

DECIDED
20 August 2014

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- 'I_ Fourth,. the doctrine of recent possession was wrongly invoked in finding . him ' guilty_ . as charged. . . Fifth, the trial . magistrate . . erred in law by relying on the caution statement which was retracted. Sixth, the defence of the)3ppellant was ignored by the trial magistrate. He accordingly urged this ' ~ ! . " . 1• , '1\'; '~:Jr'"): ' . court to allow his appea_l; quash the conviction and set aside the sentence : 'of imprisonment imposed on him. . I For the respondent Republic in this appeal, is Mr. Obadiah Kajungu, Learned State

Attorney. Mr. Kajungu did not support the appeal. Much as he agreed that the dock identity was not favourable, he emphasized that, apart from the visual identification evidence, the trial court considered other evidence like, that the appellant was found with the stolen property (motor cycle) and that, a bag containing the appellant's clothes was found at the scene of the crime. More so, it is Mr. Kajungu, contention that, the appellant was identified at the identification parade. The prosecution case against the appellant was built on the evidence of six witnesses. These were Chacha Mwita (PW1), Christopher Marwa. (PW2), Inspector Kimasa (PW3); E. 6921 David Leonard, (PW4); E. 9453 Sgt Thomas (PW5) and Matutu Mtundi Nyanduru (PW6). PW1 told the trial court that, on 28th June, 2010 he was at Mabatini bus stand. While watching a football match nearby, He was informed that, PW2, whom he left his motor cycle with, had been stabbed with a knife and the motor cycle has been robbed. According to PW1, after a thorough search, the appellant was caught at Lamadi with the motor cycle. Another piece of evidence came from PW2. This witness told the trial court that, on the fateful day, while at Mabatini, PW1 gave him his motor cycle so that he could refuel it: Then came the appellant who hired him. As they were approaching Lake primary school, the appellant stabbed PW2 with a sharp object on his head. He then fell down. The appellant tried to stab PW2 on his stomach but as he was protecting himself with his arm, he was stabbed in the arm, and the appellant took the motor cycle and disappeared. The matter was reported to the police and a search ensued. According to PW2, at the scene of the crime, a small bag was found which was taken to the police. PW3 was the police inspector who conducted the identification parade where PW2 identified the appellant. PW4, and investigations officer told the trial court how he went to Lamadi to pick up the appellant together with the motor cycle, and a knife which allegedly was used to stab PW2. PW1 was the Police Officer who took the 3 juveniles to the station; PW5, PW6, PW7, PW8, PW9, PW10, PW11, PW12, PW13, PW14, PW15, PW16, PW17, PW18, PW19, PW20, PW21, PW22, PW23, PW24, PW25, PW26, PW27, PW28, PW29, PW30, PW31, PW32, PW33, PW34, PW35, PW36, PW37, PW38, PW39, PW40, PW41, PW42, PW43, PW44, PW45, PW46, PW47, PW48, PW49, PW50, PW51, PW52, PW53, PW54, PW55, PW56, PW57, PW58, PW59, PW60, PW61, PW62, PW63, PW64, PW65, PW66, PW67, PW68, PW69, PW70, PW71, PW72, PW73, PW74, PW75, PW76, PW77, PW78, PW79, PW80, PW81, PW82, PW83, PW84, PW85, PW86, PW87, PW88, PW89, PW90, PW91, PW92, PW93, PW94, PW95, PW96, PW97, PW98, PW99, PW100, PW101, PW102, PW103, PW104, PW105, PW106, PW107, PW108, PW109, PW110, PW111, PW112, PW113, PW114, PW115, PW116, PW117, PW118, PW119, PW120, PW121, PW122, PW123, PW124, PW125, PW126, PW127, PW128, PW129, PW130, PW131, PW132, PW133, PW134, PW135, PW136, PW137, PW138, PW139, PW140, PW141, PW142, PW143, PW144, PW145, PW146, PW147, PW148, PW149, PW150, PW151, 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PW1883, PW1884, PW1885, PW1886, PW1887, PW1888, PW1889, PW1890, PW1891, PW1892, PW1893, PW1894, PW1895, PW1896, PW1897, PW1898, PW1899, PW1900, PW1901, PW1902, PW1903, PW1904, PW1905, PW1906, PW1907, PW1908, PW1909, PW1910, PW1911, PW1912, PW1913, PW1914, PW1915, PW1916, PW1917, PW1918, PW1919, PW1920, PW1921, PW1922, PW1923, PW1924, PW1925, PW1926, PW1927, PW1928, PW1929, PW1930, PW1931, PW1932, PW1933, PW1934, PW1935, PW1936, PW1937, PW1938, PW1939, PW1940, PW1941, PW1942, PW1943, PW1944, PW1945, PW1946, PW1947, PW1948, PW1949, PW1950, PW1951, PW1952, PW1953, PW1954, PW1955, PW1956, PW1957, PW1958, PW1959, PW1960, PW1961, PW1962, PW1963, PW1964, PW1965, PW1966, PW1967, PW1968, PW1969, PW1970, PW1971, PW1972, PW1973, PW1974, PW1975, PW1976, PW1977, PW1978, PW1979, PW1980, PW1981, PW1982, PW1983, PW1984, PW1985, PW1986, PW1987, PW1988, PW1989, PW1990, PW1991, PW1992, PW1993, PW1994, PW1995, PW1996, PW1997, PW1998, PW1999, PW2000, PW2001, PW2002, PW2003, PW2004, PW2005, PW2006, PW2007, PW2008, PW2009, PW2010, PW2011, PW2012, PW2013, PW2014, PW2015, PW2016, PW2017, PW2018, PW2019, PW2020, PW2021, PW2022, PW2023, PW2024, PW2025, PW2026, PW2027, PW2028, PW2029, PW2030, PW2031, PW2032, PW2033, PW2034, PW2035, PW2036, PW2037, PW2038, PW2039, PW2040, PW2041, PW2042, PW2043, PW2044, PW2045, PW2046, PW2047, PW2048, PW2049, PW2050, PW2051, PW2052, PW2053, PW2054, PW2055, PW2056, PW2057, PW2058, PW2059, PW2060, PW2061, PW2062, PW2063, PW2064, PW2065, PW2066, PW2067, PW2068, PW2069, PW2070, PW2071, PW2072, PW2073, PW2074, PW2075, PW2076, PW2077, PW2078, PW2079, PW2080, PW2081, PW2082, PW2083, PW2084, PW2085, PW2086, PW2087, PW2088, PW2089, PW2090, PW2091, PW2092, PW2093, PW2094, PW2095, PW2096, PW2097, PW2098, PW2099, PW2100, PW2101, PW2102, PW2103, PW2104, PW2105, PW2106, PW2107, PW2108, PW2109, PW2110, PW2111, PW2112, PW2113, PW2114, PW2115, PW2116, PW2117, PW2118, PW2119, PW2120, PW2121, PW2122, PW2123, PW2124, PW2125, PW2126, PW2127, PW2128, PW2129, PW2130, PW2131, PW2132, PW2133, PW2134, PW2135, PW2136, PW2137, PW2138, PW2139, PW2140, PW2141, PW2142, PW2143, PW2144, PW2145, PW2146, PW2147, PW2148, PW2149, PW2150, PW2151, PW2

~ . : ! j : ; ; ; , ~ _ _ ... - With regard to the first ground of appeal, Mr. Kajungu, Learned State , , Attorney agreed that the dock identity was not favourable as to the

- ' & intensity of the light. In his judgment, the trial court magistrate seemed to have satisfied himself as to the identity of the appellant. At page 3 of his typed judgment, he had this to say:- "i;,,. ' ' "Secondary that, the PW2 identified the accused well as at the time he hired him there was light from the nearby shops. That's why even in the identification parade he manages to identify him. " Neither PW2 nor the trial magistrate took any effort to describe the intensity of the light during the commission of the crime since it was during night time. The importance of proper and correct identification in cases whose determination hinges on identification cannot be over emphasized. In every case in which there is question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the person who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given.
- In the case of *Iribu Al)dallah VR*, Criminal Appeal No. 220 of 1994, , the Court of Appeal of Tanzania observes thus:- "In matters of identification, it is not enough merely to look at factors favouring accurate identification. Equally important is credibility of witnesses. The conditions for identification might appear ideal but that is not. ", r, , _In this particular case, all what PW2 told the court was that, he identified the appellant because there was light from nearby shops. It is a well known trite law that; courts should closely examine the circumstances in which the identification by each witness was made: The Court of Appeal
- has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows:- How long did the Witness has the accused under observation; At what distance; In what light; was the observation impeded in any way, as for example, by passing traffic, or a press of people; Had the witness ever seen the accused before; if yes how often; etc. According to the testimony of PW2, the appellant hired him after they had bargained the fare. It is not known if PW2 knew the appellant before the incident. The appellant being a passenger definitely he stayed at the back of motor cycle and therefore, somehow, it was not easy for PW2 to observe the appellant. As if that is not enough, PW2 never describe the intensity of the light. To crown it all,-- one but can conclude that the circumstances of the identification were not favourable (see: *Waziri Amani VR* [1980] TLR 250) and therefore, the trial magistrate ought to have taken caution before convicting the accused in reliance on the correctness of the identification. (See also *Shamir John V.R*, Criminal. Appeal NO. 166 OF 2004 (CA unreported) With the above, I hold that, the identification evidence of the appellant totally failed to place the appellant at the

scene of the crime. PW2 might have been honest but mistaken. I thus allow this ground of appeal. With regard to the second ground of appeal, since I have allowed the first ground, I need not labour on this. When cross examined by the appellant, PW2 told the court that the robbery occurred around 10.00 hours at night and that he identified the appellant at the identification parade. If PW2 did identify the appellant that material night, he could have given a description of the appellant before the identification parade. He was silent. When

PW3 wanted to tender PF No. 186 to prove that the appellant was identified at the identification parade, the appellant objected to its tendering claiming that he was beaten and he sustained injuries in his arm. Despite the objection, the court held thus: "Objection overruled as the accused will prove that if the parade was conducted without his consent or obtained by force in his defence."

- Thereafter the PF No. 186 was admitted as Exhibit P1 (see Police General Order). With the above therefore, I hold that, the trial court erred in
- not admitting Exhibit P1 without first conducting an inquiry, as required by the law. If the third ground of appeal is on the age of the appellant. The appellant claims that, at the time of the alleged commission of the offence, he was seventeen years and therefore he was not eligible for a prison term, in terms of section 119 (1), (2) (a) (b) and (c) of the Law of Child, ... 8, Act, No. 21 of 2009. The particulars of the accused person accompanying the charge sheet read as follows: "Particulars of the Accused Person Name: Rashid s/o Selamani @ Chidi Age: 17 years Tribe: Zanaki Religion: Moslem Occupation: Student - Nyamisisi Primary School: Resident: Kiabakari - Musoma Dated at Mwanza this 10th day of July 2010. (Signed) State Attorney. The appellant was charged on the 3rd of July 2010. Judgment of the trial court was delivered on 10th March 2011 eight months thereafter. The record is silent as to when the appellant turned eighteen as there is no evidence to show his date of birth. Under such circumstances, the appellant, I hold that, this ground of appeal has merit. In the fourth ground of appeal, the appellant has raised several issues, which hinges on the doctrine of recent possession. He submitted that, ownership of the property stolen was not proved to the tilt; Exhibit P3, the motor cycle was not tendered by the person or persons who arrested him from Rubona area, that the prosecution failed to bring one Mtanga in court to testify or corroborate the prosecution evidence; that there was no prior description of the property such as special and/or peculiar marks before the exhibit was shown to the victim, and, the objections of the appellant were wrongly and unfairly adjudged by the trial court. According to the record, it was PW4 who was ordered to go to Lamadi police station to pick up the appellant. PW4 told the court how he went to Lamadi and found the appellant already arrested and that, he was handed over the appellant, the alleged motor cycle with Registration No. T608 BEQ Sunlg and a knife. PW4 then proceeded to police Nyamagana and handed over the appellant together with the exhibits which were admitted as Exhibits P2 and P3 respectively.

Also we have the testimony of PV\ (S., the investigating officer. What he testified was what he read on -, · the case file, since he was stationed at Nyamagana c~ntral police. 10 \s}{~i. , .. _.:_ .1~z _; ;;;t::~i ::~:- :(:,\,!

- First and foremost, I take note that, of all the prosecution witnesses, nobody testified to have seen the appellant with the motor cycle. According to ...
- to PWS, on 29/6/2010, the appellant, while at Lamadi, tried to sell the ...
- motor cycle or to get oil so that he could continue with 'his journey': While doing that, good citizens suspected him and reported the matter to Lamadi police. He further told the court that, as soon as he realized that he was under surveillance, the appellant tried to flee, whereas, some motorists who were within the vicinity chased and caught the appellant, somewhere near river Rubana, and surrendered him to Lamadi police station. This leads to the question on why the good citizens were not called to testify or more worse, even the arresting officer at Lamadi police did not testify. In his testimony PWS never mentioned about the appellant having a stained knife when he was arrested. Where then did the knife come from? Lastly, if PW4 was the one who went to Lamadi custody of the appellant and the exhibits and took {Motor cycle and the knife), how come he the one who tendered them in evidence, instead of the arresting officer at Lamadi? In all fairness, it seems the appellant was arraigned on the basis that he was found in possession of a motor cycle reported to have been recently stolen from PW2. In the case of Mustapha Darajani V. Republic, Criminal Appeal No. 242 of 2008 {CAJ it was held that, for the doctrine of recent possession to apply, it must be established, inter alia, 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. I should add that, to prove this nexus, there must be inassailable evidence on how the property changed hands up to the time it was found in the possession of the alleged thief. In this particular case, I have noted that, nobody has testified in court to say how he arrested the appellant with the motor cycle and that, during the arrest, he had a knife. Funny enough, PW4 who went to Lamadi to pick up the appellant, was also handed the motor cycle and a knife. In the case of Majid John Vincent @ Mlindangabo and Abdul Selemani Hamisi @ Miburo V. Republic, Criminal Appeal NO. 264 of 2006 {CA) the Court of Appeal had this to say on the chain of

custody . ; , ~ ; . . : ~ ; , ~ of exhibits:- ~ ' . ".....Indeed, that would help in allaying and fears , ; ! ~ ~ ~ " , - about the "chain . of custody" in handling · the exhibit · - ; , ~ ' [jJf ::\ J before its production in evidence at the trial. We say so ~ " . ? ~ ' . t · · t _ : , c " . ~ ~ 12 ' · ' . tr\ . / : _ : , , . 1\1 ; : ~ \ . , , ; ; , ~ ! - ; ; ; , , _ : ' . ; : _ · : · i ! ' . - . ~ - ' ~ , ... : ! , _ .. , _ because presumably in the course of tendering Exhibit · . PW4 would have been in a better position to ' tell the . court how it was handed · from the date of the _ t . . ; . · ~ = ~ -- , , appellant's arrest to the date of its production in evidence at the trial such evidence would have been important in ascertaining whether or not there was any possibility of tempering with the exhibit in the process..... " I think with due respect, the issue here is whether or not the exhibits tendered in evidence connected the appellant with the principle of recent possession, taking into account the way they were. handled by different · · people. Taking in strid~ the Maj.id· John Vincent Case (supra), there is a · possibility of planting of exhibits, which in my opinion, watered down the · : ' principle of recerit possession, which at the end, may. have · resulted into miscarriage of justice. With the above observation, I find that, this ground of appeal has merit. , , : · , . 13

- i . , - i ? ? { : ~ : ~ ; ~ ; ~ ; : . · " : · ~ - ~ ~ : . ; · . ~ · : · · / · ~ - ~ ~ ~ ~ ~ ~ ; i , , , - · · . ~ 1 - ~ ~ ; , : t ~ , · . . , · . The fifth and sixth issues n~ed not detain me. The above grounds are ~ ~ n6ugh to determine this appeal. On its totality, I find that, the prosecution : i has failed to prove its case as required by law. There is · no enough evidence to support the conviction and sentence. I would consequently allow the appeal. The conviction entered is quashed and the sentence set aside. The. appellant should be set at liberty unless he is held on some · other lawful cause. Right of appeal explained. A.E. BUKUKU _ . . - ~ . . - ~ . JUDGE ; _ ~ : / > ' i Delivered at Mwanza this 20th August; 201~ 14 : . - · - ~ - . . . ~ : · _

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Prepared on 14 October 2026 · Esheria