IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 271 OF 2018

HASSAN RASHID GOMELA.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mtwara)

(Twaib, J.)

dated the 20th day of June, 2018
in
Criminal Appeal No. 4 of 2018

JUDGMENT OF THE COURT

1st & 5th November, 2019

MMILLA, J.A.:

Hassan s/o Rashid Gomela @ Jino (the appellant), is currently serving a term of thirty (30) years' imprisonment following his conviction by the District Court of Lindi with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 of the Revised Edition, 2002 as amended by Act No. 3 of 2011. His first

appeal to the High Court of Tanzania at Mtwara was unsuccessful, hence this second appeal to the Court.

The facts of the case were briefly that, on 30.6.2017 at about 9:00 pm, Saidi Mohamed Thabit (PW2) left Lindi Township for Kinengere village and was on a motor cycle Reg. No. MC 468 AXN make SANLG. On arrival at Mtange area, and as he entered the rough road heading to Kinengere village, he was suddenly attacked by two persons, one of whom hit him with a piece of wood as a result of which he fell down. While one of the said culprits searched him and took away his mobile phone and cash money amounting to Tzs. 40,000/=, the other bandit seized his motor cycle. As the bandit who had grabbed the motor cycle was struggling to kick-start it, a group of three people who were also on a motor cycle arrived at that place and began talking to him. Those people were Omari Hassan Kilinde (PW3), No. G. 6923 PC Fadhili (PW6) and Antony Thomas George Zana (PW7). On interrogating him, that person told them that his name was Hassan Rashid Gomela (the appellant), and he was coming from Nangaru but his motor cycle had developed problems. Unfortunately,

his explanation was not consistent; a fact which necessitated prolonged interrogation.

Meanwhile, PW3, PW6 and PW7 heard someone calling for help not far from where they were talking to the appellant. One of them approached that area and found the complainant lying down helplessly. The complainant told his rescuers that bandits hit him with a piece of wood and robbed him a mobile phone, cash money amounting to Tzs. 40,000/= and a motor cycle with Reg. No. MC 468 AXN make SANLG. It was then that they realized he was referring to the motor cycle which the appellant was struggling to kick-start. PW6 formally arrested him and took him to Lindi Police Station. After the usual formalities, the appellant was eventually charged with the offence of armed robbery.

The appellant denied the charge; and his defence was essentially that on 30.6.2017 he left Mvuleni village on a lorry for Ngongo. On arrival at Mtange area around 8:00 pm, the said lorry broke down and had to wait for the driver and his turn-boy who went back to Lindi to look for a spare part. It was around that time that he

saw three people, one of whom was a policeman, helping an injured person who seemed to have been involved in a motor cycle accident. He was informed by those people that the victim told them that he was beaten by two persons who robbed him money and a phone. He was astonished to find that those people implicated him with that robbery incident. Although he denied the allegations, the policeman told him he was not going to let him free unless he gave him Tzs. 120,000/= which he did not have. He attributed his having been charged to the corrupt policeman who faked the charges against him.

After a full trial, the trial court was satisfied that the appellant was the culprit who hit the complainant with the wood, robbed him cash Tzs. 40,000/=, his mobile phone, and the motor cycle. He was convicted and sentenced to thirty (30) years' imprisonment term, a decision which was upheld by the first appellate court.

The appellant filed a two point memorandum of appeal which stipulates as follows; **one** that the prosecution side did not prove the case against him beyond reasonable doubt; and **two** that, PW1 did not identify him as the one who allegedly robbed him.

Before us, the appellant appeared in person and fended for himself; whereas Mr. Abdulrahman Msham, learned Senior State Attorney, who was assisted by Mr. Emmanuel John, learned State Attorney, represented the respondent /Republic.

At the commencement of hearing, the appellant elected for the Republic to respond to his grounds of appeal, but reserved his right to make his submission thereafter if need would arise. We accordingly invited Mr. Msham to proceed.

Mr. Msham's position was that he was opposing the appeal, and proposed to discuss the two grounds of appeal separately, beginning with the first one.

The learned Senior State Attorney maintained that the prosecution side proved the case against the appellant beyond reasonable doubt as was found by the trial court and upheld by the first appellate court. He contended that both lower courts properly pegged the appellant's conviction on the doctrine of recent possession after evidence was led and believed that he was found in possession

of the complainant's motor cycle a little while after it was robbed from him. He explained how the appellant was attacked with a piece of wood resulting into his falling down, whereupon unknown persons searched him and made away with his mobile phone, money in cash amounting to Tzs. 40,000/=, and his motor cycle. Luckily though, he went on to submit, the complainant's motor cycle was recovered from the appellant near the scene of crime a little while thereafter by the people who emerged thereat almost immediately after the robbery.

Mr. Msham provided a profound clarification regarding the invocation of the doctrine of recent possession. Relying on **Ali Bakari and Pili Bakari v. Republic** [1992] T.L.R. 10, a case which was relied upon in the latter case of **Omary Said Nambecha v. Republic,** Criminal Appeal No. 109 of 2012 (unreported), he maintained that in order for this doctrine to apply, it must be shown that the found property was subject of the charge against the appellant; that it was found with the appellant; and that it was positively identified by the victim of robbery.

The learned Senior State Attorney submitted likewise that in the circumstances of the present case, PW2 gave evidence that after he was attacked by the bandits, three people arrived at the scene of crime and discovered him where he was lying down in agony. He told them that he was robbed a motor cycle Reg. No. MC 468 AXN Make SANLG, whereupon those people noticed that it was the very motor cycle they found in the appellant's possession and they arrested him. Mr. Msham added that those people were no other than PW3, PW6 and PW7 whom he said, found the appellant near the scene of crime in possession of the said motor cycle struggling to kick-start it, and arrested him. According to Mr. Msham, the appellant did not cross examine those witnesses in relation to the issues of armed robbery. Banking on **Goodluck Kyando v. Republic** [2006] T.L.R. 363, not only were those witnesses entitled to credence, but also that their evidence stood unchallenged.

From what he had submitted, Mr. Msham asserted that both lower courts properly invoked the doctrine of recent possession, therefore the prosecution side proved the case against the appellant to

the required standard. He urged the Court to dismiss the first ground of appeal.

The second ground of appeal is in relation to identification. The appellant's complaint is that PW2 did not identify him. In his response, Mr. Msham readily admitted that PW2 did not identify the appellant. However, he quickly added that both lower courts did not rely on the evidence of visual identification; instead they relied on the doctrine of recent possession. At any rate, he went on to submit, the appellant's complaint would be baseless because he was arrested at the scene of crime. In the circumstances, he pressed the Court to likewise dismiss the second ground of appeal.

After carefully considering the competing arguments of the parties, we crave to start our discussion with the first ground of appeal in which the appellant alleges that the prosecution did not prove the case against him beyond reasonable doubt.

We wish to begin by re-stating the cardinal principle of law on this point that unless any particular law directs otherwise (**Joseph**

John Makune v. Republic [1986] T.L.R. 44), the burden of proof in criminal cases lies squarely on the prosecution side, and are required to prove the case against an accused person beyond reasonable doubt- See **Woolmington v. Director of Public Prosecution** [1935] AC 462 and **Mohamed Said Matula v. Republic** [1995] T.L.R. 3, among others. The principle was best expounded in **Woolmington's** case in the following terms:-

> *". . . while the prosecution must prove the guilt of the prisoner, there is no such burden laid down on prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilty; he is not bound to satisfy the jury of his innocence . . . Throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilty."*

As earlier on pointed out, the trial court founded the appellant's conviction on the doctrine of recent possession, and was upheld by the first appellate court. It is the recovery of that motor cycle in

appellant's possession which urged both courts below to find him responsible for the charged offence.

The doctrine of recent possession of property suspected to have been stolen spins around proof that an accused person is found in possession of the property recently stolen. This was stated in the case of **The Director of Public Prosecutions v. Joachim Komba** [1984] T.L.R. 213. It was held in that case that:-

> *"The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."*

The other essential requirements for the doctrine to apply are that it must be shown that the found property was subject of the charge against the appellant; and that it was positively identified by the victim of theft or robbery - See the cases of **Bakari and Pili Bakari v. Republic, Omary Said Nambecha v. Republic** (supra), **Joseph Mkumbwa & Samson Mwakagenda v. Republic,** Criminal

Appeal No. 94 0f 2007, **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 **Joseph Mkumbwa & Samson Mwakagenda** (supra) the Court summarized the position that:-

> *"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 . . . ."*

However, as already seen, 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. This was lucidly put in the case of **George Edward Komowski v. R** (1948) 1 T.L.R. 322 in which the court said that:-

> *"...[The doctrine of recent possession...] is not strong as to displace the presumption of innocence to the extent of throwing on the accused the burden of giving legal proof of the innocent origin of his possession. He has merely to give a reasonably probable explanation of how his possession originated and if he gives such an innocent explanation he is entitled to an acquittal unless the prosecution can disprove his story. Even if he gives an explanation which does not convince the court of his truth he need not necessarily be convicted. The true test is whether his story is one which might reasonably be true and if that is the case, it follows that the crown has not discharged the onus which lies continuously on it in this as in other criminal*

cases, to prove the accused's guilty beyond reasonable doubt."

In the present case, there was evidence from PW3, PW6 and PW7 that on finding a person on the rough road at Kinengere area kick-starting a motor cycle, they stopped and interrogated him. He told them that he was coming from Nangaru and was heading to Ngongo village; he also said the motor cycle was his. However, upon finding PW2 a little while later helplessly lying down on the grass with wounds on the face a short distance from where the appellant was, and upon information from the victim that bandits robbed him his motor cycle Reg. No. MC 468 AXN Make SANLG - red in colour, they realized that the person they were talking to (the appellant) lied to them because the motor cycle he had was the one which was mentioned by PW2. The appellant attempted to escape but they arrested him and took him to Lindi Central Police Station.

As will be recalled, the appellant disowned the motor cycle when he testified in his defence before the trial court. His version was that PW6 and his companions faked the story against him, but he was an

innocent traveller who was stranded in that area after the lorry he had boarded on his way to Ngongo had broken down. However, his explanation was rejected by the trial court, so also the first appellate court. On the strength of the evidence of PW3, PW6 and PW7, those two courts were convinced that the appellant was found in possession of that motor cycle which was stolen a little while earlier from PW2.

As already pointed out, PW2 had named to PW3, PW6 and PW7 the Reg. No. of that motor cycle that was robbed (MC 468 AXN Make SANLG). The other evidence came from Amina Matola Sandali (PW4), the actual owner of the subject motor cycle, who was the employer of PW2. She tendered in court the Reg. Card of that motor cycle (Exhibit P4). Both lower courts found that those were credible witnesses. We share that view because as we said in **Goodluck Kyando v. Republic** (supra), it is trite law that every witness is entitled to credence unless there are good and cogent reasons to the contrary. In the present case there are no such good reasons to make us disbelieve what PW3, PW6 and PW7 stated in respect of their testimony that they found the appellant in possession of the said

motor cycle and arrested him upon discovery that he robbed it from PW2.

We take note that the appellant said he had nothing to do with that motor cycle, and that it was not true that he was found with that property. On our part, we agree with Mr. Msham that he was just trying to brave the law as he was given the opportunity to cross examine PW3, PW6 and PW7 but he never put to them any issues relating to their credibility, or generally robbery. Again, as was stated in **Goodluck Kyando v. Republic** (supra), failure to cross examine on an essential point leaves the evidence on that particular point unchallenged.

For reasons we have attempted to give, we are satisfied that both lower courts correctly invoked the doctrine of recent possession in the present case, therefore the prosecution proved the case against the appellant beyond reasonable doubt. Thus, the first ground of appeal lacks merit and we dismiss it.

Next is the second ground of appeal relating to the issue of identification. As earlier on pointed out, the appellant's complainant is that PW2 did not identify him as the perpetrator of the charged offence.

In our view, this ground too lacks merit. As correctly submitted by Mr. Msham, both lower courts did not base their respective decisions on the aspect of identification. As already alluded to above, basis was on the doctrine of recent possession, having been satisfied from the evidence of PW3, PW6 and PW7 that the appellant was found in possession of PW2's motor cycle a little while after it was stolen from him.

It is similarly important to point out that at any rate, the question of identification does not hold water because as repeatedly stated; whether or not PW2 identified the appellant does not matter as the latter was arrested by PW6 and his colleagues at the scene of crime. It is the motor cycle he was found with which squarely linked him to the case facing him. Thus, the second ground too lacks merit and we dismiss it.

That said and done, we are constrained to conclude that the appeal lacks merit and we dismiss it in its entirety.

Order accordingly.

DATED at **MTWARA** this 4th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 5th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Abdulrahaman Msham, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL