

TANZANIA / JUDGMENT

## CRIMINAL APPEAL NO

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA ( CORAM: SEHEL J.A., MAIGE, J.A And ISMAIL , J.A.^ CRIMINAL APPEAL NO. 189 OF 2021 BARAKA LUSEKELO KIBONA .....1st APPELLANT FRIDAY MBWIGAKAMETA ..... 2nd APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mbeya) (Utamwa, 3.^ dated 15th day of February, 2020 in Criminal Appeal No. 86 of 2020 JUDGMENT OF THE COURT 15th & 18th July, 2024 MAIGE, J.A.: At the Resident Magistrate's Court of Mbeya at Mbeya (the trial court), the appellants were charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code and sentenced to thirty years imprisonment each. Along with them, Boniface Mwaihojo who is not a party to this appeal (the third accused), was charged with the offence of receiving stolen property contrary to section 311 of the i Penal Code. He was sentenced to pay fine of TZS Shillings 700,000.00 and in default thereof, a custodian sentence of three years. The particulars of the offence as they relate to the appellants were that; on 10th July, 2016 at New Forest area within the City and Region of Mbeya, the appellants jointly and together did steal a mobile phone make Samsung S3 worth TZS 480,000.00, cash money TZS 900,000.00, a flat television make Boss worth TZS 700,000.00 and one laptop worth TZS 700,000.00, the properties of one Melvis D/O Mwangupi, having threatened her with a machete. On appeal to the High Court of Tanzania at Mbeya, both the conviction and sentence of the appellants were upheld, thus the current appeal. About 12 grounds have been enumerated in the memorandum of appeal. In our careful reading, however, the grounds can conveniently be reduced into nine complaints. One, the case against them was not proved beyond reasonable doubts. Two, their defence was not considered. Three, they were not properly identified. Four, proper chain of custody of the exhibits was not established. Five, the identification parade was not properly conducted. Six, the search into the residence of the second appellant was not properly conducted as the assistant ten cell leader who witnessed the same was not called as a witness. Seven, the appellants were not taken to the justice of peace. Eight, the machete alleged to have been used in the incident was not produced into evidence; and Nine, no documentary evidence was exhibited to establish that the third accused got the stolen cell phone from Shukrani Gamba. The facts relied upon by the trial court to convict the appellant can briefly but precisely be narrated as follows. On the material date at around 22:00 hours, the appellant was at home watching television. Suddenly, she was invaded by bandits . One of them who was holding a machete ordered her to remain silent. Thereafter, she was commanded to lead

them to the bed room which she obeyed. On the way thereto, she was robbed of her cellphone (exhibit P4). In the bed room, one of them robbed her TZS 900,000.00 which was kept in closet. Soon thereafter, she was taken back to the sitting room wherein the said bandits took away her flat screen television (exhibit P2) and a laptop make Dell. She said, she was able to identify them through electric tube lights at the sitting room. That was also possible according to her because the incident lasted for almost 20 minutes. On the next day, she reported the matter to the police where she disclosed the particulars of the stolen television to G3800 DC Joram (PW7) and availed him with the receipt used to purchase the same (exhibit P3). She also gave him the mobile number of the stolen cell phone. Through IMEI number, PW7 was able to track the stolen cellphone and, on 8th October, 2016, seized it from Ibrahim Kiwele (PW5). On inquiry, PW5 disclosed that he got it from his fellow soldier one Ramadhan Salumu Ngaa (PW4) who purchased it from the third accused. On his part, the third accused claimed that he got the stolen cellphone from Shukrani Gambi who was with the first appellant. On being arrested, the first appellant was interrogated by PW7 and confessed as per exhibit P4 to have participated in the offence together with the second appellant. On 21st October, 2016, the second appellant was arrested. His room was searched by the police officers in the presence of among others, the second appellant's landlady one Kefilin Kalinga (PW2). In the process, some items suspected to have been stolen, including a flat screen tv 42" make boss which was allegedly stolen from PW6, were retrieved from his room. A seizure certificate was filled in and signed by A/ Insp Abdulla Mwombeji (PW1), (exhibit PI). On the same day, PW7 recorded the second appellant's cautioned statement in which he admitted to have stolen the alleged items in the incident (exhibit P6). In their defence, the appellants denied the charge. The first appellant claimed that he was arrested on 16th October, 2016 and not on 17th October, 2016 as alleged. He challenged the prosecution evidence on his identification for want of prior description. In conclusion, it was his evidence that the case against him had been fabricated. Like the first appellant, the second appellant doubted the prosecution evidence on identification. He claimed that, on 21st October, 2016 he was arrested and produced to the Central Police Station where he was locked up until on 11th November, 2016 when he was arraigned at the trial court in connection to the incident. He denied confessing commission of the offence and asserted that he was forced to sign a document whose contents he did not know. As we said above, the trial court much as it was the High Court, believed the prosecution story on the commission of the offence and held the appellants and each of them culpable thereof and sentenced them as aforestated. In here, the appellants are still fighting to defend their innocence. In this judgment, we shall further test, basing on the grounds of appeal and submissions, whether their conviction and sentence were correct. At the hearing, the second appellant appeared in person without representation. The respondent Republic was represented by Mr. Yusufu Aboud, learned Senior State Attorney assisted by Mr. George Ngwembe, 5 learned State Attorney. However, the first appellant was absent. In accordance with the report from Ruanda Prison where he was in, he escaped therefrom on 3rd August, 2021. His whereabouts had not been established since then despite some efforts so to do. In the circumstances, Mr. Aboud prayed, which was not objected by the second appellant that; because his presence cannot be procured without undue delay, it is in the interest of justice that, his appeal be dismissed in terms of rule 80(4) read together with rule 4(2) of the Tanzania Court of Appeal Rules, 2009, and the

hearing of the appeal proceed in so far as it relates to the second appellant. We granted the prayer and dismissed the first appellant's appeal on condition that it may be restored should the first appellant appear within 18 months from the date hereof. In his submission in support of the appeal, the second appellant fully adopted his memorandum of appeal and prayed that the appeal be allowed. On his part, Mr. Aboud vehemently opposed the appeal. He combined, in his submissions, grounds 2 and 12 (second complaint) and argued them jointly on the proposition that the second appellant's defence was not considered and grounds 3 and 5 on the proposition that, the second appellant was not properly identified. He did not address ground 11 ( complaint number 9) in so far as it relates to the first appellant who now is a nonparty to this appeal. As to the remaining grounds, he argued each separately. By way of rejoinder, the appellants repeated the complaints in his grounds of appeal. In consideration of the appeal, we shall start with the 8th complaint that, the machete alleged to have been used in the incident was not produced into evidence. On this, it was submitted for the respondent that, the complaint has been misconceived as the prosecution did not claim to have seized the said machete. We agree with him. We have gone through the record and established that, the machete used to commit the offence was not among the items which were seized during investigation. Therefore, the prosecution cannot be blamed to have failed to produce an item which was not in the possession or power of any of its witnesses. The complaint is thus dismissed. Next is the seventh complaint as to failure of the prosecution to produce the second appellant to the justice of peace. The submission for the respondent was that, as the second appellant did not claim to have requested to be taken to the justice of peace and denied, his complaint is baseless. With respect, we are in agreement with him. Production of a 7 suspect to the justice of peace arises where the respective suspect volunteers himself to give extra judicial statement before the justice of peace. There is nothing on the record to the effect that the second appellant volunteered as such. The complaint is thus neither here nor there. It is dismissed. We proceed with the sixth complaint that the assistant ten cell leader who witnessed the second appellant's search was not called as a witness. Mr. Aboud conceded in the first place that, as an independent witness at the second appellant's search, the said assistant ten cell leader was a material witness. He submitted, however that, he was not the only independent witness in the process. The second appellant's landlady who testified as PW2 was present as an independent witness as well. He submitted therefore that, it was not necessary to produce both of them as the theme of their evidence was identical. Citing the provision of section 143 of the Evidence Act, he contended that number of witnesses does not matter. After all, he submitted, the second appellant did not object when the television was being produced into evidence. We agree with the learned Senior State Attorney that, under the provisions of section 143 of the Evidence Act, it is not the number of witnesses but their credibility which matters. In here, the record is clear that; when the second appellant was being searched, PW2 was among the independent witnesses. She testified in details how the search was conducted and she confirmed that the stolen television was found in the second appellant's residence. With this evidence, the omission to call the assistant tell cell leader was inconsequential. The complaint is also dismissed. This now takes us to the third and fifth complaints as to whether or not the second appellant was properly identified. The two courts below, among others, placed reliance on the direct evidence of PW6 on identification of the second appellant and her subsequent

identification of him in the identification parade. The second appellant complains that he was not properly identified at the scene of the crime and that the identification parade was not in order. Commenting on the complaint, Mr. Aboud conceded that, the evidence of PW6 on identification of the suspects is not water tight. He submitted that, while PW6 claimed to have identified the suspects because there was a bright light from electric power and that, the incident lasted for a long time, she was unable to give prior descriptions of the identity of any of the assailants. In law, he submitted, she was expected while initially reporting the incident to the police or some other persons, to give such description. Failure to do so, he submitted, raises a reasonable doubt on the correctness of the second appellant's identification. He submitted further that, in the absence of such prior description, even the evidence at the identification parade becomes meaningless. He thus urged us to allow the second and third complaints. In law, visual identification evidence can only be used to sustain conviction if the trial court is satisfied of there being no possibility of mistaken identity. This position was stated in the famous case of *Waziri Amani v. R.* (1980) T.L.R. 250 at page 252 and it has been followed constantly in a number of judicial pronouncements. In the present appeal, the trial court believed the evidence of PW6 because she suggested that, there was a bright light from the electric power and further that, the incident lasted for about 20 minutes. Equally considered, was her ability to identify them during identification parade. These, we agree, are among the factors which are relevant in determining the correctness of identification as per the decision just referred. However, such factors do not stand alone. The correctness of the evidence on identification is also tested on the ability of the appellant to disclose the identity of the suspect at the earliest possible time. Therefore, in *Marwa Wangiti Mwita & Another v. R* (Criminal Appeal No. 6 of 1995) [2000] TZCA 4 (12 June 2000; TANZLII), it was observed: "The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his ability, in the same way as unexplainable delay or complete failure to do so should put a prudent court to inquiry." We understand that, the disclosure should not necessarily be by name. That would only be material if the witness claims to have identified the suspect by name. In other cases, the identifying witness is at least expected to give a detailed description of the identity of the suspect. We have said so numerous times. See for instance, *Omary Hussein @ Ludanga & Another v. R* (Criminal Appeal No. 547 of 2017) [2021] TZCA 543 (30 September 2021; TANZLII) and *Yosiala Nicholas Marwa & Others*

- v. *R.* (Criminal Appeal 193 of 2016) [2019] TZCA 147 (9 April 2019; TANZLII). In this case, the evidence suggests that PW6 reported the incident to the police where she was interviewed by PW7. She did not disclose to him the description of either of the suspects. This raises a reasonable doubt if at all she correctly identified the appellants. In the absence of such prior description, we agree with Mr. Aboud, even the evidence at the identification parade became meaningless. Thus, in *Emilian Aidan Fungo @ Alex & Another v. R*, Criminal Appeal No. 278 of 2009 (unreported) quoted in *Omary Hussein* (supra), it was observed: "...It is trite law that for any identification to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade." In the circumstances, the second appellant was not properly identified. The 3rd and 5th complaints have merit and they are allowed. As the conviction of the second appellant was not solely

based on that pieces of evidence, we shall as we go along, consider the other substances of evidence relied upon to convict him. We proceed with the complaint that the second appellant was convicted on the evidence of his cautioned statement which was not procured voluntarily. The second appellant complained that, he was forced to sign a document whose contents he did not know. The record shows that, when the prosecution prayed to tender the respective cautioned statement, the second appellant objected with a note that he did not make it. In law, that amounts to repudiation of the confession. Mr. Aboud submitted that, though the cautioned statement was repudiated, the trial court did not admit it until it was satisfied, by way of 12 an inquiry, that it was voluntarily procured. In his contention, therefore, the confessional statement was legally received into evidence. We will start our discussion on this issue by stating the position of law under section 27 (1) of the Evidence Act that, a confessional statement can be relied upon to convict a suspect if it was procured voluntarily and in due compliance with the law. This means, therefore, being procured voluntarily, is an essential element of such kind of evidence, in the absence of which, it cannot be used as evidence. It is the law, under subsection (2) of section 27 that, where the voluntariness of procurement of a confessional statement is questioned either by way of retraction or repudiation, the burden is on the prosecution to prove, beyond reasonable doubt, that the same was procured voluntarily. This is done by the trial court conducting a trial within a trial, if it is the High Court and an inquiry, if it is a subordinate court. Be that as it may, the prosecution is obliged, in the process, to call witnesses to prove such fact. We wish to insist as we did in *Ndalahwa Shilanga & Another v. R* (Criminal Appeal No. 247 of 2008) [2011] TZCA 159 ( 15 November 2011; TANZLII) that, the result in a trial within a trial or enquiry that, the confessional statement was procured voluntarily is relevant only in justifying admissibility of the statement into evidence. From there, it is 13 trite law, the trial court is still obliged to determine the veracity of such evidence. In so doing, we further held in *Ndalahwa* (supra), the trial court may use such evidence to convict the appellant if there corroboration and if not, it has, before using such evidence to sustain conviction, warn itself "o f the danger o f convicting without corroboration!" From what we have said herein above, we are of the view that, since the second appellant's cautioned statement was admitted after an inquiry had been conducted, its admissibility was valid. We shall, however, test the veracity of the said evidence as we shall be addressing the first complaint that, the charge was not proved beyond reasonable doubt. We turn to the second complaint as to whether or not the defence evidence was considered. It was submitted for the respondent that, the same was duly considered at page 199 and 200 of the record. It was further, considered, Mr. Aboud submitted, by the High Court as pages 241 and 242 of the record show. We have examined the record and noted that, the trial court only considered, at page 199 and 200, the defence of the first appellant. At pages 241 and 242, however, the High Court considered both the defence of the first and second appellants in the following words: 14 "The respective defenses by the appellants that they did not commit the offence at issue, and they were arrested for nothing; cannot thus, be believed am id the strong prosecution evidence discussed above. Their defence did not raise any reasonable doubt in the m ind o f the court Their respective defenses did not thus, shake the proof beyond reasonable doubt that they

