IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MMILLA, J.A, MWANGESI, J.A And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 487 OF 2017

MUSSA RAMADHAN @ KAYUMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal From the decision of the High Court of Tanzania at Dodoma)

(Mansoor, J.)

dated the 6th day of October, 2017
in
DC Criminal Appeal No 162 of 2016

JUDGMENT OF THE COURT

14th & 21st August, 2019

MWAMBEGELE, J. A.:

The appellant Mussa Ramadhan Kayumba was arraigned in the District Court of Singida at Singida for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. He pleaded not guilty to the charge. After a full trial, he was found guilty, convicted and ultimately sentenced to serve a statutory minimum term of thirty (30) years in prison. His first appeal to the High Court was unsuccessful, hence this second appeal. The appeal is predicated on the following seven grounds of grievance:

1. That, the trial court and first appellate court erred in law and fact for convicting and dismissing the appellant appeal relying on doubtful identification evidence of prosecution witness;

2. That, the trial court and first appellate court erred in law and fact for convicting and dismissing the appellant appeal while there were contradictory evidence of prosecution witness;

3. That, the trial court and first appellate Court erred in law and fact for convicting and dismissing the appellant appeal while the identification parade were not properly conducted since the PW1 firstly identify the appellant while she was at the office of OCCID when was called after the alleged stolen things found to the alleged accused person;

4. That, the trial court and first appellate Court erred in law and fact for convicting and dismissing the appellant appeal while there are contradiction on the name of PW1, that is MWANAHAMISI MAWAZO and the exhibit tendered show that is the one of MWANAHARUSI MAWAZO SELEMANI;

5. That, the trial court and first appellate Court erred in law and fact for convicting and dismissing the appellant's appeal while the prosecution failed to prove its case beyond reasonable doubt;

6. That, the trial court and first appellate Court erred in law and fact for convicting and dismissing the appellant appeal without seriously consider the appellant's defence; and

7. That, the trial court and first appellate court erred in law and fact for convicting and dismissing the appellant's appeal relying on improper search and without the stolen property.

When the appeal was placed before us for hearing on 14.08.2019, the appellant appeared in person, unrepresented. The respondent Republic had the noble services of Ms. Lina William Magoma, learned Senior State Attorney. When we invited the appellant to address us on his grounds of appeal he earlier lodged in the Court on 10.5.2018, he declined the invitation. He, however, only adopted the seven-ground memorandum of appeal and opted to hear the response of the Republic after which, need arising, he would make a rejoinder.

Responding, Ms. Magoma expressed her stance at the very outset that she supported the verdicts of the two courts below. However, before going into the nitty-gritty of her response, she intimated to the Court that out of the seven grounds filed, the fourth one was a new ground not canvassed in the first appellate court. It

was being raised before us for the first time. In the premises, she beckoned upon us to disregard it because, upon a plethora of authorities, the Court would not have jurisdiction to entertain a ground of appeal not entertained by the first appellate Court.

On the remaining six grounds, the learned Senior State Attorney consolidated the fifth and seventh grounds in her arguments. The rest were argued separately in the order they appear.

The learned Senior State Attorney started his onslaught by attacking the first ground of appeal which challenges the two courts below for convicting the appellant on the strength of evidence of identification which was not watertight. The learned Senior State Attorney submitted that the material conditions obtaining at the *locus in quo* facilitated proper identification of the appellant. She submitted that there was enough light illuminated from electric tube lights in the vicinity; some ten metres away from where the couple were struggling for the complainant's handbag, the commotion spanned for about five minutes and would have taken longer but was cut short by the appellant threatening Mwanahamisi Mawazo (PW1) with a knife he wielded, that PW1 described the appellant attire as white T-Shirt,

jeans and a black jacket. That was enough identification of the appellant implicating him to the hilt, she submitted.

On the second ground of appeal which avers that the evidence for the prosecution was marred with discrepancies, the learned Senior State Attorney submitted that there were no contradictions at all. She argued that the only witnesses present at the scene of crime were PW1 and Salima Pembe (PW2) but the latter testified that she did not identify the culprit. In the circumstances, the learned Senior State Attorney submitted, the question of contradiction in evidence by the prosecution witnesses would not arise.

Arguing against the third ground which is a complaint on the identification not being properly conducted, Ms. Magoma submitted that on the date the identification parade was conducted, PW1 had been called to identify the Voter's Registration Card, NMB ATM and NBC VISA Cards. Thereafter, he identified the appellant at the identification parade. The appellant was not seen prior to the parade on that date. The averment by the appellant that PW1 saw him in the office of the OCCID before the parade, she submitted, is not backed

With regard to the fifth and seventh grounds of appeal, the learned Senior State Attorney submitted that the evidence adduced by the prosecution implicated the appellant to the hilt. She submitted that he was adequately identified at the scene of crime, he was identified in the identification parade and he was found in possession of the Voter's Registration Card, NMB ATM and NBC VISA Cards (Exh. P1 collectively) which bore the names of PW1. The learned Senior State Attorney cited **Chiganga Mapesa v. R.**, Criminal Appeal No. 252 of 2007 (unreported) to buttress the point that the appellant was the culprit because he was found in recent possession of Exh. P1.

Regarding the appellant's complaint concerning the impropriety of search and lack of a loss report to verify that PW1 had been robbed of the items the subject of Exh. P1, the learned Senior State Attorney submitted that the appellant was searched at the Police Station when he was arrested for the offence of rape. The first appellate court, she submitted, addressed the point at p. 7 of the typed judgment and was correctly satisfied that the search was appropriate. That search, she submitted, as the trial court observed, was appropriate before the

eyes of the law. In those circumstances, a loss report was not necessary, she submitted.

Regarding the sixth ground of appeal which is a complaint on failure by the trial Court to consider the appellant's defence, Ms. Magoma was of the view that it has no merit at all. She submitted that the defence was adequately considered by the trial court as appearing at p. 38 of the record of appeal and was considered by the first appellate court as appearing at p. 72 of the same record.

Having submitted and argued as above, the learned Senior State Attorney was of the view that the case against the appellant was proved beyond reasonable doubt and implored us to dismiss the appeal in its entirety.

In a short rejoinder, the appellant, randomly, submitted that no village leadership witnessed his arrest, that the identification parade was conducted while he was dirty thereby being picked on by the identifying witness easily, that it was true he was arrested for rape and that he was searched at the police station but that he was not

found in possession of anything material to this appeal. He thus prayed to be set free by allowing his appeal.

Having summarized the submissions and arguments by both sides, we are now in the position to determine the grounds of appeal before us. In our determination, we will consolidate the first and third grounds because they are intertwined. Equally related are the fifth and seventh grounds which we shall also determine together. Except for the fourth ground which we will disregard for reasons to be stated shortly, the rest of the grounds will be argued separately in the order they appear.

But before we do that, we find it apt to address the payer put across at the very outset by the learned Senior State Attorney to the effect that the fourth ground of appeal which did not feature in the High Court; the first appellate court, should be disregarded. That prayer did not meet any resistance from the appellant. Ms. Magoma is right. This Court has pronounced itself in a number of decisions that it will lack jurisdiction to entertain on appeal grounds not considered by the High Court - see: **Athumani Rashidi v. R.**, Criminal Appeal No. 26 of 2016, **Hassan Bundala @ Swaga v. R.**, Criminal Appeal No.

386 of 2015 and **Godfrey Wilson v. R.**, Criminal Appeal No. 168 of 2018 (all unreported), to mention but a few.

In **Hassan Bundala @ Swaga** (supra), for instance, the Court, having agreed with the learned Senior State Attorney who had submitted earlier that some of the grounds were an afterthought as they were not raised in the first appellate court and thus could not be entertained on second appeal, we observed:

> *"... It is now settled that as a matter of general principle this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal. See for example,* ***Jafari Mohamed v. the Republic****, Criminal Appeal No. 112 of 2006,* ***Richard s/o Mgaya @ Sikubali Mgaya v. the Republic, Nazir Mohamed @ Nidi v. the Republic****, Criminal Appeal No. 312 of 2014 (all unreported)."*

We are guided by the position we took in the above cases. As the complaint that there was a contradiction regarding the name of

PW1; that she testified as Mwanahamisi Mawazo while the exhibit tendered (Exh.1 collectively) indicated the name of Mwanaharusi Mawazo Selemani, was not raised in the first appellate court, we find ourselves loathe to entertain it on this second appeal. In the circumstances, we disregard this ground of appeal as prayed by Ms. Magoma.

First for consideration is the complaint by the appellant to the effect that his identification at the scene of crime was doubtful. Before we determine this ground, we find it apt to address the law relating to visual identification which is now settled in this jurisdiction. The landmark case on the point in this jurisdiction is the oft-cited **Waziri Amani v. R.** [1980] TLR 250. In that case, the Court, at pp. 251 – 252, observed:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are*

eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."
[Emphasis added].

Then, at p. 252, the Court went on:

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen***

> ***the accused before or not.*** *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."*
> [Emphasis added].

Adverting to the case at hand, it seems to us that the identification of the appellant by PW1, fall in all fours with the guidelines provided for in **Waziri Amani** (supra) because: **one**, the struggle for the handbag spanned for about five minutes during which PW1 managed to observe the appellant; **two**, the distance between the identifying witness and the culprit was quite close as they were struggling for the handbag; **three**, the appellant was identified by means of lights illuminating the *locus in quo* from electric tube lights which were some ten metres away; **four**, the identifying witnesses described the attire of the culprit as a "white T-shirt, jeans and a black jacket" and to cap it all, PW1, who did not know the appellant before nor had seen him before the robbery under discussion, identified him (the appellant) at the identification parade.

The above said, we are of the view that the identification of the appellant by PW1 was but watertight. We, consequently, find no merit in the first and third grounds of appeal and dismiss them.

The second ground of appeal is about a complaint over discrepancies in evidence of the prosecution witnesses. This ground of appeal will not detain us. As rightly submitted by Ms. Magoma, the only persons who eye-witnessed the alleged robbery were PW1 and PW2 but the latter testified that she did not identify the culprit because she ran away when the former cried for help. Above all the appellant did not clarify which contradictions in evidence he had in mind in respect of the second ground of appeal. We could not see any. In the end, we find ourselves constrained to dismiss this ground of appeal as well.

Next for consideration are the fifth and seventh grounds; that the prosecution failed to prove the case beyond reasonable doubt, that the search was improper and that a loss report was necessary to verify that PW1 was robbed of the items the subject of Exh. P1. It is in evidence, and the appellant does not deny, that he (the appellant)

was arrested in connection with the offence different from the one the subject of the present appeal. He was arrested in connection with the offence of rape and at the police station, he was searched and found in possession of the Voter's Registration Card, NMB ATM and NBC VISA Cards, the property of PW1 and which were tendered in evidence as Exh. P1 collectively. Those items were identified by PW1 to be hers and were in her names. The NMB card is in the name of Selemani M. M., the Voter's Registration Card has the names of Mwanaharusi Mawazo Selemani and PW1's passport size picture affixed on it. Admittedly, the names of the complaint are not identical. While the charge sheet indicate the name of the complainant as Mwanaharusi Mawazo Selemani, she testified as Mwanaharusi Mawazo. For the avoidance of doubt, the typed proceedings show PW1 as Mwanahamisi Mawazo but that was just a keyboard mistake. The original (handwritten) court record show PW1 as Mwanaharusi Mawazo. The complainant at the identification parade is shown as Mwanaharusi Mawazo. And the cards (Exh. P1) indicate the names as shown above; that is, the NMB card is in the name of Selemani M. M. and the Voter's Registration Card has the names of Mwanaharusi Mawazo

Selemani. As the names were not disputed at the trial and first appellate court, we find it in the interest of justice to find as we hereby do, that the names Mwanaharusi Mawazo Selemani in the charge sheet and the Voter's Registration Card, Mwanaharusi Mawazo in the testimony and the identification parade and Selemani M. M. in the NMB card refer to one and the same person; PW1.

The appellant was therefore found in recent possession of items robbed from PW1 and failed to give a reasonable explanation as to how he came into their possession. In **Chiganga Mapesa** (supra) we were persuaded by and quoted the following excerpt from a Canadian case of **R. v. Kowlyk** [1988] 2 C R. 59:

> *"The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may – but not must draw an inference of guilt of theft or of offences incidental thereto. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. When the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be*

for the trier of fact upon consideration of all the circumstances to decide which if ether, inference should be drawn. ***The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of the truth.***"
[Emphasis added].

We went on to quote the holding in **Rex v. Bakari s/o Abdulla** (1949) 16 EACA 84:

> *"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but for 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."*

The principle in **Rex v. Bakari s/o Abdulla** (supra) was followed in **Andrea Obonyo & Others v. R** [1962] 1 EA 542 in which it was stressed at p. 549:

"We stress the words used in R. v. Bakari s/o Abdullah:

'... if all circumstances of a case point to no other reasonable conclusion, the presumption can extend to any charge however penal'".

Reverting to the case at hand, the appellant was found in very recent possession of the complainant's properties (Exh. P1 collectively), just five days after the items were robbed from PW1. He gave no reasonable account of how he came into their possession. At this juncture, we find it apposite to echo what we stated in **Joseph Mkumbwa & Another v. R.**, Criminal Appeal No. 94 of 2007 (unreported):

"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as the basis of conviction, it must be positively 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 the 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 owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

[As quoted in **Masumbuko Charles @ Kema v. R.**, Criminal Appeal No. 466 of 2015 (unreported)].

As we also held in **Chiganga Mapesa** (supra) and the cases cited therein possession of recently stolen items has been held to support a presumption of commission of any offence however penal. On the authorities of the cases above, the appellant is therefore the person who robbed the appellant. The doctrine of recent possession was therefore correctly invoked to found a conviction against the appellant. In view of this, we find and hold that the fifth and seventh grounds are without merit and dismiss them.

Last for consideration is the sixth ground of appeal which is to the effect that the appellant's defence was not considered.

Admittedly, at law, failure to consider defence of an accused person is a fatal ailment; it vitiates the consequent conviction – see our decisions in **Leonard Mwanashoka v. R.**, Criminal Appeal No. 226 of 2014 and **James Paulo @ Memba v. R.**, Criminal Appeal No. 436 of 2015 (both unreported). However, in the case at hand, the appellant's averment that his defence was not considered is not supported by evidence. As submitted by Ms. Magoma, and to our mind rightly so, the trial court as well as the first appellate court, considered the appellant's defence at the trial. The appellant's defence was considered by the trial court as appearing at pp. 38 - 39 of the record of appeal but was dismissed basing on the case of **Waziri Amani** (supra). Likewise, the appellant's defence was considered by the first appellate court as appearing at pp. 72 - 73 of the same record and was found not to shake the prosecution case. The applicant's complaint in this respect is not borne out by the record. Consequently, we find no merit in the sixth ground as well and dismiss it.

The foregoing discussion culminates into the conclusion that all the grounds of appeal fronted by the appellant are seriously wanting

in merit and have all been dismissed. Consequently the appeal is also seriously wanting in merit and is hereby dismissed entirely.

Order accordingly.

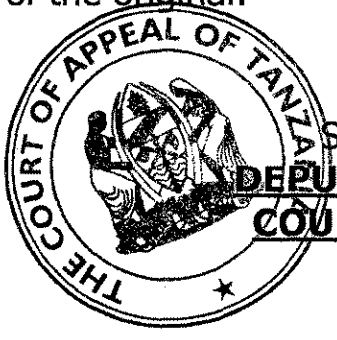
DATED at **DODOMA** this 20th day of August, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered this 21st day of August, 2019 in the presence of the Appellant in person and Ms. Catherine Gwaltu, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL