IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 46 OF 2022

(Originating from Criminal Case No. 135 of 2020 of the District Court of Moshi at Moshi)

LAURENT VENANCE MASSAWE.....APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

28/10/2022 & 07/11/2022

SIMFUKWE, J.

The appellant Laurent Venance Massawe was charged with two others before the District Court of Moshi (trial court) with the offence of Armed Robbery contrary to **section 287A of the Penal Code, Cap 16 R.E 2002 as amended by Act No. 3 of 2011**. He was convicted and sentenced to a minimum statutory sentence of thirty (30) years imprisonment; while his two co-accused persons were found not guilty and acquitted.

It was alleged by the prosecution before the trial court that the incident took place on 13/2/2019 at Mawenzi area within Moshi Municipality. On

the fateful day around 01:15hrs the complainant was asleep with her daughter when suddenly she saw a huge light flashing on her face. She was then attacked and tied with a bed sheet. The robbers asked the complainant where her husband was while threatening her with a machete. Then, the robbers searched in the house and robbed various things valued at Tshs 6,588,000/= the properties of the complainant. After the robbers had left, the complainant was rescued by her neighbor one Abasi Abdi Dhahabu who responded to the incident. Thereafter, the matter was reported at Moshi Police Station. Cyber tracking showed that the accused persons were using one of the stolen mobile phones make Honour.

In his defense before the trial court, the first accused Laurent Venance Massawe (appellant) denied to have committed the offence and alleged that the offence was fabricated against him due to grudges which he had with PW3 one Godfrey Joseph a mobile shop owner. The other two accused person gave different stories denying to have committed the offence

After being aggrieved with the decision of the trial court, the appellant appealed before this court against both conviction and sentence. He advanced eight grounds of appeal:

1. *That, the trial court erred in law when convicted and sentenced the appellant while there is variance between the charge and evidence rendering the charge fatly (sic) defective.*
2. *That, the trial court grossly erred in law and fact when it wrongly invoked the doctrine of recent possession and applied the same as the base of convicting and sentencing the appellant.*

3. *That, the trial court grossly erred in law and fact when convicted and sentenced the appellant while the prosecution evidence was loaded with contradictions, inconsistencies and discrepancies affecting the credibility of the prosecution witnesses.*
4. *That, the trial magistrate (P.S. MAZENGO, PRM) grossly erred in law and fact when assumed the role of the prosecution by cross Examining PW7 – A fellow magistrate to load her to state that there was a use of "Offensive weapon" during the commission of the offence a fact she never revealed during examination in chief.*
5. *That, the trial court erred in law and fact when convicted and sentenced the appellant while there was variance between the charge sheet and evidence on the location of the scene of crime (LUCUS IN QUO -sic) rendering the charge not to be compatible with evidence hence defective.*
6. *That, the trial court grossly erred in law and fact when convicted and sentenced the appellant, relying on exhibit P1 (The mobile phone) while the independent witness Frances Tarimo alleged by PW1 to have witnessed the search and seizure was not summoned for no any reason assigned for that omission. (sic)*
7. *That, the trial court grossly erred in law and fact when totally failed to consider and analysed the defence evidence, ending up to wrongly convict and sentence the appellant.*
8. *That, it was an error in law and fact for the trial court to have convicted and sentenced the appellant on a case which was not proved beyond reasonable doubt.*

The appeal was argued by way of written submissions. The appellant appeared in person while Ms Mary Lucas learned State Attorney appeared for the Respondent Republic.

On the first ground of appeal, the appellant faulted the trial magistrate for convicting him while there was variance between the charge sheet and the adduced evidence. He said that in the charge sheet it was alleged that the appellant robbed the complainant: two laptop make acer, one grayish in colour valued at Tshs 1,610,000/=, another one whitish in colour valued at Tshs 1,150,000/=, one mobile phone make iphone & plus GB 256 black in colour valued at Tshs 2,668,000/=, one mobile phone make honour goldish in colour valued at Tshs 700,000/=, two boxes of perfumes make Versace valued at Tshs 280,000/=, two bags valued at Tshs 80,000/= and cash money Tshs 100,000/=. That, the complainant Sophia Masati who testified as PW7 in her testimony in chief at page 51 of the proceedings she mentioned the stolen items to be: two laptops make Acer, one white and another silver in colour, two mobile phones make iPhone & plus GB 256 and Honour goldish in colour, hand watch, two back bags, cash money almost 100,000/, two boxes of perfume and wigs.

The appellant pointed out that the hand watch and wigs were not mentioned in the charge sheet. To substantiate his argument, he made reference to the Court of Appeal case of **Killian Peter v. Republic, Criminal Appeal No. 508 of 2016** at page 13 of the judgment the Court said that:

> *"In ground two of appeal, the Appellant has complained that there was variance between the charge and evidence in respect*

of the items allegedly stolen. It is vivid that a wallet and a bag containing medicines which were mentioned by PW2 as part of the stolen items were not listed in the charge sheet."

The appellant underscored that it was a requirement of law that whenever such circumstance arises, as in this case, the lower court was duty bound to ensure that the charge is amended as per **section 234 (1) of the Criminal Procedure Act** (CPA) to suit the prevailing circumstances of the case. Following such failure to amend the charge sheet, the appellant referred at page 15 of the above cited decision where it was held that:

"Given the above legal position, we think, as the appellant rightly put it, he has to benefit from the omission by the prosecution to amend the charge."

The appellant cited another recent Court of Appeal decision in the case of **Issa Mwanjiku @ White V.R Criminal Appeal No. 175 of 2018** at page 16 where it was observed that:

"We note that, other items mentioned by PW1 to be among those indicated in the charge sheet. In the prevailing circumstance of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard."

It was also submitted that another serious anomaly is that the source of value of items disclosed in the charge sheet was not disclosed. The appellant cemented his point by referring at page 16 of the case of **Issa Mwanjiku @ White** (supra) where it was stated that:

"The charge sheet included a value of the alleged stolen cell phone (Tsh 600,000/=) which was not mentioned by PW1 the victim;"

On the strength of the cited authority, the appellant insisted that the prosecution evidence was incompatible with the charge sheet, rendering the charge not in support of the evidence hence remained unproved. He persuaded this court guided by the cited decisions of the Court of Appeal which are binding to this court, to allow the first ground of appeal and quash the conviction and set aside the meted sentence imposed on him on a case not proved.

On the second ground of appeal which concerns the doctrine of recent possession, the appellant submitted that for a conviction to be based on the doctrine four criteria must be complied and achieved:

i. First, the property was found with the suspect.

ii. The property is positively proved to be property of the complainant.

iii. The property was recently stolen from the complainant.

iv. The stolen thing constitutes the subject of the charge.

The appellant quoted from the reasoning of the trial magistrate at page 12 where it was stated that:

"There is no doubt in the instant case that the mobile phone make Honour was among the stolen items on the incident date of armed robbery committed on 13/2/2019. The bandits were not seen. The mobile phone was seen one week in possession of the 1st accused and

recovered a bait three months later in possession of the 3rd accused...."

It was commented that the trial magistrate found that the first accused did not offer plausible explanation on how he came to possess the same phone and held him culpable of the offence of armed robbery by relying on the principle of recent possession. In rebuttal, the appellant cited the case of **Mashaka Bashiri v. Republic, Criminal Appeal No. 242 of 2017** at page 15 where the Court of Appeal stated that:

> *"In the instant case at hand, the appellant was, in the first place not found in possession of the alleged stolen properties. This is in accordance with the evidence of PW3 and PW4 found at page 12 to 15 of the record of Appeal."*

In this case, the appellant alleged that evidence of all prosecution witnesses is to the effect that he was not found in possession of the mobile Make Honour associated to the principle of recent possession in the judgment, or anything for that matter which is related to the charge. That, it is in evidence that the said mobile phone was found with the 3rd accused. During the trial and in his evidence, the 3rd accused vehemently denied to have known the appellant.

The appellant reiterated that the first principle of the doctrine of recent possession was not adhered to as it was held that the appellant ought to have offered the explanation where he got the mobile phone Honour which he was not found with.

On the 3rd ground of appeal which is to the effect that prosecution

evidence was loaded with contradictions, inconsistencies and discrepancies affecting the credibility of witnesses; the appellant submitted that there was contradiction between PW6 and PW7 in respect of where the complainant (PW7) was at the time she was calling PW6 and Whether PW7 had a sweater or not.

The appellant noted another contradiction between PW3 and PW4 whereas PW3 alleged that they had a phone register for phones taken there for repair. On the other hand, PW4 alleged that they had no register for registering phones. Also, it was averred by PW2 that the appellant was found standing at the shop while PW3 said that the appellant was locked inside waiting for the police officer to go there.

In support of the 3rd ground of appeal, the appellant subscribed to the case of **Mohamed Said Matula v. Republic [1995] TLR 3** in which it was held that:

> *"Where the testimonies by witnesses 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."*

In this case, the appellant alleged that the trial court completely failed to discharge its solemnly duty and ended up to erroneously convict the appellant relying on the prosecution account which is loaded with inconsistencies and contradictions among the prosecution witnesses and which clearly corrode the prosecution account. The appellant cited another case of **Dickson Hatibu Milonge vs Republic,**

Criminal Appeal No. 400 of 2019 at page 10-11 where the issue of how inconsistencies affect the credibility of witnesses was discussed.

Supporting the 4th ground of appeal, the appellant submitted that throughout her testimony, PW7 Sophia Massati never mentioned to had seen or that she was threatened with a weapon during the entire episode. That, it was until examination in chief and cross examination had passed that the court noted that omission and rectified the anomaly in favour of the prosecution. The appellant quoted from page 55 of the trial court proceedings where it is recorded that:

> *"**Court examination:** I was awaken (sic) by bright light when I was raising my head they returned to me to be using such bush knives, I was them and they were threatening me with them. I was laying side way when they came and they laid me with face facing down when they covered me." (sic)*

The appellant was of the view that the conduct of the trial magistrate was very unfair and serious attempt of defeating the interest of justice. That, the role ought to have been played by the prosecution and that the Magistrate wrongly assumed the role of prosecution.

On the 5th ground of appeal, which concerns failure to summon the independent witness who witnessed search and seizure, it was submitted that one Francis Tarimo signed in the certificate of seizure as an independent witness. However, the said witness was never summoned and no reason was assigned to that omission. The appellant cemented his submission by referring the case of **Pascal Mwinuka vs Republic, Criminal Appeal No. 258 of 2019** at page

22 where it was stated that:

> *"Nevertheless, on our part we wonder why Boniface Siame who was one of the independent witnesses and actually signed exhibit P3 was not summoned to testify at the trial."*

The appellant opined that the situation in the cited case is similar to the case at hand in that the prosecution ought to have called Francis Tarimo who was purported to have witnessed the search and signed the certificate of seizure while seizing the mobile phone make Honour-Huawei (exhibit P1). He commented that failure to call the said witness entitled this court to draw an adverse inference.

Concerning the ground that the trial court failed to evaluate and consider the defence evidence, it was contended that it is apparent on the record that the appellant testified and brought his wife who testified that the appellant was not at the scene of crime on that fateful day and that he was with her at Rombo. That, the prosecution did not oppose that evidence. Unfortunately, while composing her judgment, for no reason, the trial Magistrate totally failed to consider that defence. That, it is settled law that the defence should be considered not at the discretion of the court. Failure of which is very fatal and prejudicial to the appellant. The appellant prayed this court to find that the omission prejudiced the appellant and allow this ground of appeal.

In her reply, Ms Mary Lucas learned State Attorney on the outset she stated that they support this appeal on the ground that the prosecution side failed to prove the case beyond reasonable doubt.

It was submitted that for the offence of Armed Robbery to stand at the time of stealing or immediately after stealing uses force in order to threaten the owner of the property so as to obtain or steal the said property. That, in this case prosecution witnesses particularly PW7 who testified to be the one who owned the property allegedly to be stolen by the appellant failed to prove that the appellant did use a weapon to threaten her in order steal the properties . That, evidence on record shows that the appellant was arrested and charged with this offence just because he was found with the phone allegedly to be stolen from PW7.

It was submitted further that the doctrine of recent possession as rightly argued by the appellant on his written submission was not rightly proved. The evidence shows that the properties were stolen on 3/2/2019 but the appellant according to PW3's testimony went to his shop with the phone suspected to be stolen on 20/2/2019 and the particulars of the said phone was not even described by PW7 (the owner). That, for the doctrine of recent possession to apply the prosecution ought to prove that the stolen property was recently found by the appellant and the appellant failed to give plausible explanation on how did he come into possession of the alleged stolen property. Ms Mary made reference to the case of **Hassan twaha @ Ramadhani versus Republic, Criminal Appeal No. 151B of 2011,** CAT (unreported) in which it was stated that, in order to invoke the doctrine of recent possession, the circumstances of the case must show that:

(i) The stolen property must be found with the suspect.

(ii) The stolen property must positively be identified to be that of the complainant.

(iii) The property must be recently stolen.

(iv) The property stolen must constitute the subject of the charge.

The learned State Attorney observed further that the owner of the stolen property (PW7) failed even to describe and identify the said stolen phone. That, evidence given by the prosecution witnesses and the charges only mention the phone make 'honor'. The investigator PW2 in his testimony at page 10 describes the particulars of the phone while it had already been seized. On the other hand, it was submitted that the possession was not recent as it passed through the hands of different persons as shown in the records as well as it was testified by PW2. Hence, it is difficult to determine who stole the said phone and the time was not recent.

It was concluded that the prosecution failed to prove the doctrine of recent possession as required by the law.

Having in mind the fact that the respondent Republic supports the instant appeal, the issue for determination is *whether evidence on the record suffices to prove the offence charged beyond reasonable doubt.*

In the course of examining the grounds of appeal, submissions of both parties and the proceedings on the trial court' I could not hesitate to support the contention of the appellant in his grounds of appeal and submission. All the pointed-out grievances are crystal

clear on the face of the record.

Starting with the 1st ground of appeal, it is apparent that in the charge sheet two items which were alleged to have been stolen were not mentioned (hand watch and 2 wigs). It is settled law that the charge sheet should tally with adduced evidence. In case of any variance between the charge sheet and evidence of the prosecution, the same should be resolved in favour of the accused person. I subscribe to the authorities cited by the appellant.

On the second ground of appeal, it has been alleged that the stolen phone was recovered from one Rajabu Abeid Mchome (3rd accused) who mentioned the appellant as the person who had sold the said phone to him. On the fateful day, the appellant was not identified at the scene. Therefore, I concur with submissions of both parties that the trial court erred to convict the appellant on the doctrine of recent possession while the ingredients of it were not met.

Moreover, the contradictions and inconsistencies on part of prosecution speak loud on the record as correctly referred by the appellant.

In addition, the examination which was done to PW7 by the trial Magistrate, in my opinion was not in favour of the prosecution, rather, the examination spoiled the prosecution case. It was a clear misdirection of the trial court in violation of the rules of natural justice.

I also support the fact that failure to call the independent witness who witnessed seizure of the phone suspected to have been stolen

from the complainant, should have drawn an adverse inference against the prosecution.

In short, all the above noted weaknesses create reasonable doubts on part of prosecution which as a cardinal principle of criminal cases, ought to be resolved in favour of the appellant.

I therefore find this appeal has merit. The conviction meted against the appellant is quashed and sentence set aside. The appellant should be set free immediately, unless he is held responsible on other lawful reasons. Appeal allowed.

Dated at Moshi this 07th day of November 2022.

S.H.Simfukwe

Judge