

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: NSEKELA, J.A., LUANDA, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 158 OF 2011

JOSEPH SYPRIANO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the judgment of the High Court
of Tanzania at Arusha)**

(Sambo, J.)

**dated the 3rd day of November, 2010
in**

Criminal Appeal No. 43 of 2009

JUDGMENT OF THE COURT

8 & 18 May 2012

LUANDA, J.A.:

The appellant Joseph Sypriano @ Owino and Justine s/o Samson @ Kimaro were charged in the District Court of Arusha sitting at Arusha with robbery with violence contrary to Sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002. After full trial, Justine s/o Samson @ Kimaro was acquitted whereas the appellant was convicted and sentenced to 15 years imprisonment.

Aggrieved by the finding of the trial District Court, the appellant unsuccessfully appealed to the High Court of Tanzania. Still dissatisfied, hence this second appeal.

The appellant has raised three grounds of appeal in his petition of appeal. All along up to the filing of the petition of appeal, the appellant fended for himself. However, at the hearing of the appeal, the appellant engaged one Mr. Duncan Joel Oola, learned advocate to represent him. Mr. Oola adopted the grounds filed by the appellant. He argued ground number one and combined grounds number two and three. The three grounds can be condensed into two grounds. One, the witnesses on the prosecution side were not credible. Two, the doctrine of recent possession does not apply in this case.

The respondent/Republic was represented by Ms. Immaculata Banzi learned Senior State Attorney. Ms. Banzi did not resist the appeal.

The prosecution case which was found credible by both lower courts was that on 6/3/2007 around 9.30 am when Ernest Mamuya (PW1) was driving a taxi cab with registration number T 757 AAY was stopped by a man whom he later realized was the appellant. The appellant who was limping requested for a lift so that he would drop him at a certain hospital which was in the direction PW1 was heading. He picked him. At a certain place the appellant asked PW1 to stop whereby PW1 complied. A person emerged, talked to the appellant in a vernacular language which he could not comprehend. Alas ! PW1 was beaten and thrown out of the motor vehicle. The car was stolen. The appellant drove off. PW1 raised an alarm, there was no response. He went to the police to report. Also informed was the Joseph Chacha Makubate (PW4) the one who sold the car to PW1.

It is the evidence of PW4 that on a date he could not remember, PW1 said it was 19/8/2007, he saw the motor vehicle. He alerted PW1. Through Police eventually the motor vehicle was recovered which was in the possession of Hashim Hassan Massawe

(PW2). When asked, he said he bought the car from Justine s/o Samson @ Kimaro. Justine was arrested. When Justine was queried he agreed to have sold the car to PW2. As to how he came to possess it, he said he got it from the appellant who surrendered it as a lien for the money the appellant had borrowed. The agreement was reduced into writing and witnessed by several people. The appellant failed to repay the loan, he allowed him to sell the car.

In his defence, the appellant did not dispute the story of Justine as narrated by D/cpl Pastory (PW3). He too said he got the car from Hamisi Juma under similar circumstances as that of Justine. Hamisi Juma borrowed money from him and pledged the car. Hamisi failed to repay, he thus borrowed money from Justine and pledged the car.

Submitting on the credibility of witnesses, Mr. Oola said the Courts below did not assess their evidence properly. He gave some examples. For instance he said the registration number of the car the subject matter of this case in the charge sheet indicates T 757 AAY but PW2 stated in evidence as T 575 AAY; whereas PW4

referred to as TT 57 AAY. Further the chasis and engine numbers are different from that stated in the charge sheet, the registration card and that in the agreement.

Ms. Banzi joined hands with Mr. Oola on the question of credibility and added that even the evidence of PW1 as to the date the alleged offence was committed differ with that stated in the charge sheet; the evidence of PW1 as to the date the car was recovered is also different from that stated by PW2. She concluded by saying, the evidence of PW1 was doubtful.

We wish to point out that this is a second appeal. So, the Court is precluded from interfering with the concurrent findings of fact of the lower Courts unless there is misdirection, or non directions. (See **DPP v Jaffari Mfaume Kawawa [1981] TLR 149**).

We have carefully read the evidence of prosecution witnesses, the observation made by both learned counsel is supported by the record. Accordingly we are entitled to interfere. First the charge

sheet and evidence on record are at variance. The charge sheet alleges that the offence was committed on 16/3/2007; the car stolen is Toyota Chasser with registration number T 757 AAY with engine and chassis numbers IG 5764334 and GX 316412020 respectively.

The evidence on record shows that the offence was committed on 6/3/2007. Further some witnesses stated different registration numbers which in our view was not fatal at all when taken into consideration the fact that it was not their property and that people differ in their power of memory. Accordingly we would have ruled out that the discrepancies were not fatal if that was the only discrepancy. This is because not every inconsistency however so minor, irrelevant or flimsy would be taken into account in assessing a witness credibility. The entire evidence has to be considered as one whole before a decision can be reached as to its veracity.

But in our case the above discrepancies coupled with different numbers of both engine and chassis, is not a minor discrepancy at all. We are of the view that that is not a minor discrepancy, it goes

to the root of the case. We accordingly find that the first ground has merits.

We now turn to the doctrine of recent possession. Mr. Oola said that the doctrine does not apply as the car was not properly identified; it was not found under the possession of the appellant and lastly it was not recent.

Ms. Banzi was of the same view. She referred us to **Abdi Julius @ Mollel Nyangusi and Another v R** Criminal Appeal No. 109 of 2009 (CAT) (Unreported).

In **Juma Marwa v R** Criminal Appeal No. 71 of 2001 CAT (Unreported) the Court observed:-

"The doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a guilt receiver. "

In **Mkumbwa Mwakagenda v R.**, Criminal Appeal No. 94 of 2007 (CAT) (Unreported) which was cited in **Abdi Julius @ Mollel Nyangusi case** cited *supra* the Court stated inter alia, thus:-

*"For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second**, the property is positively proved to be the property of the complainant, **third**, that the property was recently, stolen from the complainant and **lastly**, that the stolen thing constitutes the subject of the charge against the accused The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

We have shown in this judgment that the car the subject matter of this case was neither found with the appellant nor did the prosecution prove that it belonged to the complainant. With due respect to both learned counsel, the doctrine does not apply. We agree.

In the event and for the reasons stated above, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless otherwise lawfully detained.

It is so ordered.

DATED at **ARUSHA** this 11th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(M.A. MALEWO)
DEPUTY REGISTRAR
COURT OF APPEAL