IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 261 OF 2011.

1. MAJULI LONGO
2. JUMA SALUM @MHEMA } **..... APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Uzia, J.)

dated 8th day of July, 2009
in
Criminal Session Case No. 85 of 2006.

JUDGMENT OF THE COURT

22nd & 26th March, 2012.

MASSATI, J.A.:

The appellants were charged with and convicted of the offence of murder, contrary to section 196 of the Penal Code Cap.16 R.E.2002. The High Court, sitting in Iringa, sentenced them to death. They are now appealing against both conviction and sentence.

It was alleged before the trial court that on the 21st July, 2005, at Kiveleni village, Ifunda, Iringa District, they murdered one ANGETILE S/O MWATEBELE. The trial court found as facts that the first appellant had a charcoal business gone sour with the deceased. So he planned to fix him. When he and his cohorts learned that the deceased had sold his forest to investors, and earned good money, they planned to rob him. They secured a firearm by stealing it. They finally executed their plan on 21st July, 2005. In the course of the robbery, they not only killed Angetile s/o Mwatebele but also made away with a radio cassette (Sony), a TV deck and three bicycles. On 24th July, 2005, the first appellant was arrested, and from his statement, other suspects, including the 2nd appellant, were also arrested. Investigators also led to the recovery of some of the stolen properties from the appellants. It was on the basis of that evidence that the appellants were convicted.

At the trial, and in this appeal the appellants were represented by Mr. Basil Mkwata, learned counsel. The respondent/Republic was represented by Mr. Faraja Nchimbi, learned Senior State Attorney.

Mr. Mkwata filed four grounds of appeal as follows:-

(1) That the first appellant's alleged cautioned statement (Exh.P2) and SSG Nicholas' statement (Exh.P7) were wrongly admitted in evidence and wrongly acted upon.

(2) That the properties which were found in possession of the appellants i.e. the bicycle (Exh.P3) Radio and TV Deck Exhibit P8 collectively, were not sufficiently identified as properties allegedly stolen from the deceased, Angetile Mwatebele.

(3) That the evidence of PW4 HERRICK MHAGAMA to the effect that he heard the first appellant saying

"*tulikuwa wote siyo kwamba nimewekeza*" was vague and not worth of belief.

(4) That the trial judge erred in law and fact when he convicted the 2nd appellant with the offence charged in the absence of any credible evidence against him and in view of his cautioned statement (Exhibit P5).

Arguing the first ground of appeal, learned counsel submitted that since the 1st appellant was arrested on 24/7/2005 and his cautioned statement taken on 27/7/2005, 3 days later, it was in contravention of sections 50(1) and 57 of the Criminal Procedure Act Cap.20 R.E.2002 (the CPA). Therefore, it was illegally admitted and acted upon and should therefore be expunged from the record. He referred to us the case of **JUMA RAMADHANI AND ANOTHER v R,** Criminal Appeal No.364 of 2008, and **PETER KINDOLE v R,** Criminal Appeal No. 69 of 2011 (both unreported).

On the admission of Exh.P7, Mr. Mkwata submitted that the trial court should not have admitted the statement of the late SSG Nicholas under section 34B of the Evidence Act, because on behalf of the appellants, he had objected to their admissibility, and for section 34B to be applied, all the conditions shown in paragraphs (a) to (f) thereunder, must be cumulatively met. For inspiration, he drew our attention to the decisions of the High Court in **D.D.P. v OPHANY MONYANCHA,** (1985) TLR.127; and **R v HASSAN JUMANNE,** (1983) TLR.432.

Mr. Nchimbi, learned Senior State Attorney, readily conceded to this ground of appeal. He submitted that Mr. Mkwata was right in that sections 50(1) and 57 of the CPA and section 34B of the Evidence Act, were infringed in admitting Exhibits P2 and P7 respectively. In addition, he went on to submit that, the cautioned statement (Exhibit P2) was received in the absence of assessors, and this was contrary to section 265

of the CPA. He therefore agreed that the said exhibits P2 and P7 be expunged.

We agree with the learned counsel, that the cautioned statement of the first appellant (Exhibit P2) and the statement of SSGT Nicholas, (Exh.P7) were received and acted upon contrary to law.

It is, we think, now settled law, that violations of section 50 and 57(4) of the CPA were fatal. (See **JUMA RAMADHANI AND ANOTHER v R, JANTA JOSEPH KOMBA AND OTHERS v R,** Criminal Appeal No.95 of 2006 (unreported). We also think that the High Court put a correct construction to section 34B(2) of the Evidence Act, Cap. 6 R.E.2002 that before a statement is admitted under that provision, all the conditions (a) to (f) shown under that provision must be met. If therefore, the other party (parties) object(s) to the statement being so tendered in evidence, it cannot be received in evidence. In the present case, counsel for the appellants objected within the prescribed

time to the statement being tendered; but the learned trial judge overruled the objection and ruled it admissible. With respect, that was a misdirection. Under that provision, a trial court cannot admit a statement which does not cumulatively comply with those conditions-precedent. We are further of the view that it was not open for the trial court to examine and decide on the soundness or otherwise of the objection that a party could raise under that provision. To do so would be to defeat the intention of the legislature which was to restrict the use of such statements; because in accepting that such statements be admitted, accused persons would be forfeiting their rights to cross examine their makers which is part of the process of fair hearing. The conditions-precedent were therefore meant to protect those rights. Exhibit P7 was therefore wrongly admitted and acted upon.

Mr. Nchimbi, has added another dimension to the legality of the reception of Exhibit P2, the cautioned statement of the 1st

appellant. According to him, it was admitted in the absence of the assessors. That is, not entirely correct. It is true that there had to be a trial within trial before Exhibit P2 was received; and after the court had ruled that it was admissible the assessors were recalled; and the statement was admitted in their presence. But that was only work half-done – PW1 who tendered the statement was not recalled to recount all what he had said in the trial within trial in the presence of the assessors but only asked to "continue to testify", and recounted only what he did on the date he wrote the cautioned statement. This was wrong.

We believe that the learned trial judge must have misinterpreted the true import of the decision of this Court in **GEORGE MICHAEL AND ANOTHER v R,** Criminal Appeal No.18 of 1994 (unreported) that court assessors "should not know the existence of the caution statement....." which he

cited earlier on to justify the kind of procedure he adopted. That is not, and cannot be the law.

Under section 265 of the CPA, all criminal trials in the High Court have to be with the aid of assessors. So assessors should always be present (See **ABDALLAH BAZAMIYE AND OTHERS v R,** (1990) TLR 42) except where there is a dispute as to the admissibility of any evidence (See **MASANJA MAZAMBI v R,** (1991) TLR. 200). Where such a dispute arises, the practice has been for the trial court to hold a "trial within trial". When so determining, the assessors are excused. (See **JACKSON @ MABEYO FRANCIS v R,** Criminal Appeal No. 55 of 1994 (unreported). After determining that the evidence is admissible, the assessors are then recalled; and the witness repeats all the evidence given in the mini-trial in the presence of the assessors before that piece of evidence is admitted. If it is a document, its contents are then read over to the assessors. (See **NDAGIZIMANA AND ANOTHER v UGANDA,** (1967) 1 EA.35.

So, it is not true that the law forbids the assessors from "knowing the existence of the cautioned statement". They must know, and it must be admitted in their presence, since they are part of the court. The case is different if the evidence is ruled inadmissible. Then and only then, they need not know of its existence.

In the present case, the cautioned statement (Exh.P2) was ruled admissible. So PW1 should have repeated all that he testified on the precautions he took before he recorded the statement as he did in the trial within trial. This did not happen here. So the assessors were illegally excluded from hearing essential parts of the background to the taking of Exhibit P2. That renders Exhibit P2 evidentially worthless, as it was not properly admitted before the court as fully constituted.

All in all therefore, we agree with the learned counsel, that exhibits P2 and P7 were wrongly admitted and acted upon.

They are accordingly expunged. The first ground of appeal therefore succeeds.

In the second ground of appeal, Mr. Mkwata submitted that the next piece of evidence connecting the appellants with the offence, is Exhibit P3 (the bicycle) and Exhibit P8 collectively (the radio – Sony, and TV deck) which were said to have been found in possession of the appellants respectively, either separately or jointly. He contended that, their description by PW5 was wanting, and contradictory such that they could not be said to have had special marks. He submitted that, since the appellants had no duty to prove ownership of these articles, it was wrong for the trial court to apply the doctrine of recent possession, of those properties in convicting the appellants. He was of the view that the principle in **ALLY BAKARI v R** (1992) TLR 10 was wrongly invoked in the circumstances.

But Mr. Nchimbi, submitted that, taking all the circumstances in their totality, the bicycle and the radio and TV

deck were properly identified by PW2 and PW5. He urged the Court to consider, first, that it was the 1st appellant who volunteered to show those properties. Secondly, the first appellant orally admitted to PW3 that he was involved in the robbery, thirdly, the first appellant uttered within the presence and hearing of PW4 that "*tulikuwa wote, siyo kama niliwekeza*" when they recovered the radio and TV deck (Exh.P8) from the second appellant's room. (literally meaning; he was in complicity with the second appellant) and lastly that the appellants had no claim of ownership to those properties. He said that, if there were any contradictions, they were not material. Finally, he argued that, since the deceased was robbed and killed on 21/7/2007, and the appellants were found in possession of those properties on 24/7/2007, just 3 days later, the doctrine of recent possession was properly invoked in convicting the appellant with murder. He also referred to us to the decision of **ALLY BAKARI AND ANOTHER** (supra).

What calls for determination in this ground, is whether, the doctrine of recent possession was properly applied here in convicting the appellants of murder.

We take it to be settled law that:-

> *"To be sure if upon a charge of murder it is proved that the deceased person was murdered in a house and that the murderer stole goods from the house and that 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 a reasonable account of the manner in which he became possessed of the goods, he would be convicted of the offence".*

ALLY BAKARI AND PILI BAKARI v R, (1992) TLR.10 at p.15 (See also **R v BAKARI s/o ABUJA,** (1949) 16 E.A.C.A.84).

In **MANAZO MANDUNDU AND ANOTHER v R,** (1990) TLR 92 this Court also held that in befitting circumstances, the doctrine of recent possession could be invoked not only to

support shop breaking and theft, but also murder, and that since the killing was so as to effect the stealing, it was quite proper to infer malice aforethought.

In the present case, we think that there is little dispute that, the 1st appellant showed the bicycle (Exh.P2) to a search party including PW2, and the radio and TV deck were found in the second appellant's possession in the presence of PW4, whose evidence, we think was independent and untainted by any illegality of procedure.

The bone of contention here is whether those articles had been sufficiently identified as the ones stolen from the deceased. The law is that, properties suspected to have been found in the possession of accused persons should be identified by the complainants conclusively. In a criminal charge it is not enough to give generalized description of property. (See **DAVID CHACHA AND 8 OTHERS v R,** Criminal Appeal No.12 of 1997 (unreported), And a proper identification in court is that the

complainant should describe the property before it is shown to him so that when it is eventually tendered and the description confirmed, it can be clear to the court whether or not the identification was impeccable. (See **NASSOR MOHAMED v R,** (1967) HCD.N.446.

PW2 testified that on 24/7/2005 when he was digging the grave in which to bury the deceased, policemen came with the first appellant, and informed them that the 1st appellant was willing to take them to where he had hidden the bicycle. He took them to Kivalali area where the appellant went into the bush and came out with a bicycle. He described the bicycle in that, it had no mudguards, and had no original carrier but a fabricated one. It was red in colour. It is true as Mr. Mkwata had argued that, a metal carrier could have been bought; and might be described as a common article. But we have a peculiar situation here. The appellant volunteered to go and show the bicycles he had admitted to have stolen from the deceased. This

deceased's ownership of the bicycle than the appellant's admission, as it is said that an accused person is always the best witness to the offence if he confesses (See **SELEMANI HASSAN v R,** Criminal Appeal No.364 of 2008 (unreported). We think that no more description was required after the 1st appellant's admission.

PW5 identified the Radio Sony with two speakers by its special marks "*mbonyeo juu*". The TV deck was a Hitachi with no cover at deck. He tendered them and the same were admitted as exhibit P8 collectively. Save for the mix up in the make of the deck, we are satisfied that PW5 gave special description of the radio and TV deck. If by contradictions, Mr. Mkwata was referring to the make of the TV deck, or colour of the radio, we agree with Mr. Nchimbi, that this does not detract from the central story, and they are therefore immaterial. In the first place this is strengthened by the fact that it was the first

appellant who had earlier taken the police to where he hid the bicycle, who also took them to where the TV deck and radio were sent. Two, the second appellant admitted that these were the articles brought by the first appellant. Three, the descriptions on the radio and TV deck were not controverted except for the make of the TV deck. This Court said in **SAID ALLY ISMAIL v R,** Criminal Appeal No. 241 (unreported) that not every discrepancy in the prosecution case will cause the case to flop. Likewise, we do not see any discrepancy in the description of the bicycle, radio and TV deck that would go to cause a flop in the prosecution case, given the totality of all the circumstances obtaining in this case.

In fine, we are satisfied that PW2 and PW5 were able to satisfactorily identify Exhibits P2 and P8. We dismiss that ground of appeal.

In the third ground of appeal, Mr. Mkwata has complained that PW4's testimony, to the effect that the appellant said in his

vague and incredible. His argument was that, PW4 was exaggerating when he said so, because his evidence is not supported by any other witness or piece of evidence. That statement prejudiced the trial court, argued the learned counsel.

Learned Senior State Attorney, submitted that PW4's testimony should not be taken in isolation or out of context from the rest of the evidence and circumstances taken as a whole. The first appellant's statement heard by PW4 could not mean anything else, he argued. He submitted that every witness is entitled to be believed unless proved to the contrary, and the trial court found that PW4 was a credible witness. This Court should be loathe to disturb that finding on credibility. As to why no other witness had said so, Mr. Nchimbi argued that in law, even one witness is sufficient to prove a point. He referred us to the decision of **OMAR AHMED v R,** (1983) TLR. 52 in support of his point.

We have studied the record. It is true that PW4 is recorded to have said that the second appellant said that the first appellant had deposited the radio and TV deck at his place and the 1st appellant, retorted "*tulikuwa wote siyo kwamba nimewekeza*". In cross examination, he was not challenged about hearing those words. It is also true that the trial court drew an inference from those words that:-

> "*Juma Salum @Mhema did not receive the items as innocent receiver but as the person who was sailing in the same boat of robbery with the 1st accused person*".

Mr. Mkwata has complained that those words were vague and not worth of belief. We would only say that it is not uncommon in court rooms to hear vague statements from witnesses and in such cases the trial court is permitted to draw inferences under section 122 of the Evidence Act which provides:

fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case".

As to whether it was credible, learned counsel has relied on the fact that no other witness or exhibit supported that part of PW4's evidence. We think that in law, the prosecution was not bound to call all witnesses or a certain number of witnesses to prove a point (See **ALLY SHENYEU v R,** Criminal Appeal No.27 of 1993 (unreported), **YOHANAS MSIGWA v R**, (1990) TLR 148 at 150. And as correctly submitted by Mr. Nchimbi, learned Senior State Attorney, every witness is entitled to credence and be believed, unless there are good and cogent reasons for not doing so (See **GOODLUCK KYANDO v R,** Criminal Appeal No.118 of 2003 (unreported). We can see no good reason for not believing PW4 in this case.

When all is said, we are satisfied that although PW4 was the only witness who testified to have heard those words from the appellants, his evidence is not detracted from because of that fact alone. The trial court found him to be a credible witness and drew a correct inference from those words, in the circumstances.

The last ground of appeal is that there was no credible evidence on which to sustain the conviction of the second appellant. Mr. Mkwata submitted that the second appellant's conviction rests on the evidence of the 1st appellant's confession (Exh.P2), his own cautioned statement (Exhibit P9) and Exh.P8. He said that, in Exh.P9, the second appellant exculpates himself and so the prosecutions are bound by their own evidence. He referred to us the case of **IDDI SHABANI @AMASI v R,** Criminal Appeal No.111 of 2006 (unreported). He also complained that the trial court used double standards in acquitting the 3rd accused at the trial for lack of evidence

corroborative on Exh.P2; but convicted the second appellant, although equally there was no corroboration of the 1st appellant's cautioned statement.

Mr. Nchimbi's reaction was that although Exhibits P2 and P9 were wrongly admitted and acted upon, there was strong other evidence of recent possession of Exh.P8 on which to base the conviction of the second appellant. He referred us to **MANAZA MANDUNDU v R's** case (supra) to support his argument. He therefore prayed that the appeal be dismissed.

In his brief rejoinder, Mr. Mkwata, submitted that the only piece of evidence on record against the second appellant is the alleged admission in the form of words exchanged between the appellants during the recovery of Exhibit P8. It was his view that the search warrant Exh.P5 showed that the TV deck was of the Mitisubishi Make, which was not produced in court, and so, rendered such evidence discrepant and unreliable. In his view the alleged exchange of words between the appellants ought to

be corroborated, and there was none. After this, the learned counsel urged the court to allow the appeal.

We have already discussed on the probative value of Exhibits P2 and P9 and decided that they were not properly admitted. That apart however, there was evidence of words and conducts from the 1st appellant implicating the 2nd appellant. Those, (i.e. the words and conduct, in our view, amounted to a specie of a confession, in terms of section 3(1)(a) of the Evidence Act. It therefore falls under section 33 (1) of the Evidence Act. We therefore agree with Mr. Mkwata that evidence from the 1st appellant in the form of words, being from a co-accused required corroboration in terms of section 33 (2) of the Evidence Act. (See **MT 38870 PTE RAJAB MOHAMED AND OTHERS v R,** Criminal Appeal No. 141 of 1992 (unreported).

But in our judgment, we cannot agree with Mr. Mkwata that this was the only evidence against the second appellant.

Apart from the evidence in the form of words from the first appellant which were the subject of inference by the trial court; it cannot be doubted that the deceased's radio/sony was found in the second appellant's room. His own admission that those things were brought by the first appellant without more; other than ("kuwekeza") for deposit was in our view not a reasonable explanation given the circumstances. In his defence, the second appellant admitted that the first appellant also lived in Ifunda and that the things were brought on 23/7/2005 at 10:00 am in the morning with a promise that they would be collected after half an hour, but he did not tell us how the two are related and why did the 1st appellant choose to deposit those things at his place, when he also lived nearby. This in our view, was an incriminating fact, and could corroborate the evidence of the first appellant. We therefore also find his ground devoid of merit, and we dismiss it too.

by the appellants is devoid of substance. It is accordingly dismissed in its entirety.

DATED at **IRINGA** this 26th day of March, 2012.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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

(J. S. Mgetta)
DEPUTY REGISTRAR
COURT OF APPEAL