

IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO. 79 OF 2014

PATRICK NGONGI KINDANYANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Songea)

(Manento, J.)

dated 26th March, 2003

in

Consolidated Criminal Appeal Nos. 26 and 27 of 2001

.....

JUDGMENT OF THE COURT

24th & 26th June, 2014

MMILLA, JA:

The appellant, Patrick Ngongi Kindanyani is currently behind bars serving a term of 30 years in prison after he and another person who did not appeal to this Court were on 7.3.2001 convicted by the District Court of Songea with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 of the Laws of

Tanzania. He unsuccessfully appealed to the High Court at Songea, hence this second appeal.

The background facts of the case were that, on 27.1.2000 at around 2.00 am, robbers stormed into the family house of PW2 Mary Mhagama in which she also had a shop stocked with different types of merchandise. Present in that house on that particular night were PW1 Annet Mbilinyi and PW4 Godfrey Mhagama who were respectively daughter and son of PW2, and PW3 Emmanuel Mkoma who was their tenant. On finding after waking up that they were invaded, PW1 raised an alarm and attempted to run away, but the bandits caught up with her. According to the evidence of the prosecution, the bandits were armed with clubs, pangas and knives. PW1 said she managed to identify one Hamisi (first accused before the trial court) whom she said was their neighbour with the aid of light sourced from a wick lamp. She was express however, that she did not identify the appellant. Simultaneous to assaulting her, the robbers demanded to be given money. She gave them T.shs 13,000/= which they considered too little and commanded her to open the shop. On realizing that she was not acting fast enough, they broke the door

leading therein by smashing it with a big stone. They ransacked the place and ran away after taking with them various goods from the shop.

The neighbours went to the scene of crime later only to find that the bandits had run away. With the help of neighbours, the incident was reported to the police who, apart from giving her and PW2 PF3's for purposes of going to hospital for treatment, they commenced investigation leading into the arrest of the appellant and his colleague.

In his brief defence before the trial court, the appellant denied to have committed the alleged crime, contending that there was advanced no cogent evidence to link him with that crime. He in particular said that the trial court wrongly invoked the doctrine of recent possession, especially when it was to be considered that the prosecution did not call the woman who was found with the stolen clothes who allegedly named him as having been the one who gave them to her.

In upholding the appellant's conviction, the first appellate court found that there was ample evidence to establish that some of the

stolen clothes were found clad by the appellant's wife while others were found at his home, therefore that the doctrine of recent possession was properly invoked in the circumstances of the case.

Before this Court, the appellant appeared in person and was unrepresented, while the Republic was represented by Mr. Abel Mwandalama who was assisted by Ms Tumaini Ngiluka, learned State Attorneys, who readily declined to support conviction and sentence.

The memorandum of appeal raised four grounds. In our view however, determination of this appeal depends entirely on the second ground on whether or not the doctrine of recent possession was properly invoked in the circumstances of the case. This is because as was correctly found by the trial court, the question of the appellant's identification does not arise in view of the fact that PW1, PW3 and PW4 who were the only eye witnesses in the case, did not identify the appellant at the scene of crime on the fateful day.

Now, coming to the aforesaid basic ground, it is a settled principle of law that for the doctrine of recent possession to apply, it must be shown, *inter alia*, that the property was found with the

accused; that it was positively proved that it was the property of the complainant; that it was recently stolen from the latter, and that there is a nexus between the property stolen and the person found in possession of it - See the cases of **Ally Bakari and Pili Bakari v. Republic** [1992] T.L.R. 10, **Joseph Mbelwa v. Republic**, Criminal Appeal No. 228 of 2010, CAT and **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2008, CAT (both unreported).

It is plain and certain that in the present appeal, the allegedly recovered clothes were not found in appellant's possession. Evidence was led to show that they were recovered from one Asia Komba of Mkumbi village, a woman who was said to be appellant's wife. However, in his defence the appellant was steadfast that that woman was not his wife. In fact, he went beyond that by saying that he did not even know her. The situation is worsened by the fact that the prosecution did call that woman as a witness in court to clear the doubts. Consequently therefore, there was no cogent evidence to link the appellant with the clothes recovered from that woman. As such, we find and hold that the doctrine of recent possession was not properly invoked in the circumstances of the present case.

For reasons we have given above, the appeal has merits and we allow it. In consequence, we quash the conviction and set aside the sentence and the order for compensation. We direct that the appellant should be released from prison unless he is otherwise being lawfully held for some other lawful cause.

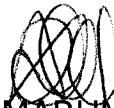
DATED at IRINGA this 25th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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


Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL