IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 140 OF 2018

OSCAR JOHN BOSCO @ JACOB ..... 1ST APPELLANT

ELIAS SHIGOMELO @ BAMBALA ..... 2ND APPELLANT

VERSUS

THE REPUBIC ..... RESPONDENT

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

(Gwae, J.)

dated the 7th day of May, 2018

in

Criminal Appeal No. 83 of 2016

JUDGMENT OF THE COURT

2nd May & 12th May, 2022

RUMANYIKA, J.A.:

On 02/03/2015, Osca John Bosco @ Jacob and Elias Shigemelo @ Bambala, the first and second appellants respectively, were arraigned before Chato District Court, the trial court, of the offence of armed robbery contrary to section 287A of the Penal Code [Cap.16 R.E. 2002, now R.E. 2019] (the Code). They were convicted and ordered to suffer a custodial sentence of thirty (30) years. They appealed to challenge that decision in the High Court (Gwae, J) unsuccessfully. The conviction and

sentence were upheld. They are unhappy and are before us on a second appeal.

The particulars of the offence charged are that on 27/02/2015 at about 20:45 hours at Wanga Village within Chato District in Geita Region, the appellant stole TZS. 15,000/= cash, one mobile phone make Nokia valued at TZS. 40,000/= and a motorcycle with Reg. No. T913 CZQ make SANLG valued at TZS. 1,800,000/= all totally valued at TZS 1,855,000/= from Shida Paulo, the complainant whom before stealing they threatened to injure using firearm in order to obtain the said property.

According to the prosecution, the complainant (PW1), a commercial motorcycle rider, on 27/02/2015 while along Bwanga road at work, he met the appellants armed. They threatened to shoot him while demanding the motorcycle and all the items that he had. They robbed him the said motorcycle, the cellular phone and the cash. They varnished until shortly thereafter when the motorcycle fell short of fuel and the engine stopped. The second appellant purchased some fuel from PW3. At the earliest stage of police investigations, PW6, the 1st appellant's landlord to the 1st appellant's arrest by PW9. He was found in possession of a gun namely SMG with twenty ammunitions (Exhibit PE6). He confessed before PW11 in the presence of Omary

Mohamed (PW13) and mentioned the 2nd appellant as his accomplice. The latter was searched and found in possession of the motorcycle and the cellular phone. Like the 1st appellant, he also confessed, so both of them did it before PW12, justice of the peace. Based on those facts, as said earlier, the appellants were arraigned, charged and accordingly prosecuted before the trial court. The appellants were the sole defence witnesses. Nevertheless, they were convicted as charged and accordingly sentenced. They appealed but lost the battle in the High Court, hence the instant appeal. Besides the substantive one, they lodged a supplementary memorandum of appeal on three points as follows: -

(1) That, the prosecution case was not proved beyond reasonable doubt.

(2) That, the appellant's conviction was based on an improperly procured and admitted cautioned statement.

(3) That the appellants' conviction was based on improperly procured and admitted extra judicial statements.

When the appeal came up for hearing, Mr. Anosisye Erasto, learned State Attorney appeared for the respondent Republic whereas Mr. Feran Kweka, learned counsel appeared for the appellants.

Arguing the three grounds together, Mr. Kweka told the Court that the appellants were not properly identified at the alleged crime scene during the alleged material night to warrant a conviction. Additionally, he argued that if anything, PW3's evidence recorded at page 24 of the record of appeal was not credible because she identified the 2nd appellant at a petrol shop, away from the scene of crime. Mr. Kweka further submitted that at most the prosecution evidence suggested that, if at all, they committed offences of unlawful possession of firearms and being found with property suspected to have been stolen or unlawfully acquired. Therefore, he submitted that the appellants were wrongly charged and are entitled to be acquitted. He rested his submission praying the Court to allow the appeal, quash the conviction, set aside the sentence, and restore the appellants' liberty.

Having left grounds number two and three without being argued, we probed Mr. Kweka on his position as regards those grounds, in respect of the appellants' cautioned and extra judicial statements. He submitted that the statements are premised on improper and unreliable evidence of visual identification at night, therefore liable to be discounted. However, he submitted that on admission of the statements, the appellants had objected the statement but the trial magistrate just

ignored the objections raised. Additionally, he submitted that having been improperly admitted, yet the appellants' statements were not read out in court as required by law, much as the conviction was not based on the said statements. They may be expunged from the record.

Mr. Erasto supported the conviction and the custodial sentence meted out to the appellants. He submitted that with regard to the motorcycle and the cellular phone recovered from the appellants about two days later, and the fact that they did not object their admission as exhibits in evidence indeed, the two courts bellow invoked the doctrine of recent possession properly and according to law. Referring us to the criteria to be considered for application of the doctrine of recent possession, Mr. Erasto cited our decision in **Mustapha Maulid Rashid v. Republic**, Criminal Appeal No. 241 of 2014 (unreported). Moreover, he submitted that the appellants' admission before a civilian, PW6 shown at page 22 of the record of appeal also counted as reliable evidence. Supporting his argument, he cited this Court's decision in **Godfrey Sichizya v. D.P.P,** Criminal Appeal No. 176 of 2017 (unreported).

Additionally, Mr. Erasto submitted that the gun which the 1st appellant admitted having been found in possession of, supported the PW1's testimony as a victim of the armed robbery.

As regards the improperly procured, and, for that reason the expunged statements, Mr. Erasto submitted that even when the said exhibits are gone, yet the remaining evidence is strong enough to sustain the appellants' conviction. In support of his argument, he cited our decision in **Emmanuel Mwaluko Kanyusi and 4 Others v. Republic,** Consolidated Criminal Appeal Nos. 110 of 2019 and 553 of 2020 (unreported).

Mr. Kweka had no rejoinder submission.

Having considered the learned attorneys' rival submissions, the issue for our consideration is no longer whether the appellants were properly identified. In fact, as herein above demonstrated, the appellants were not properly identified under the unfavourable conditions that prevailed then. We accede to Mr. Kweka's contention that if anything, PW3 identified the 2nd appellant away from the scene of crime therefore the latter was not actually identified for the offence charged. As regards the admission in evidence of exhibits PE4 and PE8, we are not convinced by Mr. Kweka that the learned trial magistrate

ignored the appellants' objection. The record clearly shows at pages 38 and 42 of the record of appeal that the statements were admitted in evidence unopposed. It is trite law that courts' records are serious documents which cannot be impeached casually. On this one, there is plethora of authorities including **Iddy Salum @ Fredy v. Republic**, Criminal Appeal No.192 of 2018 (unreported), and **Abieza Chichili v. Republic** (1998) TLR 557. In **Iddy Salum @ Fredy** (supra) the Court stated:

> *....the principle as regards a court record is that the same is taken to reflect a true position of what took place during the conduct of the proceedings and cannot be lightly impeached."*

In the circumstances, we subscribe to, and take the above stated stance. The position has been so because the court records reflect what transpired in court. We think, that is the best and safety garget of protecting court records.

It would have been a different scenario, which is not the case, if, in their memorandum of appeal they complain about falsification of the evidence by the learned trial Resident Magistrate. Nevertheless, we would agree with both learned attorneys that upon being admitted, the trial court's failure to read out the statements rendered them getting

into the trial court's record improperly. Like, it was rightly proposed by Mr. Erasto, the High Court judge ought to have discounted the cautioned and extra judicial statements.

On our part, we are inclined to expunge the said improperly admitted statements from the record as we hereby do. In deciding so, we are guided by decisions that we made on a number of occasions, for instance, in **Jamila Mfaume Makanjila @ Mama Warda v. Republic**, Criminal Appeal No. 383 of 2016 (unreported). In the circumstances, grounds two and three of the appeal are allowed only in the context that the documents were tendered unlawfully.

Lastly we turn to the first ground of appeal. The point for determination is whether the two courts below invoked the doctrine of recent possession properly. Citing this court's decision in **Ally Bakari and Another v. Republic [1993] T.L.R. 10** cited with approval in **James Paul @ Masibuka and Another v. Republic**, Criminal Appeal No. 61 of 2004 (unreported), rightly so in our considered opinion, the High Court Judge was beyond reasonable doubt convinced that the 2nd appellant was found in possession of the motorcycle parts and the mobile hand set which were hardly two days later reported stolen from PW1. That evidence also formed the basis of the appellants' conviction, as it is indicated in the copies of the certificate of seizure (Exh.PE7) of

which the 1st appellant had knowledge. It is, therefore, evident that not only the property was the very one which was recently stolen from PW1 but also it belonged to the latter, and it was a subject matter of the case at hand. The appellants neither rebutted the stories nor did they claim title on the said property. As such the prosecution met the criteria that we stated in **Hassan Said Twalib v. Republic**, Criminal Appeal No. 92 of 2019 (unreported). As regards to when the doctrine of recent possession founds a conviction, on different occasions, for instance in the case of **James Paul @ Masibuk**a (supra), we stated as follows:

> *"...**it is essential of the doctrine of recent possession** that the stolen thing in the possession of the accused must have a reference to the charge laid against the accused. That is to say **that the presumption of guilty can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged..."***
> (Emphasis added).

We hereby subscribe to the immediate above cited authority.

Without prejudice to the foregoing discussion, the gun which admittedly the first appellant was found in possession of, further

strengthened the prosecution case that PW1 was robbed at a gun point. Consequently, ground number one of the appeal fails.

The upshot of it is that the prosecution case was proved beyond reasonable doubts. The appeal falls short of merits. We hereby dismiss it in its entirety and order accordingly.

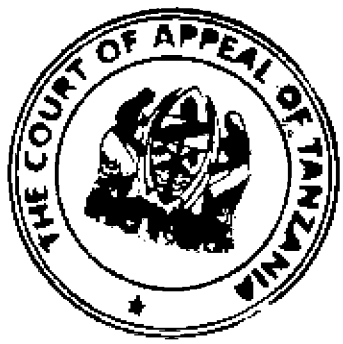
DATED at **MWANZA** this 12th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 12th day of May, 2021 in the presence of the Appellants in person and Mr. Emmanuel Luvinga, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL