

DECIDED
31 August 2010

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received a report, exhibit P3, which showed the motor vehicle registered with number TZQ 3855 was a lorry of FUSO make whose owner was one Hashim Mwambashi of P.O. Box 70445 Dar es Salaam. On 18/11/2003 at 8 a.m. the appellant recorded an extra-judicial statement, exhibit PG with PW2 Jennif Jr Changani. In the statement the appellant claimed ownership over the motorcycle he was arrested with and gave a long and detailed explanation on how one Mohamed Japhari promised to find a motorcycle for him to buy, how the motorcycle sale was negotiated and concluded and how he took possession of the same and used until the time of his arrest. The appellant recorded in his extrajudicial statement that before agreeing to buy the motorcycle from Mohamed Japhari he had the motorcycle inspected for roadworthiness by his mechanic Abdul Mlowe in the presence of the seller Mohamed Japhari. The appellant had mentioned Mohamed Japhari as the seller of the motorcycle, 4 and that the sale was witnessed by one Abdul Mlowe. This led to the arrest of Mohamed Japhari. On 17/11/2003 PW4 ASP Eric Kayombo conducted an identification parade in which Abdul Mlowe picked Mohamed Japhari as the person who sold to the appellant the motorcycle which the appellant was in possession of, and which was identified by PW3 Abel Mgimwa as a government motorcycle. The extra-judicial statement which the appellant recorded with a justice of the peace, exhibit P6 was preceded by a cautioned statement which the appellant recorded with the Police and was tendered in evidence as exhibit P2. In the cautioned statement the appellant narrated how he knew Mohamed Japhari, how the deal for the sale of the motorcycle was conducted with Mohamed Japhari both at his (i.e. Mohamed Japhari's) home and later at Mgera Village where the motorcycle was, how he had to hire a taxi to ferry Mohamed Japhari to the place of sale and how he had the motorcycle inspected by a motorcycle mechanic Abdul Mlowe before the sale. The appellant testified how Mohamed Japhari gave him a registration card with registration number TZQ 3855 and how he used the motorcycle both at Mafinga in Iringa and how he was arrested while riding the motorcycle. 5, ... The prosecution also fielded PWS Abdul Mlowe as one of their witnesses. This witness testified how the appellant took him from Mafinga to go to Iringa town where he was to inspect a motorcycle which Mohamed Japhari was selling to the appellant. He also testified on how they went to Mohamed Japhari's office at the Iringa Fire Brigade offices where they did not meet Mohamed Japhari. From there they went to Mohamed Japhari's house where they met Mohamed Japhari, and after a twenty minutes talk they left in a taxi to a place outside town where Mohamed Japhari and another person left briefly and came back pushing a motorcycle. PWS said he tested the motorcycle and left the appellant to conclude the sale after which himself and the appellant left with the motorcycle. Under cross-examination PWS Abdul Mlowe insisted that he trusted that the sale was proper because Mohamed Japhari was a soldier working in the government. The arrest of the appellant in Kabuku, Handeni and the naming of Mohamed Japhari by PWS Abdul Mlowe led to the two being charged with murder. In his defence, given under affirmation Mohamed Japhari who appeared as the first accused person admitted that he was a government officer with rank of Inspector in the Fire Brigade at Iringa but he denied 11 ' ' 6). ., knowing the appellant or PWS Abdul Mlowe. He also testified that on 28/8/2003 he spent the whole evening at home repairing his TV and listening to the news on television at 8 p.m. after which he retired to bed until the following day 29/8/2003 so he had no knowledge of the death which occurred that night. He fielded as his witness his wife, DW2 Hawa Salehe, who testified

that her husband spent the evening of 28/8/2003 repairing his television and listening to the news before retiring to bed. On his part, the appellant testified that he knew Mohamed Japhari who used to visit him in Mafinga, and that he had indicated his wish to buy a motorcycle for use in his business of selling minerals and chain saw spares. The appellant went on to say that Mohamed Japhari promised to find a motor cycle for him, and on 1/9/2003 he visited Mohamed Japhari both in his offices at the Iringa Fire Brigade and at his home where they discussed the sale of the motor cycle, which Mohamed Japhari said he had secured, and agreed on a price of Sh. 800,000/=. The appellant went on to say he left Mohamed Japhari with a promise to meet him on the following day 2/9/2003 to have the motorcycle inspected by a mechanic before the sale was concluded. On 2/9/2003 he met Mohamed Japhari in the presence of the mechanic Abdul Mlowe (PWS) and they had to travel in a taxi which he 7 __, t-- hired to a place outside town where Abdul Mlowe tested the motorcycle, passed it for use and the deal was concluded. The appellant further said he paid an advance of sh. 400,000/= and was given a photocopy of a registration card by Mohamed Japhari who promised to give him the original card when the balance of the purchase price was paid. The appellant reiterated that what he told the police in his cautioned statement, exhibit P2 and in his extra-judicial statement exhibit P6 is true. At the end of the trial, after the obligatory summing up by the court to them, the assessors entered a unanimous verdict that the then first accused person Mohamed Japhari is the person who sold the motor vehicle to the second accused who is now the appellant. They therefore returned an opinion of "GUILTY" against Mohamed Japhari and one of "NOT GUILTY" against Ernest Mgimba who is the appellant now. In his judgment, the trial judge based his judgment only on the evidence of PWS Abdul Mlowe and that of the appellant. He branded Abdul Mlowe a criminal and an unreliable person, and the appellant an unmitigated .), . 8 ,i ,.. liar. A sample of the vitriolic attack by the learned trial judge on PWS goes thus:- 11 After all PWS is not a clean person. Otherwise he would not have taken part to witness the sale and handing over of a motorcycle in a bush at night These are characteristics of a criminal. After suspecting the time and place if he were an innocent person he would have refused to be a party to the sale. Evidence of people of bad character is not reliable. " As for the appellant himself, the reasoning of the learned trial judge goes thus:- 11 /n fact what the accused is required to give under this doctrine is not Just 11any explanation. " He must not only give an explanation to the satisfaction of the court that he lawfully acquired the stolen property or that he is in no way connected with other offences committed during the unlawful obtaining of the property he was found in possession of. " 9 le The trial court found it as a fact that the first and the second accused persons did not know each other as alleged by the appellant (who was the second accused in the trial court). This was in response to the allegation . that the appellant and the first accused during the trial had business relations, and that the first accused Mohamed Japhari met with him at Mafinga when the idea of the appellant acquiring a motorcycle was first broached. The appellant and PWS had testified that they knew the first accused and his wife prior to August. PWS had in fact identified the first accused effortlessly as the person who sold the motorcycle to the appellant, and that he knew the first accused person as a "government soldier." The record shows that the first accused Mohamed Japhari did not question the evidence of PWS on identification. It is a rule of law that an appellate court should not interfere with findings of fact made by a trial court unless the finding is based on skewed

premises and has led to miscarriage of justices, see *Salum Mhando V Republic*, (1993) TLR 170 and *Verani Philip V Republic*, Criminal Appeal number 223 of 2007 (Arusha Registry - unreported). We are satisfied that the totality of the evidence on record shows that both the appellant and PWS Abdul Mlowe knew each other for a considerable period, and that it is ~

- . 10 √f,t ' ~J- their closeness which led to the appellant and the first accused Mohamed Japhari entering into negotiations for the purchase of a motorcycle as early as 10/8/2003, and that these negotiations were made after Mohamed Japhari visited the appellant in Mafinga while on a business trip. We also accept it as a fact that Mohamed Japhari promised to find the appellant a motorcycle for the appellant to buy way back on 10/8/2003, and on 2/9/2003 Mohamed Japhari showed the appellant a motorcycle ready for sale. We are also satisfied that the appellant approached the sale without any underhand motive because he took a witness with him to the sale, PWS Abdul Mlowe who was a motorcycle mechanic to test the motorcycle for servability. That the first accused denied knowing the appellant and Abdul Mlowe at all, despite evidence to the contrary is a negative factor as far Mohamed Japhari is concerned. We also observe that the record shows that the trial court, in reaching the conclusion it did, did not analyse the evidence adduced by the prosecution and the defence as a whole, but concentrated on attacking the defence of the second appellant and the evidence of PWS Abdul Mlowe whose evidence was in favour of the appellant. The case of *Lockhart- Smith V United Republic* (1965) EA 211 at p. 217 as quoted with ll t., approval in *Michael Ellias V. The Republic*, Criminal Appeal No. 243 of 2007 (Arusha Registry- unreported) underscores the importance of a trial court analysing both the prosecution and the defence case in order to reach just conclusion. We are satisfied that the learned trial judge ignored this basic canon of law. The conviction of the appellant for murder was founded on the fact that the appellant was found in possession of a motorcycle which was stolen on 28/8/2003 when the deceased, who was in possession of it, was killed. The Republic relied on the case of *Manazo Mandundu and Another V the Republic* in support of the conviction, a decision which is based on the doctrine of recent possession. This authority held that the doctrine of recent possession can ground a conviction of murder. But what is the doctrine of recent possession? To put it simply, the doctrine is an inference of fact that where a person is found in possession of property which is proved to have been recently stolen, that person may be presumed to have been the thief if he does not give any explanation which, in the circumstances of the case show that he came by the property innocently. 12 The Mandundu case quoted above has expanded the principle further to cover cases of murder. The doctrine, however, does not rest at possession only as the essential element in proof of the offence. In addition to possession, there must be proof that when the appellant was found in possession of the property he failed to give an explanation which could explain away the seemingly incriminating circumstances of his possession of the property. The law requires the appellant to give an explanation which may reasonably be true. It is enough that the appellant raises doubt on the prosecution case which rests on the premise that since the appellant was found in possession of the motorcycle whose last possessor was killed and the motorcycle stolen, then the appellant must be the killer. The

doctrine also requires the particular circumstances of each case to be taken into account.

What are the particular circumstances of the present case? The circumstances of this case shows that when the appellant was arrested he cooperated with the police in providing all the details surrounding his acquisition of the motorcycle. In his cautioned statement to the police (Exhibit P6) and in his extra-judicial statement (Exhibit P2) and in court while giving evidence the

- L...1 r •)t 13 appellant gave a similar story which did not change. In fact the appellant put up a rival claim of ownership over the motorcycle. His side of the story is that he desired to buy a motorcycle, and communicated this desire to a friend, Mohamed Japhari, way back on :10/8/2003 when Mohamed Japhari visited him in Mafinga. He went on to say that Mohamed Japhari promised to find him a motorcycle for purchase, and on 2/9/2003 he went to purchase the motorcycle in the company of a motor cycle mechanic who tested the motorcycle for servisability before the agreement for sale was concluded. He went on to say that the agreed price was sh.800,000/= and that Mohamed Japhari, the seller, agreed to accept half the purchase price on the agreement that he (Mohamed Japhari) would give the appellant a photocopy of the registration card of the original copy of which was to be availed when the balance of sh.400,000/= of the purchase price was paid. The appellant also testified that at the time of handing over of the motorcycle it was Mohamed Japhari who handed over the appellant a registration number TZQ 3855 as well as the photocopy card. The record shows that the appellant did not try to hide the motorcycle after taking possession of it, and moved with it from Iringa to Kabuku Handeni Tanga where his mineral business was. The consistent explanation of the appellant is reasonable in the circumstances of the case. All his dealings with Mohamed Japhari, the Police, the justice of the peace and in court during 14 ~ (I. the trial showed the conduct of somebody who had nothing to hide. We are satisfied that the learned trial judge failed to appreciate this aspect of the appellant's demeanour. Instead he looked at the conduct of Mohamed Japhari positively, a person who has been shown to deny a friend in daylight, and one whose conduct during the sale was furtive, to say the least. The essential element in the doctrine of recent possession is first possession after the particular item is reported lost. In the present case possession is first traced to Mohamed Japhari, and secondly to the appellant by way of sale. The sale, by a friend who arranged for a photocopy registration card and registration numb~r plate, which both turned to be fake, could not arise suspicion in this case where parties had prior knowledge of each other, and the appellant and his witness to the sale PWS Abdul Mlowe knew the seller to be "government soldier" and, presumably, a trusted person. We are satisfied that the appellant has discharged the burden placed upon him. Consequently the conviction entered against him cannot be allowed to stand. The same is quashed and the sentence set aside. The appellant should be released from custody unless he is held on some other lawful cause.

15 ' st DATED AT IRINGA this 31 dayrf August, 2010. E.M.K. RUTAbNGWA ;; JUSTICE OF~
 APPEAL i ~ N.P. KIMARO JUSTICE OF1 APPEAL W. 5. MANDIA JUSTICE OF: APPEAL I I
 certify that this is a true copy of tthe original. ~~-,-] I J.S. MGETTA DEPUTY REGISTRAR·
 COURT OF APPEAL

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