IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 292 OF 2011

1. MUSSA HASSAN BARIE
2. ALBERT PETER @ JOHN ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Sambo, J.)

dated the 21st day of November, 2011
in
Criminal Session No. 54 of 2008

JUDGMENT OF THE COURT

14th & 18th September, 2012

MASSATI, J.A.:

The appellants were convicted of the offence of murder contrary to section 196 of the Penal Code, by the High Court (Sambo, J.) sitting in Arusha. They were sentenced to death. Still protesting their innocence, they have lodged the present appeal.

It was alleged before the trial court that on the 25th May, 2008 at 01:00 hours, at Sumawe village, Karatu District, Arusha Region the appellants and another person who was acquitted murdered one Martin s/o Faru.

The prosecution led evidence to the effect that HERMAN MAFUNGA (PW1) and LABAN MORUO (PW4) live in two rented houses in the same compound belonging to one Lusian. They shared a gate, which was looked after by a watchman called Martin Faru (the deceased). On the material night the compound was invaded by armed bandits. The bandits not only murdered MARTIN FARU, but also raped ASHA SHABANI (PW2) and NEEMA MPANDA (PW4) who were living with PW4 (who was not present on that particular night) but also stole from PW4's household, several articles including a camera, golden earings, chains, and handbags. Two or three days later PW2 and PW3 were called at the Karatu police station where there were identification parades. They were able to identify the 1st accused (who was acquitted) and the 2nd accused (now the 1st appellant). But on 25/5/2008, PW 4 not only received news about the robbery and murder from PW1, but also received a phone from HASSAN ALLY (probably

PW11) that his laptop had been sent to him for sale. He sent one Melita to collect it from PW11 and went with it to the police station Karatu and identified it, as one of the properties also stolen from his household. With the assistance of PW11, and KESSY RASHID, the taxi driver, who it is alleged, took the 1st and 2nd appellants to their various spots to deliver the laptop, the police through PW5 2218 D/C KIJANDA, investigated, traced and arrested the appellants. PW6, SP Cloud Kanyorote, conducted the identification parades, which was witnessed by PW7 KASTORI ERRO BAZANI, and PW8 RAMADHANI SWALEHE where the appellants were said to have been identified by PW2 and PW3.

In their sworn defences, which they supported by several witnesses, the appellants assigned their arrests and subsequent charges to existing grudges between them and the police, and that otherwise they had watertight *alibis* which were supported by their respective wives, DW3 (for the 1st appellant) and DW5 (for the second appellant).

The trial court, found that the appellants were properly identified by PW2 and PW3 which evidence was corroborated by their recent possession

of PW4's laptop (Exh. P3), and therefore rejected their defences of *alibi*, hence their conviction.

In this Court, the 1st appellant is represented by Mr. Joseph Materu learned advocate, the 2nd appellant is represented by Mr. Elvaison Maro, learned counsel, whereas the respondent/Republic was represented by Mr. Zakaria Elisaria, learned Senior State Attorney.

Mr. Materu, filed and argued six grounds of appeal, to the following effect. **First,** that the 1st appellant was not properly identified at the scene of crime; **second,** that the identification parade at which the appellant was identified was flawed; **third,** that it was wrong for the trial court to have found that the 1st appellant was found in possession of the laptop Exh. P3; **fourth,** that having found that the evidence on record did not establish who killed the deceased; it was wrong to convict the appellants of the murder; **fifth,** that it was wrong for the trial court to have accorded no weight to the 1st appellant's *alibi*; and **lastly**, that the prosecution case was not proved beyond reasonable doubt. The learned counsel amplified his arguments by referring to a number of decisions of this Court; namely,

RAYMOND FRANCIS VS R (1994) TLR 100, **R VS MWANGO MANAA** (1936) 18 EACA 29; **IJUMAA RAMADHANI VS DPP** Criminal Appeal No. 59 of 2010; **PASCHAL CHRISTOPHER AND OTHERS VS R** Criminal Appeal No. 108 of 2006 (both unreported) **JACKSON MWAKATOKA & OTHERS VS R** (1990) TLR. 17 and **DAMIANO PETRO AND ANOTHER VS R** (1980) TLR. 260.

Mr. Maro, also filed a six ground memorandum of appeal. In the **first** ground he criticized the trial court for violating section 192 (3) of the Criminal Procedure Act ("CPA") in receiving some evidence such as the postmortem examination report (Exh. P2). In the **second** ground, he attacks the credibility of the prosecution witnesses. In the **third** ground, the learned counsel attacks the evidence of identification of the second appellant at the scene of crime. In the **fourth** ground, the identification parade at which the second appellant was said to have been identified is put to task. In the **fifth** ground, the trial court is faulted for wrongly invoking the doctrine of recent possession in convicting the appellant. In the **sixth** and last ground the trial court is criticised for self-contradiction;

in that having found that there was no evidence to link the second appellant with the offence, yet it went on to convict him.

Like his colleague, Mr. Maro also referred to us, a number of decisions; such as **IJUMAA RAMADHANI vs DPP** (*supra*) **MOHAMED SAID MATULA vs R** (1995) TLR 3, **WAZIRI AMANI vs R** (1980), TLR 250, **ISIDORI VS SMZ** (2004, 1 EA 57, **ISSA s/o MGAZA SHUKA VS R** Criminal Appeal No. 37 of 2005 (unreported) **PASCHAL CHRISTOPHER & OTHERS vs R** (*supra*).

In the upshot, it was the contention of the learned counsel for the appellants that the prosecution case was not proved beyond reasonable doubt against the appellants. They therefore prayed that the appeal be allowed.

Mr. Zakaria Elisaria, learned Senior State Attorney came out in full support of the appeal. And he had his reasons. Briefly it was his view that the identification of the appellants at the scene of crime was not watertight; the identification parade was flawed and therefore of little

value, and the doctrine of recent possession was inapplicable in the circumstances. So, he asked us to allow the appeal.

We think it is common ground that the conviction of the appellants is grounded upon two pieces of evidence; visual identification, and recent possession. The crucial witnesses of visual identification were PW2 and PW3. It is supported by that of PW7 and PW8 who witnessed the identification parades. The evidence of PW4, PW10 and PW11 build up the case for recent possession of the laptop (Exh. P3).

We shall first set out the position of the law on visual identification and recent possession.

The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **WAZIRI AMANI vs R** (*supra*).

Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*).

But it has also been developed that in matters of identification favourable conditions alone are not enough. The credibility of witnesses is also important (See **JARIBU ABDALLAH vs R** Criminal Appeal No. 220 of 1994 (unreported).

It has equally been held consistently that in order to enhance his or her credibility, a witness of identification would be expected to give a description of the suspect, in relation to physique, attire etc, and if he knows him, to name him at the earliest opportunity (See **MOHAMED**

ALLUI vs R (1942) 9 EACA 72, **MARWA WANGITI MWITA AND ANOTHER vs R** Criminal Appeal No. 6 of 1985 (unreported).

While still on identification, we must say something about identification parades. An identification parade is by itself not substantive evidence. It is usually only admitted for collateral purposes, mostly, to corroborate dock identification of an accused by a witness (See **MOSES DEO vs R** (1987) TLR. 134. But if it is to be of any value, such identification parades must be conducted in compliance with the applicable procedure as set out in **REX vs MWANGO s/o MANANA** (1939) 3 EACA 29 (or GPO 231). Otherwise, it will be of little probative value against an accused person.

With regard to the doctrine of recent possession, the law is also settled. It is a rule of evidence, not of law, that an unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft but also, for any other offence however serious (See **MWITA WAMBURA vs R** Criminal Appeal No. 56 of 1992

(unreported) **ALLY BAKARI vs R** Criminal Appeal No. 47 of 1991 (unreported).

But for the doctrine of recent possession to be invoked, the following must be proved. **First,** that the stolen property must be found with the suspect; **Second**, the property must be positively identified to be that of the complainant. **Thirdly**, that the property was recently stolen from the complainant, and **lastly**, that the subject matter must constitute the subject of the charge. (See **JOSEPH MKUMBWA & SAMSON MWAKAGENDA vs R** Criminal Appeal No. 94 of 2007; **ABDI JULIUS @ MOLLEL NYANGUSI AND ANOTHER vs R** Criminal Appeal No. 107 of 2009; and **NELSON GEORGE @ NORIEOA AND 4 OTHERS vs R** (all unreported).

In the present case, it is common ground that the evidence of visual identification is totally wanting in credence. Given that it was the first time for PW2 and PW3 to see the culprits, and it was at midnight, surprised in a sudden and life threatening attack, the witnesses could not offer more than general as opposed to distinct description of those who attacked them,

which was not sufficient. (See **ISSA MGARE SHUKA vs R** Criminal Appeal No. 37 of 2005) (*supra*) **PASCHAL CHRISTOPHER AND OTHERS vs R** Criminal Appeal No. 106 of 2006 (*supra*).

But the credibility of PW2 and PW3 has also come under a scathing attack from the learned counsel. The most conspicuous discrepancies in their evidence were when the witnesses purported to identify the 1st accused from the identification parade when he was not there (which led to his acquittal) and secondly, when they claimed that they attended the identification parades, three or four days after the incident on 25/5/2008, when according to the Exhibits P3 and PW6 who conducted the parades, the parades were conducted on 9/6/2008 some two weeks later. In **MOHAMED SAID MATULA vs R** (*supra)* this Court directed that where there are such contradictions inconsistencies, and lies in the evidence of witnesses, the trial court has a duty to address them and make a finding whether or not they were material. The trial court in this case did not, and stepping into its shoes, we find that the inconsistencies, and contradictions in the evidence of PW2 and PW3 tarnish the credibility of those witnesses

and so go to the root of the prosecution case which largely depended on their evidence.

The identification parades themselves have been criticized from several angles, and we think rightly so. Several rules governing the conduct of identification parades are alleged to have been breached. The parades have for instance been criticized for not putting persons answering the same description in the parades; and for not according the suspects the right to express whether they were satisfied with the conduct of the parades. Both these allegations were not refuted by the prosecution. In **RAYMOND FRANCIS vs R** (*supra*) it was held that such breaches were enough to render the parades of little value.

The doctrine of recent possession was also invoked by the trial court to found the appellants' convictions. The prosecution contended and the trial court found that the appellants were caught in the web of recent possession of the laptop (Exh P3). This exhibit was tendered by PW4 on 11/6/2010. There are many question marks that pertain to the handling of this exhibit. When PW4 tendered it, he told the court that he received it

from one Melita Santaeli. But Melita did not testify to tell the court where he got the laptop from. So the chain of custody of this exhibit ever since its seizure has been broken. In **PAULO MADUKA AND OTHERS vs R** Criminal Appeal No. 110 of 2007 (unreported) this Court underscored the importance of proper chain of custody of exhibits and that there should be:-

> *"..... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime....."*

The chain of custody of the laptop (Exh P3) in this case is broken by the absence of Melita as a witness who would have told the trial court, where he got the laptop from and would have identified whether it was the same laptop which was handed over to him. Even PW4 did not tell the court who sold the computer to Hassan Ally. Confusion is added when HASSAN

ALLY did not testify, but there was a strong inference that HASSAN ALLY and HASSAN SULEMAN (PW11) were the same person. But if PW11 is the person who informed PW4 about the laptop, strange things must have happened. How come that PW10 was hired by Musa to go to Kaloleni at 11:00, while PW11 received a phone from his neighbour Albert about a proposed sale of a laptop at the same time 11:00? But even before receiving and seeing it, PW4 received a phone at 11:00 a.m. from Hassan Ally, that his computer had been taken to him. We asked ourselves, whether those witnesses were talking about the same laptop and if so, whether it was probable for all those transactions relation to it to happen at the same time?

Be that as it may, there is no single prosecution witness who testified that any of the appellants was found in possession of Exh. P3. Indeed even the trial court made a specific finding that the second appellant could have been a middleman, save for his being identified by PW2 and PW3. As shown above we are satisfied that the evidence of PW2 and PW3 on identification of the second appellant was wanting, and so the finding that he was a middle man, remained a real possibility.

The 1st appellant is linked to the laptop by PW4, PW10 and PW11. But PW4 did not see the 1st appellant bring the laptop. PW10, the taxi driver, just sent the first appellant to Kaloleni, but could not identify if the 1st appellant was carrying a laptop or a C.D. PW11 did not receive the laptop from the 1st appellant. So there is no chain linking the 1st appellant with the laptop (Exh. P3). This means the doctrine of recent possession was not properly, and could not be applied in the circumstances, to connect the appellants with the murder of the deceased in the present case.

Lastly we would like to make a few comments arising from Mr. Maro's first ground of appeal. This is to the effect that the PF3 of PW2 and PW3 and the Post-mortem examination report (Exh. P2) as well as the memorandum of matters not in dispute were received and deemed proved contrary to the provisions of section 192 (3) of the Criminal Procedure Act. He referred to us the decisions of **IJUMAA RAMADHANI vs THE D.P.P.,** (*supra*) **EFRAIM LUTAMBI vs REPUBLIC** (2000) TLR 265, and MT 7479, **BENJAMIN HOLELA vs REPUBLIC** (1992) TLR 3, in support of the

matters not in dispute were not read over to the 2nd appellant and so should be expunged. He went on to submit that, if those matters are expunged, there would be no evidence left on record to prove who had died and what was the cause of his death. This, he went on, is made more complicated when the deceased is referred to, invariably as **MARTIN FARU, MARTIN FARI, MARTIN FARO,** and **MARTIN KASSI,** at various stages of the trial.

We agree that noncompliance with the provisions of section 192 (3) of the CPA renders the proceedings of the preliminary hearing, a nullity. So what was deemed to have been proved in terms of section 192 (4) remained in issue and had to be formally proved if they should carry any probative value. In the present case and with due respect to Mr. Maro, there may have been some other evidence of the watchman's death from PW1 who saw his still body. We nevertheless agree with him that there is no medical evidence of the cause of his death, less still, its connection with the appellants.

For all the above reasons, we think the appellants' convictions are not safe. Accordingly, we allow the appeal. We quash the convictions and set aside the sentences. We order that they be forthwith released from custody unless otherwise lawfully held.

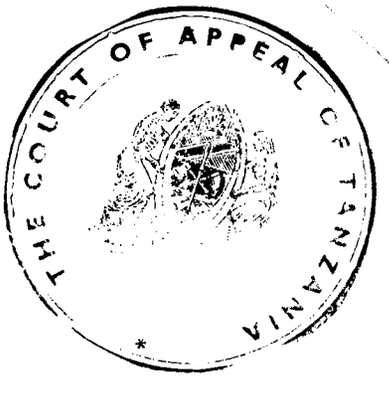
DATED at ARUSHA this 16th day of September, 2012.

E. A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



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