

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

(CORAM: OTHMAN, C.J., MJASIRI, J. A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 241 OF 2014

MUSTAPHA MAULIDI RASHIDI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
At Mtwara)**

(Mipawa, J.)

dated the 22th day of June, 2012

in

Criminal Appeal No. 49 of 2011

JUDGEMENT OF THE COURT

1stOctober, 2015& 3rd February, 2016

MJASIRI, JA:

This appeal arises from the decision of the High Court at Mtwara. The appellant was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, R.E. 2002 and was sentenced to death. The background leading to the conviction of the appellant is as follows: The appellant resides in Mozambique but has a family in Nakarara Village in Mtwara Region. It was alleged by the prosecution that on June, 18, 2011 the appellant hired a motorcycle operated by the deceased from

Nagaga Village to Nakarara Village within Masasi District in Mtwara Region. Upon reaching Nakarara Village he took the deceased to his home where he found his sister before he led him to the field, where he attacked him with an iron bar and caused his death.

At the hearing of the appeal the appellant was represented by Mr. Hussein Mtembwa, learned advocate while the respondent Republic had the services of Mr. Paul Kimweri, learned Senior State Attorney who was assisted by Ms. Nuru Mangu, learned State Attorney.

The appellant presented in Court a lengthy, fourteen (14) point memorandum of appeal. This was reinforced by a supplementary memorandum of appeal filed by Mr. Mtembwa learned advocate. The supplementary memorandum of appeal is reproduced as under:-

- 1. That the Honourable trial Court erred in law and fact by convicting the appellant basing on the principle of recent possession of Exhibit P2 which was not properly identified by PW1, PW3 and PW4 to have been found in possession by the appellant.*
- 2. That the Honourable trial Court erred in law and fact by convicting the appellant basing on the evidence of PW2*

who did not happen to see and identify the dead body of the deceased.

3. That the Honourable trial Court erred in law and fact by believing and acting upon Exhibit P3 which was obtained illegally.

The conviction of the appellant was based on the doctrine of recent possession. The prosecution case relied on the evidence of PW2, Nuru Abdul Mussa who is the sister of the appellant, PW3, Amir Kaiche, who led to the arrest of the appellant and PW5, Amir Talib Salanje who was a friend of the deceased and the appellant's extra-judicial statement (Exhibit P3) which provided a detailed account of what transpired.

Mr. Mtembwa on his part vehemently argued that the charge against the appellant was not proved beyond reasonable doubt. He informed the Court that he would focus on the supplementary grounds of appeal as they represented the core grounds of appeal filed by the appellant.

In relation to ground No. 1, he stated that there was no proof that the motorcycle found with the appellant was properly identified as the one belonging to the deceased. According to him the person who should have tendered the motorcycle in Court (Exhibit P2) should have been PW2 who

led to the arrest of the appellant and not PW5 who was merely a friend of the deceased. He also submitted that the ownership of the motor cycle in question was not clearly established. It was alleged by the prosecution that the motorcycle belonged to the deceased's sister but she was not called in court to testify. The motorcycle was tendered in court without the registration Number. Mr. Mtembwa submitted that the principle of recent possession was not correctly applied. According to him the appellant was simply convicted because he did not have a plausible explanation. He submitted that the burden of proof is always on the prosecution. He relied on the case of **John Makolobola v. Republic** (2002) TLR 296.

With regards to ground No. 2 Mr. Mtembwa argued that the High Court Judge wrongly relied on the evidence of PW2 to ground a conviction against the appellant. PW2 did not give the description of the deceased nor the description of the motorcycle in her testimony. He cited the cases of **Mohamed Saidi Matula v. Republic**(1995) TLR 3 and **Alphonse Mapunda and Another v. Republic** (2006) TLR 395.

On ground No. 3, Mr. Mtembwa submitted that the extra-judicial statement was illegally obtained. He stated that even though the appellant conceded that he went to the Justice of the Peace (PW7) to record his

statement, what was recorded by PW7 is not what he said to her. The appellant did not sign on most parts of the said statement. He argued that in the absence of corroborative evidence it was unsafe for the High Court Judge to rely on the appellant's extra judicial statement. In the absence of Exhibit P3 there is no other cogent evidence to link the appellant with the death of the deceased. He made reference to the case of **Nkeshimana John @ Didone vs. Republic**, Criminal Appeal No. 229 of 2005 CAT (unreported) and stated that in a case where the prosecution case relies on circumstantial evidence, the link on the chain must not break. He reiterated that the burden of proof is on the prosecution to prove the case against the accused person beyond reasonable doubt. If there is any doubt it should be resolved in favour of the accused. He brought to the attention of the Court the case of **Zakaria Japhet v. Jumanne & Two Others v. Republic**, Criminal Appeal No. 37 of 2003 CAT (unreported).

Ms. Mangu on her part supported the conviction of the appellant. She argued that the appellant was found in possession of the motorcycle within hours after the incident. PW2 who is the sister of the appellant testified that the appellant went to their home on a motorbike operated by another person. They went to the field but the appellant returned alone

with the motorbike. The appellant asked PW2 for a hoe in the middle of the night, and when asked for an explanation he was very annoyed. She therefore handed over the hoe to him. Ms. Mangu argued that the evidence of PW2 is in line with what was stated in the extra-judicial statement. She argued that the doctrine of recent possession was properly invoked. The appellant was arrested with the motorbike by PW3 and PW4. PW5 clearly identified the motorbike, as he knew it well, as it was operated by his friend, the deceased.

She stated that though PW2 did not give the description, the motorbike was properly identified by PW5. She argued that where a person is found in possession of the property within a very short time after a theft or a death has taken place the doctrine of recent possession applies. She made reference to the case of **Manazo Mandunduv. Republic** (1990) TLR 92.

In relation to Exhibit P3, she submitted that a retracted confession can be used, the court only needs to warn itself on the dangers of relying on a retracted confession. The High Court Judge warned himself. The extra-judicial statement was corroborated by the evidence of PW2, PW3, PW4 and PW5.

We on our part after carefully reviewing the record of appeal, the judgment of the High Court and the submissions made by counsel would like to make the following observations. The conviction of the appellant was based on circumstantial evidence. There was no eye witness. The doctrine of recent possession was invoked, leading to the conviction of the appellant after he was found in possession of the deceased's motorbike only a few hours after the deceased was brutally murdered.

The major issues for consideration and determination in this case are as follows:-

- 1. Whether or not the doctrine of recent possession was properly invoked by the High Court.*
- 2. Whether or not there was sufficient evidence to convict the appellant for the offence charged.*

In **Juma Marwa v. Republic**; Criminal Appeal No. 71 of 2001 CAT (unreported), it was stated thus:-

"the doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had

come by the same, the Court may legitimately presume that he is a thief or a guilty receiver."

In **Mkubwa Mwakagenda v. Republic**, Criminal Appeal No. 94 of 2007 CAT (unreported), the Court made the following observations:-

*"For the doctrine to apply as a basis of conviction, it must be proved, **first**, that the property was found with the suspect, **second** 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 to prove the above elements"*

As noted earlier, this case relied on circumstantial evidence as there was no eye witness when the deceased was killed. In **Simon Musoke v. Republic** (1958) EA 718 it was stated thus:-

"In a case depending conclusively upon circumstantial evidence, the Court must, before deciding upon a

conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt."

In the above mentioned case the Eastern Africa Court of Appeal referred to the decision in the case of **Teper v. Republic** (2) 1952 A.C. 480. The Privy Council at page 489 stated thus:-

*" It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that **there are no other co-existing circumstances which would weaken or destroy the inference.**"*

[Emphasis provided].

In **Hassani Fadhili v. Republic** (1994) TLR 89, it was held that in order to ground a conviction on circumstantial evidence, it must be incapable of more than one interpretation. See **Ally Bakari and Pili Bakari v. Republic** (1992) TLR 10 and **Rex v. Bakari Abdulla** (1949) 16 EACA84.

Is the possession of the motorcycle by the appellant sufficient to sustain a conclusion that the appellant robbed the deceased's motorcycle and caused his death?

In the case of **Republic v. Loughlin** 35 Criminal Appeal. R 69 the Lord Chief Justice of England had this to say at page 71:-

"If it is proved that premises have been broken into, and that certain property has been stolen there from and that very shortly afterwards, a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop-breaker and, if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself.

In **Manazo Mandundu and Another v. Republic** 1990 TLR 92. It was held as follow:-

" (i) The possession was very recent and that this fact cannot be ignored.

(ii) In the circumstances it was not wrong to conclude that the appellants were responsible for killing the deceased,

and because we are satisfied that the killing was to effect the stealing we are of view that it was quite proper to infer malice aforethought;

(iii) This is a fit case for invoking the doctrine of recent possession to support not only the shop breaking and the theft but also murder."

In **Rex v. Bakari Abdulla**(supra), the Court had this to say on the doctrine of recent possession:-

*"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of **burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal"***

[Emphasis proved].

Taking in consideration the circumstances of this case we are of the considered view that just like in the **Mandundu case** (supra), this is a fit

case for invoking the doctrine of recent possession to support not only the theft of the motorcycle but also murder. We have in mind the extreme proximity in time. The appellant was found in possession of the motorcycle within a few hours. The appellant failed to offer any reasonable explanation.

We are therefore inclined to agree with the learned State Attorney. In the result, we find the conviction of the appellant to be in order and we dismiss the appeal.

DATED at **MTWARA** this 15th day of December, 2015.

M. C. OTHMAN
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, consisting of a large, loopy 'A' followed by 'TEYE' in a more structured script.

A. TEYE
DEPUTY REGISTRAR
HIGH COURT MTWARA