

TANZANIA / JUDGMENT

20100513 TZCA Mwanza2

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IN THE COURT OF APPEAL OF TANZANIA ATMWANZA (CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.) CRIMINAL APPEAL NO. 64 OF 2006 MASUNGA JOHN @ NERA 1!1•..... APPELLANT VERSUS THE REPUBLIC RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mwanza) (Rweyemamu. J.) dated the 12th day of October, 2005 in HC Criminal Appeal No. 178 of 2004 JUDGMENT OF THE COURT 12 & 13 May, 2010 MSOFFE, J.A.: PW1 Kidumu Fundikira and PW2 John Mganga told the trial District Court of Mwanza (Magafu, PDM) that on 31/1/2003 at about 3.00 a.m. bandits broke into their house and stole an assortment of articles including a radio and cassettes. The bandits were wielding a spear and machetes. They reported the incident to the police on the same night. In the meantime, in the early hours of the morning of that same night the police were on patrol duty at Rufiji area near • Nyakabungo Hill in Mwanza. While there they saw a number of people carrying luggages on their heads. : They suspected them. They followed them on foot. As they approached them the said people decided to flee. In the ensuing chase they arrested the appellant, who on seeing the police threw the luggage he was carrying, to the ground. They took the appellant and the luggage to the poliJe station where ; PW1 identified a radio and cassettes as being among the properties stolen on that fateful night. Indeed, the cassett~s, which were 1 produced and admitted in evidence at the trial, had her name Kidumu Fundikira inscribed on them. On the basis of the above evidence, the trial District Court invoked the doctrine of recent I possession and ! accordingly convicted the appellant of armed robbery contrary to Sections 285 and 286 of the Penal Code as amended by the relevant II provisions of Acts No. 10/89, 27 /91, 6/94 and 12/98, and sentenced him to a term of imprisonment for thirty years. The appellant's first appeal to the High Court (Rweye~amu, J.) was I dismissed, hence this second appeal. In the memorandum of appeal there are two oasic complaints. I One, the evidence of visual identification in the case was insufficient 2 to ground the conviction. Two, it was wrong for the. courts below to invoke the doctrine of recent possession because thb radio and the cassettes were not sufficiently identified by PW1. Mr. Victor Kahangwa, learned Senior State Attorney appearing on I behalf of the respondent Republic, urged mainly that the courts below were justified in invoking the doctrine of recent possession in the i I . circumstances of this case. With respect, we agree with him for reasons which we will state hereunder. The first complaint has no basis. The conviction was not based on the evidence of visual identification. Both Pw1i and PW2 were positive that they did not identify the appellant at lthe time of the incident. • I The judge on first appeal addressed the second J:omplaint ,

thus:- The appellant was in fact caught I "red I handed"~ The proximity in time between commission of the offence and the appellant's arrest; circumstances of possession i.e. I why would the appellant be carrying luggage at that I 3 time of night; his failure to explain possess/on; all indicate that the articles found on the I appellant must have been unlawfully obtained I i Regarding identification of property by I the owner, the evidence clearly shows •that PWJ the complainant and PW2 had already reported missing items at the police station when by coincidence PWJ turned up with~ the I appellant, and some of the stolen article~ which the victim identified to be hers _ one j article had her name on it I With respect, we are in entire agreement with the appellate judge in her assessment of the evidence in relation to the doctrine of recent I possession. We will only add by way of emphasis. that when the ! cassettes bearing the name of PW1 were produced ~nd admitted in evidence the appellant did not object. In fact, the assertion that PW1 did not sufficiently identify the articles, particularly the cassettes, is a I clear afterthought because the appellant did not can't raise the point at the trial and in the first appeal. 4 We are of the settled view that the appeal has no merit. Indeed, this is a case in which, if we had wanted, we could have easily invoked our jurisdiction under Section 4 (4) of the Appellate I Jurisdiction Act, 1979, as amended by the Appellate I Jurisdiction I (Amendment) Act No. 17 of 1993, and summarily reject the I appeal. We hereby dismiss the appeal in its entirety. DATED at MWANZA this 13th day of May, 2010. J. H. MSOFFE JUSTICE OF APPEAL M. S. MBAROUK JUSTICE OF APPEAL S. J. BWANA JUSTICE OF APPEAL I certify that this is a true copy of the original. 5

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