IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 249 OF 2011

ADOLF MACRIN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Wambura, J.)

dated the 1st day of July, 2011
in
Criminal Appeal No. 19 of 2010

JUDGMENT OF THE COURT

13th & 18th June, 2013

RUTAKANGWA, J.A.:

This is a second appeal. It emanates from Criminal case No. 139 of 2009 of the District Court of Mbozi District in which the appellant was convicted, as charged, of the offence armed robbery. He was sentenced to thirty years imprisonment and corporal punishment. His appeal to the High Court against conviction and sentence was unsuccessful, hence this appeal.

The prosecution case in the trial District court rested on the disjointed evidence of four (4) witnesses. These were PW1 Thadeo Edmund Sanga, PW2 Nelson Jonas Mwanyunga, PW3 No. E. 5150 D/Cpl. Stephen and PW4 No. F. 3663 P.C. Joseph. None of these eyewitnessed the alleged robbery. They testified on what they were told on how the robbery allegedly took place.

PW1 Sanga is a businessman at Tunduma township. PW2 Nelson owns a security guard company. PW1 is a wholesale dealer in alcoholic drinks, including the popular Konyagi, baptised by its manufacturer as the "Spirit of the Nation". On 25th August, 2009, PW1 Sanga earned about Tshs. 10,164,100/= from his business transactions. He kept the money plus Tshs. 2,000,000/= belonging to one Bashiri, in his liquor shop, as the business closed late in the evening. The shop was being guarded by a watchman from PW2 Nelson's company.

On 26th August, 2009, at around 02.00hrs, PW2 Nelson was on patrol duties. When he reached Sikanyika area he came across a group of seven people coming from the direction of PW1 Sanga's shop. Out of the seven, he claimed before the trial court to have recognised only one

Emmanuel, who was the 3rd accused. He proceeded to PW1 Sanga's shop, where he found the guard helpless tied with ropes. The said unidentified guard allegedly told him that robbers had struck, broke into the shop, and "**had stolen the money**". PW2 Nelson claimed in the trial court to have "advised him to report the matter to the police". Whether the guard paid heed to the advice is not known as he or she never testified and no police officer testified to that effect. Thereafter, PW2 Nelson left his employee and along the way he once more met the seven people. This time he was physically assaulted, as he claimed. He was cut with a panga on the head and hands. He specifically mentioned Emmanuel to be the perpetrator but his evidence is strangely silent on what he did thereafter. Apparently, he neither reported the incident to the police nor went for treatment.

It was PW1 Sanga who testified that at about 04.00hrs, his accountant, one Nahaula, phoned and informed him about the breaking into the shop. He hastened to the shop where he found the injured guard and the doors of the shops open and the "wardrobes" and boxes wherein he had kept the money broken open. On the morning of 26th August, he said, when the accountant, and not him, carried out a

stocktaking, he/she discovered a shortage of 10 cartons of Konyagi (viroba), 20 cartons of canned Castle Lager, 20 crates of Serengeti Lager and 10 cartons of "stella beer". He then reported the matter at the Tunduma Police Station.

On their part, PW3 Cpl. Stephen and PW4 P.C. Joseph told the trial court that they arrested the appellant, who was with other "bandits" at Vwawa on the morning of 26th August, 2009. While PW3 Cpl. Stephen testified that the appellant was found in possession of "cellular phone, cash money, passport, a driving licence and drinks (Konyagi)," PW4 P.C. Joseph said that the appellant was found in "possession of money". Curiously, not only none of them mentioned the amount of money seized from the appellant, but they also did not tender in evidence any of the goods allegedly found with the appellant. So everything allegedly found in the possession of the appellant is not part of the evidence.

At the trial, the appellant was initially charged with Godwin Salehe (1st accused), Emmanuel Richard (third accused), and Hemed Said (4th accused). After PW1 Sanga and PW2 Nelson had testified, the 4th accused Hemed passed away and Godwin and Emmanuel mysteriously

disappeared. We have used the word "mysteriously, "deliberately because they had all along, going by the record, been in remand prison. As a result, the prosecution on 18th February, 2010 substituted a fresh charge of armed robbery c/s 287 A of the Penal Code which excluded the deceased, Hemedi.

The particular of the charge read thus:-

> *"That Godwin s/o Salehe, Adolf s/o Macrin and Emmanuel s/o Richard are jointly together charged on 26 day of august, 2009 at about 04.00 hours at Tunduma township within Mbozi district in Mbeya region* ***did steal cash Tshs. 17,095,000/= the property of Thadeo s/o Sanga and immediately before the time on (sic) such stealing they used (sic) a gun to obtain or retain the said stolen property****".*
> *[Emphasis in ours].*

In his sworn evidence, the appellant who identified himself as a businessman, denied any complicity in the alleged armed robbery. He told the trial court that he was on 26/08/2009 taken off a bus at Vwawa by policemen while on his was to Mbeya. He was searched and his one

cellular phone and Tshs. 45,000,000/= seized by the police. Answering a question on cross examination, he unequivocally said:

> *"You did not give me prisoner's property (PP) receipt".*

That a cellular phone and/or cash money were seized from the appellant was confirmed by both PW3 Cpl. Stephen and PW2 P.C. Joseph as already shown above.

In his judgment the learned trial Resident Magistrate found himself having only one issue to determine. This he said was:

> *"Whether the accused persons were identified by PW2."*

In his brief answer to the issue, he was convinced that PW2 made no mistake in his identification of the appellant and his co-accused because "there was electricity light". He thus concluded without more.

> *"In my view the factors which have been stipulated in case of* ***Waziri Amani v.R.*** *(1980) T.L.R. 252 have been fulfilled. For instance, the PW2 told this court that it is not the first time to see, 1st, 2nd and*

3rd accused as they were residing at Tunduma township..."

We have carefully read the evidence of PW2 Nelson. We have respectfully found out that it does not bear out the learned trial Resident Magistrate on this assertion. All he said was that he was cut by Emmanuel (page 17, line 9). Earlier on he had specifically mentioned the same Emmanuel by name to have been among the seven people he had seen (pages 16-17), and that he had identified Emmanuel as:

"he is familiar to me, he used to sell mobile phones, near the mosque area."

But while under cross-examination, PW2 appeared to dampen the positive impact of the above piece of evidence when he said:

"You are not a guest (sic) to me. I used to saw (sic) at Tunduma near one shop of a Chaga man selling commodities as machinga."

It is doubtful, then, if he knew Emmanuel before. But all in all, PW2 Nelson never stated to have positively identified the appellant among the so called seven people. His pointing at the appellant while testifying in the absence of an identification parade, was a mere dock

identification, which evidence, we have persistently held to be totally valueless.

As we have already indicated, the appellant's appeal to the High Court was dismissed. The learned first appellate judge, like the learned trial Resident Magistrate, found the visual identification evidence of PW2 Nelson, to be watertight and leaving no iota of doubt on the guilt of the appellant. She predicated this stance on three grounds. One, the appellant was not a stranger to PW2 Nelson. Two, he was found in possession the stolen cash money, and Konyangi and accordingly invoked the doctrine of recent possession. Three, he was incriminated by an alleged confession of Emmanuel.

Supporting this appeal, Ms. Lugano Mwakilasa, learned State Attorney for the respondent Republic, urged us to reject the reasons relied on by the first appellate judge as they are not convincing. She discarded the first reason as the so called visual identification evidence did not in any way incriminate the appellant. To her, the best witness to the alleged robbery would have been the watchman or guard, who for undisclosed reasons never testified. She pressed us to hold that the

doctrine of recent possession was wrongly invoked in the peculiar circumstances of this case. Lastly, she was of the firm view that the alleged confession of Emmanuel, could not be safely used to ground a conviction because there was no proof that it was voluntarily made.

After dispassionately evaluating the entire evidence on record and considering the law governing confessions by co-accused persons and the doctrine of recent possession, we have found ourselves in full agreement with Ms. Mwakilasa's submission. First of all, we have already held that in the absence of an identification parade, the evidence of PW2 Nelson, was worthless. Secondly, as we have already clearly shown, the "evidence" relied on by the learned first appellate judge to justify the invoking of the doctrine of recent possession, was not evidence before the trial court. PW3. Cpl. Stephen and PW4 PC Joseph claimed to have seized cash money, regardless of its amount, and cartons of Konyagi from the appellant. They never tendered the same in court as evidence. We are aware that PW1 Sanga purported to tender Tshs. 1,505,500/= as exh. P3. But this witness categorically stated while under examination in chief that he was told by the police that the said money was "found in the possession of the 1st accused...".

All the same, there was no iota of evidence to establish that the money (exh. P3) was the one seized from the accused persons, as there is no evidence to show that the seized money was returned to PW1 Sanga. Worse still, both PW3 and PW4 never identified exh. P3 in court.

Secondly, we have learnt from the record that PW1 Sanga also tendered one carton of Konyagi as exh. P1, despite strong objections from the accused persons. We have found this piece of evidence, of no probative value to all, because the carton of Konyagi was not subject of the charge. In order to properly invoke the doctrine of recent possession, the prosecution has to positively prove beyond reasonable doubt, among other things, that the property belongs to the complainant and "the stolen thing in possession of the accused constitutes the subject of the charge against the accused", which was not the case here: See, **Joseph Mkumbwa & Samson Mwakegenda v. R.**, Criminal Appeal No. 94 of 2007 (unreported) among many others. The appellant and his co-accused faced a charge of robbing only cash Tsh. 17,095,000/=.

Thirdly, having discounted the visual identification evidence and the doctrine of recent possession, the only strand of evidence remaining relied on by the learned judge is the alleged confession of Emmanuel. Even if we assume that the said confession, contained in exh. P4, was voluntarily made, we are increasingly of the view that the learned judge erred in law in relying on it in view of the clear provisions of s. 33(2) of the Evidence Act, Cap. 6. The sub-section provides as follows:-

> *"(2) Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused".*

Having discarded the discredited visual identification evidence and misapplied the doctrine of recent possession, there remains no scintilla of evidence to corroborate exh. P4, even if we assume without deciding, that it was voluntarily made. It goes without saying, therefore, that the appellant was wrongly convicted.

The above notwithstanding, we wish to record our views that the above conclusion was premised on the assumption that the prosecution had proffered evidence to prove the offence of armed robbery contrary

to S. 287A of the Penal Code. We now say confidently that there was no such evidence. These are our reasons.

Section 287A partly reads as follows:-

> *"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of stealing uses or threatens to use violence* ***to any person****, commits an offence termed "armed robbery"... [Emphasis is ours].*

"Armed robbery" is an aggravated form of theft. Ordinarily, robbery is stealing coupled with the use of actual violence or threats to use actual violence to any person or property in order to obtain or retain the stolen property. A pre-requisite for the crime of armed robbery, therefore, is that "there should be violence to the person of the claimant": See, **Zubell Opeshutu v.R.**, Criminal Appeal No. 31 of 2003 and **Mohamed Harun @ Mtupeni & Another v.R.** Criminal Appeal No. 259 of 2007 (both unreported). Additionally, the charge must disclose the identity of

the victim of the alleged violence, so as to enable the accused person to prepare himself effectively for his defence and rule out surprises.

We believe that in this particular case, the charge failed to meet this specific statutory requirement nor did the prosecution prove, even on a balance of probabilities, this essential ingredient of the offence. No violence or threat of it, was directed at PW1 Sanga who is mentioned in the charge sheet. PW2 Nelson was nowhere near the scene of the crime when the robbery was allegedly committed. The exact time of the commission of the robbery was not established by the evidence. Since the charge alleged that violence was used "**immediately before,**" the time of stealing, then the evidence of the guard/watchman was very material. His was the only evidence required to prove not only the use of violence but the stealing of the money by way of armed robbery, and no other person. Equally important and unavoidable was the evidence of the accountant, who reported the theft to PW1 Sanga. In the absence of the evidence of these two key witnesses, we have found it very unsafe to conclude with any degree of certitude that the offence of armed robbery was proved at all.

All said, we allow this appeal in its entirety. The conviction of the appellant as well as the sentences imposed on him, are hereby quashed and set aside. The appellant should be released forthwith from prison unless he is held for another lawful cause.

DATED at **MBEYA** this 17th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL



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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL