

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MSOFFE, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO.273 OF 2008

ALLY ABDALLAH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Arusha)**

(Bwana,J.)

**dated the 14th day of September, 2007
in
Criminal Appeal No. 80 of 2005**

JUDGMENT OF THE COURT

27th & 29th September, 2011

MSOFFE, J.A.:

The appellant ALLY ABDALLAH together with one INNOCENT MKINDI were convicted of armed robbery contrary to sections 285 and 286 of the Penal Code by the District court of Kiteto and sentenced to the statutory term(s) of thirty years imprisonment; and corporal punishment of twelve strokes of the cane. The trial District Court was satisfied that PW3 Kipondo Olboro and PW4 Mamaya Sakita were guarding the KINAPA offices at Kiteto on 17/9/2003 when at around 3.00 a.m. they were ambushed by

armed robbers who included the appellant and the said Innocent. The robbers managed to steal money and an assortment of other articles belonging to KINAPA. In the ensuing search on the following morning PW1 ASP Malle participated in chasing a bus christened *HAJEES* in which it was believed the appellant had boarded. The bus was destined for Dodoma and Dar es Salaam. On arrival at Mkoka the search party saw the bus with the appellant in it. While at Mkoka, it was alleged that PW1 removed a scarf from the appellant's trouser and that the said scarf was eventually identified by PW3 as his property. It was also alleged that one DC Lique (who did not testify) removed a stabilizer from a jacket worn by the appellant. It was also in evidence that while at Mkoka PW5 Mohamed Mabaruku, a primary school teacher at Chapakazi in Matui village, saw the appellant dropping a wall clock from his jacket before running away. It was believed that the wall clock belonged to KINAPA.

Essentially on the basis of the above evidence the trial District Court opined that the appellant was identified on the fateful night by PW3 and PW4. Furthermore, that this was a case in which the doctrine of recent possession could be invoked. On the basis of these two points, the said

District Court accordingly convicted and sentenced the appellant as aforesaid.

On appeal the High Court discounted the evidence of identification and held that it was insufficient to ground the conviction. As for the doctrine of recent possession, the High Court held that it was properly invoked by the trial District Court in that the appellant was found with properties stolen from KINAPA.

Aggrieved, the appellant has preferred this second appeal. In his five point memorandum of appeal the appellant is challenging the High Court's findings on the doctrine of recent possession. In a nutshell, he is of the view that taking the evidence as a whole the doctrine was improperly applied by the High Court in the first appeal. He was supported that much by Mr. Zakaria Elisaria, learned State Attorney representing the respondent Republic.

With respect, we agree with the judge on first appeal that there was no enough evidence of identification to warrant the conviction by the trial District Court. In the evidence of PW3 and PW4 there is nothing to show that they duly, positively and adequately identified the appellant on that night. Besides their evidence that the security lights were on at the time of the robbery and that it was the appellant who was directing the robbers on that day and time there is nothing else to show that they **positively** identified the appellant.

On the doctrine of recent possession we wish to begin by stating the law on the doctrine as propounded by the defunct Court of Appeal for Eastern Africa in **Rex v Bakari Abdalla** (1949) 16 EACA 84 when it stated:-

*....That cases often arise in which possession by an accused person of property **proved** to have been very recently stolen have been held not only to support a presumption of burglary or of house breaking and entering but murder as well, and if all the circumstances of a case point to no other*

*reasonable conclusion the presumption can extend
to any charge however penal.*

(Emphasis supplied.)

In a more or less similar situation the doctrine was restated by the defunct Court of Appeal for Eastern Africa in **Kantilal Jivraj and Another v. R** (1961) EA. 6 at page 7 thus:-

*It is of course, well established that a court may
presume that a man in possession of stolen goods
soon after the theft is either the thief, or has
received the goods knowing them to be stolen,
unless he can account for his possession.*

So, the principle discerned from **Jivraj** (supra) is essentially that if a person is found in possession of goods recently stolen, unless of course if he can account for his possession of the same, he will be presumed to be the actual thief or guilty receiver.

In our view, the key word in **Abdalla's case** (supra) is **proved**. In other words, there has to be proof that property (the subject of the charge) was stolen before the presumption in the doctrine can be invoked. In this case, as correctly submitted by Mr. Zakaria Elisaria, the evidence does not establish conclusively and clearly that the properties that the appellant was allegedly found with belonged to KINAPA. Apparently no forthright evidence was forthcoming from any KINAPA officer to prove that the properties actually belonged to KINAPA. We appreciate that PW6 Salum Ndeleya and PW8 Sufian Rajabu, a "mratibu" and an accounts clerk, respectively, working with KINAPA, testified. However, at best their evidence was only to the effect that there was a robbery at KINAPA, without more. These two witnesses did not come up with positive evidence that the properties allegedly found with the appellant actually belonged to KINAPA. It follows therefore, that in the light of the evidence on record the doctrine of recent possession was improperly invoked by the High Court.

For the above reason, there is merit in the appeal. Accordingly we hereby allow the appeal, quash the conviction and set aside the sentences

of imprisonment and corporal punishment. The appellant is to be released from prison unless lawfully held.


DATED at ARUSHA this 28th day of September, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy for the original.


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL