

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

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

CRIMINAL APPEAL NO. 46 OF 2008

1. FADHILI SALUM
2. SAID OMARY @ KIPYANO
3. RAMADHANI SALIM @ BABU MSENDA }APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mruma, J.)

**dated the 21st day of May, 2007
in
Criminal Sessions Case No. 75 of 2003**

JUDGMENT OF THE COURT

28 June, 19 July, 2012

MUNUO, J.A.:

The three appellants namely –

1. Fadhili Salum
2. Said Omary @ Kipyano
3. Ramadhani Salim @ Babu Msenda

were convicted of murder c/s 196 of the Penal Code, Cap. 16 R.E. 2002 in that on the 22nd February, 2002 at Temeke Mikoroshoni at Sandali area in

Temeke District within Dar es Salaam Region, the appellants jointly and together murdered one Saidi Mohamed Nakupeta. The late Saidi Mohamed Nakupeta was employed by a businessman, one Seif Salim who deposed at the trial as P.W.1. P.W.1 stated that the deceased was his taxi driver; he drove a taxi registered no. TZK 3488. He did not return the taxi to PW1 on the fateful night. In the morning the taxi driver's wife informed PW1 that the said taxi driver did not return home either. A few hours later, PW1 was informed that the body of the deceased had been spotted lying at Chang'ombe area.

The body of the deceased was spotted by two watchmen Hamisi Iddi and Derick Phillip Mkemwa who were on guard duty at Sandali Primary School at Temeke. Around 23.00 hours the two watchmen saw a red taxi heading towards the school through a closed road. When the taxi reached the end of the closed road, it parked and switched off lights. Some people allegedly got out of the taxi and then got back into the taxi, made an about turn and drove off. The watchmen found no discrepancy in the taxi's movements because the road was closed so the taxi had to return anyway. At dawn, the watchmen heard a woman screaming and upon responding

the watchmen found the body of the deceased lying where the taxi's tyre marks ended. The police came to collect the body. The body was subsequently to be that of Said Mohamed Nakupeta, the driver of P.W.1. Later on, the taxi was found dumped at Vingunguti, seriously vandalized.

In the course of investigations, the police were informed that a vehicle TZE 4447 Toyota corolla saloon was seen loading some parts which had been dismantled from the dumped taxi TZK 3488 Toyota corolla saloon. On the same day, that is, the 22nd February, 2002 the police led by P.W.2 DC Cpl Jandwa traced motor vehicle TZE 4447 Toyota corolla at Ilala area in Dar es Salaam City. The police found the said vehicle TZE 4447 Toyota corolla parked with some passengers therein. When the said vehicle noticed the police landrover approaching, it sped off at very high speed. The police vehicle chased the suspected TZE 4447 through Karume, Shauri Moyo and Lindi Streets in Ilala. The Toyota broke down. The suspects abandoned it and ran away but the police managed to apprehend three of the suspects, P.W.2 asserted.

On being questioned by the police, 1st Appellant, Fadhili Salim told the police that the Toyota corolla TZE 4447 belonged to the 2nd Appellant, Said Omary @ Kipyano. The house of 2nd Appellant was reached and suspected motor spares such as two tyres, 4 wheel caps, 10 wheel nuts, one battery Exide no. 50 were seized and taken to Chang'ombe police station. P.W.1 Seif Salim, the employer of the deceased identified a jack he had written TZK 3488 thereon for identification. PW1 also identified a tyre which had been repaired with a blue string. The first accused was arrested on the 22/2/2002 when the police pursued and captured him from the suspected Toyota TZE 4447. However, the 2nd Appellant was arrested on the 29th April 2002 while the 3rd Appellant Ramadhani Salim @ Babu Msenda was arrested on the 12th September, 2002.

The 3 Appellants categorically denied murdering the deceased. The learned trial judge convicted the appellants and sentenced them to death. Aggrieved, the appellants lodged this appeal.

Mr. Mwandambo, learned advocate filed 4 grounds of appeal contending that there was no reliable evidence to connect the appellants

with the charge of murder. He further contended that the prosecution did not establish the guilt of the appellants beyond all reasonable doubt and that the appellants were wrongly convicted on the involuntary cautioned statements. The learned judge, counsel for the appellants submitted, ought to have acquitted the appellants for lack of sufficient evidence against them.

Before us, counsel for the appellants submitted that any other vehicle could have dumped the body of the deceased at the end of the closed road as many vehicle could have been driven along the said road on the 21st February, 2002. This alone, counsel argued, should have raised doubt in the prosecution evidence and entitled the appellants to acquittal at the trial because the 2nd Appellant's Toyota TZE 4447 was not identified by the watchmen at Sandali Primary as being the vehicle which dumped the body at the end of the closed road on the material night. The scanty evidence of a jack marked TZK 3488 was too scanty to ground a conviction in the circumstances of this case.

Citing the cases of **Ally Bakari versus R (1992) TLR 10;** **Mohamed Saidi Matula versus R (1995) TLR 3** and **Hamisi Athumani and 2 Others versus R (1993) TLR 110**, Mr. Mwandambo submitted that where circumstances do not conclusively point to the guilt of the appellants, the benefit of the doubt should go to them. Counsel for the appellants faulted the admission of cautioned statements the appellants had retracted and which apart from being involuntary, were not recorded within the prescribed time of 4 hours after arrest in compliance with the provisions of section 50(1) of the Criminal Procedure Act, Cap 20 R.E. 2002. On this, counsel for the appellants cited the cases of **Salim Petro Ngalawa versus R Criminal Appeal No. 85 of 2004** (unreported); and **Tumaini Mollen @ John Walker, Criminal Appeal No. 40 of 1999 (CA) at Arusha** (unreported) wherein statements recorded in contravention of the provisions of section 50(1) of the CPA were rejected by the Court. As the cautioned statements of the 1st and 3rd Appellants were recorded beyond the set 4 hours as stipulated under the provisions of section 50(1) of the CPA, Cap. 20 the same should be expunged from the record, counsel for the appellants argued. Counsel observed, furthermore, that the 1st and 3rd Appellants did not sign or

thumb print their cautioned statements, Exhibit P8 so the authenticity of the said statements is doubtful. The cautioned statements were also not recorded in compliance with the provisions of section 27(1) of the Evidence Act Cap. 6 R.E. 2002 so the said statements should have been rejected by the trial court, counsel for the appellants urged. In view of the weak evidence against the appellants, Mr. Mwandambo prayed that the appeal be allowed, the conviction be quashed and the appellants be acquitted.

The learned State Attorney, Ms Sinda supported the conviction and sentence on the ground that the charge was proved beyond all reasonable doubt. The learned State Attorney contended that the evidence on record provides an unbroken chain of circumstantial evidence reflected in the incriminating cautioned statements, Exhibit P8, and the spares found in possession of the appellants which spares had been dismantled from the taxi the deceased was driving on the day he was killed by bandits. She observed that the cautioned statements were tendered without objection from the defence. Conceding that the cautioned statements though supposed to have been recorded by the same person appear to have been recorded by different persons, Ms Sinda contended that the said cautioned

statements were not objected to at the trial so they are authentic and were rightly admitted as Exhibit P8.

On the recovery of some spares stolen from the deceased's taxi, the learned State Attorney contended that the jack and tyre identified by the taxi owner, Seifu Salimu Seifu by the mark TZE 3488 on the jack which was allegedly found in the house of the 2nd Appellant during the police search shortly after the murder of the deceased. However, P.W.2 said that the jack was recovered in motor vehicle TZE 4447 on the 21st February 2002 at 13.00 hours. The principle of recent possession would apply in the circumstances of the case, the learned State Attorney further stated, contending that the 1st and 3rd Appellants were arrested in the suspected vehicle TZE 4447 so they should be convicted of murdering the victim. There is sufficient evidence to connect the appellants with the offence charged so they were properly convicted, the learned State Attorney submitted. As the appeal is lacking in merit, it should be dismissed the learned State Attorney argued.

The issue before us is whether the appellant jointly or otherwise murdered the deceased.

From the evidence of P.W.2 D3865 Detective Corporal Jandwa, the 2nd Appellant's vehicle TZK 4447 was suspected, when on seeing the police landrover, it started 'running amock', pursued by the police patrol landrover until it broke down after knocking on a road bump. The driver of TZK 4447 managed to escape but P.W.2 stated that the three appellants were there and then apprehended by the police. P.W.2 said that he arrested the 1st Appellant and also recovered a jack which was marked TZE 3488 thereon from motor vehicle TZK 4447. Another police PW4 D2966 Stg Aden stated that the appellants were arrested on different dates in that on the 29th April, 2002, he got a report that the 2nd Appellant was arrested after being found in possession of a pistol. PW4 further stated that he questioned the 2nd appellant and he admitted that he had killed the driver of a taxi TZK 3488. It was evidence of PW4 that the 3rd appellant was arrested on the 12th September, 2002 and that he too admitted killing the deceased. Furthermore, PW4 stated that he recorded all the 3 cautioned statements of the appellants. Both learned counsel in this case, admit that

on the face, the cautioned statements appear to have been written by different people because the handwriting looks visibly different.

It appears that P.W.2 might or might not have apprehended the suspects the police landrover pursued until it broke down at a road bump. P.W.2 claimed that only the driver of TZE 4447 escaped arrest on 21.2.2002 during the hot pursuit by the police patrol landrover at about 13.00 hrs in broad daylight. If all the three appellants were apprehended when their vehicle TZE 4447 broke down at a road bump, how come that the 2nd and 3rd appellants were arrested on the 29th April, 2002 and on the 12th September, 2002? Either P.W.2 or P.W.4 did not have his facts correct. The chances of the suspects who were being pursued by the police landrover having escaped when their vehicle brokedown at a road bump cannot be ruled out in view of P.W.4's evidence that the 2nd and 3rd appellants were arrested on different dates, some months after the murder. In view of this grey area in the prosecution evidence, we find it unsafe to uphold the conviction.

In view of the above, we agree with counsel for the appellants that the guilt of the appellants was not proved beyond all reasonable doubt. We find no reason to probe into the cautioned statements, Exhibit P8, which on the face of it, appear to have been recorded by different persons although P.W.4 said that he recorded the said statements.

We are satisfied that the appeal has merit. We accordingly quash the conviction and set aside the sentences of death imposed on the respective appellants. We order that the appellants be set free if they are not detained for other lawful cause.

DATED at **DAR ES SALAAM** this 10th day of July, 2012.

E.N. MUNUO
JUSTICE OF APPEAL

B. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL