TANZANIA / JUDGMENT

emmanuel bulemo another vs republic 2016 tzca 247 12 october 2016

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA fCORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY. J J U CRIMINAL APPEAL NO. 24 & 25 OF 2014 EMMANUEL BULEMO.....1st APPELLANT PASCHAL M AGANGA..... 2nd APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from decision of the High Court of Tanzania at Tabora) (Lukelelwa, J.^ Dated 29th day of October, 2013 in Criminal Appeal Case No. 142 & 143 of 2008 JUDGMENT OF THE COURT 10th & 13th October, 2016 MBAROUK, J.A.: In the District Court of Nzega at Nzega, the appellants were arraigned for two counts, armed robbery, contrary to section 287A of the Penal Code and being found in possession of goods suspected of having been stolen contrary to section 312(a) of the Penal Code; Cap. 16 R.E. 2002. The trial District i Court convicted both appellants and sentenced each one of them to serve thirty (30) years imprisonment for the 1st count and three (3) years imprisonment for the 2nd count and further ordered that the sentences to run concurrently. Aggrieved with that decision, the appellants unsuccessfully appealed to the High Court of Tanzania at Tabora, hence the present appeal. Briefly stated, the facts of the case as they appeared at the trial court were that, one day, the complainant Nhongoke s/o Masanja (PW .l) met the appellants at the auction market where he went to sale his cattle. The appellants were in a company of one Mwanasambo who asked him in the presence of the appellants as to how many cattle he has sold at the market. As he had nothing to suspect, PW1 replied that he had sold three cattle. After he finished the business of selling his cattle, PW1 returned home and slept at around 17:00 hours. While he was sleeping, he then heard the door of a major house broken. He realized the danger, hence he got out and ran away. Then the bandits chased him and they apprehended him. To save his life, PW1 gave the bandits Tshs. 1,000,000/= and the bandits also went away with one bicycle make HERO the property of one Masanja Maziku. PW1 further testified that he managed to identify the appellants at the scene of crime. He then reported the matter to the police station and thereafter, the appellants were arrested with one bicycle allegedly stolen from PW1. PW1 then identified the said bicycle having red marks on its carrier and the words SAFARI NJEMA written on its carrier. In their defence, both appellants categorically denied to have committed the offences charged against them. The 1st appellant stated that he was arrested by the police maliciously after they received a wrong information from his debtors called Kashindye s/o Mathias and Maganga. In

support of his contention, the 1st appellant contended that, one day he sold two bags of charcoal to Kashindye and another one to Maganga worth Tshs.30,000/= each. He further added that, he followed those two several times to demand his money, but he was not paid. He therefore said, to avoid such disturbance of demanding his money, the two debtors decided to instigate something bad to the police who had bad blood with him so as to prevent him from demanding his money from those two debtors. On his part, the 2nd appellant testified that when he was searched, nothing was discovered in relation with the alleged offences charged against him. He also testified that, none of the prosecution witnesses testified to have identified him at the scene of crime. In this appeal, each appellant lodged his own memorandum of appeal containing several grounds of appeal, but in essence, we are of the considered opinion that, they boil down to the following grounds of complaint:-

1. That, first appellate court erred in law and fact in sustaining the appellants' conviction on the basis of weak and unreliable visual identification evidence. 4

2. That■ the first appellate court erred in law and fact in sustaining the appellants' conviction relying on the doctrine o f recent possession which was not established. At the hearing, the appellants who appeared in person unrepresented had nothing to submit, but they opted to allow to the State Attorney to submit first and if the need arises they will respond later. On his part, Mr. Idelphonce Mukandara, learned State Attorney who represented the respondent/Republic from the outset indicated to support the appeal. He started by pointing out that, the record of proceedings shows that there are contradictions on the issue of visual identification. In elaborating his argument, he said that at page 15 of the record of appeal, PW1 testified that he met the appellants for the first time at the auction market. However, the learned State Attorney said, at page 16 of the record of appeal when PW1 was cross examined by the 1st appellant, he said he knew him very much. Relying on the decision of this Court in the case of Juma Machemba v. Republic, Criminal Appeal No. 102 of 2015 (unreported) Mr. Mukandara submitted that the pointed out contradiction was not addressed and resolved by the two courts below. He therefore urged us to find that, as the contradiction was not addressed and resolved, that renders the credibility and reliability of the identifying witness to be eroded. Mr. Mukandara added that, as the incident occurred at night, the prosecution evidence ought to have considered to show the source of light and its intensity, but no such thing on record was explained by the identifying witness. He also added that as to whether PW1 knew the appellants before, it seems there are contradictions which were not addressed and resolved by the two courts below, hence the credibility and reliability by PW1 and PW3 as the identifying witness remain to be doubtful. On the issue of relying on the doctrine of recent possession to convict the appellant, Mr. Mukandara submitted that, the record shows that the bicycle was in the custody of police but the same was tendered in court by Masanja Maziku (PW2) the alleged bicycle owner and not by D. 6369 D/S Pius (PW4) who was the police investigator. He said, the evidence on record does not show how the bicycle moved from the police custody to PW2. Relying on the case of Makoye Samwel @Kashinje & Four others v. The Republic, Criminal Appeal No. 32 of 2014, (unreported), Mr. Mukandara submitted that, the 'chain o f custody' requires that in

handling exhibits, each step from the moment such exhibit is seized to the time of its production in court as an exhibit every step must be documented. But, he said, in the instant case that was not done, hence the possibility of tempering cannot be ruled out. For those reasons, the learned State Attorney urged us to allow the appeal and set the appellants free from jail sentence. It has always been emphasized in various decisions of this Court that, in a case where evidence on visual identification is to be relied upon in resolving a case, some guidelines have been p ut in place so as to avoid mistaken identity. For example in the case of Raymond Francis v. Republic

[1994] TLR 100 this Court held as follows:- .... its elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the outmost importance." As for conditions favouring correct identification, the land mark case of Waziri Amani v. Republic [1980] TLR 250 and many others have given the guidelines. For example in the case of Omar Iddi Mbezi and Three others v. Republic Criminal Appeal No. 227 of 2009 (unreported)has pointed out some of those guidelines as follows:-

1. I f the witness is relying on some light as an aid o f visual identification he must describe the source and intensity o f that light.
2. The witness should explain how dose he was to the culprit (s) and the time spent on the encounter.
3. The witness should describe the culprit or culprits in terms o f body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.
4. Ideally, upon receiving the description o f the suspect(s) the police should mount an identification parade to test the witness's and then at the trial the witness should be led to identify him again. In the instant case, as shown by the learned state Attorney, the prosecution evidence has failed to consider the above mentioned guidelines. The learned State Attorney has also shown that PW1 as identifying witness relied by the prosecution gave some contradictory evidence as to how he was able to identify the appellants. As pointed out earlier, in this case the contradictions concerning visual identification in the evidence of PW1 and PW3 were not addressed and resolved by the two courts below, and that erodes the credibility and reliability of PW1 as identifying witnesses. (See Juma Machemba (supra). In addition to that, we also agree with the learned State Attorney that the doctrine of recent possession was not established in this case, because the 'chain o f custody' of bicycle tendered as exhibit was broken. This is because when the said bicycle was tendered by PW2 - the owner and not the police investigator (PW4) to whom the said bicycle was in his custody at the police station before it was tendered in court. It is not shown at what time after the incident the bicycle was handed over to PW3 if at all it was recovered from the appellant. This Court in the case of Makoye Samwel, @ Kashinje (supra) summarized what

was held in the case of Paulo Maduka and Four others v. The Republic, Criminal Appeal No. 110 of 2007 (unreported) where it was held as follows:- " Thus, chain of custody requires that from the moment a piece o f evidence is seized or collected its every handlingcustody or transfer must be documented up to the time o f its production in court as an exhibit. Indeed, such handling would allay fears against there being any possibility o f tempering with the exhibit in the process (see, Majid John Vicent @ Mlindangako and Another Vs. The Republic - Criminal Appeal No. 264 o f2006 -unreported)." In the instant case, the conditions stipulated above were not complied with, as it is not known when did that bicycle ii tendered by PW2 landed in his hands from the police custody as there were no records given to show the chain of custody. For that reason, we are of the considered opinion that, the doctrine of recent possession was improperly invoked by the two lower courts with respect to the bicycle seized in connection with the 2nd count. For the foregoing reasons, we find merit in this appeal. We therefore allow it, quash the convictions and set aside the sentences. The appellants should be released from prison forthwith unless they are otherwise lawfully held. DATED at T A BORA this 12th day of October, 2016. M. S. MBAROUK JUSTICE OF APPEAL B.M. LUANDA JUSTICE OF APPEAL R.E.S. MZIRAY JUSITCE OF APPEAL I certify that this is a true cc le original. E. I DEPUTE 5TRAR COURT PEAL. 12

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