

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 64 OF 2021

(Originating From Criminal Case No 210 Of 2019 before the District Court of Kinondoni
at Kinondoni, Hudi, RM)

RAJABU BOI.....1ST APPELLANT

BEATUS ALEX.....2ND APPELLANT

JAPHET JAMES KABUGE.....3RD APPELLANT

ANDREW ROBERT MUNDE.....4TH APPELLANT

OSCAR OWEN KUMBULU SEMUNGE.....5TH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last Order: 8/8/2022
Judgment: 31/8/2022

MASABO, J:-

On 22nd December 2020, the district court of Kinondoni convicted the appellants for the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 RE 2019] and subsequently sentenced each of them to a prison term for 30 years. The allegations leading to their conviction and sentence was that on 10th January 2019, while armed with machete, they invaded a home of F.4824D/CPL Joseph at Bunju B area, Kinondoni District in Dar es Salaam. While there, they stole two mobile phones make Samsung,

a flat screen television make Samsung (TV) and a sum of Tshs 2,760,000/= property of the said F.4824D/CPL Joseph and in the course of theft they threatened him with the machete.

Aggrieved with the conviction and sentence, they have jointly filed the present appeal armed with 9 grounds of appeal abbreviated as follows. **One**, the conviction was based on evidence of visual identification which was not reliable and watertight as PW2 did not state the intensity of light; the distance between him and the appellants; the lengthy of time spent with the appellants and he did not describe the physical features of the appellants or mention their names. **Two**, there was no proof of recent possession as the receipt for TV did not match the particulars of the TV (Exhibit PE2). Also, the contents of Exhibit PE2 were not read out loudly after admission and the independent witness was not brought to give evidence. **Three**, there were multiple irregularities in the admission of Exhibit PE1 which is the alleged stolen TV. **Four**, the admission of exhibits PE3, PE4, PE5 and PE6 was marred by multiple irregularities. **Five**, the trial was prejudicial to the appellants as they were not given the right to cross examine. **Six**, section 24 of the Criminal Procedure Act [Cap 20 RE 2019] was not complied with.

Seven, PW1's evidence was highly contradictory. **Eight**, the defence case was unjustifiably disregarded. **Nine**, the prosecution's case was not proved beyond reasonable doubt.

On the date set for a *viva voce* hearing, the appellants who appeared unrepresented did not have much to submit. They adopted their grounds of appeal and presented the following authorities in support: **Scapu John and Another v R**, Criminal Appeal No. 197 of 2008, CAT at Dar es Salaam and **Mashaka Pastory Paul Mahengi@ Uhuru & Others v R**, Criminal Appeal No. 61 of 2016, CAT at Dar es Salaam (all unreported).

For the Respondent Republic, Ms. Jenipher Masue, learned State Attorney, supported the appeal on the ground that evidence of visual identification which was the basis of conviction was not water tight; there was breakdown of chain of custody, and irregularities in admission of documents. On visual identification, she submitted that, the offence was committed at night. PW2 stated that he identified the appellants using light inside the and outside the room but did not state the type of the light and its intensity. He just stated that there was enough light. Thus, as per the authority in **Scapu John &**

Another v R (supra) and **Flano Alphonse Masalu @ Singu & 4 Others v R**, Criminal Appeal No. 366 of 2018, CAT at Dar es Salaam (unreported), the evidence was insufficient to support a conviction. The first ground of appeal is thus with merit.

She then cited the case of **Masumbuko Charles @Kema & Another v R**. Criminal Appeal No. 466 of 2015, CAT at Mwanza (unreported) and argued that, the TV allegedly found in possession of the 1st appellant was not matched with the receipts contained in Exhibit PE2. Hence, there was fundamentally no evidence in proof that the TV belonged to PW2. Also, the contents of documentary evidence were not read out contrary to the authority in **Seleman Mgonela Chiwanza v R**, Criminal Appeal No. 49 of 2019. Under the premises, she joined hands with the appellants that the case against them was not proved to the required standards and prayed that the appeal be allowed and they be discharged.

On my party, I have carefully considered the grounds of appeal, the submission by the learned state Attorney, the authorities rendered in support of the appeal and the records from the lower court. From the records, I have

observed that the prosecution evidence was anchored on the testimony of PW2, the victim of the offence, who narrated the occurrence of the incident. He told the court that, at around 2pm the appellants who were armed with machete, an iron bar and a knife broke into his house. Three of them (the 1st to 3rd appellant) forcefully entered his bed room. Threatening him with the machete and iron bar, they ordered him to sit down and while he was seated, they searched the room, took the mobile phones and money. Thereafter, they took him to the seating room where he found the 4th to 5th appellant taking his TV. He stated that he identified the appellants through a light inside and outside the room.

Of specific relevant also, was exhibit PE1 a flat screen TV found in the possession of the 1st appellant (Exhibit PE1) and receipts (Exhibit PE2), caution statements of the 1st accused (Exhibit PE3), the 5th accused (Exhibit PE4); 3rd accused's (Exhibit PE5); 4th accused (Exhibit PE6) all of which were retracted. The remaining evidence were all hearsay save for narrations regarding interrogation and the facts that the 1st appellant was found in possession of the TV.

As all the caution statement were retracted, it is true, as argued by the parties herein, that, the only tangible evidence implicating the accused was evidence of visual identification and evidence of recent possession of the stolen TV. Starting with the evidence of visual identification which the learned state Attorney has cited in support of appeal, the law as articulated in **Waziri Aman v R** [1980] TLR 250 is well settled that no court should ground a conviction based solely on evidence of visual identification unless all the probabilities of mistaken identity have been eliminated and the court is convinced that the evidence so rendered is water tight and this can only be established after considering the following factors:

"... the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there m moonlight or hurricane lamp etc.) whether the witness knew or has seen the accused before or not." (Also see Scapu John & Another v R (supra)).

In the present case, the offence happened at late night hours. Hence, it was crucial for the prosecution to demonstrate whether there was light at the scene by showing not only the type of the light but the intensity of such light

to assist the court to rule out the possibilities for mistaken identity but that was not done. PW2 casually stated that there was light inside and outside the room through which he identified his assailant. No explanation was rendered as regards the type of the light and its intensity. As held in **Issa Mgara v R**, Criminal Appeal No. 37 of 2005, CAT (unreported).

"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity."

Accordingly, in the present case, a full disclosure of the source of light and its intensity, explanation of the proximity to the culprit and the time PW2 spent on the encounter was indispensable. As this is missing in the record and as correctly guided by the authorities above cited, I am fortified that there is merit in the first ground of appeal and I allow it.

Turning to the doctrine of recent possession which was relied upon by the court, the law as articulated by the Court of Appeal in **Dickson Kamala v R**, Criminal Appeal No. 422 of 2018 is that:

Under the doctrine of recent possession, an inference of guilty knowledge may be drawn against the accused in the absence of

a reasonable explanation from him of how he came by the stolen item in his possession. In Joseph **Mkumbwa & Samson Mwakagenda v Republic**, Criminal Appeal No. 94 of 2007 (unreported), the Court summarized the position on the application of the doctrine 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 wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved, first, that the property was found with the suspect, second, that the property is positively proved to be the property of the complainant, third, that the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."
(emphasis mine)

When the present principle is applied to the facts of the present case, it becomes vivid that the trial court was lucidly misguided in grounding the conviction as there was no concrete proof that the TV admitted as exhibit

PE1 was indeed the property of PW2. As correctly submitted by the learned State Attorney the particulars of the Exhibit PE1 was not matched with the receipt admitted as Exhibit PE2. Thus, it could not be told with precision that the TV was indeed the property of PW2. Accordingly, the second ground of appeal is found meritorious and it is allowed.

As these two grounds sufficiently disposes of the appeal, I will not advance to the remaining grounds of appeal. The appeal is therefore allowed. The conviction and sentence grounded by the trial court are quashed and set aside. It is subsequently ordered that all the appellants be discharged unless they are otherwise lawfully held.

DATED at DAR ES SALAAM this 31st day of August 2022

8/31/2022

X



Signed by: J.L.MASABO

J. L. MASABO

JUDGE

31/08/2021

Judgment delivered remotely via virtual court this 31st day of August 2022 in
in the presence of all the appellants and in the absence of the Respondent.

8/31/2022

X



Signed by: J.L.MASABO

J.L. MASABO

JUDGE

31/08/2022

