IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 422 OF 2018

DICKSON KAMALA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

dated the 3rd day of September, 2013
in
HC Criminal Appeal No. 10 of 2012

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JUDGMENT OF THE COURT

19th March & 21st May, 2021

NDIKA, J.A.:

The appellant, Dickson Kamala and another person not a party to this appeal (Joseph Nelson) stood trial before the District Court of Ilala at Samora Avenue on a charge of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002 ("the Penal Code"). Both persons were convicted as charged and each of them was sentenced to thirty years' imprisonment. The appellant's first appeal to the High Court of Tanzania

at Dar es Salaam against conviction and sentence was unsuccessful, hence this second and final appeal.

It is essential to provide at the beginning the salient facts of the case. Briefly, it was alleged at the trial that the appellant and the said Joseph Nelson, on 1st November, 2008 at 11:30 hours at Segerea within Ilala District in Dar es Salaam Region, stole one motor vehicle with registration number T.660 AJC, a Honda CRV valued at TZS. 9,500,000.00, the sum of TZS. 310,000.00 in cash, two Motorola and Bird mobile phones valued at TZS. 230,000.00, one Hitachi television set valued at TZS. 800,000.00, one CD and cable programmes receiver, all properties valued at TZS. 11,000,000.00 being the properties of Xu Jinzhul and immediately before such stealing they threatened him with a knife and tied him with a manila rope around his hands and legs in order to obtain the said properties.

The prosecution's narrative, based on the testimonies of four prosecution witnesses, was as follows: on 1st November, 2008 around 11:40 hours, PW2 Xu Jinzhul was inside his home when he heard his dog bark outside. As soon as he got out of the house to find out what was going on, four unmasked thugs burst forth to seize him. According to PW2,

the appellant was one of the thugs and that he identified him by his markedly small or receding chin. Besides such peculiar profile, PW2 knew the appellant because he frequently visited his (PW2's) place of work where the appellant's supposed confederate, Joseph Nelson, also used to work.

PW2 also recalled that the appellant tied him with a rope and covered his face with a mask. Thereafter, the gang got into his bedroom from which they stole two mobile phones and a TV cable receiver. They also grabbed a spare key for a car that was parked at that home (T.660 AJC, Honda CRV) and drove it away with the stolen property. It is noteworthy that he did not mention any theft of money in cash.

Police Officer D.7676 D/S.Sgt. Patrick (PW3), the then Head of the Anti-robbery Unit at Morogoro, testified at the trial that the police learnt from an informer on 4th November, 2008 that certain persons had been spotted at Kingo Street, Sabasaba Ward in Morogoro with a car suspected to have been stolen, which they were offering for sale at a throwaway price. Around 13:00 hours on that day, he rushed to that place posing as an intending purchaser. He found the appellant and the said Joseph Nelson offering for sale at TZS. 2,000,000.00 a car that was later confirmed to be

T.660 AJC, Honda CRV. They claimed that the car was their property and that they had left its registration card in Dar es Salaam. PW3 arrested both of them on the spot and took them to Morogoro Police Station along with the car and one phone retrieved from the said Joseph Nelson suspected to be one of the two mobile phones stolen from PW2's home.

Police Officer E.1279 D/Cpl. Peter (PW1) recalled to have marshalled the investigations after PW2 had reported the incident to the police and pointed out the identities of the perpetrators. On learning that a car matching the description of the one stolen from PW2's home had been recovered in Morogoro, PW1 and PW2 travelled there for verification. PW2 confirmed that the said car was the one stolen from his home. He too identified at the station the appellant and his co-accused as the gangsters that robbed him on the fateful day. In support of the prosecution case, PW2 tendered a copy of the registration card of the recovered car (Exhibit P.1) while PW3 tendered the car and the phone as Exhibits P.2 and P.3 respectively.

There was further evidence from No. D.1020 D/Sgt. Shimba that the appellant's co-accused, the said Joseph Nelson, recorded a cautioned

statement by which he confessed to the armed robbery. However, the trial court ruled the statement inadmissible.

When put to their defence, the appellant and his co-accused denied the accusation against them as hard as possible. Each of them also raised a defence of *alibi*. The appellant, in particular, blamed his travails on his chinless profile. He bemoaned that while at the Sitakishari Police Station in Dar es Salaam PW2 was made to point an accusing finger at him just because of his peculiar face.

Apart from finding that the appellant and his co-accused were positively identified by PW2 at the scene, the trial court took into account that they were found in possession of the car a few days after it was robbed. The court considered their respective defences but it was unimpressed. On the first appeal by the appellant, the High Court was equally unconvinced by the appellant's case. It upheld the impugned conviction and sentence as it sustained the finding that the appellant was positively identified at the scene as one of the perpetrators of the robbery.

The appellant initially challenged the High Court's decision on seven grounds raised in the Memorandum of Appeal lodged on 1st April, 2019. Then, he lodged a supplementary Memorandum of Appeal on 1st

September, 2020 raising two additional grounds before he finally filed another two-point supplementary Memorandum of Appeal on 8th March, 2021. The three memoranda, in our view, raise ten complaints, which we reproduce in a logical sequence as follows: **one**, that the charge was incurably defective; **two**, that the visual identification evidence adduced by PW2 was weak and unreliable; **three**, that the testimonies of PW1 and PW2 were contradictory on whether the robbers wore masks at the scene; **four**, that the chain of custody on the motor vehicle and the phone (Exhibits P.2 and P.3) was unproven; **five**, that PW1 and PW2 did not identify the motor vehicle and the mobile phone as the subject matter of the case; **six**, that there was a variance between the charge and the evidence of PW2 on the actual value of the stolen properties; **seven**, that PW2 testified through an interpreter whose competence was not established before he assumed the duty to interpret; **eight**, that the appellant was denied the right to cross-examine his co-accused (DW1); **nine**, that the defence evidence was recorded contrary to the dictates of section 210 (3) of the Criminal Procedure Act, Cap. 20 RE 2002 (now RE 2019) ("the CPA"); and **finally**, that the defence was not accorded

sufficient weight despite raising a reasonable doubt against the prosecution case.

Prosecuting his appeal via a virtual link from Ukonga prison, the appellant adopted his grounds of appeal and urged us to allow the appeal. Through Ms. Deborah Mushi, learned Senior State Attorney, the respondent Republic, on the other hand, valiantly opposed the appeal.

At first, we are enjoined to determine Ms. Mushi's submission that the seventh and eighth grounds of complaint as enumerated above should not be considered on the reason that they are new complaints. That they were not raised on the first appeal or determined by the High Court. She contended that the Court is precluded to entertain such new grounds unless they were pure points of law but she did not cite any authority in support of her submission. The appellant, being self-represented and obviously unacquainted with the thrust of Ms. Mushi's submission, offered no counter argument.

Indeed, it is settled that this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal. This position has been reaffirmed by the Court in numerous decisions – see, for instance, **Hassan Bundala v. Republic**,

Criminal Appeal No. 385 of 2015; **Kipara Hamisi Misagaa @ Bigi v. Republic**, Criminal Appeal No. 191 of 2016; **Florence Athanas @ Baba Ali and Emmanuel Mwanandenje v. Republic**, Criminal Appeal No. 438 of 2016; **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016; and **Lista Chalo v. Republic**, Criminal Appeal No. 220 of 2017 (all unreported).

Guided by the above principle, we analyzed the two grounds complained of and came to agreement with Ms. Mushi that they raise new factual matters. To begin with, the complaint in the seventh ground that PW2, a Chinese national, testified through an interpreter whose competence was not established before he assumed the duty to interpret was neither raised at the trial nor was it a subject matter in the first appeal. So was the grievance in the eighth ground of appeal that the appellant was denied the right to cross-examine his then co-accused (DW1). In the premises, we sustain Ms. Mushi's submission and hold that the two grounds are new complaints underserving of our attention. Accordingly, we refrain from entertaining them in this appeal.

Having disposed of the two grounds above, we propose to deal with the rest of the grounds as follows: at first, we will consider the first, sixth,

ninth and tenth grounds sequentially. Thereafter, we will revert to the second and third, which we will address conjointly. Then, we will round off with the entwined complaints in the fourth and fifth grounds.

Beginning with the grievance in the first ground of appeal that the charge was laid under a non-existing provision of law, we hasten to say that this complaint is plainly misconceived. We agree with Ms. Mushi that section 287A of the Penal Code was the proper charging provision for the offence of armed robbery as at 1st November, 2008 when the offence was allegedly committed. As rightly stated by the learned first appellate Judge, as shown at page 65 of the record of appeal, the said provision was introduced into the Penal Code in 2004 by the Schedule to the Written Laws (Miscellaneous Amendments) Act, No. 4 of 2004. We are aware that its text was deleted and replaced in 2011 vide section 10A of the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011 with a minor change. All the same, we dismiss the first ground of appeal as we are satisfied, as did the learned first appellate Judge, that the impugned charge was proper in both form and substance.

