IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 68 OF 2013

1. **KEFA RASHID**
2. **LUDUBULA JILALA**
3. **KULWA BULELE** .....**APPELLANTS**
4. **MWANDU LUCAS**
5. **DOTTO CHUGA**

VERSUS

THE REPUBLIC .....**RESPONDENT**

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Kaduri, J.)

dated the 2nd day of December, 2009
in
DC. Criminal Appeal No. 158, 159, 160, 161 of 2008 and 105 of 2009

JUDGMENT OF THE COURT

19th & 26th September, 2013

MANDIA, J.A.:

On 27/8/2009 at 1 a.m in the early hours of the morning, PW1 Rubeni Urasa of Ideka Village, Uyui District of Tabora Region was asleep in his home with his wife. He was awakened from sleep by a sound of people breaking into his house. Before he could do anything, people entered into his house, and he counted at least seven people. Those people, whom he

did not identify, shone a flashlight towards him, ordered him to keep quiet and get under his bed. PW1 testified that the space between the bed and the floor was small so he could not get in. As he hesitated, the unknown robbers cut him with a panga on his left and right side as well as on the one leg while at the same time asking for money. He told the robbers he had no money and they, replied that they would take the mattress of size 6' x 4' instead. The robbers also took one radio and another mattress of size 4' x 5' as well as cash shs. 80,000/=, as well as 10 pieces of soap "Kosheni" brand, one suitcase full of clothes, a bicycle of Phoenix make and five saucepans. The robbers then left PW1 inside the house and locked the door from outside. The door was opened by PW1's son Musa five minutes after the robbers had left.

PW1 did not recognize any of the robbers. A neighbour PW3 Mohamed Mesengula as well as the Village Executive Officer PW2 Masola Mmeta who responded to the cries of alarm by PW1 Rubeni Urasa took up the search for the alleged robbers. Both PW2 and PW3 told the trial court that they followed bicycle tyre marks which led them from the house of PW1 to the house of the second appellant Ludubula Jilala. They searched

the second appellant's house but the search recovered nothing. The second appellant took them to the house of the first appellant Kefa s/o Rashid. Kefa reportedly confessed to the theft and showed where the stolen property was. In his evidence in chief PW3 Mohamed Mesengula testified that **the stolen properties were found 50 metres** from the house where the appellants reside, a house which is owned by one person called Machunga who was not present during the search. The search party then called up the police who came to arrest the appellants.

Another witness to the search was PW5 Joseph Kaji, the cell leader for Katarani Village. The substance of his evidence is that he was part of a search party at Machuga's house where they recovered five iron pots inside the house of Dotto Chuga, the fifth appellant. They also searched the compound surrounding the house and found mattresses, bicycle, radio, iron. PW5 told the trial court that this house is used by Mwandu Lucas, Dotto Chuga and Kulwa Bulele who are 4th, 5th and 3rd appellants respectively.

Seven accused person were charged in the trial court. Two accused persons the 3rd and the 5th, were found not guilty and acquitted. Five were

convicted as charged and sentenced accordingly. Their appeal to the High Court of Tanzania at Tabora was dismissed in its entirety, hence this second appeal.

The appellants lodged separate memoranda of appeal for each one of them which, on scrutiny reveal the following common grounds of complaint:-

1. That each one of them was searched but nothing was recovered in their respective premises
2. That none of them led the way towards discovery of any stolen property
3. That the owner of the house where the property was recovered, one Machunga, was not called to testify.
4. That the alleged owner of the property did not prove ownership by producing receipts showing ownership.
5. That the doctrine of recently possession which is the basis of their conviction was wrongly invoked.

At the hearing of the appeal, the appellants appeared in person, unrepresented, while the respondent Republic was represented by Mr.

Hashim Ngole, learned Senior State Attorney. The appellant had nothing to add to their separate memoranda of appeal they filed.

Arguing the appeal Mr. Hashim Ngole took the line of combining some of the grounds in the separate memoranda as they were repetitive. In the end, the general trend was that he took the line of arguing the appeal generally. Mr. Hashim Ngole was of the view that the evidence on record showed that the connection between the second appellant and the alleged crime was that tyre marks led to his house, and the second appellant in turn took the search party to the house of the first appellant who in turn led the way to Machunga's house where the stolen property was recovered. For the 3rd, 4th and 5th appellants the learned Senior State Attorney conceded that the doctrine of recent possession was improperly invoked against them and he did not support the conviction and sentence in respect of them.

As rightly pointed out by the learned Senior State Attorney, the conviction entered against the appellants was largely based on the doctrine of recent possession in respect of the third, fourth and fifth appellants. We

will therefore start with these three appellants in discussing the appeal. We hasten to add that our approach in analyzing the appeal before us will be along the line adopted by the learned Senior State Attorney, that we will discuss the appeal generally. In this respect, we observe first and foremost that a basic ingredient of the doctrine of recent possession is a description of the property alleged to have been stolen so as to establish ownership. The evidence of the purported owner, PW1, Ruben Urasa, with regard to ownership of the property is at page 7 of the record, and goes thus:-

> *"Later on my neighbour searched on various area and found my properties. The stolen properties were taken to police station for identification and I did identified (sic) them. I was told that Kefa and Lubugula (the accused) have been arrested for the said offence who are before this court. On 27/8/2007 other 3 bandits were arrested. I pray all the above mentioned properties to be admitted as exhibit by this court."*

As the extract of the evidence reproduced above shows PW1 never made any effort in court to describe the property, which was seized by

others so as to lay a claim on ownership. The first ingredient of the doctrine therefore has not been proved.

The evidence of three members of the search party PW2 Masola Mmeta, PW3 Mohamed Mesengula and PW5 Joseph Kaji showed that the stolen property was not recovered in the possession of any of the appellants, but was, according to PW3 Mohamed Mesengula, recovered **fifty metres** from the house of one person called Machunga who was absent during the search. None of the appellants can therefore be accused of being in possession of the property which they had to explain how they came into possession of. It was only after the appellants have been proved to be in possession of the property that they would have been required to give any explanation. If the property was found **fifty metres** from Machunga's house, the best person to explain how the property found its way there was Machunga who was not called to testify. It is instructive to note that when the property was exhibit in court, the appellants commented in unison thus: -

"We don't recognize the said properties."

Before the doctrine of recent possession can be invoked, certain benchmarks need to be met. These were set out in the case of **1. JOSEPH MKUMBWA 2. SAMSON MWAKAGENDA versus THE REPUBLIC**, Criminal Appeal No. 94 of 2007 (unreported) and they go thus: -

> *"The position of the law on recent possession can be stated thus. Where a person is found in possession of property recently stolen or unlawfully obtained he is presumed to have committed the offence connected with person or place wherefrom the property was obtained for the doctrine to apply as a basis of conviction, it must positively be proved, first that the property was found with the suspect, second that the property is positively the property of the complainant; third the property was recently stolen from the complainant; and lastly that the stolen thing in possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commission of the offence charged. 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 (See **ALLY BAKARI AND PILI***

BAKARI v R. *1992 TLR 10 which was followed in* ***SALEHE MWEYA and 3 OTHERS v R****, Criminal Appeal No. 66 of 2006 and* ***ACHAJ AYUB @ MSUMARI & OTHERS v R****, Criminal Appeal No. 136 of 2009 (both unreported)".*

In this appeal we can say none of the benchmarks set out has been reached so the doctrine was wrongly invoked.

For the first and second appellants, evidence led shows that a search in their respective houses did not recover anything which was connected to the charge laid against each one of them. The judgment of the trial court inferred guilt on the first and second appellants merely on the ground that tyre drag marks were found leading up to the second appellant's house and that the second appellant led them to the first appellant. This finding was supported in the appellate High Court. With respect, we are of the opinion that this was a misdirection on the part of the appellate High Court to uphold the finding of fact of the trial court. We hold this opinion because, in the absence of recovery of the bicycle in the second appellant's house, and in the absence of any explanation from the second appellant, the tyre marks only aroused a suspicion on his part which did not warrant

an inference of guilt. It is trite law that suspicion, however grave, cannot be used to prove a criminal offence. This view is reinforced by the evidence that the evidence of PW3 Mohamed shows that the stolen property was found fifty metres from the house of one Machunga. There is another aspect which both lower courts failed to consider. This is the fact that in their respective defences the first and second appellants led evidence to show that they did not lead the way as the participants in the search party claimed. They said the search party led the way themselves and took them along while beating them all the way. This evidence was not discounted by the prosecution, and was not considered by the trial court or the first appellate court. Failure to consider the defence, especially where it leads to a misapprehension of the evidence leading to a wrong conclusion of fact, is fatal to the prosecution case. This is the situation obtaining in the present case. We are of the opinion that such failure has occasioned a miscarriage of justice. This failure, put side by side with the wrong application of the doctrine of recent possession allows this court to interfere with the findings of the two courts below along the lines of **Salum Mhando vs R** (1993) TLR. 70 and **The Director of Public Prosecutions versus Jaffari Mfaume Kawawa** (1981) TLR. 149.

We are satisfied that there is no incriminating evidence which was put before the trial court which could be upheld by the first appellate court. We therefore allow the appeal, quash the conviction entered and set aside the sentence passed against the appellants. The appellants should be set at liberty unless they are held on some other lawful cause.

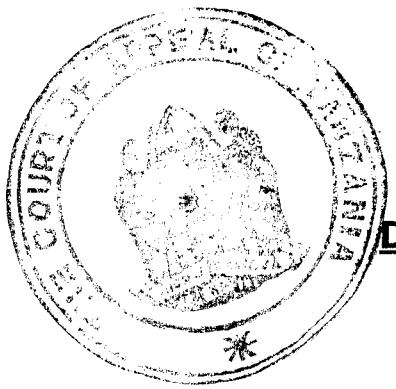
DATED at TABORA this 25th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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



Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL