

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: RUTAKANGWA, J.A.; KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 143 OF 2007

BETWEEN

DAVID MBAIGWA APPELLANT

AND

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Dar es Salaam)**

(Nyerere, J.)

dated the 14th day of March, 2006

in

Criminal Sessions Case No. 39 of 2005

JUDGMENT OF THE COURT

19th May & 25th June 2009

MANDIA, J.A:

The appellant, DAVID MBAIGWA, was charged and convicted of the offence of Murder contrary to section 196 of the Penal Code. He was sentenced to death. He is now appealing against both conviction and sentence.

Evidence led by the State tended to show that on 22/9/2003 PW1 William Machila, a peasant and cattle owner at Mavinsi village in Kilosa District saw off one of his sons Yohana Mbaigwa, the deceased, take cattle to the grazing ground. The exact time the deceased left home with the cattle is 8 a.m in the morning as indicated by PW2 Musa Machila who is the deceased's brother. PW1 and PW2 did not indicate the exact number of cattle the deceased took out on the morning of 22/9/2003, but the evidence of the father PW1 William Machile showed that at around 7 p.m. in the evening of the same day one big cow and the goats came back from grazing without the deceased. PW1 William Machila raised an alarm and a village search party was formed. The search party included, among others, PW1 William Machila, PW2 Musa Machila, PW3 Michael Machila who is a brother of the deceased and PW4 Joram Machila who is an uncle of the deceased. The search party did not find the deceased or the cattle that evening and went back home. On the next morning on 23/9/2003 the search resumed at 6 a.m and found the deceased's body lying on its stomach with a big cut wound on the head. It is this big cut wound cutting through the skull into the brain which caused the death of the deceased as shown in the report on

post-mortem examination tendered during the Preliminary Hearing as Exhibit P1.

In the afternoon of 23/9/2003 at about 3 p.m. the appellant was stopped at Nhumbi village by PW6 EX-MT69729 Private Yohana Elias Kusena, a retired soldier and village militiaman who was accompanied by PW5 Michael Chamhene and other members of the militia. The militia asked for a permit from the appellant who was driving five head of cattle through their village. The appellant reportedly resisted and tried to flee and was overpowered. He was taken into custody of the militia. On 25/9/2003 PW2 Musa Machila went over to Nhumbi village where he identified five head of cattle seized from the appellant as belonging to his father PW1 William Machila and that these were the five head of cattle which the deceased Yohana Mbaigwa took out for grazing on the morning of 22/9/2003.

After the identification of the cattle by PW2 Musa Machila, the matter was reported to Kilosa Police Station. PW8 E. 8560 D/C Nassoro visited the scene and was a witness to the post-mortem

examination on the body of the deceased. Another police officer PW9 WP 626 Detective Sergeant Major Danini recorded a cautioned statement made by the appellant in which the appellant alleged that the five head of cattle he was found driving through Nhumbi village belonged to Mrema Mmang'ati and Mmasai Limbau. While under cross-examination by Mr. Mbezi, learned counsel for the appellant, PW9 insisted that she did not see the need to trace the two people named by the appellant as the owners of the five head of cattle which the appellant was driving. Similarly, PW8 Detective Constable Nassoro revealed, while under cross-examination, that the names of Mrema Mmang'ati and Mmasai Limbau came out in the appellant's cautioned statement as the owners of the cattle but he decided against joining these two persons in the charge because the deceased's father told him (PW8) that Mrema Mmang'ati could not be a thief because he participated in the search for the stolen cattle. The same witness also admitted while under cross – examination that he failed to trace Mrema Mmang'ati and Mmasai Limbau, and that he turned down an offer by the appellant to help trace the named persons if taken out of prison. The same witness also admitted under cross – examination that on the morning of the day PW8 gave

evidence the appellant had asked back for a copy of a written agreement which the appellant had previously given PW8, but he (PW8) denied ever receiving a written agreement from the appellant or seeing it anywhere. The same witness also admitted that when arrested the appellant mentioned the fact that there were two other persons following him on a motor cycle. All this said, the appellant was charged with the murder of the deceased Yohana Mbaigwa.

While testifying in his own defence the appellant gave evidence under oath. The appellant testified that on 23/9/2003 at 6 a.m. in the morning he was at the house of his brother Lameck Mbaigwa who he was visiting at Nduga Village. Two persons Mrema Mmang'ati and Limbau went over to him and asked him to drive five head of cattle they had with them to Laiseri cattle auction. Of the two, the appellant said he knew Mrema Mmang'ati previously. The appellant alleged that he reduced the agreement to drive the cattle to the auction mart in writing, and the writer of the agreement was his brother Lameck Mbaigwa. The agreement read thus:-

“Mimi Mrema Mmang’ati namkabidhi ng’ombe
ndugu David Mbaigwa kwa makubaliano ya
kuswaga ng’ombe kupeleka mnadani Laiseri
kwa malipo ya sh. 19,000.”

The appellant alleged that he was paid sh. 4,000/= in advance and given the cows to drive by Mrema and Limbau, and that Limbau had a motor cycle. The appellant testified that he left Nduga Village at 8 a.m. with Mrema Mmang’ati who was carrying the permit for the cattle. At Mbagilo Village they were stopped and asked for a permit and Mrema Mamang’ati produced it which made the villagers allow them to pass the Village. The appellant and Mrema Mmang’ati proceeded further to Nhumbi Village which they passed without a query. The appellant testified that at Nhumbi village Mrema Mmang’ati told him (the appellant) to proceed alone while he (Mrema) took some local brew. The appellant, therefore, proceeded alone with the cows, leaving Mrema Mmang’ati behind with the permit. The appellant allege that before reaching the next village, Rubeho, he was apprehended by three persons who asked for a permit for the five head of cattle he was driving. He offered to take

the three persons to Mrema Mmang'ati who was still at Nhumbi Village but the three persons beat him up and stabbed him on the shoulder and back and had to spend six days at Kongwa District Hospital. From the hospital he was taken to the Police Station and charged. The appellant testified that he handed over the written agreement to PW8 Detective Constable Nassoro who said the agreement will help him trace Mrema Mmang'ati. The appellant also testified that while in remand the District Magistrate in Charge of Kilosa District Mr. Ndibamenya arranged for him to see the Officer Commanding of Police, Kilosa District, one Madali and volunteered to show where Mrema Mmang'ati and Limbau Mmasai lived but the OCD refused. A witness for the defence DW3 Lameck Mbaigwa testified in court. He admitted that the appellant was his brother but denied writing an agreement for the driving of cattle on behalf of the appellant.

The two gentlemen assessors who sat in the High Court gave a unanimous opinion that the appellant was guilty of the offence as charged and based their opinion on the fact that the appellant was found with recently stolen cattle one day after they were stolen and

the herdsboy murdered. The learned trial judge agreed with the opinion of the assessors. The judgment of the trial court is based on the following predicates:-

1. That when apprehended, the appellant tried to fight off the persons who were apprehending him and tried to flee.
2. When apprehended the appellant mentioned one Mrema Mmang'ati as the person who gave him the cattle to drive to cattle market but the deceased's father exonerated Mrema Mmang'ati as one of the searchers for the deceased's body. The court reasoned that Mrema Mmang'ati could not be at two places at the same time because the search area and the place where the appellant was arrested were two villages set far apart.
3. That when apprehended, the appellant mentioned that there was a written agreement for him to drive the stolen cattle to the market drawn by his own brother DW3 and that the brother had denied the existence of the written agreement.

Based on this reasoning the trial High court found the appellant guilty of murder and sentenced him to death. The appellant was aggrieved by the conviction and sentence, hence this appeal. The appellant was represented in this appeal by Walter Chipeta, counsel, while the Respondent /Republic was represented by Ms Evelyn Makala, learned State Attorney. The memorandum of appeal filed by the appellant through his counsel has only one ground of appeal, namely:-

1. That the trial Judge erred in law in relying on the doctrine of recent possession in view of the explanations and /or defence brought forward by the appellant during the hearing.

Arguing in support of the appeal Mr. Walter Chipeta correctly surmised that the conviction of the appellant by the trial court is based on the doctrine of recent possession but reliance on the doctrine is possible only when the accused person does not give a reasonable explanation on possession of the property. Counsel cited **MARZUKU HAMISI V R** (1997) TLR 1. Counsel also faulted the trial court for not appreciating the fact that two persons

Mrema Mmang'ati and Limbau Mmasai are mentioned as having given the cattle to the appellant but were neither arrested nor called as witnesses in court. Counsel urged this Court to find the appellant not guilty, quash the conviction entered by the trial High Court and set aside the sentence.

On her part, Ms Evelyn Makala, learned State Attorney appearing on behalf of the respondent /Republic, supported the conviction and sentence. It was her argument that the appellant's explanation was not reasonable in that the stolen cattle were found in his possession the day following the theft, and that the person who the appellant mentioned as the writer of the agreement to transport the cattle for a fee denied this fact in Court.

There is no dispute that the appellant was found in possession of the cattle which twenty four hours earlier, were in the possession of the herdsboy YOHANA MBAIGWA, now deceased. The possession is very recent, and in the circumstances of this case there is enough evidence to afford the

inference that those who stole the cattle from the deceased YOHANA MBAIGWA killed him in order to effect the stealing, so as to fall within the ambit of section 200 (c) of the Penal Code. The doctrine of recent possession which the trial court invoked, can ground a conviction of murder as held in **MANAZO MANDUNDU AND ANOTHER V R. (1990) TLR 92**. The doctrine depends on an inference from the court depending on the circumstances of each particular case. The inference by the court can only be made if the person on whom the recently stolen property was found fails to give a reasonable and probable explanation on how he came to be in possession of the property. In **ALLY BAKARI & PILI BAKARI V R (1992) TLR 10** at p. 15 this Court made the following observation:-

“Also pertinent to this matter is the rule that in a case where the evidence against the accused is wholly circumstantial, the facts from which an inference adverse to the accused is sought to be drawn must be proved to be beyond all reasonable doubt,

and must be clearly connected with the fact sought to be inferred there from.”

On record, there is no direct evidence of a person who saw the appellant kill YOHANA MBAIGWA. Is the fact of arrest of the appellant with the cattle devoid of any explanation except that he killed the deceased? The learned trial judge drew an adverse inference against the appellant because he fought off those who apprehended him and tried to flee. The record of trial, at pages 34 –35 gives a different reason for the flight. To use the appellant’s own words he said this:-

“They insisted I give them permit, I answered, the person with permit is coming behind. They told me to go back to Nhumbi. But I told them the owner is coming this very same route. So they started beating me and I ran backward going to Mrema to inform him. Before reaching Nhumbi, they had reached me and stabbed me on my shoulder and on

my back near kidney. They fetched push cart and I was taken to Executive Officer Nhumbi till morning. The report was taken to Division Chairman of Mlali Division who phoned Police Officers at Kongwa on 24/9/2003 Police Kongwa came and took me to Police where I was issued with PF3 and taken to District Hospital Kongwa. I was admitted for six days.”

The appellant’s account of the beating and stabbing he received at the hands of those who apprehended him was not challenged by the prosecution during cross-examination. This account shows that the appellant did not run away from justice, but was saving himself from people who ended up assaulting him and stabbing him.

When apprehended, the appellant explained that he had been hired to drive the five head to the cattle auction by one Mrema Mmang’ati who was in league with one Limbau Mmasai. The

appellant was consistent in this story throughout the period of arrest, at the Police Station and during his trial in the High Court. At page 34 of the record, the appellant had this to say:-

"I asked Hon. DM Ndimbenya DM i/c Kilosa that I want to see Kilosa OCD MADALI, I saw him and I told him about the allegation about me that, there are other persons who are Mrema Mmang'ati and Limbau Mmasai who gave me the cows which I was found with. So I asked the OCD to handcuff me and I volunteered to go and show or identify those persons. The OCD told me that, that is not my duty. He has official information and they are still tracing those persons. To date they are not joined in this case."

As a suspect when arrested, and as a defence witness during his own defence, the appellant had named Mrema Mmang'ati and Limbau Mmasai and had kept to his story. That he was consistent in

this story is proof of the appellant's veracity – see **MARWA MWITA V R Criminal Appeal Number 6 of 1995** and **KULWA MAKWAJIPE & 2 OTHERS VR Criminal Appeal Number 35 of 2005**. Even during the time of his arrest, when asked for a permit to drive the cattle, the appellant told PW6 MT 69729 PT. YOHANA ELIAS KUSENA that there were colleagues behind him who had the permit.

The identity of the two persons Mrema Mmang'ati and Limbau Mmasai is established. The father of the deceased PW1 WILLIAM Machila, PW8 E 8560 DC Nassoro and PW9 WP 626 D/Sgt Major Danini all admitted in court that Mrema Mmang'ati featured prominently in connection with the stolen head of cattle. There was also evidence of a motor cycle involved in the movements of Mrema Mmang'ati and Limbau Mmasai, a fact which is acknowledged by PW8 E 8560 DC Nassoro in his evidence. PW1 William Machila and PW8 DC Nassoro decided that Mrema Mmang'ati was not involved because he joined in the search for the deceased, and could not therefore be in two places at the same time i.e. the search area and the village

where the appellant was arrested. For a person who had a motor cycle, however, this was possible.

The third, and last, reason which the trial court used to pin liability on the appellant is the fact that the appellant mentioned the existence of a written agreement between him and Mrema Mmang'ati in which the fee for taking the cattle to market was agreed upon, an agreement which the alleged author DW3 denied the existence of. It is this denial by DW3 Lameck Mbaigwa who is a brother of the appellant, that sealed the fate of the appellant in the eyes of the trial judge. The record, however, shows that the mention of the agreement is not an off – the – cuff remark. The appellant had mentioned the agreement right from the time of his arrest to the time of trial. Evidence of this is the evidence of PW8 DC Nassoro in connection with the agreement. It goes thus:-

“ Accused never show (sic) or gave me anything. I can't hide anything. It is true this morning accused asked me about the piece of

agreement and answered him that he has never given me that not even show it to me.”

This bit of evidence is contrasted with the evidence of the appellant in his own defence at page 34 of the record:-

“ I slept at Police Kilosa I wrote statement before Nassoro not WP Danini today is my first day to see her. When Nassoro asked about cows I took out the agreement and handed over to him. After writing statement I asked about the agreement and Nassoro replied that, that will assist him in arresting Mrema Mmang’ati and Limbau Mmasai. I am telling this court the truth DC Nassoro lied to this court.”

The evidence of PW9 D/Sgt Major Danini shows that she recorded the appellant’s cautioned statement on 2/10/2003. On 23/2/2007 the evidence of PW8 DC Nassoro shows that the appellant

asked for the agreement from him (DC Nassoro) just before DC Nassoro entered the court to testify against the appellant. The trial record shows that the alleged writer of the agreement DW3 Lameck Mbaigwa denied his brother the appellant ever visiting him and at page 41 of the record he denied knowing that the appellant was charged in court. This denial was in response to a question put to the witness by the first assessor, and shows an effort by the witness to dissociate himself with the appellant in any way. There had to be a reason for this.

All in all, what the record shows is that the appellant made great effort to show that he had a good reason for being found in possession of the stolen cattle. The reason is that he was engaged, in writing and on payment, to drive the cattle to a cattle auction by persons he named. He travelled part of the way with these persons but when he was arrested the persons abandoned him. He has also shown that a named policeman DC Nassoro took the written agreement from him and has not returned it. He has shown how he made efforts to help the police trace his employers Mrema Mmang'ati and Limbau Mmasai but the police frustrated his efforts by shielding

these *later* two. Under the law the appellant was required to give an explanation which was probable. The appellant went out of his way to prove his innocence which was not his duty. The analysis of the evidence in the judgement of the trial court just dwelt on the possession aspect of the evidence it did not assess the evidence as a whole, particularly the conduct of the police officers who are shown to be more interested to be covering up for a known suspect than in availing the court with evidence upon which the trial could proceed. Had the trial court assessed the evidence adduced during the trial as a whole, not in bits and pieces, it would have come to a different conclusion than it did. **In V. BAKARI s/o ABDULLA (1949) 16 EACA 84** the Court of Appeal for Eastern Africa made the following observation:-

“ Cases too often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all circumstances of a case point

to no other reasonable conclusion, the presumption can extend to any other charge however penal. The court must in every case consider all the circumstances of the particular case before it.”

This authority was quoted with approval in **Obonyo v. Republic (1962) EA 592** and also in **Ogembo v. Republic (2003) I EA 224** at page 225. Emphasis is on the court to consider all the circumstances of the case before it which the trial judge failed to do by treating the defence case casually. We are satisfied that the appellant discharged the burden imposed upon him of giving a reasonable and probable explanation. We are, therefore, inclined to agree with the line of reasoning advanced by Mr. Walter Chipeta, counsel, when arguing this appeal.

The appeal is accordingly allowed. The conviction is quashed and the sentence is set aside. The appellant should be set at liberty forthwith unless he is held on some other lawful charge.

DATED at DAR ES SALAAM this 17th day of June, 2009.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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




J.S. MGETTA
DEPUTY REGISTRAR