Concerning the sixth ground of appeal, contending that there was a variance between the charge and the evidence of PW2 on the actual value

of the stolen properties, we would agree, at first, with both the appellant and Ms. Mushi that the alleged variance existed. To be sure, while the charge sheet particularized that properties worth TZS. 10,840,000.00 were robbed from PW2's home, PW2 estimated the value of the stolen items, at page 14 of the record of appeal, at TZS. 12,000,000.00. Nevertheless, this variance is plainly inconsequential bearing in mind that the value of the stolen items is not an ingredient of the charged offence and that the value given in the evidence was most probably an estimated value as opposed to the actual value. That apart, it is quite unassailable in the evidence that the appellant was found with, at least, one of the stolen items – the motor vehicle – three days after the robbery. This piece of evidence renders the variance a trifling issue for he could still be inferred to have been one of the robbers on account of his unexplained possession of the recently stolen motor vehicle. Accordingly, we dismiss the sixth ground of appeal for lacking substance.

The ninth ground of appeal contends an impropriety in the manner the learned trial Resident Magistrate recorded the testimony of the appellant as a defence witness. Section 210 (3) of the CPA provides the procedure for handling a witness' testimony after it is recorded thus:

"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."

The above provision directs the presiding magistrate to avail every witness an opportunity to have his evidence read over to him after it is recorded and then note down whatever comments the witness makes after his testimony is read over. This procedure guarantees against distortion, perversion and suppression of evidence – see **the Director of Public Prosecutions v. Hans Aingaya Macha**, Criminal Appeal No. 449 of 2016 (unreported).

Ms. Mushi conceded, rightly so, that the trial record shows that the trial Resident Magistrate did not inform the appellant of his entitlement under the above provision after recording his testimony. What then is the effect of this omission? When confronting a similar omission in **Jumanne Shaban Mrondo v. Republic**, Criminal Appeal No. 282 of 2010 (unreported), we stressed that in every procedural irregularity the crucial

question is whether it has occasioned a miscarriage of justice. We, then, reasoned that:

> *"In **Richard Mebolokini v. Republic** [2000] TLR 90, Rutakangwa, J. (as he then was) was faced with a similar complaint. The learned judge observed that when the authenticity of the record is in issue, non-compliance with section 210 may prove fatal. We respectfully agree with that observation. **But in the present case the authenticity of the record is not in issue, at least, the appellant has not so complained. In the circumstances of this case, we think that non-compliance with section 210 (3) of the CPA is curable under section 388 of the CPA.**"* [Emphasis added]

See also **Athuman Hassan v. Republic**, Criminal Appeal No. 84 of 2013; **Elia Wami v. Republic**, Criminal Appeal No. 30 of 2008; **Omari Mussa Juma v. Republic**, Criminal Appeal No. 73 of 2015; **Flano Masalu @ Singu and Four Others v. Republic**, Criminal Appeal No. 366 of 2018; and **Iddy Salum @ Fredy v. Republic**, Criminal Appeal No. 192 of 2018 (all unreported).

In the instant matter, we are satisfied that the authenticity of the trial record is not in question because the appellant has not suggested that his testimony was distorted or suppressed. The omission complained of occasioned no miscarriage of justice to the appellant and, therefore, it is curable under section 388 of the CPA. The ninth ground of appeal fails.

Next is the tenth ground of appeal contending that the appellant's defence was not accorded sufficient weight even though it raised a reasonable doubt against the prosecution case. On this ground, Ms. Mushi referred us to pages 45 and 46 of the record of appeal, contending that the appellant's defence, constituting a general denial of liability and an *alibi*, were duly considered but rejected by the trial court. She thus urged us to dismiss the complaint.

The complaint at hand clearly flies in the face of the record. It is vivid, as rightly submitted by Ms. Mushi, that the trial court, at pages 45 and 46 of the record of appeal, weighed the appellant's defence against the prosecution case but rejected it. For clarity, we excerpt the relevant part of that court's reasoning and finding thus:

> *"... I disregarded the 2nd accused's cry that he was mistakenly identified simply because of his lack of*

chin. As I said before, the incident occurred during broad daylight where possibility of mistaken identlty is minimal. As to the question of cooked case against the 2nd accused, the same is dismissed ...."

The trial court stated that it rejected the claim that the case was a frame-up in view of the totality of the evidence that the appellant and his co-accused were not only recognized at the scene but also that they were traced and arrested at Morogoro in possession of the stolen motor vehicle three days after the fateful incident while they were negotiating to dispose of the vehicle at a throwaway price. The learned first appellate Judge upheld the above reasoning and finding, as revealed at page 65 of the record. On our part, having reviewed the above finding and reasoning, we find no cause for upsetting this finding by the two courts. As a result, we find the tenth ground of appeal baseless.

We now revert to the second and third grounds of appeal. They both assail the visual identification evidence adduced by PW1 and PW2 on the ground that it was contradictory, weak and unreliable.

Submitting on the above grounds, Ms. Mushi referred us to PW2's evidence at page 15 of the record of appeal where he adduced that he

clearly saw the appellant among the unmasked thugs that invaded his home in broad daylight at 11:00 hours and that he identified him because he was familiar to him. She said that PW2 adduced that the appellant tied him with a rope. She admitted that PW1 (the police investigator) said that the raiders were masked but she contended that since this witness was not at the scene when the offence was committed his evidence cannot contradict that of PW2. She thus urged us to uphold the lower courts' concurrent finding that the appellant was positively identified at the scene.

At first, we are mindful of the caution in this Court's seminal decision in **Waziri Amani v. Republic** [1980] TLR 250, at pages 251 – 252, that:

> *"... 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]

In view of the circumstances of this case, we share the concurrent view of the courts below that the evidence of visual identification adduced

by PW2 is plainly watertight and that it leaves no possibilities of mistaken identity. For it is in the evidence that the offence was committed in broad daylight at 11:00 hours in the morning; that the appellant was well known to the identifying witness (PW2) as he (the appellant) used to visit his offices so frequently with his supposed confederate Joseph Nelson; and that PW2, without delay, named the appellant to the police (PW1) as one of the raiders that robbed him. It is instructive to recall that in his evidence in chief, PW2 testified, as revealed at page 14 of the record of appeal, that the bandits were unmasked and that he saw and observed them closely in full glare of daylight:

> *"When they entered my house they were not wearing masks. However, later on they tied me with a rope and put a mask on my face. I saw the 2nd accused [meaning the appellant] tying me with ropes on my legs. I identified the 2nd accused to be chinless."*

When cross-examined by the appellant, as shown at page 15 of the record, PW2 was emphatic that:

> *"I saw you at the scene as I used to see you at my workplace. I exactly noted you. I have seen you frequently previously. That is why you became*

familiar to me. I saw you at Mganga's place before the incident. You were the one who tied me with rope on my legs."

We recall that the appellant claimed that he was picked on because of his peculiar face. That contention is beside the point because he did not cross-examine PW2 on it. As to the contention that PW1 (the police investigator) contradicted PW2's testimony on the aspect whether or not the robbers were masked, we agree with Ms. Mushi that the said assertion was essentially hearsay since PW1 was not at the scene when the offence was committed and, therefore, that detail could not have materially contradicted the testimony of PW2, the victim of the armed robbery. We thus find the second and third grounds unmerited.

Finally, we deal with the fourth and fifth grounds of appeal together as they commonly seek to deflate the inference of guilty invoked by the courts below based on the finding that the appellant was found in possession of the motor vehicle and the phone (Exhibits P.2 and P.3) three days after they were stolen. The appellant's contention here is that the chain of custody of the two exhibits was unproven and that PW1 and PW2 did not identify them as the subject matter of the case.

Addressing us on the above grounds, Ms. Mushi referred us to the evidence of Police Officer D.7676 D/S.Sgt. Patrick (PW3), at pages 19-20 of the record, who tendered the two exhibits. As regards the mobile handset (Exhibit P.3), she conceded that no detail was given on it by PW3 linking it to its stealing from PW2 and, accordingly, urged us to discount it. On the motor vehicle (Exhibit P.2), she submitted that it was unique property and that its chain remained unbroken because it could not be tampered with or change hands easily. However, she acknowledged that the registration card (Exhibit P.1) over the motor vehicle was not read out after it was received in evidence, hence it was liable to be expunged from the record based on the principle in our decision in **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 218 on handling admitted documentary exhibits.

On our part, we agree with the learned State Attorney that no specific detail was given by PW3 on Exhibit P.3 allegedly recovered from the appellant's co-accused as proof that it matched the description (such as the unique identification number – the International Mobile Equipment Identity) of the mobile handset that was stolen from PW2. This exhibit, therefore, lacks any evidential value.

Quite the reverse, however, we are satisfied that the cogency of the motor vehicle (Exhibit P.2) is too plain for argument as this exhibit is a unique item whose description was undoubted. Although, as rightly argued by Ms. Mushi, the contents of the registration card (Exhibit P.1) over the said motor vehicle were not read out and that the card must be expunged from the record on the authority of our decision in **Robinson Mwanjisi** (*supra*), PW2's ownership of the vehicle was undoubted. He had identified it as his property at the police station in Morogoro after it was recovered hardly three days after the robbery. The vehicle, in the circumstances of this case, does not appear to have been swapped, altered or tampered with. We think that its chain of custody remained unbroken.

The above view is in line with the position in our numerous decisions that the chain of custody principle should not be treated as a straitjacket but one that must be relaxed when dealing with items which cannot be easily altered, swapped or tampered with – see, for example, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017; and **Vuyo Jack v. Director of Public Prosecutions**, Criminal Appeal No. 334 of 2016 (all unreported). We find it instructive to recall what we observed in

Joseph Leonard Manyota v. Republic, Criminal Appeal No. 485 of 2015 (unreported) that:

> *"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."*

Admittedly, although both courts below found it proven, based on the evidence by PW3, that the appellant and his co-accused were found in possession of the motor vehicle (Exhibit P.2), none of them considered if the appellant's conviction could also be pegged on the doctrine of recent possession besides their concurrent finding that he was positively recognized at the scene of the crime as one of the robbers. Under the doctrine of recent possession, an inference of guilty knowledge may be

drawn against the accused in the absence of a reasonable explanation from him of how he came by the stolen item in his possession. In **Joseph Mkumbwa & Samson Mwakagenda v. Republic,** Criminal Appeal No. 94 of 2007 (unreported), the Court summarized the position on the application of the doctrine thus:

> *"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 a basis for conviction, it must be proved,* ***first,*** *that the property was found with the suspect,* ***second,*** *that the property is positively proved to be the property of the complainant,* ***third,*** *that the property was recently stolen from the complainant, and* ***lastly,*** *that the stolen thing constitutes the subject of the charge against the accused. 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 also **The Director of Public Prosecutions v. Joachim Komba** [1984] TLR 213; **Abdi Julius @ Mollel Nyangusi & Another v.**

Republic, Criminal Appeal No. 107 of 2009; and **Kennedy Yaled Monko v. Republic,** Criminal Appeal No. 265 of 2015 (all unreported).

In the instant appeal, it is the concurrent finding of the courts below that the appellant and his co-accused were found in possession of the motor vehicle (Exhibit P.2), with which we find no basis to interfere. Moreover, based on the evidence of PW1 and PW2, the motor vehicle was confirmed to be the complainant's property. It is also in the evidence by PW2 that the said motor vehicle was stolen from his home three days prior to its recovery from the appellant and his partner-in-crime at Morogoro by PW3. Finally, it is unassailable that the said motor vehicle constitutes the subject matter of the charge. It is significant that the appellant offered no explanation on how he came by the possession of the motor vehicle as he simply denied having been found with it. Weighed against the evidence of PW1, PW2 and PW3, the appellant's bare denial does not deflect the prosecution case. Bearing in mind that the motor vehicle is not an item that could change hands or be swapped easily within the short span of time involved in this matter, we take the view that it was open for the courts below to infer that the appellant came by possession of the motor

vehicle after robbing PW2 of it as alleged. Accordingly, we find no substance in the fourth and fifth grounds of appeal.

In the final analysis, we share the first appellate court's view that the appellant's conviction was soundly based on properly evaluated evidence. The appeal is, therefore, wholly unmerited. It stands dismissed.

DATED at **DAR ES SALAAM** this 18th day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 21st day of May, 2021, in the Presence of the Appellant in person and Ms. Easter Kyara, learned State Attorney appeared for the Respondent, is hereby certified as a true copy of the original.

E.G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL