IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 342 OF 2008

1. **SAID ALLY MAJEJE @RICO@KADETI**
2. **OMARY ALLY @JUMA @DEDI**
3. **HUSSEIN SAIDI MTANDA@ NGOFU** } ..... **APPELLANTS**
4. **OMARI MUSSA @SELEMANI @AKWISHI**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Mtwara)

(Shangali, J.)

dated the 17rd day of December, 2007

in

Criminal Sessions Case No. 45 of 2004

JUDGMENT OF THE COURT

27th & 30th September 2011.

BWANA, J.A.:

Initially eleven (11) people were charged with Murder contrary to section 196 of the Penal Code. It was the prosecution case that on the night of 12 April 2003, at Nandenje village within

Ruangwa District of Lindi Region, the said accused persons jointly and together murdered one Dadi Hamisi @Liame. A criminal plot had been hatched same days earlier to rob the shop of one Abdul Kanduru (PW3) of Nandenje village. A submachine gun is said to have been hired for the purpose and the gang executed their plan in the early hours of the 12th April 2003. The targeted shop was broken into around 1.00 am and an assortment of items stolen. PW3 had got wind of the intended robbery that night so he kept away from the building which housed the shop. When the robbery took place, he, together with his brother, took cover close to the shop watching the events that were and how they were unravelling. Dadi Hamisi, the deceased, a close neighbour of PW3 may have heard of the robbery taking place. He came out of his house, only to be shot at by the bandits. He was seriously injured in the abdomen region. He died the very night.

The murder triggered a man hunt by the police and as it is shown later herein, a number of suspects found in possession of items suspected to have been stolen in the course of that robbery arrested. All in all, eleven suspects were arrested and

subsequently arraigned before the High Court at Mtwara. Upon conclusion of that trial, the three appellants were convicted of murder and they were sentenced to suffer death by hanging, the only statutory punishment for murder. The other seven accused persons were acquitted.

During the trial stage, all the accused persons were represented by Mr. Mlanzi, learned Advocate while Mr. Hyera, learned State Attorney represented the Republic. Before us, the four appellants were represented by Mr. John Mapinduzi, learned Advocate and Mr. Ismail Manjoti, learned State Attorney, assisted by Mr. Prudens Rweyongeza, learned Senior State Attorney, represented the respondent Republic. Mr. Mapinduzi filed and argued two main points of appeal, namely;

> That, the trial court did not satisfy itself whether the alleged stolen property was properly identified in the absence of any description.
>
> That, the trial court wrongly acted on the appellants' cautioned statements and wrongly admitted them and without corroboration.

His address before the Court was mainly amplification of the two above points. Likewise Mr. Manjoti's address was centred on the two main issues.

It was Mr. Mapinduzi's argument that the trial court was not keen in dealing with exhibits and or cautioned statements of some of the accused persons. He trenchantly argued that the trial court did not comply with the requirements of the law as provided under section 192(3) and (4) of the Criminal Procedure Act (the CPA) and Rule 6 of the Accelerated Trial and Disposal of Cases Rules, 1988 (GN No.192) wherein during the Preliminary Hearing, the court is under obligation to read over and explain to the accused person the contents of the documents intended to be used in the trial and require the accused to state which of those facts he admits and which he does not admit. The court would then record his replies. Thereafter a memorandum of matters not in dispute is drawn up. In the present case, the record just shows that reference was made to the said statements, that is, the post-mortem report; the sketch plan of the scene of crime; and the ballistic expert report. To each of those documents, the record shows that counsel for the accused persons, Mr. Mlanzi,

just replied: "no objection" meaning that he did not object to those documents being tendered as exhibits during the Preliminary Hearing. We will consider shortly, what are the consequences of such irregularity in the proceedings. Likewise Mr. Mapinduzi drew the attention of this Court to the fact that the cautioned statements were improperly relied upon by the trial court while the same had been retracted by their makers but no trial within trial were conducted as the law directs.

In so far as the description of the stolen property is concerned, it was Mr. Mapinduzi's views that the same had not been adequate. Accordingly, the doctrine of recent possession was wrongly invoked by the trial court, leading to the conviction of the appellants.

Mr. Manjoti, learned State Attorney, controverted Mr. Mapinduzi's views. According to him, the Preliminary Hearing was properly conducted. Failure to read to the accused persons the contents of those documents did not occasion injustice to them particularly when they had counsel and who was replying for and on their behalf. As regards the cautioned statements, Mr.

Manjoti was of the view that the trial court proceeded with the hearing of the case (instead of conducting a trial within a trial) because the trial judge did not agree with the retraction which she considered to be an after-thought.

Concerning the application of the doctrine of recent possession and the identification of the stolen property, it was Mr. Manjoti's submission that all the said properties were identified by PW3 adequately both at the police station and in court. His description of the same left no doubt that they were the items stolen from his shop a few days earlier before being found in possession of the accused persons. We will shortly discuss the doctrine of recent possession and what it entails.

From the evidence on record, it is apparent that there is no direct prosecution evidence that links the appellants directly with the murder. They were not seen, identified or arrested at the scene of crime. There is, however, circumstantial evidence which tends to link them with the offence. They were found in possession of items recently stolen from PW3's shop. Mr. Mapinduzi's argument that the doctrine of recent possession is

inapplicable here as there was no adequate description of the items drew our attention. The doctrine implies that were property has been stolen and that soon thereafter a person is found in possession of the said property, that person may be held liable for the commission of the offence, unless he can prove his innocence (on a balance of probabilities). In **Mwita Wambura vs Republic,** Criminal Appeal No. 56 of 1992 (unreported) this Court stated:-

> ".....the appellant failed to explain to the court how he acquired possession of the stolen goods. Under our criminal law, the unexplained possession by an accused person of the fruits of crime recently after it has been committed is presumptive evidence against an accused..... when there is reason for concluding that such aggravated.....crimes were committed in the same transaction....."

(See also: **Ally Kinanda and Others v Republic**, Criminal Appeal No. 206/2007; **Seif Salum v Republic**, Criminal Appeal No. 150/2008; **William Lengai v Republic**, Criminal Appeal No.

203/2007 – all unreported). Possession of the stolen items leads to a necessary inference being drawn, implicating the one found in possession (**Alex Thomas v Republic**, Criminal Appeal No. 230/2008, unreported)).

The position in the instant appeal may be conveniently explained by the following evidence as discerned from the record. The items found in possession of the appellants bore the same description as given by PW3 whose shop had been broken into and in the process Dadi Hamisi was shot dead. The appellants gave explanation as to how they came into possession of those new items. The first appellant admitted to have been found in possession of one new bed-sheet and four torch bulbs (Exhibit P4). These items fit the explanation given by PW3. The first appellant told the police then that he had bought them from a shop. He did not say which shop and when. He did not produce any receipt.

On his part, the second appellant admitted that when the police searched his house on 15th April 2003, they seized his radio-cassette, make "Top Sonic", Hitachi cassette; one Radio 88;

two new towels and one bed-sheet. He said he bought some of those items from street vendors, popularly known as "machinga". He had bought the Panasonic cassette in 1999 and was not new. He did not show where he bought it from. About the Radio 88, he claimed to have been given to him by his late father. He then bought a Hitachi radio from "one old man". He did not give a description of that "old man" nor did he call him as a defence witness. However, PW3 had described all those items as being part of the loot from his shop.

The third appellant admits to have been found in possession of a Radio Cassette make National Panasonic; and four domestic trays. He claimed to have bought them from the "machinga". He further admitted that his fiancée – Zuhura Kiungo, PW4 witnessed his arrest by the police and that the said items were retrieved from his house at night. However, all those items were identified by PW3 in the course of this evidence. He was never cross-examined on the issue.

The fourth appellant was also arrested by the police on 15th April 2003 at his house. He admitted to have been found in

possession of 13 shorts blue ones; 3 towels of red stripes new ones; 3 underskirts; 4 pairs of 'kaniki' cloth; 3 tins of hospital medicines; one pressure lamp; vicks kingo;and eye oilment. He claims to have purchased them from "machinga". He admits those items were found in his house three days after the break in at PW3's shop. PW3 had identified those items as being part of the stolen items from his shop.

We should note here that while PW3 and other witnesses were testifying on the identity of those items, neither the appellants nor their counsel, Mr. Mlanzi, did cross-examine those witnesses. We will discuss the evidential effects of failure to cross-examine a witness.

After analysing the evidence before her, the trial judge was of the view that the doctrine of recent possession was applicable in the circumstances of this case. She proceeded to implicate the appellants with the robbery at PW3's shop which resulted in the death of Dadi Hamisi. We have equally analysed the said evidence and come to the same conclusion as the trial judge on this issue.

We now consider the legal effects of failure to cross-examine a witness. From the record it is apparent that neither the appellants nor their counsel did cross examine the key witness, that is, PW3, on the items he was identifying in court and being tendered as exhibits and or the killing of Dadi Hamisi. The reason advanced by Mr. Mlanzi, learned counsel, for failure to cross-examine, was unacceptable by the reasoning of the trial judge and the law as she understood it. We do agree with her.

The purpose of cross-examination is firstly to elicit from the witnesses evidence supportive of the cross-examiner's version of the facts in issue. Secondly, to weaken or cast doubt upon the accuracy of the evidence given by the witness in chief, and thirdly in appropriate circumstances, to impeach the witness' credibility. It is trite law that failure to cross-examine a witness leaves his/her evidence to stand unchallenged (see **Goodluck Kyando v The Republic**, Criminal Appeal No. 118 of 2003, unreported). For that reason, the evidence of PW3 herein, stood unchallenged, meaning in essence that the description of the property allegedly stolen from his shop and the receipts tendered as exhibits were

all supportive of the prosecution case and gave credence to PW3's evidence.

In addition to the foregoing and in relation to possession, there is evidence that the appellants brought those items in their respective houses at night. PW4, a fiancée of 3rd appellant for example, testified that on the night of 14th April 2003, the third appellant brought 4 new domestic trays and a big radio – both identified by PW3 and tendered as Exhibit P6 and Exhibit P13. PW11 was first appellant's girlfriend. On the material day she found new bed-sheets in the room she was sharing with him. All this evidence is supportive of the doctrine of recent possession.

The other issue raised is non compliance with the Provisions of Section 192(3) and (4). The purpose of conducting Preliminary Hearing pursuant to Section 192 is to promote a fair and expeditious trial (see **Issa Bakari and Others vs The Republic**, Criminal Appeal No.121 of 2008, unreported). In **MT.7479 Sgt. Benjamin Holela** (1992) TLR121 this Court stated inter alia, –

"In cases where matters comprise documents, **the contents of the documents must be read and explained** to the accused.....to ensure that he is or she is in a position to give an informed response....." (Emphasis added).

That is in conformity with section 192 (3) and (4) and Rule 6 of GN 192 of 1988. It is not in dispute that those provisions of section 192 were not complied in respect of the tendering of the ballistic expert report, sketch plan of the scene of crime and the post-mortem report. Consistent with past practice and decisions of ' ' ' Court, the documents referred to above are hereby di ıted (see **Athumani Ndagala @Mikingamo v Republic**, Cr nal Appeal No.63 of 2007, unreported).

Having discounted those documents, we are left with the recent possession and the circumstantial evidence that were relied upon by the trial judge in convicting the appellants.

Circumstantial evidence can be a base for conviction if it irresistibly leads to an inference of guilty on the part of an

accused person and totally incapable of any other reasonable explanation. In the Seychelles' case of **Vidot v Republic** (1975) SLR 1, it was held thus –

> "In a case depending exclusively upon circumstantial evidence, the judge must direct himself expressly that before deciding upon conviction, he must find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt."

see also **Elisha Ndatage v The Republic**, Criminal Appeal No. 51 of 1999, unreported, and the persuasive judgment of the Privy Council in **Teper v R** (1952) AC 480 wherein it was held:

> "It is also necessary before drawing the inference to be sure that there are no other co-existing circumstances which would weaken or destroy the said inference".

(See **Kobelo Mwaha v Republic**, Criminal Appeal No. 173 of 2008, unreported). We subscribe to the foregoing position of the

law, including case law. We now turn to the issue of circumstantial evidence.

Circumstantial evidence should not be seen or taken to be a chain and each piece of evidence as a link in the chain, for if one link breaks, the chain would fall. Rather (per Teper case – *supra*);

> ".....it is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight but these stranded together may be quite of sufficient strength...."

(See **R v Exall**, 1886, cited with approval in **Thomas v R** (1972) N.Z.L.R.; **Mathias Bundala v The Republic**, Criminal Appeal No. 62 of 2004, unreported).

It is, therefore, to be noted that in circumstantial evidence, there may be a combination of circumstances, none of which may raise a reasonable conviction or more than a mere suspicion. It is settled that mere suspicion, however high, is insufficient to ground a conviction. However, when it comes to circumstantial

evidence, all factors taken together, they may create a conclusion of guilt with much certainty.

The above analysis is consistent with the events in this case. Prior information of a plan being hatched to break into PW3's shop was obtained. The plan was carried out. In the course of that robbery Dadi Hamisi was shot dead. Although the perpetrators of the crime were not identified or arrested at the scene of crime, several suspects were arrested a few days later – in a spate of three days. They included the three appellants. When their residences were searched, they were found in possession of items that were positively identified as having been some of the things stolen from PW3's shop, a few days earlier. The appellants did not give plausible explanation as to their ownership of those items. To the contrary, there was evidence that some of those articles had been delivered to those residences at late hours of the night within those two to three days following the robbery. Taking into account the doctrine of recent possession and guided by the principle enunciated by this Court in **Ally Bakari v The Republic**, Criminal Appeal No.47 of 1991 (unreported), the trial judge found the appellants guilty of

murdering Dadi Hamisi. They were convicted and sentenced accordingly.

In the **Ally Bakari case** (supra), this Court held thus:

> "If upon a charge of murder it is proved that the deceased person was murdered in a house and the murderer stole goods from the house, and the accused was a few days afterwards found in possession of the stolen goods, that raises the presumption that the accused was the murderer and unless he can give reasonable account of the manner in which he became possessed of the goods, he would be convicted of the offence."

(See also **Festo John Kimati vs The Republic**, Criminal Appeal No.66 of 2005, unreported).

We subscribe to the above holding by the Court. As stated, herein above, the appellants did not give reasonable account of the manner in which they became possessed of those goods, to controvert the credible evidence of PW3.

The trial judge was of the same finding. Accordingly she convicted the appellants of the offence of murder and sentenced them to suffer death by hanging. We have no reason to fault the findings of the trial judge. It is settled law that if death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice aforethought is deemed to be established in terms of section 200(c) of the Penal Code. (see **Fadhili Gumbo @Malota and 3 Others vs Republic** (2006) TLR 50).

The appeal is therefore dismissed in its entirety.

DATED at MTWARA this 29th day of September, 2011.

E. N. MUNUO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(M. A. Malewo)
DEPUTY REGISTRAR