

TANZANIA / JUDGMENT

DAMSON DANFORD MALLYA AND 2 OTHERS vs

COURT
TANZLIIDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI SUB REGISTRY AT
MOSHI DC CRIMINAL APPEAL NO. 23196 OF 2024 (Originating from Criminal Case No. 524412 of
2023 of Moshi District Court) DANSON DANFORD MALLYA 1ST APPELLANT
IDDI SAID MADAVA @ IDRISA 2ND APPELLANT SWEATBERT JOSEPH MALEMA
..... 3RD APPELLANT VERSUS REPUBLIC
RESPONDENT

JUDGMENT

24/10/2024 & 10/12/2024 SIMFUKWE, J. Before the District Court of Moshi at Moshi (the trial court), the appellants, Danson Danford Mallya, Iddi Said Madava @ Idrisa, and Sweatbert Joseph 1 Malema, were charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E 2022]. During the trial, it was alleged against the appellants that on the 24th day of August 2023, at Nsaranga-Rawia area within Moshi District in Kilimanjaro Region, the appellants stole two mobile phones, make Samsung, valued at TZS 1,200,000; one power bank valued at TZS 120,000; six gold bracelets valued at TZS 550,000; and cash amounting to TZS 750,000, the properties of Rahel Zephania. It was further alleged that immediately before and after the theft, the appellants used a bush knife, pocket knife, and pliers to threaten the victim in order to retain the said properties. In order to substantiate the allegations against the appellants, the prosecution marshalled six witnesses and produced thirteen exhibits. Briefly, the prosecution evidence before the trial court was to the effect that on the fateful day, the victim, who testified as PW2, was invaded by the three appellants, who were armed. The 1st, 2nd and 3rd appellants were holding pliers, a pocket knife, and a bush knife, respectively. PW2 stated that she was able to identify the appellants with the aid of a 100-watt electric bulb which was illuminating her room. It was alleged that the 2 appellants ordered the victim to lie on her stomach. While lying down, the victim noted that the appellants had vacated her room as she heard a motorcycle screeching. Upon getting up and checking her belongings, she found that the appellants had stolen her power bank and its USB cable, six pairs of bracelets, two mobile phones make Samsung, and cash amounting to TZS 750,000. It was further alleged that in the morning, the victim reported the matter at the police station. Fortunately, on the same day she saw the 2nd and 3rd appellants, who were arrested and searched in the presence of an independent witness, who testified as

PW4. Upon the search, the 3rd accused was found in possession of one large Samsung mobile phone, and the 2nd appellant was found in possession of a smaller phone. Both phones were said to have been stolen on the fateful night. The 1st appellant was arrested following identification by his fellow appellants. According to PW3, the investigator, the 1st accused was searched in the presence of an independent witness and was found in possession of a power bank and USB cable, five bracelets, and a bush knife. PW3 also recorded the cautioned statement of the 1st accused, who admitted to have committed the offence together with the 2nd and 3rd appellants. 3 Furthermore, PW6, who interrogated the 2nd appellant, stated that the 2nd appellant admitted to be the owner of the motorcycle used in the commission of the offence. He directed the police to the location of the motorcycle, and upon search, it was found at the place indicated by the 2nd appellant. The exhibits, including the two Samsung phones, a bush knife, a pocket knife, pliers, five bracelets, one power bank, and its USB cable, were handed over to PW1, the custodian of exhibits, by PW2. In their defence, the appellants denied the allegations levelled against them and testified about how they were arrested. The 1st appellant admitted to have recorded the cautioned statement, although he alleged that he was forced to sign it. Similarly, DW2 stated that he was forced to sign. Upon full trial, the trial court convicted the appellants and sentenced them to serve 30 years' imprisonment. Aggrieved by both the conviction and sentence imposed by the trial court, the appellants lodged the instant appeal on thirteen (13) grounds of appeal as follows:

1. That, the learned trial magistrate strayed into error of law when she failed to note that there was material variance of the charge and evidence adduced, as first, the first report 4 given at the police was about theft and not armed robbery; second, nowhere the complainant PW2 states that the incident occurred on 24th day of august, 2023; third, in regard to the properties stolen, while PW2 states that she was stolen cash money Tshs 700,000/=, the charge alleges that Tshs 750,000/= was stolen and while PW2 states that she was stolen five bracelets and two mobile phones Samsung valued at Tshs 1,200,000/= for the big one and Tshs 700,000/= for the smaller, the charge alleges that six English gold bracelets were stolen and the two stolen mobile phones valued at Tshs 1,200,000/= both.
2. That, the learned trial magistrate erred both in law and factual analysis when she wrongly relied on the doctrine of recent possession without noting that its conditions were not proved at all.
3. That, the learned trial Magistrate erred both in law and factual analysis when she failed to note that there was no proof of ownership of the alleged stolen properties.
4. That, the learned trial magistrate erred both in law and factual analysis when she failed to note that the chain of 5 custody of the prosecution physical exhibits was compromised as it was crucial to prove oral evidence or paper trail of the sequence of events in the handling of the exhibits from the time they were seized, controlled, stored, until they were tendered and admitted in court.

5. That, the learned trial magistrate erred both in law and factual analysis when she failed to note that there was no receipt issued after seizure of the alleged stolen properties, considering that the appellants disowned their signatures and the trial court made no efforts to consider their objections on merits.
6. That, the learned trial magistrate grossly erred both in law and factual analysis when she failed to note that identification was done in unfavourable conditions, as such, the possibilities of mistaken were not fully eliminated to justify the reception of evidence which is absolutely watertight. (sic)
7. The learned trial magistrate erred in law and factual analysis when she relied on PW2's dock identification of the appellants in the absence of any other supportive evidence to prove that there was an identification parade and a first report in regard to the description of the invaders.
8. The learned trial magistrate erred in law and factual analysis when she made remarks in her judgment which do not reflect (sic) in the evidence adduced.
9. The learned trial magistrate strayed into error (sic) of law when she failed to note that the exhibits must be cleared for admission, as the court must observe legal requirements for its admissibility and the witness must point out specific identification marks or names or other peculiar features in relation to the exhibit to be tendered, as such PW1 and PW2 failed to explain how they will identify exhibits P1, P4, P5, P6, P7, P8, P9 and P10 before being tendered and lay foundation of the same.
10. The learned trial magistrate erred in law and factual analysis when she acted on uncorroborated evidence of PW4 Bulhan who had an interest of his own to serve
11. The learned trial magistrate erred in law and factual analysis when she failed to consider the appellant's objection in regard to the cautioned statement Exh. P12 7 which was admitted with legal flaws and the trial within (sic) was conducted unprocedurally.
12. The learned trial magistrate erred in law and factual analysis when she relied on weak, contradictory, inconsistency, unreliable, uncorroborated with material discrepancies prosecution evidence.
13. The learned trial magistrate erred in law and factual analysis when she failed to note that the charge was never proved beyond reasonable doubts. During the hearing, the 1st and 3rd appellants were unrepresented while the 2nd appellant was represented by Mr. Ephraim Koisenge learned counsel. The Republic was represented by Mr. Makore Maheri, learned State Attorney. On the first ground of appeal Mr. Ephraim, submitted that, the charge was not proved beyond reasonable doubt based on contradictions in the prosecution evidence and the charge sheet. In the charge sheet, the appellants were alleged to have robbed the victim TZS 750,000 and bracelets valued at TZS 550,000, which contradicts evidence adduced by the prosecution through PW1, PW2 (the victim) and PW3. The said 8 witnesses testified that the robbed amount was TZS 700,000, and two cell phones, one valued at TZS 1,200,000

and the other at TZS 700,000. Also, the witnesses alleged that five bracelets were stolen, while in the charge sheet it was indicated that the stolen bracelets were six. The learned counsel was of the opinion that the contradictions go to the root of the case. Hence, the charge was not proved beyond reasonable doubt. In support of his argument, Mr. Ephraim cited the case of Mohamed Said Matila vs Republic [1995] TLR 3, in which it was held that if the contradiction goes to the root of the case, the same should benefit the accused person. He prayed that the contradictions should benefit the appellants. On the sixth and seventh grounds of appeal, Mr. Ephraim faulted the trial court for convicting the appellants despite unfavourable conditions of identification. He said that, based on the evidence of PW1 and PW3 the accused persons were identified by PW3. When PW3 was interrogated in respect of identification parade, he told the court that there was no need for identification parade because he knew the faces of the accused persons. However, PW2 stated that identification parade was conducted. 9 Unfortunately, no exhibit was tendered to show that identification parade was conducted. Moreover, PW2 stated that the appellants were identified through the light which was illuminating in her room. However, PW2 had stated that it was time to sleep, and she did not clarify when did she wake up and switch on the light. For these reasons, Mr. Ephraim prayed these grounds of appeal to be allowed. Regarding the second and third grounds of appeal, Mr. Ephraim criticized the trial court for relying on the doctrine of recent possession without verifying the ownership of the properties suspected to have been stolen. Pursuant to the evidence of PW3, it was purported that the accused persons were found in possession of two cell phones, five bracelets, and a power bank the properties of PW2 (complainant). Nevertheless, PW2 failed to adequately identify or explain about the said properties. PW2 stated the colour of the phones and bracelets. She did not tender any other evidence to prove ownership. For instance, receipt for buying the properties or any special mark, apart from colour identification. Relying on the case of George Mingu v. R [1989] TLR 10, Mr. Ephraim contended that identification of property suspected of being stolen, 10 through colour is weak identification for convicting the appellant. He argued that PW2's identification of Exhibit P1 occurred only after it was shown to her. On the ninth ground of appeal, Mr. Ephraim faulted the trial court for relying on PW6's evidence, pointing out that the proceedings did not indicate that PW6 was sworn, which is contrary to the law. Referring to *Atu J. Myna v. CFAO Motors Tanzania Ltd* [2022] TZCA 187 (5 April 2022) at page 9 it was held that the law requires that a witnesses must be sworn before testifying. He prayed that evidence of PW6 be expunged from the record. On the fourth ground of appeal, Mr. Ephraim faulted the trial court for admitting exhibits without satisfying itself how they were kept. He explained that, the exhibit keeper, did not lay a foundation how the exhibits came into his hand, how he identified the exhibits, and kept before their admission. He cited *Christian Ubechi vs Republic* [2021] TZCA 3539 to support his argument that proper procedures for admitting exhibits were not followed and prayed for the exhibits to be expunged from the record. 11 Regarding the fifth and tenth grounds of appeal, Mr. Ephraim submitted that the trial court erred by relying on PW4's evidence and admitting exhibits without a certificate of seizure. PW4 stated that he signed the certificate of seizure but failed to specify where it occurred, having in mind the fact that the appellants were arrested and searched at two

different locations. He argued that the discrepancies rendered the evidence unreliable and prayed the exhibits to be expunged. On the eleventh ground of appeal, Mr. Ephraim argued that Exhibit P12 was improperly admitted, as the correct procedures were not followed. He further noted that the accused persons were not free during the recording of the exhibit, as reflected in their raised objection. Finally, on the eighth, twelfth, and thirteenth grounds of appeal, Mr. Ephraim averred that the prosecution's evidence was weak and failed to meet the standard of proof beyond reasonable doubt as required in criminal cases, particularly for the charge of armed robbery under section 287A of the Penal Code (supra). The learned counsel concluded by submitting that the prosecution's evidence contained discrepancies that raised reasonable doubt. He prayed the court to find merit in the appeal and acquit the appellants. 12 In his reply, Mr. Makore, the learned State Attorney, opposed the first ground of appeal. He submitted that the trial court's judgment was based on the doctrine of recent possession. He stated that the properties which were found under the possession of the first and second appellants formed the basis of the conviction. The trial court relied on the principles stated in the case of Godfrey Lucas vs Republic, Criminal Appeal No. 23 of 2013, TZCA 269 at page 7. Responding to the assertion that PW2 failed to identify her stolen properties and that her evidence contradicted the charge sheet; Mr. Makore replied that the same was not true. He referred to pages 20 and 21 of the trial court proceedings and noted that PW2 clearly identified her stolen properties, including a power bank with its USB and two Samsung cell phones, which were also mentioned in the charge sheet. Although the trial magistrate did not consider the alleged stolen cash and bracelets in her judgment, other properties identified by PW2 matched the charge sheet. He argued that since the money and bracelets were not part of the trial court's decision, there was no inconsistency between the charge sheet and the evidence. Mr. Makore contended that ownership was proved beyond reasonable doubt. PW2 provided detailed descriptions, including the IMEI numbers of her phones, to establish ownership. 13 Regarding the fifth ground, which faulted the trial court for failing to verify signatures on the certificate of seizure, Mr. Makore acknowledged that the third accused persons had denied signing the document. However, he noted that the trial court admitted the exhibit after determining the raised objections, and the accused persons were given the opportunity to cross-examine on the matter. On the sixth and seventh grounds, which challenged the identification of the appellants, Mr. Makore submitted that the identification was credible. He relied on PW2's evidence, who explained that she had stayed with the accused persons for more than five minutes in her room and the light was not switched off while asleep. Also, PW2 described the physical appearances of the appellants and that the 3rd appellant wore grey t-shirt with jeans. The second appellant was identified to be white and short. The first appellant was identified to be black and short. At page 21, PW2 said that she doesn't switch off the lights when going to sleep. Moreover, PW2 is the one who made a phone call to the investigator of the case and informed him that she had seen the suspects. She had reported the robbery at Majengo Police Station on the same day in the morning. In the afternoon she saw the appellants at Kwa Mtei area and made a phone call to the investigator. Mr Makore was of the view that if there was mistaken 14 identification, PW2 could have not identified the accused persons. He subscribed to the

case of Waziri Amani v. R and Yohana Chibwingu V.R, Criminal Appeal No. 117 of 2015, TZCA 447 (Tanzlii) at page 6 where it was stated that a witness should state the description of the suspect. In our case, the victim gave the description of the persons who had robbed her. Thus, there was no requirement of identification parade. On the eighth, twelfth, and thirteenth grounds of appeal, which are to the effect that the offence of armed robbery was not proved beyond reasonable doubt; Mr. Makore argued that evidence of six prosecution witnesses, particularly PW2 and PW3, proved the offence charged beyond reasonable doubts. PW2 explained how the incident occurred, the weapons which were used and she identified the accused persons. At the same time, PW3 stated how he investigated the case and interrogated the first accused who confessed to had committed the offence. The cautioned statement was tendered as exhibit. On the tenth ground, which is in respect of independent witnesses; Mr. Makore referred to PW4's testimony on page 39, where it was explained that certificates of seizure were filled and signed at each location of the 15 search. He noted that PW4's evidence was corroborated by PW3, the investigator. Regarding the eleventh ground, which challenged the admission of Exhibit P12; Mr. Makore argued that the exhibit was admitted lawfully following a trial within a trial, during which the objection raised by the accused person was determined. Thus, all the principles were adhered to. On the fourth ground, which alleged that there was no chain of custody, Mr. Makore pointed out that PW1, the exhibit keeper, explained the chain of custody in detail, including how and when he received the exhibits, who handed over, and how they were recorded in the exhibit register. He argued that the chain of custody had been properly maintained in accordance with the law. Finally, on the ninth ground, Mr. Makore contested the claim that the exhibits were not properly identified. He stated that PW1 and PW2 had clearly identified the items, and the appellants had not objected to their admission during the trial. In conclusion, Mr. Makore submitted that the appeal has no merit and prayed that it should be dismissed. 16 In rejoinder, Mr. Ephraim reiterated his submission in chief. Having carefully examined the available records, the raised grounds of appeal, and the rival submissions of both parties, the issue for determination is whether the prosecution discharged its burden of proving the case beyond reasonable doubt. On the first ground of appeal, it was the appellants' contention that there were material discrepancies between the charge and the evidence on record, particularly regarding the stolen properties. That, PW2, the victim, testified that the stolen cash amounted to TZS 700,000, whereas the charge sheet alleged that TZS 750,000 was stolen. PW2 further stated that five bracelets and two Samsung mobile phones were stolen, valued at TZS 1,200,000 and TZS 700,000 respectively. Mr. Ephraim, argued that the variances were material and undermined the prosecution's case. On the other hand, Mr. Makore, contended inter alia that the bracelets and cash money were not considered in the judgment of the trial court. I agree with the learned State Attorney that the appellants were convicted based on the properties which the appellants were found in possession which were proved before the court. In the case of Mustapha Darajani 17

- v. Republic, Criminal Appeal No. 242 of 2008 (unreported), the Court of Appeal held that: “For the doctrine of recent possession to apply, it must be established; Firstly, that the property was found with the suspect or there should be a nexus between the property stolen and the person found in possession of the property; secondly, the property is positively the property of the complainant; thirdly, that the property was recently stolen from the complainant; and lastly, the stolen property in possession of the accused must have a reference to the charge laid against him.” Having gone through the judgment of the trial court, I am satisfied that the learned trial magistrate complied to all principles of the doctrine of recent possession. Her reasoning indicated inter alia that upon search the stolen properties were found in possession of the accused persons. She referred to exhibit P10 which indicated that the power bank, USB charger and five bracelets, were retrieved from the first accused, a small mobile phone make Samsung was retrieved from the second accused while the big mobile phone make Samsung was retrieved from the third accused. Moreover, the stolen properties were proved to be the properties of PW2 18 and the trial Magistrate found that PW2 managed to identify her recovered properties. Furthermore, the complainant (PW2) identified the appellants on the same day when she met them. Also, Armed robbery was the subject of the charge against the appellants. In addition, the properties which were found to be at variance with the charge sheet were disregarded. Hence, no injustice was occasioned. Concerning the procedural irregularities in the handling and admission of exhibits; Exhibits Management Guidelines, published by the Judiciary of Tanzania in September, 2020 prescribe procedures for admitting exhibits during the trial. Page 10 of the Guidelines reads as follows: “2.4.3. Steps in Tendering Exhibits Step 1: Ensure a witness has laid foundation evidence for tendering an exhibit, (i.e., witness explains how the exhibit is connected to the case and how it came in his possession). Step 2: Ensure the exhibit is shown to the opposing party for comment. 19 Step 3: N/A Step 4: N/A. In the case at hand, I am of considered opinion that the procedures for tendering exhibits were complied with. Looking at page 15, 16 and 17 of the proceedings of the trial court, it is clear that the above quoted procedures were complied with. PW1 (the exhibit keeper) explained how the exhibits were connected to this case and how they came into his hand. He stated that D/C Muchunguzi handed over to him two Samsung mobile phones, bush knife, pocket knife, five pieces of gold bracelets and one power bank with its wire. D/C Muchunguzi informed PW1 that the said properties were recovered from the suspects and mentioned the IR number (IR 2841/2023). Then, PW1 registered the exhibits in the exhibit register. Moreover, the accused persons were afforded an opportunity to comment in respect of all exhibits, it is recorded that they had no objection. On the issue of identification, I am conversant with established principles in respect of identification in unfavourable conditions. In the case of Frank Richard Shayo vs Republic (Criminal Appeal No. 333 of 2020) [2024] TZCA 230 (22 March 2024) at page 6 it was held that: 20 “It is trite that, evidence of visual identification is the weakest kind and most unreliable and should not be acted upon unless all the possibilities of mistaken identity have been eliminated. See our decision in the famous case of Waziri Amani v. Republic [1980] TLR 250; where we stated that: Evidence of virtual identification is not only of the weakest kind, but it is also most unreliable and a court should not act on it unless all possibilities of

mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely watertight" In this case, I support the contention of the learned State Attorney that PW2 elaborated how she identified the culprits, that the lights in the room were not switched off when she was invaded, she described the physical appearance of the appellants and managed to identify them when she met them on the same day. In the circumstances, I have no shadow of doubt in respect of identification of the appellants. Adduced evidence was watertight. On the issue of independent witness and receipt; I have examined the proceedings of the trial court at page 39. As clearly submitted by the learned State Attorney PW4 who was the independent witness, narrated 21 how they searched the homestead of each accused person, filled the certificate of seizure and signed. The same was supported by the testimony of the investigator, PW3. The objections in respect of the signatures of the accused persons were overruled by the learned trial Magistrate. In the case of Jumanne Mpini @ Kambilombilo & Another vs Republic (Criminal Appeal No. 195 of 2020) [2021] TZCA 303 (15 July 2021); it was held that where there is a certificate of seizure, failure to issue a receipt is not fatal. At page 12 and 13 it was stated that: "Admittedly, as was rightly submitted by Mrs. Makala, there was no certificate of seizure or a receipt on the seized item that was issued to the appellants as per section 38 (3) of the Criminal Procedure Act [Cap 20 RE 2019] (the CPA) requiring the officer seizing anything under subsection (1) to issue a receipt acknowledging the seizure of that thing, with the signature of the owner or occupier of the premises who was or his near relative or other person for the time being in possession or control of the premises and the signature of witnesses to the search. However, we are of the view that failure to issue the appellants with such document did not vitiate the prosecution evidence. This is so because of the evidence of PW1, PW2, PW3 and PW4 who 22 witnessed how the subject matter was seized from the 2nd appellant's residence and how the certificate of seizure was filled up and signed by those witnesses including the 2nd appellant himself." Emphasis added Based on the findings in all raised issues, this court is satisfied that the charges against the appellants were proved beyond reasonable doubts. That being the case, I dismiss this appeal in its entirety. Order accordingly. DATED and DELIVERED at Moshi this 10th day of December 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE 10/12/2024 23

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