IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 143 OF 2021

CHARLES NKWAMBI NYANDA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Kilombero District Court at Ifakara (Hon. B.N. Mashabara, RM))

dated the 03rd day of October, 2019
in
Criminal Case No. 86 of 2018

JUDGMENT

Date of Last Order: 25/03/2022 &
Date of Judgment: 31/03/2022

S.M. KALUNDE, J.:

CHARLES NKWAMBI NYANDA, the appellant herein, stood charged before the District Court of Kilombero at Ifakara (henceforth **"the trial court"**) in **Criminal Case No. 86 of 2018** with the offence of conspiracy to commit an offence contrary to section 389 of **the Penal Code, Cap. 16 R.E. 2002** (henceforth **"the Penal Code"**) and armed robbery contrary to section 287A (2) of **the**

Penal Code. The particulars of the offences were that on 29th April, 2018 at about 02:00hrs at Ichima, Idete area within Ifakara, Kilombero District in Morogoro Region, the appellant stole several items the properties of HENRY MHESI and immediately before and after such stealing he used a bush knife, knife and a piece of a log in order to obtain and retain the said properties. Th appellant pleaded not guilty hence full trial ensued.

In an effort to prove the charges against the appellant, the prosecution called six (6) witnesses. The appellant was unrepresented and therefore defended himself under oath. The appellants trial terminated in him being convicted of both counts. He was subsequently sentenced to two (2) years imprisonment for the 1st count of conspiracy to commit an offence; and thirty (30) years imprisonment for armed robbery. The appellant is aggrieved by both conviction and sentence meted by the trial court and thus he has preferred an appeal before this Court. On the 21st day of June, 2020 the appellant filed a Petition of Appeal eight grounds of appeal. In addition to that, on 02nd December 2021 he filed another seven

grounds of appeal. All the grounds may be summarized into the following complaints:

> *"1. That, the learned trial magistrate grossly erred in both law and facts by wrongly invoking the doctrine of recent possession;*
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> *2. That, the learned trial magistrate erred in law by convicting the appellant based on a contradictory testimonies of prosecution witnesses;*
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> *3. That, there was no certificate of seizure or explanation on how the stolen goods were found in possession of the appellant;*
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> *4. That, the learned trial magistrate grossly erred in by convicting the appellant based on Exhibit P3 (Caution statement) which was y admitted in evidence without complying with the required procedure;*
>
> *5. That, the learned trial magistrate erred in law in convicting the appellant when the prosecution failed to establish that the appellant was positively identified;*
>
> *6. That, the learned trial magistrate erred in law and in fact by convicting the appellant based on proceedings that were marred with procedural irregularities; and*
>
> *6. That, the learned trial magistrate erred in law by convicting the appellant based on a defective charge.*

Relying on the strength of the above complaints, the appellant appealed to the Court that the proceedings of the trial court be nullified, and that the conviction and sentence thereby be set aside and him be released from prison.

Given that the appellant and the counsel for the respondents/Republic were both in Dar es Salaam, hearing of the appeal was conducted virtually, through the Judiciary of Tanzania Virtual Court System. At the hearing the appellant appeared in person unrepresented. The respondent/Republic was represented by learned State Attorney **Mr. Edgar Bantulaki**.

At the outset Mr. Bantulaki intimated that the respondent was supporting the appeal. He submitted that one of the aspect used to convict the appellant was that he was found in possession of a pair of sandals. He added that during trial PW1 did not state that one of the items stolen were a pair of sandals. The counsel argued that the issue of the stolen pair of sandals was raised by PW2. The said pair of sandals were also not tendered in evidence. Mr. Bantulaki submitted further that there was no certificate of seizure or any

evidence demonstrating that the pair of sandals or the items alleged to have been stolen were found in possession of the appellant.

Submitting further Mr. Bantulaki argued that there was no sufficient description of the said pair of sandals in the testimony of both PW1 and PW2 to indicate that the sandals were the property of PW1 and PW1 alone. In addition to that, the counsel added, there was evidence that the items were found in another person's room. On account of the above discrepancies, the counsel argued that it was wrong for the trial court to invoke the doctrine of recent possession in convicting the appellant. He cited the case of **Paul Maduka & Others vs. Republic**, Criminal Appeal No. 110 of 2007 for an argument that, if anything, the items found in possession of the appellant came from a common manufacturer, therefore it was wrong for the trial court to invoke the doctrine of recent possession without description eliminating confusion of identification by products manufactured by the same or common manufacturer. Further to that, the counsel questions the integrity of the exhibits given that the chain of custody was not properly outlined.

According to Mr. Bantulaki, once the item alleged to have been stolen are eliminated from the records, the remaining incriminating piece of evidence is the cautioned statement of the appellant (**Exhibit P3**). In relation to the said evidence, the counsel submitted that the exhibit was not read over to the appellant upon its admission into evidence. Relying in the case of **Robinson Mwanjisi & Three Others vs. Republic** [2003] TLR, the counsel argued that the failure to read out loud the contents of Exh. P3 was sufficient to have the same expunged from the records.

In conclusion, Mr. Bantulaki stated that having discredited the application of the doctrine of recent possession and expunged from the records Exh. P3, there was no sufficient evidence to sustain conviction against the appellant. The counsel sought it was superfluous to discuss the remaining grounds of appeal.

I think that Mr. Bantulaki, was right in not supporting the conviction of the appellant. The trial Court was satisfied that there was conspiracy to commit an offence and that there was armed robbery on the basis of the doctrine of recent possession, and it was

corroborated by the appellant's cautioned statement (Exh. P3). In its decision the trial court made a conclusion that:

> *"As per evidence it is clearly adduced that accused person was found in recent possession of stolen property sandals which PW2 became suspecting of him went to report to Mwenyekiti wa Kitongoji and informed PW.1 and on the court they did manage to identify him on 30/4/2018."*

From the above excerpt, it is clear that conviction and sentence of the appellant was grounded on the doctrine of recent possession. To elucidate the doctrine, I find it instructive to quote a persuasive decision of the Court of Appeal of Kenya decision in the case of **Christopher Rabut Opaka vs. Republic Kisumu,** Criminal Appeal No. 82 of 2004 in which while addressing the doctrine of recent possession cited the case of **Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic,** Criminal Appeal No. 82 of 2004 which laid the principles of the doctrine as follows:

> *"... It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession*

must be positively proved. In other words, there must be positive proof, ***first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant.*** *The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.* ***In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses."***

[Emphasis is mine]

In the instant case, the prosecution case was that the appellant was found in possession of a pair of sandals allegedly to have been recently stolen from PW1. As rightly pointed out by Mr. Bantulaki, the evidence on record was not sufficient to invoke the doctrine of recent possession. **First,** the prosecution failed to establish that the alleged

pair of sandals was one of the items stolen during the armed robbery; **secondly,** there was no evidence to suggest that the appellant was found in possession of the alleged pair of sandals. **Thirdly,** it was not positively established that the pair of sandals were the property of the complainant, PW1. In his testimony, PW1 did not state that the sandals were one of the items stolen. In addition to that he did provide any description of the peculiar features distinguishing the sandals from other products coming from the same manufacturer.

There was also no evidence that search of the appellants premises was conducted in accordance with the required procedures and that the items alleged to have been stolen were found in the possession of the appellant. To the contrary, the items were allegedly found in another person's room. There was no search and seizure certificate tendered in evidence or testimony to that effect. As if that was not enough, the prosecution did not establish the chain of custody of the alleged items and how they made into the prosecution evidence and eventually in the court room.

For the foregoing reasons, I agree with Mr. Bantulaki that, before the trial court, there was no sufficient evidence for the learned trial magistrate to invoke the doctrine of recent possession in convicting and sentencing the appellant of the offence of conspiracy to commit an offence and armed robbery.

The last piece of evidence relied upon by the trial court is the appellant's cautioned statement. This was tendered by PW5 and received as Exh P.3. I entirely agree with Mr. Bantulaki that the exhibit was incorrectly received in evidence. It is on record that when the exhibit was tendered in evidence it was not read out loud upon its admission. Procedurally, this was wrong, and the error is incurable. The law requires that, whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted in evidence, before it can be read out in court. There is a long list of authorities to this end, including the case of **Robinson Mwanjisi and Three Others** (supra), **Walii Abdallah Kibuta and Two Others v. The Republic,** Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa and Three Others v.The Republic,** Criminal Appeal No. 132 of 2015, **Lack s/o**

Kilinganiv. The Republic, Criminal Appeal No. 405 of 2015 **Issa Hassan Ukiv. The Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 (All unreported)).

In the instant case, although the appellant's cautioned statement (Exh. P3) was admitted without objection from the appellant the trial court omitted to read over the contents of the exhibit to enable the appellant to understand and make a meaningful defence. I am therefore satisfied that the omission was fatal as it occasioned a miscarriage of justice to the appellant. Consequently, I expunge **Exhibit P.3** from the records.

Having discredited how the doctrine of recent possession was invoked and thereby expunged Exhibit P.3, I wholly agree with Mr. Bantulaki that the remaining oral evidence of the six prosecution witnesses is insufficient to sustain the conviction and sentence against the appellant. I say so because there is no settling evidence on record to arrive at a conclusion that the appellant was responsible for the robbery let alone that he had conspired with any other

person. It is on record that none of the prosecution witnesses gave a detailed description of the items alleged to have been stolen or give an account of the contents of the expunged documentary exhibit. None of the prosecution witnesses sufficiently established that the items alleged to have been stolen were found in the possession of the appellant.

I accordingly allow the appeal, quash the convictions on two counts of conspiracy to commit an offence and armed robbery against the appellant, set aside the sentences imposed on the appellant and order that the appellant be released from prison forthwith, unless he is being held for some other lawful cause.

Order accordingly.

DATED at **DAR ES SALAAM** this **31st** day of **MARCH, 2022.**

S.M. KALUNDE

JUDGE