committed the offence." Looking at the substance of the defence of the second appellant as summarized elsewhere in this judgment, it is without doubt that, though it was not considered by the trial court, it was duly considered by the first appellate court. Whether the conclusion of the first appellate court was correct or otherwise is an issue which can further be considered in line with the first complaint that, the charge was not proved beyond reasonable doubt. To that extent, we shall revert to the issue. Otherwise, the second complaint lacks merit and it is hereby dismissed. We turn to fourth complaint that proper chain of custody of the exhibits was not established. In so far as the second appellant may be considered, the exhibit used to sustain his conviction was the flat screen television believed to have been stolen from PW6. In his submission, Mr. Aboud admitted, in the first place that, chain of custody was not established by documentation. He submitted, however that, television set being among the items which cannot easily be tampered with, the principle does not strictly apply. He referred to us the case of Joseph Leonard Manyota v. R. (Criminal Appeal No. 485 of 2017) [2017] TZCA 261 (11 August 2017; TANZLII). He submitted further that, as the description of the said screen television was clearly provided by PW6 soon after the incident and it was unique; it could, therefore, not be said to have been tampered with. In any event, he submitted, production of the item was not objected to. The second appellant did not object being found with it. Truly, as submitted for the republic, chain of the custody of the television has not been properly established by documentation as the rule in Paulo Maduka & Others v. R (Criminal Appeal No. 110 of 2007)

[2009] TZCA 69 (28 October 2009: TANZLII) requires. The said rule, however, has now been modified ( See for instance, Joseph Leonard Manyota (supra)), so that it cannot apply strictly in cases where the item involved is that which cannot easily be tampered with. The item involved in this issue is a television. It is clear in evidence that, while PW6 was reporting to the police, she disclosed the serial number of exhibit P2 and submitted a copy of the receipt bearing the respective serial number. Subsequent upon its recovery from the second appellant, she also identified the exhibit using the same serial number. She did so at the trial court before the stolen television was admitted into evidence. With these facts and applying the principle in Manyota (supra) we think, this was a fit case for the exhibit be relied upon notwithstanding the breakage of the chain of custody, regard being had that a television with a serial number is not in a nature of an exhibit which can easily be tampered with. Accordingly, we dismiss the fourth complaint. We now wind up with the first complaint on whether the charge against the appellant was proved beyond reasonable doubt. As we said, the second appellant was convicted based on three substances of evidence including visual identification evidence of PW6, which we have held, in relation to the 3rd and 5th complaints that, it was not watertight enough to eliminate possibility of mistaken identity. We shall, therefore, in this complaint, not consider the same. We shall only consider two substances of evidence namely; the second appellant's confessional statement and circumstantial evidence under the doctrine of recent possession. The two lower courts found that the evidence on confessional statement as corroborated by the evidence that the appellant was found in possession of

the stolen property sufficient 17 to establish the offence. So, in the presence of concurrent findings of fact by two lower courts, this Court is not expected to hold otherwise unless it is established that there was a misappreciation of the evidence on record or incorrect application of the basic principle of law, See for instance, Aloyce Maridadi v. R. (Criminal Appeal No. 208 of 2016) [2017] TZCA 244 (06 July 2017; TANZLII). We will, in this discussion, be guided by the above principle. Making reference to the evidence on the record, Mr. Aboud has urged us to dismiss the said complaint as the case was proved beyond reasonable doubt. We have said in relation to the fifth complaint that, where, like in the instant case, the prosecution relied on repudiated confession, unless there is corroboration, the trial court would not use such evidence to convict the appellant without warning itself as to the danger of so doing. We note, however that, both the two courts below believed such evidence in as much as it was corroborated by, among others, the evidence as to the recent possession. We have taken time to carefully examine the second appellant's cautioned statement. Like the two courts below, we entertain no doubt that, the statement therein, consists of confession of the commission of the offence under discussion by the second appellant. It appears that, 18 despite the contrary finding by the trial court during inquiry that he was the maker of the statement, the second appellant still maintains, as he did during trial that, he did not make the statement. We, however, note that, his conviction was not only based on his confession but also on the existence of the evidence that the property he confessed to have stolen was found in his possession. Indeed, that was the reason why the two courts below believed the prosecution evidence on the guilt of the second appellant. Perhaps, the issue which may be necessary to be inquired into, is whether the evidence that the second appellant was found in possession of the said property was without reasonable doubt. In evidence, the doctrine of recent possession raises a presumption that he who is found in possession of a recently stolen property is the thief or a guilt receiver. The presumption is however, rebuttable upon there being given reasonable explanation as to how such item came into possession of the suspect. Thus, in Juma Marwa v. Republic, Criminal Appeal No. 71 of 2001 (unreported), the Court said in relation to the doctrine as follows: "The doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, 19 the Court may legitimately presume that he is a thief or a guilty receiver." In accordance with the principle in Joseph Mkumbwa and Samson Mwakagenda v. R., Criminal Appeal No. 94 of 2007 (unreported), for the Court to rely on such type of evidence, four elements must cumulatively be established, One, the stolen property must have been found in possession of the suspect. Two, the respective property has to be positively proved to be the property of the complainant. Three, the property in question must have been recently stolen. Four, the property at issue must constitute the subject of the charge against the accused. Having examined the evidence, we agree with the two courts below that all the four elements were established. First, the evidence of PW1 as supported by that of PW2 establishes, without any doubt that, upon being searched, the second appellant was found in possession of exhibit P2. Second, the evidence of PW6 as supported by PW1 suggests that,

soon after the incident, she complained to the police and mentioned exhibit P2 as one of the properties stolen during the incident. Indeed, she portrayed to PW7 in detail description of the exhibit including its serial number, Boss 42. On top of that, when the property was recovered from 20 the second appellant, she was able to identify it through among others, its serial number before PW1. As that might not be enough, she did so when the document was being admitted into evidence. We may add that, while the prosecution was praying for production of the same, there was no objection from the second appellant. Third, while the incident happened in July 2016, exhibit P2 was found in possession of the second appellant in October, 2016. Come what may, the item was recently stolen. Fourth, in the particulars of the charge upon which the second appellant was convicted, exhibit P2 is pleaded as one of the items which were stolen in the alleged incident. In conclusion, therefore, all elements required for the doctrine of recent possession to stand were established. The next question is whether the second appellant's evidence in defence gave any explanation to justify how such item came into his possession. Again, we have gone through the record and, like the two courts below, are satisfied that no such explanation was given. Thus, the presumption was not rebutted. Conclusively speaking, therefore, the evidence in the second appellant's confessional statement (exhibit P6) and his recent possession of the stolen property in exhibit P2 when weighed together with his defence, establishes, without any doubt that, the charge against him was 21 proved beyond reasonable doubt contrary to his complaint in the first ground of appeal. In total, therefore, the appeal is without any merit and it is hereby dismissed. DATED at MBEYA this 18th day of July, 2024. B. M. A. SEHEL JUSTICE OF APPEAL I. J. MAIGE JUSTICE OF APPEAL M. K. ISMAIL JUSTICE OF APPEAL The Judgment delivered this 18th day of July, 2024 in the presence of the 2nd Appellant in person, in the absence of 1st Appellant and Mr. Augustino Magessa, learned State Attorney for the Respondent/ Republic is hereby certified as a true copy of the original.

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