

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)**

CRIMINAL APPEAL NO. 47 OF 2015

Raymond John @ Kaka }
Joseph John }Appellants

Versus

The Republic.....Respondent

(Appeal from the conviction of the High Court of Tanzania

At Arusha)

(Massengi,J.)

Dated the 18th day of February, 2012

In

Criminal Appeal No. 62 of 2012

REASONS FOR JUDGMENT

7th& 12th October, 2015

KILEO, J.A.:

On 7th October 2015 we allowed the appeals by Raymond John @ Kaka and Joseph John, quashed their convictions and set aside sentences imposed upon them. We ordered their immediate release from prison unless they were held therein for lawful causes. We reserved our reasons which we now give.

This is an out of the ordinary case which, as we will show in the course of our consideration, left more questions than answers.

An Information for murder contrary to section 196 of the Penal Code was filed in the High Court of Tanzania at Arusha vide Criminal Sessions Case No. 62 of 2012. It was alleged that on 13th day of December, 2010 Raymond s/o George @ Kaka and Joseph s/o John at Naisinyai village within Simanjiro District Manyara Region, did murder one James s/o Jombo.

The appellant's conviction was based on the testimonies of six prosecution witnesses who purported to show that the deceased met his death in the course of an armed robbery. Though no one witnessed the crime being committed, the appellants were linked to it because, according to the prosecution case, they were found with the motorcycle that was stolen from the deceased a short time after the robbery was perpetrated. Cautioned statements purportedly made by the appellants were found by the learned trial judge to have corroborated the fact that the appellants were found with the stolen motorcycle.

The appellants denied involvement in the crime. The first appellant claimed that he was arrested and kept in custody some days prior to the date of the incident. He was in custody until 14/12/2010 when he was taken to Bomang'ombe police station and later to Babati District Court with the second appellant whom he did not know before. He stated also

that at the time of his arrest he had some minerals. As for the second appellant he claimed that on 12/12/2010 he had gone to KIA from Mererani and while he was there he saw a group of people running to Moshi road. He decided to follow those people to see what was amiss only to find them quarrelling over a motorcycle. He claimed that he was arrested because he was from Mererani. His 800,000/- in cash, phone and minerals worth 400,000/- were taken.

At the hearing of the appeal the appellants were jointly represented by Mr. John Shirima and Mr. Modest Akida, learned advocates. Two memoranda of appeal were filed, one on 28/9/2015 and the other one on 1/10/2015. The memoranda were combined and the following grounds were argued:

- 1. That, the learned trial Judge erred in law and in fact admitting the cautioned statements recorded out of the prescribed time; Exhibit PE₂ tendered by PW3 and Exhibit PE₄ tendered by PW5.*
- 2. That, the learned trial Judge erred in law and in fact by invoking the doctrine of recent possession to the tempered exhibits, i.e. The prosecution failed to account of the chain of custody of the Exhibits PE_(a & b) which were tendered by PW3 and Exhibit PE5 which was tendered by PW6*

3. *That the persecution case was not proved beyond all reasonable doubt.*
4. *That the Trial Court erred in law and in fact when it entered its judgment and conviction basing on hearsay evidence.*

The respondent Republic was represented by Ms Tamari Mndeme who was assisted by Mr. Omari Kibwana, both learned Senior State Attornies. They did not support conviction and sentence.

The case centres mainly on the doctrine of recent possession and credibility of witnesses. There is also the question whether the cautioned statements were properly admitted in evidence.

We will begin with the question of the cautioned statements.

It is very unfortunate, and it is difficult in the circumstances of this case to comprehend why, neither of the defence counsel at the trial raised objection to the admission of the cautioned statements. Surely justice was not done to the appellants.

As rightly pointed out by Mr. Shirima, the statements were taken outside the time provided for under the law for the taking of the statement of a person who is under restraint for purposes of investigation. The appellants, going by the evidence of the prosecution witnesses, were arrested on 13/12/2010 and their statements were

taken on 14/12/2010 at around 14hrs or thereabout. This was certainly beyond the time provided under the law. The relevant provision of the Criminal Procedure Act, Cap 20 R. E. 2002 (CPA) states:

"50. Periods available for interviewing persons

(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;"

There is nothing on record to show that the time for interviewing the appellants was legally extended. Section 51 of the CPA requires that extension beyond 8 hours be with the leave of a magistrate. The provision provides:

"51 (1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may–

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period.”

Reaffirming that the cautioned statements were wrongly admitted Ms. Mndeme pointed out that in addition to the fact that the statements were taken beyond the time allowed by law, the second appellant's statement was read in court before it was admitted. Referring to **Walii Abdallah Kibutwa & Others v. R**, Criminal Appeal No. 181 of 2006 (unreported) the learned Senior State Attorney submitted that this was wrong. In this case the Court referred to Criminal Appeal No. 154 of 1994 between **Robinson Mwanjisi and Three Others v. The Republic** (unreported) where the Court observed as follows:

"Whenever it is intended to introduce any document in advance, it should first cleared for admission, and be actually admitted, before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial"

We will put to rest the issue of cautioned statements. Suffice it to say that for all intents and purposes they ought not to have been admitted.

The next question that we need to determine is whether the doctrine of recent possession was properly applied in the circumstances of this case.

In **Joseph Mkubwa & Samson Mwakagenda v. R.** –Criminal Appeal No. 94 of 2007 (unreported) the doctrine of recent possession was succinctly explained by this Court where it stated:

*"where a person is found in possession of a 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 a basis 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 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 learned trial judge in the present case rightly pointed out that the doctrine applies in charges of murder as well as it was held in **Ally Bakari and Another vs. Republic**, [1992] TLR 10. In that case it was stated:

"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."

The learned trial judge was satisfied that the appellants were found in possession of the motorcycle which was stolen in the course of the robbery just a few hours after it was reported that the deceased had been robbed of the same and he was wounded by the robbers. She went on to find further that as the appellants failed to give any reasonable explanation on how they came into possession of the motorcycle they had to be liable for the offence.

It goes without saying that the prosecution had a duty to prove their case beyond reasonable doubt. The question is: was it proved beyond reasonable doubt that the appellants were found with the stolen motorcycle? To begin with, was the ownership of the motorcycle that was tendered in court as part of exhibit PE1 proved beyond reasonable doubt? The prosecution called PW6 who purported to be the owner of the motorcycle that was said to be stolen. She claimed that she had entrusted the motorcycle to the deceased for hire. There is nowhere on record to show that the witness was ever shown the motorcycle physically so that she could recognize it. Furthermore, there was no

comparison between the details contained in the registration card (exhibit PE5) and the engine and chassis numbers of the motorcycle that was tendered as part of exhibit PE1 in this grave matter. We need not dwell on the question of ownership any more. We are satisfied that ownership of the motorcycle was not proved at all. Putting aside the question of ownership of the motorcycle the chain of custody was also not established. The importance of establishing a proper chain of custody was emphasized in **Paulo Maduka and Another v. R – Criminal Appeal No 110 of 2007** (unreported) where it was held that there should be:-

"A 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...."

PW6 claimed to have participated in the arrest of the appellants and recovery of the motorcycle which was found in their possession. Though he claimed to have taken the motorcycle to Bomang'ombe from where it was picked by PW3, he did not say to whom he handed it over. PW3 did

not state from whom he picked it. In the circumstances, the doctrine of recent possession was not properly applied in this case.

We started by saying that this was an out of the ordinary case. It is curious, as expressed by Mr. Akida, that PW3 who claimed to have been assigned to investigate the murder case could be involved in every aspect of the case. He drew a sketch map of the scene of crime where he claimed to have found the body of the deceased. He did not tell who was there to direct him as to how things were, he himself not being a witness to what happened. He indicated in the map which was drawn at Naisinyai and which was tendered in court as exhibit PE3, the position where the body of the deceased was located- Surprisingly, the map is dated 14/12/2010 while the witness claimed to have drawn it on 13/12/2010. As if that was not enough, though PW3 claimed that he found the deceased's body at the scene of crime, PW1 who was at KIA claimed that the deceased, who was his relative, was brought at KIA while he was still alive. It was not clear from the record as at what point PW3 went to the scene of crime. Did he go to KIA before he drew the map? Or was it the other way round? Either way it doesn't make sense. If he drew it before he went to KIA, one may ask what happened to the body of the deceased that he found at the scene of crime? Who took it to KIA? If he drew it after he had been to KIA, then what about the

testimonies of PW1 who claimed that their fatally wounded relative arrived at KIA and had to be attended? A reproduction of PW3's testimony at page 16– 20 of the record will bear out our concerns:

"PW3: No. E. 4006Cpl. Edwin, 44 years, Christian, sworn and states:- Exam in chief by state attorney. I am working at Police station Merarani. On 13/12/2010 I was assigned to investigate a murder case which had occurred at Naishyi. Deceased was Joseph Jombo. I therefore contacted with KIA Police as I had informed the killers have robbed a motorcycle which was being driven by deceased and they were heading to KIA. After a few minutes I was informed that two people were arrested at KIA with the stolen motorcycle. So I went to KIA and found accused person have been taken to Boma Ng'ombe Police Station. On 14/12/2010 I wrote cautioned statement of 2nd accused. I also I was (sic!) the stolen motorcycle and a panga. The motorcycle was green in colour and it was Sky mark make Reg. No. 829 BLA. I pray to tender the motorcycle and a panga which was used in assaulting deceased as exhibit before this court."

At page 17 he said:

"I also took the statement of the 2nd accused where....."

And at page 18 he is recorded as having said:

"I also went to the scene of crime and drew a sketch map which showed the area of the commission of the crime and where the deceased fell...."

At page 20 the witness said:

"When I drew the sketch map deceased was at the scene of crime..."

PW3 was an unreliable witness and we have no doubt that if the learned trial judge had analysed his evidence properly as well as that of the rest of the witnesses she would have found their evidence to have been untrustworthy. PW3 mixed up dates, saying he was assigned the police case file on 14/12/2010, yet he went to the scene on 13/12/2010. He was the one who took the cautioned statement of the 2nd appellant. He was also the one who tendered the motorcycle as an exhibit though he neither recovered it nor did he keep it in his custody. He was a witness at the post-mortem examination. His involvement in every aspect of the case in the circumstances of this case where the appellants claim that it was a cooked up story in order to silence them for demanding for their properties that were confiscated from them was enough to raise anyone's eyebrows.

PW4 claimed that he was assigned to investigate a robbery case where robbers had wounded the driver of a bodaboda (motorcycle). He went to KIA where he was informed that the robbers had gone to. At KIA he claimed to have found PW1 and PW2 and a short while after he had joined them the appellants came by riding the motorcycle. The witness claimed that the appellants were apprehended by bodaboda riders who started beating them and he had to intervene to rescue them. No bodaboda rider ever testified in court concerning the incident.

PW1 and PW2 claimed that it was Elias Joseph who informed them that their relative who was on his way from Arusha to Mererani had been waylaid by robbers and wounded. It is strange that Elias Joseph who was a crucial witness never testified in court.

The evidence of PW5 who claimed to have taken the 1st appellant's statement was also highly suspect. He claimed that on 14/12/2010 he went to Bomang'ombe to take down the 1st appellant's statement. On being cross-examined he said that he saw the deceased still alive at scene of crime with a wound on the right hand and two wounds on the head. PW5 could not be telling the truth as he came into the picture long after the deceased had been removed from the scene of crime. Moreover, PW3 did not mention that PW5 also visited the scene of crime. No wonder the appellants claimed that the case was framed up against them. In view of such unreliable evidence we will not hesitate to say that the appellants' convictions were unfortunate.

Both Mr. Akida and Ms. Mndeme expressed their concern about a grave irregularity that was apparent on the face of the record. They pointed out that the judgment was delivered a day before summing up to assessors. At first we thought there might have been a typing error with regard to the dates but upon close scrutiny we were not sure if that

was the case. The record shows that on 07/02/2014 both the State Attorney and the defence counsel prayed to court to assistit by filing written submissions. The court granted the prayer and ordered that written submissions be filed by 19/02/2014. There is also an entry at page 26 of the record that summing up to assessors would be on the same day. The record however shows that judgment was delivered a day before the final day of filing written submissions and before summing up to assessors. On the same day, 18/02/2014 Authorityfor Detention was issued. The learned trial judge in her judgment referred to the opinions of assessors but it is curious that judgment was delivered on 18/02/2014, a day before the summing up which the record shows was on 19/02/2014.

As it was, judgment was delivered before the trial judge had had the benefit of the written submissions on behalf of the appellants. Mr. Akida rightly pointed out that if the defence counsel had an opportunity to file written submissions then probably the anomalies in the case might have been brought to the attention of the trial judge and she would not have arrived at the decision she did.In all criminal proceedings great care has to be taken because the consequences may result in the curtailing of someone's liberty. In murder cases accused

case has been proven beyond reasonable doubt.

It was in the light of the above considerations that we allowed the appeals by Raymond George @ Kakaa and Joseph John, quashed their convictions, set aside their sentences and ordered their immediate release from prison.

Dated at Arusha this 09th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL