LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT DODOMA. CRIMINAL APPEAL NO. 150 OF 2008. KILEO,J.A,MASSATI, J.A AND ORIYO,J.A.	**SEIF SALUM VS. THE REPUBLIC** (Appeal from the Decision of the High Court of Tanzania at Dodoma, Masanche J.)	1. There is no need to call all and every witness, because one credible witness can prove a prosecution case. 2. Since the accused's evidence was not considered by the trial court the effect was to deprive the accused of his defence. 3. Every magistrate or judge has got his or her own style of composing a judgment and what vitally matters is that the essential ingredients should be there and these include critical analysis of both the prosecution and the defense.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 150 OF 2008

SEIF SALUM ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 12th day of December, 2007
in
Criminal Appeal No. 45 of 2006

JUDGMENT OF THE COURT

8 & 17 March 2010

MASSATI, J.A.:

The Appellant was charged with and convicted of armed robbery contrary to sections 285 and 286 of the Penal Code (Cap 16 – RE 2002) in the district court of Dodoma. He was sentenced to the mandatory prison term of 30 years. His appeal to the High Court was dismissed in its entirety on 12th December, 2007 by Masanche, J. (retired). Further aggrieved, he has lodged the present appeal.

Briefly, the facts were that, on the 24th April, 2003, at about 8.30 p.m. at Airport Area, within the Municipality of Dodoma, the complainant, Hamisi John, who testified as PW1 in the trial court was riding a bicycle towards Ipagala area. He was confronted by a gang of 8 people, who hit him on the head twice by an iron bar, grabbed the bicycle he was riding and ran away. The complainant told the trial court that the gang dispersed and ran in different directions; including the way to a bar called, Amani Bar. He followed that path. There, he managed to see the Appellant with the aid of electric light. The Appellant is said to have threatened to kill the complainant if he kept on following them. It was also in evidence that the complainant suspected the Appellant to be one of the assailants. He reported his suspicion to the police, where he mentioned the Appellant's name. He did not however, know where the Appellant was residing. Working on such information, the police traced the Appellant to his residence. In the early morning of 7th May, 2003, (at 4 a.m.) the Appellant's room was searched and a bicycle seized therefrom. That bicycle was identified by PW1, as the one that was stolen from him. As a result of the evidence collected by the police, the Appellant and

two others were charged with the offence herein described, but the other two were acquitted.

Before this Court, the Appellant appeared in person; while Miss Neema Mwanda, Senior State Attorney represented the Republic/Respondent.

The Appellant filed three grounds of appeal. In the first ground of appeal, the Appellant complained that both courts below erred in law and facts in not considering the defence case in their judgments. In the second ground, the Appellant cries foul over the way the search was conducted at his home. In his last ground of appeal, the Appellant faults the lower courts for finding that the Appellant was sufficiently identified.

The Appellant opted to let the Respondent argue first before responding. Starting with the third ground of appeal, Miss Mwanda submitted that the Appellant was sufficiently identified by PW1 as they were known to each other; who traced him to Amani Bar and

saw him with the aid of electric light, and identified him by face and name. It was her alternative view that, if identification was unsatisfactory, the fact that he was found in possession of the complainant's bicycle warrants the court to invoke the doctrine of recent possession and find that the Appellant must have been involved in the robbery. On the second ground, Ms Mwanda submitted that it was true that the search in the Appellant's room was without a warrant, as required by Section 40 of the Criminal Procedure Act (Cap 20 – RE 2002) but quickly sought relief from Section 42 (a) and (b) (i) and (ii) of the Act. And so, submitted the learned counsel, the unwarranted search was justified in the circumstances. Against the first ground of appeal, the learned State Attorney refuted the Appellant's assertion by pointing out several passages from the trial, and first appellate courts' judgments in which the lower courts visibly considered the defence case. At the end of her submission, Ms Mwanda, argued that the conviction was fully justified and so urged the Court to dismiss the appeal.

Although the Appellant was not represented, his case lost nothing in clarity, because before us he was able to express himself clearly on all his grounds of appeal and in response to the Respondent's submission. First, he attacked the evidence relating to his identification essentially arguing that in all the circumstances, PW1 could not be said to have identified him beyond reasonable doubt. He cited such instances as PW1's failure to describe him when he reported to the police; the internal contradictions in PW1's testimony as to the people he allegedly identified; the inconceivability of PW1 having been hit by an iron bar twice on the head to have woken up and with yet a clear mind be able to identify him at Amani Bar. He also criticized the non calling of witnesses from the bar where PW1 said he identified him and the doctor who prepared the PF3 to prove whether he attended PW1. As for the bicycle, the Appellant said that much as he had given explanations on where he got it, PW2, did not take him along, when he set out to verify the information. He also criticized PW3's evidence because, according to the Appellant he did not "produce any document" to corroborate that he witnessed the search and seizure of the bicycle from his room.

Finally, on this point, the Appellant argued that if PW1 had truly identified him it would not have taken up to 7/5/2003 to have him arrested, because he knew him. The Appellant then did his best to convince the Court to accept his second ground of appeal, which was that the exhibit was obtained illegally at night and without a warrant of search and without there having been issued a certificate of search which he would have signed if satisfied that it was lawful or if there was one, it was not tendered in court. Then, in his last ground of appeal, the Appellant argued that the first appellate court misdirected itself in holding that PW1 had identified him before he (PW1) was hit by an iron bar. He said that this finding was not supported by the evidence on record. Then he criticized the lower courts' perfunctory treatment of the defence case in their judgments. He cited the cases of **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 166 (CA) and **MPANGWE AND TWO OTHERS v R** (1974) LRT 50 and **NDEGE MARANGWE v R** (1964) EACA Criminal Appeal No. 156 of (Unreported) to drive home his point. With these, the Appellant urged the Court to allow his appeal and quash his conviction and sentence.

In her rebuttal submission, Ms Mwanda, argued that the Appellant was identified with the aid of electric light at Amani bar. She referred us to the case of **YOHANA MSIGWA v R** (1990) TLR 148 to illustrate the point that under section 143 of the Evidence Act 1967 there was no need to call all and every witness, because one credible witness can prove a prosecution case. She submitted that even without the PF3 there was other credible evidence to prove that PW1 was hit by iron bars on the material night. She then went on to cite the case of **MUSSA OMARI Vs R** Criminal Appeal No. 83 of 2002 (Dar es Salaam) (Unreported) to illustrate how the doctrine of recent possession could be used to connect the Appellant with the commission of the present offence. In all fairness, and as an officer of the Court, Ms Mwanda supported the Appellant's assertion that the 1st appellate court misdirected itself in fact in finding that PW1 had identified the Appellant before the attack as that was not borne out by the evidence on record. After so conceding Ms Mwanda wound up her submission by reiterating her prayer that the appeal be dismissed as the case against the Appellant had been proved beyond reasonable doubt.

We have given serious consideration to the rival arguments of the parties. Before we turn to the grounds of appeal, we think we should set out matters which we believe are not in dispute. First, on the fateful night PW1, was attacked and the bicycle he was riding stolen from him. Second, that bicycle was later recovered and tendered as a prosecution exhibit. Third, the Appellant's room was searched on the night of 7/5/2003. The issue before the two courts below and this Court, is whether the Appellant had any connection with the commission of the offence?

It need not be gainsaid that the prosecution had the burden to prove the involvement of the Appellant beyond any shadow of reasonable doubt. This, the prosecution sought to discharge through the evidence of PW1, PW2 and PW3, as well as Exh. P1, P2 and P3. PW1 is the victim of the robbery. PW2 is the police officer who arrested and searched the Appellant's room. PW3 is the Appellant's co tenant who witnessed the search and seizure of the stolen bicycle (Exh. P1) from the Appellant's room. The search was conducted at

the dawn of 7/5/2003. Exh. P2 is the tax invoice for the purchase of the bicycle (Exh. P1) while Exh. P3 is the PF3 (police form No. 3) that showed that the victim of the robbery was attended to after the assault.

In the first ground of appeal the complaint is against the two lower courts not considering the defence case in their analysis of the evidence. A number of cases were cited in support of that point, including that of **NDEGE MBANGWE v R** (1964) EACA Criminal Appeal No. 156 (Unreported) which was followed in **MPANGWE AND 2 OTHERS** (1974) LRT. Unfortunately, we could not lay out hands on these cases but this position was followed by this Court in a string of cases, (See **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 166, **MALANDO BADI AND 3 OTHERS v R** Criminal Appeal No. 74 of 1993 (Mwanza) (Unreported). In **HUSSEIN IDD's** case, the Court held that since the accused's evidence was not considered by the trial court the effect was to deprive the accused of his defence. In **AMIRI MOHAMED v R** (1994) TLR 138, this Court held:-

> "Every magistrate or judge has got his or her own style of composing a judgment, and what vitally matters is that the essential ingredients should be there, and these include critical analysis of both the prosecution and the defence."

In the present appeal, the Appellant's defence at the trial was that at the material time he was at home, and that he had problems with the police who framed up the case. The trial court declared in its judgment that it had considered the prosecution and the defence cases although, it is not clear why it rejected the Appellant's defence. And on appeal to the High Court the Appellant's defence was mentioned in passing only, but, again no reasons were assigned why it was rejected.

Section 312 (1) of the Criminal Procedure Act requires a judgment to contain; the point(s) for determination, the decision thereon and the reasons for the decision. Here, what is lacking is the reason for the rejection of the defence. The question is whether the

Appellant was prejudiced thereby. After considering the totality of the evidence of both the prosecution and the defence on record, and the reasons that will follow later below, we think that, even if it was considered, and reasons for rejecting the defence given, it would not change the concurrent findings of the courts below that he was found with the stolen bicycle, a few days after it was robbed from the complainant. So, we find no merit in the first ground of appeal.

In the second ground of appeal, the Appellant challenges the legality of the search and its consequences. The Respondent submits that this was saved under Section 42 of the Criminal Procedure Act.

We think this should not detain us. It is true that Section 40 of the Criminal Procedure Act, requires

> "every search warrant may be issued and executed on any day and may be executed between the hours of sunrise and sunset, but the court may, upon an application by a police

> officer or other person to whom it is addressed permit him to execute it any hour."

A search warrant is issued under S 38 (1) of the Criminal Procedure Act, which is then referred to a magistrate. In the present case, there was no evidence that such a warrant was issued and used in searching the Appellant's room. So Section 40 of the Criminal Procedure Act does not apply. On the other hand there are several provisions, including sections 41 and 42 of the Criminal Procedure Act which allow any police officer to conduct search in emergencies. They allow police officers to have access to any place and seize anything therefrom. Under those provisions, no warrant of search is necessary. Since the Appellant's complaint was based on the assumption that there was a search warrant and since the law also allows search without a warrant in certain circumstances; we find that the Appellant's complaint against the search, without legal basis. We also dismiss this ground of appeal.

The next ground of appeal was on identification. As pointed out above, a number of discrepancies were pointed out by the

Appellant on this ground. Although Ms Mwanda, the learned Senior State Attorney, put up a strong resistance to this ground, she submitted in the alternative that should identification of the Appellant be found wanting the doctrine of recent possession be called in aid to salvage the situation and confirm the conviction.

The position of the law is that where the evidence against an accused person is solely that of identification, such evidence must be watertight to justify a conviction (See **R v ERIA SEBWATO** (1960) EA 174) and it is even more so where such evidence is that of a single witness. It has been held that such evidence must be tested with the greatest care. In such cases what is needed is other evidence, direct or circumstantial pointing to the guilt of the accused (See **ABDALLAH BIN WENDO v R** (1953) 20 EACA 166. In **WAZIRI AMANI v R** (1980) TLR 250 the Court said:-

> "evidence of visual identification ... is of the weakest kind and most unreliable. It follows, therefore that no court should act on evidence of visual identification unless all possibilities of

> mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

In the present case, the robbery took place at night (at 8.20 p.m.), PW1 was the only one around. So his evidence is that of a single witness. Although both courts below found that he recognized the Appellant at the scene of crime; we find that this finding is not supported by the evidence on record. No one was recognized at the scene. PW1 only came to see the Appellant at Amani Bar. This was not the scene of crime. Ms Mwanda had argued forcibly that since the complainant knew the Appellant by face and name and since there was electric light the tests in **WAZIRI AMANI'S** case were met. We do not think so. Having found that the witness did not identify the Appellant at the scene, but only at Amani Bar, we cannot see how the tests in **AMANI's** case were met. Furthermore, even if he met the Appellant at Amani Bar, he could not describe the Appellant when he reported to the police. In the circumstances we are unable to accept that evidence of identification of the Appellant

was watertight. So we think, there is substance in the Appellant's complaint on identification. But that is as far as we can go.

However, the evidence against the Appellant in this case is not solely that of identification. The robbery took place on 29/4/2003. A bicycle was stolen. On 7/5/2003, this bicycle is found in possession of the Appellant. The search was witnessed by PW3 his co tenant. As discussed, this search and seizure was lawful. According to the evidence on record, the Appellant was asked to account how he came about the bicycle. He gave implausible explanations. Before us, the Appellant complained that after mentioning the sources from where he got the bicycle, PW2 went about verifying the information without him. There is no record however whether he attempted to call any of those sources as a witness in his defence. In our view where be got the bicycle was peculiarly within his knowledge and so under Section 114 (1) of the Evidence Act (Cap 6 – RE 2002) the burden was on him to prove how he acquired title to the bicycle, which was proved by Exh. P2 to belong to PW1. So, we agree with Ms Mwanda that the doctrine of recent possession applies. As this

Court said in **MWITA WAMBURA** Criminal Appeal No. 56 of 1992 (Unreported) (Mwanza)

> " --- the appellant failed to explain to the court how he acquired the possession of the stolen goods. Under our criminal law the unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the accused not only on the charge of theft or receiving with guilty knowledge, but of any aggravated crime like murder, when there is reason for concluding that such aggravated and minor crimes were committed in the same transaction."

In this case, PW1 saw the Appellant immediately after being robbed of his bicycle. The Appellant threatened him if he kept on following him. Then a week or so later, the Appellant is found in possession of the same bicycle. The recent possession of the bicycle and the unchallenged and unexplained threat at PW1's life at Amani Bar, immediately after the robbery, is all presumptive evidence that he,

the Appellant must have participated in the robbery of PW1. So, with respect, the conviction of the Appellant is well grounded.

For all the above reasons, we find no substance in this appeal. The appeal is therefore dismissed in its entirety.

DATED at DODOMA this 12th day of March, 2010.

E.A. KILEO
JUSTICE OF APPEAL

S.A.L. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

(E.Y. MKWIZU)
DEPUTY REGISTRAR