IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MMILLA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 5 OF 2017

SIMON EDSON @ MAKUNDI ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Moshi)

(Sumari, J.)

dated the 28th day of January, 2017
in
(DC) Criminal Appeal No. 36 of 2016

JUDGMENT OF THE COURT

11th & 18th August, 2020

KWARIKO, J.A.:

The appellant, Simon Edson @ Makundi was charged before the District Court of Hai with the offence of armed robbery contrary to section 287A of the Penal Code [CAP 16 R.E. 2002- now R.E. 2019]. He was accused of stealing a motorcycle with registration number T 390 CBH make Toyo the property of Ismail Ramadhan and threatened him with a bush knife to obtain or retain the property. Having denied

the charge, the appellant was fully tried. At the end of the trial, the court found that the prosecution case was proved beyond reasonable doubt against the appellant. He was convicted and sentenced to thirty (30) years imprisonment. The appellant's appeal before the High Court of Tanzania at Moshi was not successful. Undaunted, he is before this Court on a second appeal.

During the trial, the prosecution brought a total of four witnesses and tendered four exhibits, whereas the appellant was a sole witness in defence and tendered one exhibit. The facts of the case as deduced from the said witnesses from both sides and led to the appellant's conviction can be summarized as hereunder. Ismail Ramadhan (PW1) owned a motorcycle which he used for hire business commonly known as bodaboda. On 4/9/2014 at or about 22:00 hours while at his parking place, he was hired by a woman to take her to Kingereka Bomang'ombe area within Hai District. Upon arrival at the intended destination, his passenger called her host who appeared wearing a 'spy' coat and a cap which did not cover his face. Immediately thereafter, another person emerged and the two

ordered PW1 to lie down. PW1 complied and the assailants tied his hands and legs. When this was happening, his passenger disappeared. The two assailants stole the said motorcycle and his mobile phone make Techno black in colour with Vodacom sim card No. 0755 999962. When the thugs left, PW1 managed to untie the ropes by teeth and reported the matter to the Police Station.

Meanwhile, PW1's brother, Abasi Ramadhan (PW2) was informed by his wife about the robbery incident and one Alamin told him that he had seen the stolen motorcycle heading to Moshi direction. In the company of a Police Officer No. E8079 Det. Cpl. Damas (PW4), they followed the lead and found the stolen motorcycle parked at Panone Petrol Station and the appellant herein was nearby. PW4 asked for assistance from No. D7972 Det. Sgt. Frank Christian (PW3) who was on patrol where the appellant was arrested. Upon being searched, he was found in possession of the stolen motorcycle's keys and two mobile phones. During the trial, the prosecution tendered the motorcycle with registration No. T 390 CHB, a black coloured cell phone, motorcycle's keys and a certificate of

seizure which were admitted in evidence as exhibits P1, P2, P3 and P4 respectively.

In defence, the appellant was the sole witness. He denied the allegations and said that on the material night at 20:00 hours he was watching football match at one Mohamed's kiosk. On his way home, he was arrested together with other youths by patrol policeman, including PW4. The police accused them of being vagabonds and idlers and demanded bribe so that they could release them. When they responded that they had no money, they were sent to a police station where the appellant was locked until 9/9/2014 when he was sent to court with the offence of armed robbery.

The appellant discredited PW1's evidence for he did not identify his assailant and only made a dock identification of the appellant. In his bid to impeach PW1's evidence, the appellant tendered his statement which was admitted in court as exhibit D1.

At the end of the trial, the trial court found that the prosecution case was proved beyond reasonable doubt and convicted the

appellant and sentenced him as indicated earlier. The first appellate court concurred with the finding of the trial court and dismissed the appellant's appeal.

In his memorandum of appeal to this Court, the appellant has raised six grounds of appeal as follows:

> *"1 That, the first appellate court erred in law and in fact when it upheld the decision of the trial court while the prosecution did not prove their case against the appellant beyond reasonable doubt.*
>
> *2. That, the prosecution failed to account on the chain of custody of exhibits, P1 and P2 which were tendered by PW1 i.e the ownership of the motorcycle was not proved, chain of custody was also not established.*
>
> *3. That, the first appellate court erred in law and in fact when it failed to scrutinize the evidence of PW1 and hence it arrived on an erroneous decision. The testimony of PW1 is inconsistent with his statement exhibit D1.*

4. *That, the first appellate court erred in law and in fact for failing to notice the variations between the charge sheet and evidence on record.*

5. *That, the first appellate court erred in law and fact in upholding the appellant's conviction on the basis of the doctrine of recent possession in respect of items of properties which were not positively identified by PW1.*

6. *That, failure by the prosecution to call the investigating officer as a witness, the court ought to have drawn an adverse inference on the part of the prosecution."*

At the hearing of the appeal, the appellant was not physically present in Court, but was linked through video conference facility from prison whilst the respondent Republic was represented by Ms. Agnes Hyera, learned Senior State Attorney assisted by Ms. Naomi Mollel, learned State Attorney.

In his submission in support of the appeal, the appellant argued generally that the prosecution case was not proved beyond

reasonable doubt. He contended that the alleged stolen motorcycle, exhibit P1 and the mobile phone, exhibit P2 were not sufficiently identified and their ownership was not proved by PW1. Further, the chain of custody in relation to exhibit P1 was not established because when PW1 tendered it in court, he did not say where the same had been kept after it was allegedly found from him.

The appellant went on to argue that the prosecution did not prove that he was found in possession of the motorcycle. This is because the pump attendants from which he was allegedly arrested did not testify to support PW2's, PW3's and PW4's evidence. He complained further that, the arresting officers were not led to identify exhibit P1 in court more so as the same can easily be transferred from one hand to another.

Moreover, it was the appellant's argument that there was a variance between the charge and prosecution evidence. This is so because while the charge mentioned only the motorcycle as the stolen item, the evidence showed that mobile phone and keys were

also stolen property. In the end he implored the Court to allow his appeal and order his release from custody.

When on the other hand Ms. Mollel took the stage, she made her stance clear supporting the appeal for the same reasons as the appellant that the prosecution case was not proved beyond reasonable doubt. In the course of her submissions, Ms. Mollel was probed by the Court as to whether the judgment of the first appellate court complied with legal requirements. In response, the learned counsel submitted that the High Court Judge did not consider the grounds of appeal which were filed by the appellant and instead, she decided the appeal generally by holding that the prosecution case was strong enough to ground conviction.

Ms. Mollel submitted further that by not considering the grounds of appeal, the High Court Judge contravened the provisions of section 312 (1) of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA). She contended that, as a result this Court cannot consider the appellant's grounds of appeal which did not originate from the judgment of the first appellate court. As to the way forward, Ms.

Mollel urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 R.E. 2019] henceforth the AJA, to nullify the High Court's judgment and remit the record to that court with a view to composing its judgment afresh according to the law.

Upon further probing, Ms. Hyera on her part came up with another option where she implored the Court to step into the shoes of the High Court to consider the evidence on record and decide the appellant's appeal. According to her, this option was justifiable because the evidence on record is insufficient to ground conviction and it would be prejudicial to the appellant to remit the record to the High Court to compose the judgment afresh.

In his rejoinder, the appellant concurred that the High Court did not consider his grounds of appeal. He complained that since he has been in custody for a long time, it won't do him justice if the record is remitted to the High Court to compose the judgment afresh. He thus urged us to consider the evidence on record and allow his appeal.

We have heard the submissions by the parties and will now consider their merits or demerits. We will start with the issue we raised *suo motu* concerning the propriety of the judgment of the first appellate court. The record shows that the appellant had raised a total of eleven grounds of appeal before the High Court. However, in its judgment the High Court Judge did not consider any of them. Instead, she gave general sweeping statements and dismissed the appeal. For ease reference we shall let the decisive portion of the impugned judgment speak at page 109 of the record of appeal thus:

> *"I had ample time to peruse carefully the evidence on record and I am satisfied that the trial magistrate properly evaluated the evidence. There is no doubt that prosecution case is strong against the appellant in the sense that its witnesses corroborated each other. I entirely agree with the learned State Attorney that the appellant's conviction was well founded. The appeal is therefore dismissed".*

Reading from the extract above it is clear that the first appellate judge neither considered the grounds of appeal presented before that

court, nor did she re-evaluate the evidence on record to decide whether the trial court was correct in its findings. There is therefore no gainsaying that the High Court judgment is not the judgment which the law envisages. The contents of a judgment are provided under section 312 (1) of the CPA as follows:

> *"Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court".*

Although the cited provision refers to judgments under section 311 of the CPA which caters for judgment in criminal trials, it can as well be applied in the High Court in determination of criminal appeals. In the case of **Muhidin Mohamed Lila @ Emolo & Three Others v. R,** Criminal Appeal No. 444 of 2015 (unreported), the Court stated:

"We hasten to observe that although section 311 expressly governs judgments in criminal trials, we think the requirement under subsection (1) of section 312 on the contents of a judgment would be equally applicable to a judgment by the High Court determining a criminal appeal".

In **Malmo Montagekonsult AB Tanzania Branch v. Margret Gama,** Civil Appeal No. 86 of 2001 (unreported), the High Court had determined the appeal after consolidating several grounds of appeal into one, the Court had this to say:

"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is, however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive ground of appeal only or discuss each ground separately".

By analogue, although the above excerpt is derived from a civil appeal, we think it applies to criminal appeals as well.

The cumulative effect of the law and the cases cited above is that, the appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal. It is also necessary for the first appellate court to re-evaluate the evidence on record before reaching to its conclusion. With respect, the impugned judgment fell far below the required standard and for that reason, it was not a judgment known in law. It was a nullity. For the stated reasons, we invoke our revisional powers under section 4 (2) of the AJA and nullify the purported judgment.

Having nullified the High Court's judgment, the question which follows for our determination is the way forward. The learned State Attorney urged us to remit the record to the High Court for it to compose a fresh judgment. In the alternative, the learned counsel implored us to step into the shoes of the High Court and determine

the appeal more so because the evidence on record did not prove the case beyond reasonable doubt and thus remitting the record to the High Court will be prejudicial to the appellant.

We have considered those options and we are settled that the latter option appears to be an appropriate one. This is so because we have found the prosecution evidence materially wanting. That means we shall step into the shoes of the first appellate court to do what it ought to have done. In so doing, we shall consider the evidence on record before arriving at a conclusion whether the prosecution evidence proved the case against the appellant beyond reasonable doubt warranting the conviction and sentence.

Our starting point is to see whether the appellant was found in possession of the stolen motorcycle and hence the application of the doctrine of recent possession.

Upon scrutiny of the evidence on record we are of the settled mind that the prosecution did not prove that the appellant was found in possession of the stolen motorcycle. We have the following reasons

for this holding. One, when PW2 was cross-examined, he said that they found the appellant sitting on the motorcycle and tried to hide himself from them behind a fuel pump. On his part, PW3 stated that they found the appellant near the motorcycle and attempted to run away but they managed to arrest him. PW4 on the other hand said that, on seeing them the appellant tried to run away but was arrested and found in possession of keys and two cell phones. With this evidence, it is not difficult to see that the arresting team differed materially on the issue whether the appellant was actually found in possession of the stolen motorcycle. This contradiction created doubt on whether it was the appellant who was found in possession of the stolen motorcycle. This doubt ought to be resolved for the benefit of the appellant.

Two, the above said doubts could have been cleared by an independent witness. In this case, the pump attendants who were present on that day were crucial witnesses. Any of them ought to have been called to corroborate the evidence of PW2, PW3 and PW4. Failure to call them adversely impacted on the prosecution case.

Although the law under section 143 of the Evidence Act [CAP 6 R.E. 2019] does not specify any number of witnesses required to prove a fact, in this case the said witnesses were crucial to corroborate the evidence of PW2, PW3 and PW4. In the case of **Aziz Abdallah v. R** [1991] T.L.R 71, the Court held *inter alia* that:

> *"The general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".*

It follows thus that failure to call any of the petrol station attendants who were within reach with no apparent reason entitles us to draw an adverse inference against the prosecution with the obvious consequences that is to say; the claim that the appellant was found in possession of the stolen motorcycle remains doubtful.

Three, the certificate of seizure which was allegedly prepared after the arrest of the appellant suffers several ailments; firstly, it was

not witnessed by independent witnesses to eliminate the possibility of false implication onto the appellant; and secondly, it was not dated to prove that it was indeed filled in at the time of the appellant's arrest.

It is trite law that the burden of proof in criminal case lies on the prosecution and it never shifts to the accused. See our previous decisions in **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016, **Nchangwa Marwa Wambura v. R,** Criminal Appeal No. 44 of 2017 and **Mohamed Haji Ally v. R,** Criminal Appeal No. 225 of 2018 (all unreported), to mention but a few. It is for the stated reasons we think that had the trial court directed its mind properly to the evidence, it should have held that such evidence was not water tight to make a finding of guilt warranting conviction and sentence. Instead, it ought to have acquitted the appellant.

In the light of the foregoing, we sustain the submissions by both the appellant and the learned State Attorney that the conviction of the appellant was premised on an insufficient evidence.

Accordingly, we quash the conviction and set aside the sentence with an order for the appellant's immediate release from custody unless he is held therein for another lawful cause.

DATED at **ARUSHA** this 16th day of August, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 18th day of August, 2020 in the presence of the Appellant in person and Ms. Tusaje Samwel, State Attorney for the respondent is hereby certified as a true copy of the original.

E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL