IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A, LUANDA, J.A And MJASIRI, J.A)

CRIMINAL APPEAL NO. 367 OF 2008

JAPHET THADEI MSIGWA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Uzia, J)

Dated 25th day of November, 2008
In
Criminal Session Case No. 15 of 2005

JUDGEMENT OF THE COURT

- EVIDENCE
- CJ'S INSTRUCTIONS ON JPs -
FAILURE TO COMPLY WILL NORMALLY RESULT STATEMENT NOT TO HAVE BEEN TAKEN VOLUNTARILY.

27 June & 1 July, 2011

LUANDA, J.A:

The appellant JAPHET THADEI MSIGWA, was convicted of murder by the High Court of Tanzania sitting at Songea. Because at the time of committing the offence he was below 18 years of age, in terms of section 26 (2) of the Penal Code, Cap.16 R.E. 2002 he was ordered to be detained during the President's pleasure.

Aggrieved by both the conviction and sentence , the appellant has come to this Court on appeal.

In this appeal Mr. Alfred Kingwe learned counsel represented the appellant; whereas the respondent Republic was represented by Ms Andikalo Msabila, learned Senior State Attorney. Ms Msabila supported the finding of the High Court and the sentence imposed.

Mr. Kingwe has raised two grounds of appeal in the memorandum of appeal which he argued together. The grounds are:-

1) *That the trial learned Judge erred to admit both extra judicial statements of the appellant which contradicted each other.*
2) *That the learned trial judge erred in fact when he did not consider the defence case on the facts of which transpired on 15/9/2004 the facts of which were not refuted by the prosecution.*

The evidence which led to the appellant's conviction was that on 3/9/2004 when Anastazia Mlelwa (PW1), who was the resident of Mateleka and mother of the appellant, was returning home from a stroll, she saw dogs eating human meat near her house. She reported the incident to the area chairman who directed the area to be guarded. The matter was then reported to police. The police responded by going to the place. It was discovered that the dead body was of Silvester s/o Mtewele who went missing for some days after his relatives, inter alia, Gindo Mtewele (PW4) had managed to identify him.

Police searched the house of PW1 which was near where the dead body was being eaten by dogs. They seized an axe stained with blood and a bicycle. The bicycle was identified by PW4 to belong to him which he gave to his deceased young brother to do business of collecting crops from villagers.

As to how the bicycle reached there, Policarp Frolian Malekela (PW3) a primary school teacher stationed at Matetereka told the story. He said when he was in Songea Town for a meeting, he happened to come across

the appellant who had the bicycle and he was asked to take the same and send to his mother (PW1). PW3 agreed to do that. He took the bicycle and handed it over to PW1. PW1 confirmed to have received the bicycle from PW3.

The prosecution side also relied on the extra judicial statement the appellant gave to the Justice of Peace on the 15/9/2004, one Baltazar Ndunguru (PW6) which was tendered in Court during trial as ExhP 6 which the appellant is said to have confessed to have committed the offence. During cross – examination in a trial within the trial, it transpired that on the 8/9/2004 the appellant also gave an extra Judicial statement to the same Justice of Peace (PW6) which the appellant denied to have committed the offence which was tendered in the main trial as Exht D.1.

In his defence, the appellant denied to have commited the offence. As regards his Extra Judicial Statement (Exht P6), he said PW6 told him to sign a piece of paper which had already been written.

The learned trial judge convicted the appellant basing on the combination of two sets of evidence explained above namely, circumstantial evidence and in particular the doctrine of recent possession and the extra judicial statement Exh.P6.

Mr. Kingwe submitted with force that whereas the appellant denied to commit the offence in Exh D1, we do not know the circumstances which made the appellant to give another statement on 15/9/2004. The record is silent. The Justice of the Peace ought not to have taken the second statement as the same was not taken voluntarily. He prayed that the same be expunged from the record.

In response, Ms Msabila contended that the second extra judicial statement was properly taken. She did not elaborate. In case it was not, she went on to say that it is not the only evidence which the prosecution relied upon.

We have gone through the record. Indeed, PW6 did not tell the Court in his evidence in chief in the trial within the trial, that the appellant first

gave an extra judicial statement on 8/9/2004. The appellant gave two extra judicial statements. The first on the 8/9/2004, wherein the appellant denied to commit the offence. In the second one on the 15/9/2004 he is allegedly confessed to have committed the offence. The learned trial judge found that the appellant made two extra judicial statements before PW6. He, however, was of the view that the second one dated 15/9/2004 was properly made which the appellant admitted killing the deceased after he retracted the first one of 8/9/2004.

Whatever the case, our concern is: Was the second statement which the trial court accepted and relied on as evidence, was it properly taken as per the dictates of the law?

In the instant case the second extra judicial statement (Exh P.6) reads:-

JAMHURI YA MUUNGANO WA TANZANIA

MAHAKAMA

MAUNGAMO YA MTUHUMIWA JAPHET TADEI

MSIGWA.

MAUNGAMO YA MAUAJI

KATIKA MAHAKAMA YA MWANZO MJINI, SONGEA.

MAHABUSU JAPHET TADEI MSIGWA AMELETWA MBELE YANGU BALTASAR NDUNGURU MLINZI WA AMANI LEO 15/9/2004 SAA 7 MCHANA. JAPHET TADEI MSIGWA KWA HIARI YAKE AKIWA NA AKILI TIMAMU ANAPENDA KUTOA MAELEZO YAKE MBELE YA MLINZI WA AMANI TULIKUWA WAWILI CHUMBANI.

SAHIHI YAKE Sgd .....

MTUHUMIWA AMECHUNGUZWA NA AMEONEKANA HANA JERAHA NA AMEKIRI KUWA HAJAPATA MATESO YOYOTE HUKO POLISI

Sgd
MLINZI WA AMANI

MAELEZO YA MTUHUMIWA

MIMI KWA.....

The appellant then gave his statement.

Under section 56 (2) of the then Magistrates' Court Act, 1963 Cap. 537 which is *pari materia* with section 62 (2) of currect Magistrates' Courts Act, Cap. 11.R.E.2002 the Chief Justice is empowered to issue instructions to the Justices of the Peace for the better undertaking of their duties. The section reads:_

> *"52 (2) The appropriate judicial authority may, from time to time, issue instructions not inconsistent with any law for the time being in force for the guidance and control of justices of the peace in the exercise of their powers, functions, and duties, and every justice of the peace* ***shall*** *comply with and obey such instructions".* [Emphasis supplied]

On the authority of the above cited section, the Chief Justice who is the appropriate judicial authority as per s.2 of the above cited law, issued instructions to the Justices of the Peace to guide them. The same were

published in a booklet titled " A Guide for Justice of the Peace" which contain, inter alia, the manner of taking extra Judicial statements from 1st July, 1964 the date when the Magistrates Courts Act, Cap. 537 came into force.

But in 1984, the Magistrates' Court Act, Cap 537 was repealed and replaced by the Magistrates' Courts Act, 1984 (Act No 2 of 1984) which now is Cap 11 of the Revised Edition, 2002. Notwithstanding the repeal and replacement of Cap. 537 with Cap 11, by virtue of the saving provisions as contained in section 72 (3) of the Magistrates' Courts Act, Cap 11, the aforesaid Chief Justice's Instructions are part and parcel of the laws of this Land until and unless they are revoked or amended. To our recollection the same have neither been revoked nor amended. The section provides:-

> *"72 (3) Any applicable regulation made under the Magistrates' Court Act, 1963, and in force prior to the date upon which this Act comes into operation shall remain in force as if they have been made*

under this Act until such time as they are amended or revoked by rules made under this Act".

So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed.

The Justice of the Peace ought to observe, inter alia, the following

(i) *The time and date of his arrest*

(ii) *The place he was arrested*

(iii) *The place he slept before the date he was brought to him*

(iv) *Whether any person by threat or promise or violence he has persuaded him to give the statement.*

(v) *Whether he really wishes to make the statement on his own free will.*

(vi) *That if he make a statement, the same may be used as evidence against him.*

We think the need to observe the Chief Justice's Instructions are two fold. **One**, if the suspect decided to give such statement he should be aware of the implications involved. **Two**, it will enable the trial Court to know the surrounding circumstances under which the statement was taken and decide whether or not it was given voluntary. Non compliance will normally render the statement not to have been taken voluntarily.

In our case, the Justice of the Peace merely stated that "he observed the appellant who had no bruises and that he was not tortured". That was not enough. The Justice of the Peace ought to observe all steps enumerated in the Chief Justice Instructions. Since that was not done, the evidence of PW6 is inadmissible. We expunge Exht P6 from the record . We agree with Mr. Kingwe.

We now move to the doctrine of recent possession. Mr. Kingwe did not say anything about it. The question is:- Was the doctrine properly invoked? PW3 informed the trial Court that on 4/9/2004 the appellant gave him a bicycle to send to his mother PW1. PW3 sent it and PW1 confirmed

to have received it. It is also on record that two days before PW3 sent the bicycle to PW1, the appellant was seen by John Thadei Msigwa (PW7) his elder brother, with the same bicycle. This means the appellant was seen with the bicycle a day after the deceased met his death. And the said bicycle was recovered from PW1's homestead, where the appellant resides. The bicycle was duly identified by PW4, the real owner. Taking these factors into consideration and as the appellant did not attempt to explain how he came to possess the same, like the trial court, we are satisfied that the possession of the bicycle by the appellant was recent.

In **Rex V Bakari s/o Abdallah [1949] 16 EACA 84** the then Court of Appeal for Eastern Africa observed.

> " *Possession by an accused person of property proved to have been recently stolen may not support a presumption of burglary or breaking and entering but of murder as well, and if all the circumstance of a case point to no other reasonable conclusion the presumption extend to any other, however, penal".*

We are of the settled mind that the doctrine was properly invoked.

In the final analysis, we find the conviction was sound in law. We dismiss the appeal in its entirety.

Order accordingly.

Dated at **Iringa** this 1st day of July, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL