THE UNITED REPUBLIC OF TANZANIA

JUDICARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

CRIMINAL APPEAL NO.74 OF 2021

(Originating from Liwale District Court in Criminal Case No.27 of 2020)

ASHRAF SWALEHE UMMI @ DIAMOND..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

Date of Hearing: 04/02/2022

Date of Judgment: 18/02/2022

JUDGMENT

MURUKE, J.

The appellant, Ashraf Swalehe Ummi @ Diamond and his co-accused (Mohamed Abdallah Ngolongo @ Mabuti) were jointly arraigned before Liwale District Court on two counts. The first count was on the offence of gang robbery contrary to section 286 (2) and 287C of the Penal Code, Cap. 16 R.E. 2019. As for the first count, it was alleged that, on 09th April 2020 at Mery Mery Pub within Nangando Village Liwale District and Lindi region the appellant and his co accused stole a celephone make Infinix Smart with IMEI numbers 355480108349528 and 355480108349536 valued Tshs.300,000/=,external adopter make Sumsung valued at Tshs.150,000/= and cash money Tshs.160,000/= the property of THOMAS JULIUS KAPINGA and at the time of stealing used actual violence to THOMAS JULIUS KAPINGA in order to obtain or retain the items stolen. Whereas, the second count was assault occasioning actual

bodily harm contrary to section 241 of the Penal Code. The particulars were that on 09th April 2020 at Mery Mery Pub within Nangando Village Liwale District and Lindi region the appellant and his co accused while at Merry Merry Pub did assault THOMAS JULIUS KAPINGA which occasioned his neck injuries.

The appellant and his co accused denied the charge thus, the case went to a full trial, in which appellant found guilty, convicted and sentenced on the offence of robbery with violence. Whereas his co-accused was found guilty, convicted and sentenced on the minor offence of receiving stolen property, dissatisfied with the conviction and sentence, the appellant has preferred this appeal comprising eleven grounds of appeal which will be reproduced in the due course of settling them.

In a nutshell, the factual background leading to the appellant's conviction and sentence can be briefly stated as follows. The prosecution's case was featured by six witnesses, six documentary evidence and two physical/object evidence. It goes further that on 09/04/2020 the victim Thomas Julius Kapinga (who testified as PW2) went to Samoma bar for drinks after meeting his colleague one Hamidu Mtemekala. At around 2200 hours PW2 went to Miami bar for the same purpose and met his relative called Baba Muddy. When it reached 0000 hours Miami bar was closed. But at that moment Baba muddy was extremely drunk to the extent that was unable to control his motorcycle. Seeing that, PW2(victim) hired a motorcycle while baba Muddy took one of the motor cyclists to ferry him at his home. PW2 escorted his relative thereafter he told his hired motorcyclist to ferry him to Merry Merry pub. Though before they started a journey another bodaboda cyclist demanded to join them. Indeed, PW2 (victim) consented since he believed him to be a good person. PW2 and two bodaboda riders reached at Merry Merry pub

which was found closed. Suddenly, the two motor cyclists started assaulting PW2 by using the fist at the eyes. The beatings went on in various parts of PW2's body which resulted into the swollen of the left side of the neck and tender on palpation of the eye.PW3 (Richard Ngoilalei) a medical doctor of Liwale District Hospital proved that PW2 was harmed as a result of assault.

At the hearing of this appeal on 04/02/2022 the appellant appeared in person and unrepresented. Whereas, the respondent, Republic enjoyed the services of Mr. Wilbroad Ndunguru, the learned Senior State Attorney. On the part of the appellant prayed his grounds of appeal be adopted as his oral submission. In response, the learned Senior State Attorney from the outset opposed the appeal and instead he supported both conviction and sentence. He further merged ground 1,2, 9 and 10 ground of appeal and submitted that:- the appellant was charged on two offences, armed robbery and assault occasioning actual bodily harm to the victim. He further contended that the evidence available at the trial court is that the appellant was with another person named Mohamed Abdallah Ngolongo @ Mabuti. He argued that the victim was found with injuries and stressed that the appellant and Mohamed Abdallah Ngolongo were involved. Evidence of identification of the accused persons at the scene of crime proved that victim hired the appellant and the other person to take him home. Monalisa called the appellant to drive the victim at his home. Learned Senior State maintained that the two prosecution witnesses knew the appellant by identification.

Respondent counsel was of the settled view that the trial court properly found the stolen property in the possession of the second accused which the appellant gave him but was stolen from the victim. For clarity, Mr. Ndunguru pinpointed four conditions for the doctrine of recent

possession to apply. **One,** he submitted that the property was found with the suspect. **Two**, Property must be proved to be the property of the complainant. **Three**, the property was recently stolen from the complainant. **Four**, the stolen property constitutes the charge against the accused. He thus, insisted that the trial court used four conditions to ground conviction.

It was insisted by respondent counsel that during the Preliminary hearing the appellant and second accused admitted to have stolen the cellphone of the victim. He also referred to the evidence of PW1, PW2, PW5 and PW6 as reflected at page 18,25-27 of the typed proceedings of the trial court. Basing on such pieces of evidence Mr. Ndunguru submitted that the issue of identification and being found with the stolen property were properly discussed. In view of that submission the learned Senior State Attorney argued that 1,2, 9 and 10 grounds of appeal lack merits.

As to the third ground, Mr. Ndunguru argued that the trial court considered the defence evidence though it did not raise any doubts to the evidence of PW2 and PW3. On the fourth and fifth grounds of appeal he contended that the tendering of the exhibits had no any problem since procedures were complied with. Though he argued that exhibit P8 was objected on its admissibility by the appellant as it has a different signature and name of the appellant. Under those circumstances trial court ought to have conducted an inquiry. Since the trial court did not comply with that procedure then the remedy is to expunge exhibit P8 from the trial court records, however, the evidence of PW6 detailed what the appellant had admitted. Moreso, exhibit P7 implicates the appellant. In addition, in the memorandum of undisputed facts the appellant admitted to be found with the cellphone. Thus, the learned Senior State Attorney argued that ground 4 and 5 lacks merits.

Submitting on the sixth ground, Mr. Ndunguru argued that exhibit P7 (the cautioned statement of the second accused) carries a different name of Maliki Mohamed Ngolongo @ Mabuti while the charge sheet bears the name of Mohamed Abdallah Ngolongo @ Mabuti these are two different persons thus exhibit P7 be expunged from the trial court records. However, there were other pieces of evidence which were enough to ground conviction of the appellant. The evidences include the Evidence of PW1 who recovered the phone from the second accused, the evidence of PW5 and the appellant's admission during preliminary hearing. Thus, Mr. Ndunguru argued this court to dismiss this ground for lack of merits.

Responding to the seventh ground, the learned Senior State Attorney submitted that the appellant was called by a different name of Mustapher however the proceedings and exhibit referred to appellant. Mr. Ndunguru argued this court to hold that the mistake if any is curable by section 388 of the Criminal Procedure Act, [Cap 20 R.E. 2019].

Reacting to the eighth ground the learned Senior State Attorney argued that the appellant was rightly convicted basing on the evidence testified by PW1, PW2, PW3, PW4, PW5 and PW6, thus, eighth ground lacks merits. On eleventh ground the learned Senior State Attorney conceded that on gang robbery sentence must be the same. Thus, he prayed this court to revise the sentence meted to the appellant and the second accused. In totality learned state Attorney argued that the appeal be dismissed and the second accused be sentenced accordingly.

In a very short rejoinder, the appellant requested this court to go through the grounds of appeal and reconsider the evidence.

Having carefully considered the grounds of appeal, submission advanced by the parties and the trial court record, it is imperative to state that, this being the first appellate court has the duty to re-evaluate the entire evidence on record by reading together and subjecting it to a critical analysis and where need arise reach to my own findings and conclusions of the facts, in terms of holding in the case of **D.R. Pandya v. Republic** (1957) EA 336.

From the grounds of appeal it is imperative to have one major issue which is whether the prosecution proved its case beyond reasonable doubt. But in tackling this issue I will also address other emerging issues like whether or not the doctrine of recent possession was properly invoked by the trial court in grounding conviction of the appellant and his co accused. Also, whether or not the cautioned statements admitted as exhibit P7 and P8 covered the accused persons named in the charge sheet.

Starting with the issue of the doctrine of recent possession. The doctrine of recent possession entails a situation where a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, thus the court may legitimately presume that he is a thief or guilty receiver. The Court of Appeal in the case of **Mkubwa Mwakagenda v. Republic**, Criminal Appeal No. 94 of 2007 CAT (unreported), the Court made the following observations with regard to the doctrine of recent possession: -

> "For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second,** 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 to prove the above elements."

As to the above four cardinal conditions of the doctrine of recent possession let this court look one after another and find out if the prosecution evidence proved the application of the doctrine which grounded the conviction of the appellant and his co accused. There is no doubt that Exhibit P1 was found in possession of the second accused who was the suspect. As to the second condition, trial court did not go further to prove ownership of the cellphone found in possession of the second accused as owned by PW2 (the victim). The mere proof of the IMEI numbers found in the sticker (exhibit P.) which were correlated with the one found in the exhibit P1 does not in itself prove that PW2 owned the same. Here proof of ownership of exhibit P1 required further proof such as procurement of electronic purchase receipt by the complainant. Nowhere, the (victim) PW2 produced an electronic receipt or gave evidence covering how exhibit P1 came into his possession. The mere words that he remembers the appearance and IMEI numbers as were written in exhibit P3 after the purchase do not suffice proof of ownership by him. In addition, nowhere PW2 mentioned his IMEI numbers and explained the physical appearance of exhibit P1. For clarity I quote what PW2 testified as envisage at the last paragraph of page 18 of the typed proceedings of the trial court: -

"I went to the Police and recognize the phone and accused here. I remember my phone through appear once(sic) and Imei numbers as

the same were written in a sticker given after purchase. This is the phone stolen during the battle. (PW2 identify exhibit P1).That is all."

Reading between lines of the above excerpt, nowhere PW2 described the physical appearance of exhibit P1 and also mentioned the IMEI numbers written in **exhibit P3**. In addition, at the last paragraph of page 14 of the typed judgment, the learned trial Magistrate was convinced that PW2 proved his ownership over **exhibit P1** by believing that PW2 gave description marks as elaborated during trial. In the light of that observation, I am of the settled view that the learned trial Magistrate was wrong to hold that the evidence of PW2 proved ownership over **exhibit P1**, while the above extracted evidence of PW2 does not show how he described the cellphone found in possession of the second accused. As I have intimated earlier, the learned trial Magistrate ought to take this condition seriously in proving ownership of exhibit P1. Lack of electronic purchase receipt, lack of physical description of **exhibit P1** from the victim makes the evidence of PW2 fall short in proving that he owned exhibit P1. Therefore, in view of that evaluation I am convinced that the doctrine of recent possession was wrongly invoked by the learned trial Magistrate in grounding conviction of the appellant and his co accused, respectively.

I now come to the second minor issue as to whether or not the cautioned statements admitted as exhibit P7 and P8 covered the accused persons named in the charge sheet. In addressing this issue, I am aware that the learned trial Magistrate has covered in extenso the applicability of cautioned statements and confession to ground conviction of the accused. As to the present case, the learned trial Magistrate corroborated the confessional statements sourced from the cautioned statement of the appellant and his co accused. However, upon perusal

and serious scrutiny, I have discovered that, the cautioned statements admitted as exhibits P7 and P8 were admitted with wrong descriptions of the appellant and co accused. Also, the evidence testified by the prosecution witnesses covered the names of different persons named in the caution statement. In, **exhibit P7** is for one Maliki Mohamed Ngolongo @ Mabuti but the charge arraigned before the appellant and his co accused named one Mohamed Abdallah Ngolongo @ Mabuti as the second accused. In addition, PW5 when testifying in the trial court told the trial court that she recorded the caution statement of one Mariki. In light of this observation, there is an apparent variance as to names of the second accused as seen in the charge and the other person with the name of Maliki Mohamed Ngolongo @ Mabuti who real testified in the trial court as DW2 and whose cautioned statement was admitted.

In the same line when PW6 testified in the trial court told the same that he took the cautioned statement of the person named Mustapher @ Diamond. While the cautioned statement **exhibit P8** was of one Ashrafu Swalehe Umi@ Diamond which the appellant objected for containing different names and signatures. From the above clarification of exhibit P7 and P8 there is no doubt that the learned trial Magistrate erred in treating it as confessions statement which were part of grounding conviction of the appellant and his co accused.

Regarding the evidence testified by PW6 did not support what he tendered and admitted by the trial court as exhibit as exhibit P8. The evidence of PW6 shows that he took the cautioned statement of one Mustapher @ Diamond but the admitted exhibit P8 has the name of Ashraf Swalehe Umi@ Diamond while the appellant testified as Ashraf Salehe Ummi@ Diamond. During trial the appellant objected the tendering of the same on reason that it had a different signature and

name. Unfortunately, the learned trial Magistrate did not take it seriously by not making an enquiry which could assist him in knowing which were the correct names and signature of the appellant. As submitted by Mr. Ndunguru that failure to comply with that procedure when the appellant objected the admissibility of exhibit P8 the remedy is to expunge exhibit P8 from the trial court records. Thus, I expunge exhibit P8 from the records of the trial court.

Learned State Attorney argued that PW6 detailed what the appellant had admitted. However, PW6 did not cover the details of the contents of exhibit P8. Rather, it covers the rights explained to the appellant before PW6 recorded his cautioned statement.

In view of the above evaluation, I am of the firm view that the learned trial Magistrate erred in using the cautioned statements which featured different names to the persons brought in his court to ground conviction of either the appellant or co accused. Also, on the same line the cautioned statements tendered and admitted by the trial court as exhibit P7 and P8 differs with the evidence testified by PW5 and PW6.

In the light of the above evaluation, I am of the settled view that the evaluation of the emerging issues is capable of disposing of this appeal without going further to the other grounds of complaint as raised by the appellant. Also, as to the major issue analysis is answered in affirmative that the prosecution did not prove case against the appellant and his co accused on the required standard of proof of beyond reasonable doubt.

In the event, I allow the appeal and, proceed to quash the conviction and set aside the sentence imposed on the appellant and his co accused. Accordingly, I order that, the appellant be set at liberty forthwith unless held for lawful purposes.

It is so ordered.

Z.G. Muruke

Judge

18/02/2022

Judgment delivered in thus presence of Ajuaye Bilishanga, and Faraja George, learned state Attorneys and in the presence of appellant in person.

Z.G. Muruke

Judge

18/02/2022