rightly applied the doctrine of Recent Possession in this case. This ground lacks merit same is dismissed forthwith.

Another contention raised by the appellants in this appeal is on proper identification during eventful night. Both parties have argued convincingly on this point with relevant authorities which stand among the guiding principles. One of the most cerebrated precedent referred in this issue is the case of **Waziri Amani Vs. R, [1980] TLR. 250.** The factors for proper identification, are the distance between the identifying witness and the suspect; source and intensity of light; prior acquittance of the witness with the suspect before; visual ability of the witness; time spent in the contact; also the ability to mention or identify the suspect at the earlier opportunity time. These are among the cross-cutting factors in proper identification of a suspect, be it night or otherwise. I understand that the same cannot be exhaustive, but the baseline is that no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely watertight.

In this appeal, I have repeatedly perused the evidences on record, I found PW2 had perfect knowledge of the first appellant, before the eventful date. A strong evidence was given to the effect that, the 1st appellant went to PW2's office twice consecutively on 15th and 16th of December 2017. Even on the fateful day, the perpetrators got into a very close contact, conversed and some time they escorted the victims to

rooms in the victim's house. About 45 minutes in the sitting room and other rooms where intense light from the electric bulbs at the victim's premise. There was favourable environment for both identification and recognition of the appellants.

At the time when the appellants were arrested, PW2 identified them promptly and properly leaving no doubt on proper identification of the culprits. In this issue the trial court properly addressed it perfectly from pages 13 to 23 of the court judgment. Thus, making this ground unmerited for consideration, same is dismiss forthwith.

Ground six and ten of the appeal comprised complaints that the statements by prosecution witnesses were contradictory and the trial court therefore, was wrong to believe them and base its conviction on such contradictory evidences. In response therein, Mr. Bantulaki disputed it by arguing that, the witnesses for the prosecution were credible, reliable and trustworthy. Minor contradictions did not affect the case at all.

In considering these grounds, the court is guided by the settled position of law that, every witness is entitled to credence unless there are cogent reasons not to believe him. This is what was also expounded in the case of **Goodluck Kyando Vs. R [2006] T.L.R 363.** On the other hand, contradictions in the testimony of a witness is one of the bases for lack of credibility of a witness, but those contradictions must be sufficient, serious and material to the ends of justice. They should concern matters that are relevant to the issue in dispute.

In the case of **Mohamed Said Matula Vs. R, [1995] TLR 3.** In case of any inconsistences in the case, the court gave guidance as follows:-

"Where the testimony by witness contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter. "

The rationale behind the above quotation is that, not every discrepancy would cause the prosecution case to fail. Some are minor and do not go to the root of the case, while others are material capable of affecting the whole trial. See **Said Ally Ismail Vs. R, Criminal Appeal No. 241 of 2008, (CAT – Mtwara).**

I admit that there was no much discussion on the issue of contradictions in the trial courts judgment, except at page 28. By my efforts to consider the contradictions pointed out, I noticed that some are really reflected in the trial court's proceedings. Among them, was on the attire of the appellants, PW1 stated that the first appellant wore a long black jacket with a hood and the second appellant had a T-shirt. PW2 stated that the first appellant put on like a rain jacked with a hood with and boot at page 44 - 51. Then in the later stages, PW2 would state that the three persons wore in the likeness of the military clothes. However, the inconsistence of the prosecution witnesses was minor which may have occurred for loss of memory with time lapse, almost three years from the incident to the dates of testimony. Above all, the appellants were arrested recently after the event and were found with properties recently stolen on the very night.

Usually, the general rule is that, serious contradictions will have the effect of throwing a reasonable doubt to the prosecution case. At some degree they may suggest that a witness is testifying falsehoods before the court. In the case of **Lucas Kapinga and Two others Vs. R, [2006] TLR. 374**, the appellants were charged for murder and the only eye witness (PW1) at one stage stated that he saw the appellants at the scene of crime and at a later stage he said that he did not see them. That was taken to be a serious contradiction which created doubt.

Contradictions related to colour especially, the interacting colours like in this case (green and black), estimation of distance and division of time are minor, subject to other circumstances like literacy, civilization and knowledge base of the witness. Same do not discredit the witness who is otherwise credible. It is from the reasoning above, I find that though the trial court failed to address the contradictions found in the prosecutions' evidences, the same were minor that could not bring any change in the trial court's judgment. Obvious these two ground must be dismissed.

Now is my consideration on grounds 7 & 8 of the appeal. The appellants contended that the owner of the money, minerals, mobile phones and other items alleged to be stolen was not proved, no document was tendered to prove such ownership. This court has considered at length the evidence and exhibits tendered before the trial court. The following is among my observations; Save for the cash money, most of the stolen items had special features proving ownership. P5 - Driving Licence, College ID and ATM Card were affixed with the owner's passport size photos, names and other particulars of the owners (PW2 and another victim). The minerals packets were scripted the

names of Arshath and others Shaffi Gems respectively. The evidence of PW2, PW10, PW11, PW13, and exhibit P11 (the minerals packets) corroborated what PW2 testified on the ownership. At page 62 of the proceedings PW2, explained on exhibit P11. His testimony is quoted saying:-

> *"These are the packets of minerals which were stolen and I identified them at police. They have our names; Hishani Saleeth and Cassim. My name Cassim Saleeth is one of the directors. My mobile No. 0766846644. The company name in these packets is Shafii Gems."*

Such testimony was not contradicted by the appellants. Apart from that, PW13 (Hamlet chairman) stated that the victim identified his mobile phone which was retrieved from the 2nd appellant's room. PW10 (exhibit keeper) testified to have been given two mobile phones. Thus, proving ownership of the properties recently stolen but found in possession of the appellants. Therefore, without labouring much on this ground, I am certain these two grounds lack merits same are hereby dismissed.

Considering on failure of the prosecution to call material witnesses as grounded in ground 9 of the appeal. The legal principle is now settled in our jurisdiction that, failure by a party to call an important witness who is within reach without any reason may entitle the court to make an adverse inference against that party on a particular fact. That is what was held in the case of **Aziz Abdallah Vs. R, [1991] TLR. 71,** and has remained the position of law in our jurisdiction.

As to who is a material witness, is subjective to the scenario of each case, based on flow of events. It may be a victim, or a first person to reach at the scene, or any person according to whose knowledge every other witness refers back to him. In other words, we may say a person without whose testimony, the material facts and a flow of events breaks in and raise unanswered questions. **The Black's Law Dictionary, Eight Edition** pg. 1634 has interpreted the term material witness to mean; *"A witness who can testify about matter having some logical connection with the consequential facts"*

In our case, the appellants raised the following persons were material witnesses; Mr. Mohamed Saleeth (who was among the victims); a motorcyclist who was among the first persons to reach at the scene and assisted the victims by calling PW7, OCD of Ulanga; Shafii; Mr. Baraka (an independent witness to search); the director of Shafii Gems Co. Ltd; and a mineral expert who authored a mineral report (P14). In this respect there were no significant submissions by the parties. My observation in this ground is that Mr. Mohamed Saleeth was among the key witnesses. If he were to appear before the court, reasonable assumption is that he would testify the same evidence as of what PW2 testified before the trial court. I am confident at the onset to rule that PW2's testimony served the purpose. But when the matter came for hearing, three years later, Mr. Saleeth who seemed to be a Sri Lankan national was in Sri Lanka. The Republic sought to tender his statement, but it was not admitted after the appellants' objection as the trial court was not satisfied of the reasons for his failure to attend in court.

All other witnesses the appellants have mentioned here were not material. The OCD, Shafii and Mr. Haisham, in my opinion were not

material witnesses as all what they had in their knowledge was a hearsay evidence and a bit of accounting of the events periphery to the incident. Otherwise, I am certain that not all persons named by appellants were material witness worth calling them.

According to the considered decision in the case of **Aziz Abdallah (supra),** obvious failure of the Republic to present before the trial court Mr. Mohamed Saleeth as a witness, was well justified for he was outside the country and to procure him would incur heavy costs. Above all, the evidence he would testify could be the same as what was testified by PW2. To the best I know no rule that enjoin all persons who happened to witness the incident in question should be called as witnesses. Since there is no specific number of witnesses is required to establish a fact, even one witness may suffice so long the contents of his testimony proves the alleged offence. This is the spirit of section 143 of **The Evidence Act, Cap 6 R.E 2019** and as supported by the decision in the case of **Tafifu Hassan @ GUMBE Vs. R, Criminal Appeal No. 436 of 2017, (CAT – Shinyanga)** where it was held that, the prosecution enjoys the liberty to choose the witnesses that will establish the case. As such the case of **Hemedi Saidi Vs. Mohamedi Mbilu (supra)** cited by the appellants is distinguishable in this appeal. Likewise, this ground must fail, same is dismissed.

On ground 11 related to chain of custody, that was not established as per Order 229 of the PGO, the appellants firmly argued that the guns and minerals (P7 and P15 respectively) were not registered and the chain of custody was not established. They supported their argument by the case of **Paulo Maduka (supra) and Alberto Mendes Vs. R, Criminal Appeal No. 473 of 2013.**

I appreciate the input provided for in the case of **Paulo Maduka,** which has been followed in a good number of cases. The rationale of establishing chain of custody was well articulated by the Court of Appeal as follows:-

> *"The idea behind recording chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime, rather than for instance, having been fraudulently planted to make someone appear guilty"*

The Police Force and Auxiliary Services (Police General Orders) Order, 2021, Order 229 - 8(a), (b) is couched very close to the above. The respondent claim to have produced all witnesses who were involved with the exhibits. The nature of the exhibits in this case are of the nature that cannot change hands easily, Mr. Bantulaki Argued. I would buy this argument in respect of the motor vehicle (P3) and guns (P7).

In **Maduka's** case the exhibit in question was currency notes and a gun. The notes currency was not recorded their numbers and generally the movement of exhibits was obscured that is why, the court found that the chain of custody was not established. Not only that, even the evidence to link the gun seized to the armed robbery was not given. I meditate that the facts and value of evidence in **Maduka's** case were not similar to the case at hand, there was a high possibility of the exhibits having been planted on the appellant.

In this appeal, the chain of custody being disputed of is in respect to minerals and guns. Exhibit P10 (Certificate of seizure) the appellants were present when the exhibit P15 was seized at the PCCB Office Ulanga

and they signed. exhibit P9 (certificate of seizure in respect of the guns) at the PCCB office was witnessed by PW9. Both the said 18 packets of minerals and the guns were registered at Ulanga Police Station. The testimony of PW1 taken together with PW2, PW3, PW4, PW5, PW9 (Chacha Kahiti) together with exhibits P12, P13 and P14, P22 brings a very detailed movement of the guns and minerals. Despite some witnesses' hesitation on how the exhibits were registered, I am satisfied that the chain of custody was not broken and thus, there were no reasonable doubt or any probable assumption of the exhibits being planted upon the appellants. Consequently, this ground is dismissed.

I am now faced with ground 13, where the appellants lamented bitterly that the trial court violated section 312 (1) of **Criminal Procedure Act** for failure to analyse and evaluate the evidences of each witness of the prosecution and of the defence. It is the appellants' contention that only five prosecution witnesses out of 14. The rest and the defence witnesses were not considered at all.

To consider this point, maybe I should point out on the contents of section 312 (1) of CPA. Simply section 312 deals with contents of a judgement. The appellants herein have impliedly attacked the trial magistrate's judgment on the reasons for the decision. In the case of **Shija Masawe Vs. R, Criminal Appeal No. 158 of 2007 (CAT – Dsm),** the court stated categorically points for determination, the decision thereon, and the reasons for the decision to mean evaluation or analysis of the evidence and the law applicable. In **Shija Masawe**'s case, the trial court failed to analyse the prosecution's evidence and a significant part of the defence evidence was disregarded. The position is settled that when the trial court fails to evaluate the evidence or pay

regard to the defence evidence, the first appellate court is duty bound to make a re-evaluation and make its finding as if is a trial court.

Based on the above principle, I find obliged to re-evaluate the defence evidence as recorded during trial. In totally, the defence evidences were general with specific denial of committing the offence. They both admitted that, they reached at the office of Ally Gems, not to the PW2 and they went there for a follow up of some Police Officers saga over corrupt dealings with the Sri Lankan natives who were dealing with minerals business. Though they found some police officers there, they did not arrest them. After when they moved from there and continued with their ordinary business, the police officers, including PW1 arrested them and asked them as to why they were making follow up of the police affairs. They narrated a lot of other encounters on how the search and seizure were conducted. The first appellant was not found in possession of any of the PW2's items, they claimed. They did not recognize the guns said to have been retrieved from the PCCB offices at Ulanga, where they used to work.

The theme of the defence suggested that the police officers had a motive to vexatiously devise the case against them in retaliation for investigation on some police officers' corruption. Though they defended as above, in cross examination, they did not mention any reference in relation to the corruption case they were investigating on police. Not even the names of the suspects. None of the PCCB officer adduced evidence to corroborate this version of tales. Though it is the duty of the prosecution to prove its case, there is ample evidence that before the trial court, defence case was very weak and otherwise unable to establish reasonable doubt, against the prosecution case.

Considering the already determined grounds of appeal and reference to various testimonies of witnesses above all, I have tirelessly put serious consideration on every valuable piece of evidence adduced by both parties during trial, I am satisfied that an analysis of the evidence by the trial court was reasonably fair though it did not go into details of each piece of evidence of the appellants. The criticism of the appellants against the trial court's decision that, it considered only five witnesses' testimony is unfounded. What I have grasped is that not each witness had his own or new version of the story or evidence. Rather the trial court referred generally to the testimonies which were similar, especially when several witnesses testified over the same fact and in one flow of event. Therefore, the trial court rightly considered both evidences before arriving to the conclusion.

On burden and standard of proof (Ground 5 and 12), the appellants cluster the whole appeal hereto that the case against them was not proved beyond reasonable doubt. The standard required to prove criminal cases is beyond reasonable doubt. Sections 3 (2) (a), 110 and 111 of **The Evidence Act** provide same.

As a matter of principle, "proof beyond reasonable doubt" should neither be underestimated nor should be exaggerated. It does not have to conquer the ceiling of perfection, but credible evidence that links the accused to the offence committed in a degree that no other inference can be drawn from the facts than that the accused committed the offence.

In this appeal, I would admit that there were remote doubts and minor discrepancies as previously pointed, but in my evaluation of the entire evidences of both parties, I am satisfied that there was proof that

PW2 with another at their premises were robbed various properties. The perpetrators used guns to threaten the victims in the course of stealing. That the said perpetrators are the appellants in company of another person not apprehended and arraigned in court to date.

Even considering the appellant's arguments, in this point, it is true that money seized from the appellants was a suspicious property. But that does not disprove the established fact that the appellants stole TZS. 10,450,000/= among other properties. In my digestion of the law, failure to retrieve stolen property from the accused, does not disprove the fact that the said properties were not robbed or stolen, if at all is well established.

The evidence left no doubt that the Pistol Bareta (P16), Short gun (P17) and cartridges seized at the scene of crime were related contrary to the appellants' contention. Apart from the evidence of PW1 and PW2, I have studied the testimony of PW3 (F5914 DCPL Hafidhi at page 73 – 84 who is stationed at Police Central DSM Barristic and Explosions Department. He testified in detail how he received the guns and cartridges for barristic examination. The methodology used and his findings were clearly conclusive that the guns seized at the appellants' office (PCCB Ulanga) and the cartridges found in the PW2's premises were related.

Further, PW1 testified that, the minerals were sent to the Ministry of Minerals for examination. The same were examined by an expert and the report was tendered before the trial court. Exhibit P10, P12, P13, P14 and P15 concerning the movement of the packets of minerals (P11), the report was tendered by PW1 and admitted without any objection from the appellants' counsel (page 40 – 42).

Moreover, I am aware the prosecution during trial marshalled up 14 witnesses and tendered a total of 25 exhibits. Under such circumstance, no reasonable court would expect a perfect compatibility in all witnesses' statements and on all exhibits. Notably, investigators and prosecutors are human beings and such activity is done by human being who are prone to human errors. Thus, there were minor discrepancies, save for the expunged exhibits, otherwise the rest were satisfactorily admitted in court as were rightly tendered in court. No injustice was occasioned on those minor discrepancies.

Taking the evidence of both parties and the case as a whole I am satisfied, as above exhibited, the remaining evidence of the prosecution proved the case beyond reasonable doubt and thus, no strong reason to fault the trial court's decision. Hence, the appeal lacks merits.

Having dealt with the appellant's appeal, I now turn to consider on cross appeal. I have considered the criticism advanced by the Republic on the trial court's judgement. The first ground of Cross appeal is related to failure of trial court for not holding exhibits P3 (the Motor vehicle make Alteza, bearing registration No. T. 595 CFX) an instrumentality of crime and hence liable to forfeiture.

I am in agreement with what the Republic has argued, that instrumentalities and proceeds of crimes are prone for confiscation under our legal regime. But before any order can be issued, court must be satisfied on which class such property falls, whether it is a really an instrumentality of crime or a proceed of crimes or a mere suspicious property. On this issue, there are several decisions to that effect. In the case of **DPP Vs. Muharami Mohamed Abdallah @ Chonji, Criminal**

Appeal No. 284 of 2017, (CAT DSM) the concept of instrumentality of a property to the crime is to be understood in the sense as was well elaborated by the Court of Appeal in this case. The Court held:-

> *'...to constitute an instrumentality of an offence the property sought to be forfeited must in a 'real or substantial sense... facilitate or make possible the commission of the offence' and that it 'must be instrumental in, and not merely incidental to, the commission of the offence'.*

The Court continued to hold:-

> *"It must play a reasonably direct role in the commission of the offence; the employment of that property must be functional to the commission of the crime. It must facilitate or make possible the commission of the offence"*

There is no dispute that in our case the appellants were caught on the run using a motor vehicle in question. Despite the fact, I am of the view that, the prosecution had the duty to establish further evidence on how the motor vehicle was used in the commission of the crime to be instrumental or at least a tainted property, taking in consideration that the offence in question was that of armed robbery and there was no evidence establishing that the appellants used the said motor vehicle to arrive at the crime scene. Although common sense would suggest the possibility that the appellants used the same vehicle, the circumstance surrounding the case does not deter reasonable probability of the appellant using some other form of transport to the crime scene.

Further there was no witness who testified on how the appellants travelled to the crime scene. Therefore, I am equally not convinced if the said vehicle could be termed as instrumentality of crime.

Considering on the second limb of cross appeal, I am satisfied that all facts and circumstances surrounding this appeal, the doctrine of recent possession was properly applied. The parameters for applicability of the doctrine as above discussed, were met in this case. See the old case of **DPP Vs. Joachim Komba [1984] TLR. 213** and **Samson Mzamani Vs. R [2002] TLR. 79.**

Despite that fact, I am in agreement with the trial court's reasoning at page 26 – 27 and 34. The relevant property entails TZS. 421,000/= were seized from the 1st appellant and TZS. 721,000/= were seized from the 2nd appellant while TZS. 2,000,000/= were found in the 1st appellant's room and TZS. 2,800,000/=were found in the 2nd appellant's room. This is the only property that the appellants claimed ownership, while the prosecution claiming that it was among the PW2's stolen properties.

I am of the settled opinion that, all other properties found in possession of the appellants immediate after the event; to wit ATM cards, College ID, driving licence and even the minerals were of the nature easily to establish ownership and the same had no dispute of ownership. But the currency notes, under the circumstance, unless some special efforts were made, there was no proof to establish that they belonged to PW2 and not the appellants. Currency notes are things of common use. Since among the parameters of applicability of the doctrine of recent possession was proved, but was not in respect to the

monies, I am settled the trial court was right to arrive to the decision it did.

In totality and for the reasons so stated, I find no viable reason to depart from what the trial court so decided. I therefore, proceed to uphold the trial court's decision, consequently this appeal and cross appeal lack merits same are dismissed forthwith.

It is so ordered.

P. J. NGWEMBE

JUDGE

20/06/2022

Court: Judgment delivered in chambers at Morogoro this 20th day of June, 2022, **Before Hon. S. J. Kainda, DR** in the presence of Appellants and Respondent.

Right to appeal to the Court of Appeal explained.

THE HIGH COURT OF TANZANIA

S. J. KAINDA

DEPUTY REGISTRAR

20/06/2021