

TANZANIA / JUDGMENT

mussa rashidi another vs republic

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IN THE HIGH COURT OF TANZANIA AT TANGA DC/CRIMINAL APPEAL NO.57 OF 2006
(Originating from Cr. Case No.84/2005 Lushoto District Court) I.M USSA RASHIDI

2. ATHUMANI OMARI.APPELLANT VERSUS THE
REPUBLIC..... RESPONDENT 9/6/08 & 15/8/08

JUDGEMENT

Shayo, J. This appeal is against the decision of the District Court of Lushoto in Criminal Case No.84/2005. The two appellants, namely, Mussa s/o Rashid and Athumani s/o Omari (hereinafter to be referred to as the first and second appellant) respectively, were charged and convicted of armed robbery contrary to section 285 and 286 of the Penal Code. They were sentenced to a statutory term of 30 years imprisonment. Dissatisfied with the conviction and sentence, they now appeal to this court. Briefly the facts of the case can be stated as follows. On 25/8/2005 at 1.00hrs PW.1 Lewis Shunda heard his door to his bedroom broken. He saw the first appellant with a torch and bush knife. He also identified the 2nd appellant by voice as he was his in law. It is in the testimony of PW.1 that the 1st. appellant attacked him with his bush knife and as PW.1 struggled to avoid the assault, his four right hand fingers were injured. The appellants then robbed his motorcycle and forced him under threat of being killed to surrender one of the ignition keys which he did and remained with the other. PW.1 cried for help and his neighbour came. He went to police station where he reported and was issued PF.3 to hospital. Few days later on 10/10/2005 PW.2 Fadhila Selemani a driver of Hiace vehicle was approached by two people who hired his vehicle to transport their motor cycle to Korogwe. PW.2 was with conductor PW.3 Yatilu Rajabu. They agreed at Tshs.60/000/= . They went with the 1st appellant who was with the two people to Dochi. At Dochi PW.2 and PW.3 parked their vehicle and meanwhile the 1st appellant went out and soon he came with the 2nd appellant pushing a motorcycle which they loaded into the Hiace. It was Honda 110 red in colour. The journey to Korogwe started and upon arrival at Soni they were stopped by PW.4 D/SSG Kedmond and his colleagues who had in fact arranged a trap by planting two informers who had posed as customers of the motor cycle to the appellants. All were rounded up and the Hiace was driven back to police central Lushoto. PW.1 was summoned to police station where he identified his robbed motorcycle to be Honda 110 red in colour, Registration No.T476 AEE, Chasis NoJD015 309304 and Engine No.2425762 as was so reflected in

the Motorcycle Licence and Importation Certificate. PW.4 interrogated the two appellants who admitted to have committed the offence. He also recorded their cautioned statements which were admitted as exhibit. The two appellants were finally charged. In his defence the 1st appellant raised defence of alibi by averring that he was from Mwelia Mombo and he had come to Lushoto on 8/10/2006 to visit his parents. The second appellant claimed that he was just arrested on 10/10/2005 on his way to Muheza and was later joined with the 1st appellant. He denied to have any knowledge of the charge nor was he identified at the scene of crime. In their petition of appeal the appellants have attacked the trial court's decision that since the trial Resident Magistrate was satisfied that the appellants were not identified at the scene of crime, there was no legal justification to convict them of armed robbery under the doctrine of recent possession. 2 Mr. Samwel, learned State Attorney, declined to support the conviction and sentence of the appellants for armed robbery on the grounds that the evidence of identification was not watertight; neither could conviction under the doctrine of recent possession be applicable for it was a long time from when the incident took place such that the nature of the item or article could readily change hands to come into possession of the appellants. He, however, was in support of the appellant's conviction of being in possession of property suspected to have been stolen c/s 312 of the Penal Code. On the evidence there is no dispute that the conditions obtaining at the scene of crime were not at all favourable for a correct identity of the appellants by the complainant. The trial Resident Magistrate rightly came to a finding that identification of the 1st appellant by torch light was of the weakest type as all possibilities of mistaken identity had not been eliminated to warrant conviction. On equal strength, PW .1's identification of the 2nd appellant by voice could not stand as well. I fully agree with the trial court that the appellants were not properly identified in that night at the complainant's house. The central issues for determination are (i) whether the appellants were found with the stolen motorcycle; (ii) whether the stolen motorcycle was properly identified and (iii) If so whether the doctrine of recent possession was properly applied. There was sufficient evidence that bandits invaded the house of PW .1 on the night of 26/8/2005 and fade away with his motorcycle after they had injured his right hand by cutting him with a bush knife. On 6/10/2005 a month and two weeks later, PW.4 got information that the stolen motorcycle was at Dochi area. A thorough investigation was conducted and having found out the truth and correctness of the information, PW.4 and his colleagues prepared a trap. Informers were sent to pretend to be buyers of the motorcycle. On 10/10/2005 the informers and the 1st appellant went to PW.2 to * hire his vehicle to transport the motor cycle to Korogwe where the informers and the 1st appellant went to PW.2 to hire his vehicle to transport the motorcycle to Korogwe where the informers had pretended to reside. PW.2, PW.3 conductor of 3 the motor vehicle Hiace, the two informers and the 1st appellant went to Dochi where the 1st appellant went to collect the motorcycle. He went to a nearby house and came out pushing the motorcycle with the 2nd appellant. They together loaded it into the Hiace. The journey to Korogwe started and upon reaching Soni town ship, .PW.4 and his colleagues stopped the Hiace. All passengers were ordered to be down back to police station Lushoto. PW .1 was summoned to the police station to identify the motorcycle. PW .1 did identify the motorcycle to be Honda 110, red in colour, Registration NO.T426 AEE, Engine No.2425762 and Chasis NO.JD615309304 which were reflected in the motorcycle licence and importation certificate

which he possessed. It is a well settled principle of law that under the doctrine of recent possession if a person is found in possession of recently stolen property he is, in the absence of a reasonable explanation as to how he came to be in possession of the property, deemed to be either the thief, burglar, robber or a guilty receiver. The question the court had to decide is whether the period between the stealing or robbery of the motor cycle and the finding of it in possession of the accused was so recent enough as to entitle the court to come to the commission that the accused was the thief and consequently the burglar. (See: Ester d/o Zacharia V.R. (1972) HCD 166, Musa Alii Mohamedi V.R.

(1968) HCD 157). The appellant in the former case of Ester was on 26/6/71 found in possession of a radio stolen in the course of a burglary which occurred some 3 Vi months previously on 8/3/71. The radio was found under the appellant's bed and her various explanations as to how it was obtained proved false. The appellant was convicted of burglary. In the later case of Musa the 4 *.VA accused vyas found guilty of stealing a radio when the same was found in his possession a month after it had been stolen. It was held that the interval was short enough to support the conclusion that the accused was a thief. 4 But in another case of Gaspar s/o Jovin V.R. (1968) HCD 443 the accused was found in possession of a watch four months after it had been stolen. The period was held to be too long to be considered "recent" in order to raise a presumption that the accused was the thief. Usually in the application of the doctrine of recent possession there is no fast rule as to what period of time is sufficient. The period varies according to the nature of the article stolen, (see. Thomas Mwanyoka V.R. (1973) TLR 30). Moreover, where the doctrine of recent possession is applied the onus on the accused is to give an explanation as to how he come to be in possession of the stolen goods. The explanation need not be reasonable and convincing. In our present case there was cogent evidence that the stolen motorcycle was found in possession of the appellants hardly 1 month and two weeks after the armed robbery. The nature of the article, that is, motorcycle was not a common article that could change hands readily to come into the hands of the appellants. It was properly identified by the complainant as he infact had all the documents pertaining to the importation of the same. The trial Resident Magistrate was justified in applying the doctrine of recent possession and convicted the appellants of armed robbery. With respect to the learned State Attorney, the appellants were not convicted of being in possession of stolen property c/s 312. They were convicted of armed robbery under the doctrine of recent possession. There is nothing to fault the trial court's conviction of the appellants. As regards sentence, there is nothing to make me interfere as it was a statutory minimum under section 5(a) (ii) of the Minimum Sentences Art Cap.90 *- & * i jv R.E. 2002. The minimum sentence provided for armed robbery is imprisonment of not less than 30 years. In the final result, this appeal dismissed in its entirety. A.A 0,J. .: \ 5 15/8/2008 Coram - W.E. LE M A -D R . Appellants - All present Respondent - Makondo (SA) C/C Sarah Court:- Judgement delivered in chamber this 15th day of August, 2008 in the presence of both parties. R/A further explained. v y 15/8/2008 6

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