

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MBAROUK, J.A., MANDIA, J.A., And MMILLA, J.A)

CRIMINAL APPEAL NO. 182 OF 2013

NZIGIYIMANA S/O ZABRON.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

At Tabora)

(Lukelelwa, J.)

dated the 25th day of June, 2012

in

Criminal Session No. 20 of 2008

.....

JUDGMENT OF THE COURT

25th & 26th September, 2013

MMILLA, J.A.:

The appellant, Nzigiyimana s/o Zabron was charged in the High Court of Tanzania at Tabora with murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that on 8.7.2004

at Kalembene Forest within Kibondo District in Kigoma Region, he murdered one Fadhili Seleman (the deceased). He protested his innocence.

The facts of the case were briefly that on 9.7.2004, PW1 Madaraka Selemani was followed at his home by his sister in law, the wife of the deceased one Angelister Masabila who informed him that her husband had left the previous day of 8.7.2004 to go to fetch charcoal but had not returned. She said that it was unusual because the deceased used to return home.

On receiving the report, PW1 went to inform his relatives about the disappearance of his brother, and that his relatives advised that they waited until the next day. He obliged.

On 10.7.2004, the deceased had not shown up. In view of that, PW1, Angelister Masabila and other relatives went to report the matter at police station at Kibondo. They were given a document (paper) to take to Kanembwe Refugee out Post. While at that Police Post, Angelister informed the police that her husband had left on a bicycle, and had a panga. PW1 and his relatives described the bicycle as having had a big carrying rack whose handle-bars were welded at the brake lever, the forks were also

police and a doctor who examined the body after which they buried it there at the scene.

On how the appellant fell in the hands of the police, the story is best told by PW2 ASP Protas and to an extent by the appellant himself.

The evidence of PW2 was briefly that then he was the Officer Commanding Station (OCS) at Kanembwe Police Station. He said that on 14.7.2004, the appellant went there and asked to be provided with a PF3 intending to undergo treatment because he had injuries on both hands, the big toe, and there was another wound on the right hand caused by teeth. He asked him how he got the wounds and that he told him that he fell from a bicycle and was cut with a panga which he was caring on carrying rack of the bicycle. By that time he had no bicycle. PW2 wanted to see the bicycle, also to be shown the place where the accident occurred. It was his evidence that the appellant took him to the place where he claimed to have fallen from a bicycle. According to him, there were no signs at the scene to show that an accident occurred there. Also, the appellant had no bruises whatsoever, but cut wounds. From there, they went to appellant's house where he showed them the bicycle. They took it to police station. However

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he failed to produce a panga which cut him. Further, on being asked how he got the bicycle, he gave no plausible account; also that he did not even provide its serial number.

On the other hand, the police examined the said bicycle and realized that it fitted the description of the bicycle which was given by PW1 and his relatives. On that account, they took the initiative of recalling PW1 and his relatives for further interrogation. After PW1 and his relatives availed themselves to police, the later sought the description of the said bicycle for the second time before showing the recovered bicycle to them for reaffirmation. On being satisfied that the description fitted the one which the deceased was said to have left with, their suspicions increased as a result of which they continued to hold him. After it was found that Fadhili Selemani was dead, they proceeded to charge him of murder as it were.

There is on the other hand the appellant's story as to what happened that led into his being a suspect in the deceased's death in the first place. His account in that regard was that, on 14.7.2004, he had gone to

Kanembwe Police Station at which he sought to be provided with a PF3 to enable him undergo treatment for the wounds he had. On meeting PW2, he was asked to explain how he got the said injuries. He told him that he was involved in an accident on 8.7.2004 for which he had fallen from his bicycle. He was asked to go and show them the place at which the said accident took place which he did and demonstrated to them how those seemingly cut wounds came about. After that he was asked to show them the bicycle which was involved in the said accident, again he cooperated. He took them to his home and showed them the said bicycle. He was also asked whose bicycle it was. He told them that it was his personal property, and that he bought it from one person known as Alex. He named Mbonilema Salvatory who was the street chairman of their area, Biziamana Francois and Nhengurikiamana Abel as having been the witnesses in that transaction. It was on this ground that he protested his innocence because he had nothing to do with deceased's death.

Before us, the appellant is being represented by Mr. Musa Kassim, learned advocate while the respondent Republic was represented by Ms Juliana Moka, learned State Attorney. She declined to support the appeal.

The memorandum of appeal filled by the learned advocate on behalf of the appellant has raised three (3) grounds as follows:-

1. That the learned trial judge erred both in law and in fact to convict the appellant basing on circumstantial evidence which did not prove beyond reasonable doubt the offence against the appellant.
2. That having not conducted proper identification of the bicycle alleged to be of the deceased before Kibondo Central Police and lack of original sale agreement exh. P3 thereby admitting photocopy thereof not showing clearly serial number of the bicycle the learned trial judge erred in law and fact to impute the doctrine of recent possession against the appellant.
3. That the learned trial judge erred in law and in fact that the appellant failed to account for the bicycle thereby linking him to the murdering of the deceased and convicting him under the doctrine of recent possession.

As these grounds reveal, there are only two matters to be addressed here. The first one touches on circumstantial evidence, and the second one touches on the doctrine of recent possession. Both, the learned advocate for the appellant on one hand and Ms Juliana Moka on the other hand discussed these two matters generally.

On his part, Mr. Musa Kassim tried his level best to impress on the Court that the trial High Court erroneously invoked the doctrine of recent possession on account that the prosecution side had utterly failed to prove that the bicycle in issue was indeed the property of the deceased such as to imply that having it been recovered from the appellant, then the appellant had a hand in the death of the deceased. He described the evidence of PW1, PW2 and PW3 regarding ownership and possession as unbelievable and that it not properly relied upon. He submitted that PW1 only managed to describe the said bicycle after it was shown to him by the police, and not before. He stressed that, this was against the practice. In his view, the practice is that the witness ought to have offered description of the said bicycle before he was shown the same.

As regards the evidence of PW3 who also "purported" to have known the bicycle, Mr. Kassim submitted that he failed to describe the bicycle in a sufficient manner, and that the purported sell agreement he relied on, was wrongly admitted in court as evidence because it was a photocopy.

On the other hand, Mr. Kassim submitted that the testimony of PW2 as to the ownership of the bicycle was not credible. He was not truthful when he said that the appellant failed to give clear explanation that he was the owner of the bicycle in issue. He submitted that the appellant gave clear evidence regarding his ownership of that bicycle. As will be remembered, Mr. Kassim went on to submit, the appellant told the trial High Court that he bought the said bicycle from one person known as Alex at the price of shs. 35,000/= in the presence of witnesses including Mbonilema Salvatory who was the street chairman, Biziamana Francois and Nhengurikiyemana Abel. Mr. Kassim submitted further that that was sufficient account that the appellant owned said the bicycle make Avon. On the basis of the above, he went on to say, it was wrong for the trial High Court to have found and held that the appellant did not give clear explanation regarding ownership of the said bicycle. On this basis, he

submitted that the trial High Court was wrong to invoke the doctrine of recent possession. He prayed this Court to allow this ground.

As regards the aspect of circumstantial evidence, Mr. Musa Kassim submitted that the evidence of the prosecution failed to maintain an unbroken link of matters connecting the appellant with the death of the deceased. He submitted that the evidence of PW2 regarding the nature and extent of the wounds the appellant was found with, contradicted that of PW5 who was the doctor who examined and treated the appellant of the injuries he had. Of course, he said, both of them testified that among the injuries, the appellant had cut wounds in both hands, toe and other parts of the body, and that they were caused by a sharp object. However, while PW2 said one of the wounds in the hands was caused by teeth, PW5 did not think that any of the wounds was caused by teeth. Mr. Kassim submitted that this piece of evidence cannot be relied upon because one of them is lying. He prayed for the Court to disregard the evidence of these witnesses on this point.

He also pointed out that it was wrong for PW2 to disbelieve the appellant who told him that the wounds were caused by his having fallen from the bicycle, an error which the trial High Court succumbed to. He maintained therefore that circumstantial evidence was deficient, thus unreliable. He requested this Court to allow this ground too.

On the other hand, Ms Juliana Moka submitted in respect of the ground of appeal touching on doctrine of recent possession that the prosecution proved its case beyond reasonable doubt that the bicycle which was recently recovered from the appellant counted from the date of deceased's death was indeed the property of the deceased. She took us through the evidence of PW1, PW1 and PW3 regarding this aspect. The learned State Attorney submitted that PW1 had first given the description of the bicycle in issue on 10.07.2004, the date on which he reported about the disappearance of the deceased from his home. Four days later, which is on 14th July, 2004, he gave the description of the bicycle to the police for the second time before he was shown the bicycle which was recovered from a suspect as they told him. She went on to say

that the record shows that, he gave the same description as that he had given on 10.07.2004. She submitted further that PW1 gave the description of that bicycle for the third time on the day he appeared in court before he was shown the same for identification. Also, she added, he had said in his evidence that his brother used to leave the bicycle at his home on those occasions he went to his (deceased's) farm, and that in her views, that was sufficient evidence to prove that the bicycle which is the subject matter in this case, was indeed the property of the deceased. Relying on the case of **Daudi Thomas v. Republic**, Criminal Appeal No. 309 of 2009, CAT, Arusha Registry (unreported), Ms Juliana Moka said that the trial High Court properly invoked the doctrine of recent possession.

Another important evidence on the point came from PW3 who said he witnessed the transaction in which the deceased had purchased the bicycle make Avon, with serial No. 0538 from one person known as Paulo Sintalo at the price of Shs. 25,000/=. The witness, she said, informed the trial High Court that the sale agreement he witnessed was reduced in writing and was able to identify the said agreement document in court. The witness showed the serial number of the said bicycle.

Miss Juliana Moka was quick to add that, though the agreement document was secondary, the court was justified in receiving it as evidence in the case for reasons it gave. However, Ms Moka said that PW3's oral evidence in that regard would still stand even without that document. She urged this Court to uphold the finding of the trial High Court that the evidence of PW3 was strong, credible and believable.

Ms Juliana Moka submitted that there was also the evidence of PW2 who told the court that the description of the bicycle in issue was given to them by PW1 and Angelister Masabila, and that the description was given before the bicycle was recovered. She also said that PW2 had asked the appellant to explain tell him how he got that bicycle, but that he failed to provide reasonable explanation how he got it, nor did he know what type it was. It was on this basis, she submitted, the trial High Court said he had not given clear explanation of his ownership of the bicycle which otherwise belonged to the deceased.

To begin with, she submitted that it was the appellant who submitted himself at Kanembwe Police Station at which he had gone to ask for PF3 enable him undergo treatment. On being asked how he sustained the injuries, he gave a story of having fallen down from a bicycle. However, the police harboured doubts because he had several wounds on his body which indicates that they were caused by a sharp object. On visiting the place where he purported the accident had occurred, PW2 did not see the signs to indicate that anyone had fallen at that place. Also, he had a wound on the right hand which showed that it was caused by teeth, hence the inference by the police that the wound could have been caused by someone who applied teeth on him. Ms Juliana Moka did not budge to the defence submission that there was a broken link to establish circumstantial evidence linking him to crime he was charge with. She urged the Court to dismiss this ground too.

In a rejoinder, learned counsel Musa Kassim repeated almost the same details given in his main submission.

We will start tackling the ground touching on the doctrine of recent possession as counsel for the parties have done, after which we will revert to the ground touching on circumstantial evidence.

It is a fact that there was a rival claim in respect of the bicycle in issue between the prosecutions on the one hand who were saying it was the property of the deceased and the appellant on the other hand who maintained that it was his personal property. It is on this basis that there is this claim that the trial High Court wrongly invoked the doctrine of recent possession.

The doctrine of recent possession evolves around proof that an accused person is found in possession of the property recently stolen. This was reflected in the case of **Director of Public Prosecutions v. Joachim Komba** [1984] TLR 213 in which it was held that:-

"The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation

depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."

This is a case of the High Court, but it expresses the correct principle of the law and we agree. See also the case of **Rex v. Bakari Abdalla** (1949) 16 EACA 84.

Going a step further, the basic elements of the doctrine under discussion have been restated before in various cases, including that of **Daudi Thomas vs. Republic (supra)**. Relying on the case of **Joseph Mkumbwa and Samson Mwakajenda v. Republic**, Criminal Appeal No. 94 of 2007 (unreported) the Court said:-

"... where a person is found in possession of property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as bases of conviction, it must be proved, first, that the property was found with the suspect, second, that the property is positively proved to be the property is positively proved to be the property of

the complainant, third that the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused.... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements..."

However, it is appropriate to stress that the doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of the truth. This was clearly put in the case of **George Edward Komowski v. R** (1948) 1 TLR 322 in which the Court said that:-

"...[The doctrine of recent possession...] is not strong as to displace the presumption of innocence to the extent of throwing on the accused the burden of giving legal proof of the innocent origin of his possession. He has merely to give a reasonably probable explanation of how his possession originated and if he gives such an innocent explanation he is entitled to an acquittal **unless the prosecution can disprove his story**. Even if he gives an explanation which does not convince the court of his truth he need not necessarily be

convicted. The true test is whether his story is one which might reasonably be true and if that is the case, it follows that the crown has not discharged the onus which lies continuously on it in this as in other criminal cases, to prove the accused's guilty beyond reasonable doubt." [Emphasis provided]

As aforesaid, in the present case there is a rival claim between the two sides. It is our view that the determining factor in such circumstances is the strength of evidence availed to the court. Of course, this has to be decided while under a constant warning that the accused person in a case is not required to prove his innocence; but that it is sufficient if he gives reasonable explanation to show ownership of the property under contention.

In the instant case, evidence was given by the prosecution that the bicycle in issue was deceased's property. On the lead was the evidence of PW1 who was recorded to have given the description of the said bicycle three times; firstly on 10.07.2004 the day when he reported the disappearance of the deceased to police, secondly on 14.07.2004 and

thirdly when he was in court. This description we note; was first given before the bicycle was recovered. This appears on page 16 of the court record, last paragraph over to page 17, paragraphs 2, 3 and 4. The witness said at this page that:-

"On 10/07/2004 we went to report the incident at the Police Station Kibondo. We were with Angelista Masabile and other.

The Police gave us a paper to take to Kenembwe Refugee out post. Angelista had said that the deceased had left on a bicycle, and had a panga.

We described the bicycle as having a big carrying rack the handlebars was welded at the brake lever, the forks were also welded.

The tyres were new, the front wheel, were finished it was an avon bicycle.

We also gave the numbers of the bicycle as No.0538 I took the piece of paper which I handed over to Afande Protas at Kanembwa Refugee Camp"

On 14.07.2004, this witness gave the description for the second time when he was called at Kanembwe Police a Station after they had recovered

the bicycle but before it was shown to him. This is appearing at page 17, last but one paragraph, the witness said that:-

"We went on making our own Investigations, then Afande Protas of Kanembwa Refugee Camp telephoned me on 14/7/2004 I went there in company of my friends and the widow of the deceased. Afande Protas asked me to describe the bicycle of the deceased I described the bicycle as said earlier. They told me that they have arrested the suspect. I did not see the suspect yet, but Protas told us that a man had been arrested, they took the bicycle and the suspect and we were driven to Kibondo Police Station"

The witness gave description for the 3rd time on the day he testified in court. Also, when he was cross examined by the 2nd assessor as it appears on page 21 of the court record, last paragraph, PW1 said:-

"I know the special marks on the bicycle because the deceased used to leave the bicycle at my home, when he went to his shamba

I know the serial numbers due to the paper of sale."

On the other hand, PW3 testified that he witnessed the transaction in which the deceased was buying a bicycle from one person known as Paulo

Sintalo. This is reflected on page 28 of the court record. He said he was very conversant with his uncle's bicycle. He identified the sale agreement constituted in exhibit P3. He said that the bicycle had serial numbers 0538, the very number which was given by PW1 in his evidence and indeed he showed it. In our view, even where the documentary evidence in this regard was to be disregarded, still the oral evidence of this witness on the point provided strong support to the evidence of PW1 that the bicycle in issue was the property of the deceased.

It is true that the appellant told PW2 that the bicycle was his, but that he failed to tell him how he got it and also he failed to describe it. At page 23 of the court record last paragraph, PW2 said:-

"I asked him where he got the bicycle; the accused could not say the type or serial number of the bicycle."

It is similarly a fact that the appellant said in his defence that the bicycle was his and that he bought it from one person known as Alex in the presence of witnesses named to be Mbonilema Salvatory, Biziamana Francois and Nhengurikiyemana Abel but then, these persons were not

called to testify nor did he produce any sale agreement. We are alive however; that the burden of proof always lies on the prosecution who are required to prove their case beyond reasonable doubt, and that appellant's duty was merely to raise a reasonable doubt. In the circumstances of this case however, we find and hold that the appellant failed to raise a reasonable doubt to convince the Court that the bicycle was ever his. This is on the strength of the all strong and unshakable evidence of the prosecution side regarding ownership of the said bicycle. In our opinion, that evidence established beyond clear that the bicycle was the property of the deceased. It being a fact that on the day the deceased left his home on 8.7.2004 had that bicycle with him, among other things, and having it been recovered from the appellant while its owner was killed, we find that the trial High Court properly invoked the doctrine of recent possession in the circumstances of this case, and was therefore justified to find and hold, as we do, that the appellant was the one who killed the deceased. Thus, this ground lacks merits and we dismiss it.

As regards the ground touching on circumstantial evidence, we have taken the view that this evidence was not very important in this case

because everything depended strongly on how the bicycle linked the appellant to deceased's death. We leave it at that.

In conclusion, we find that the appeal has no merits and we dismiss it in its entirety.

Appeal dismissed.

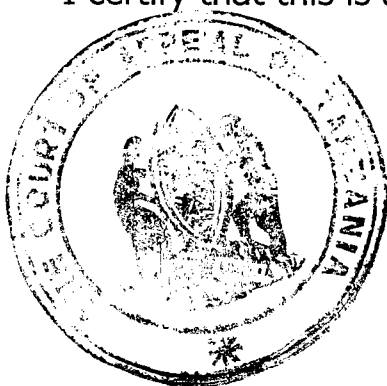
DATED at TABORA this 25th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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




Z. A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL