IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 305 OF 2015

KASHINJE JULIUS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Tabora)

(Mrango, J.)

Dated the 12th day of June, 2015

In

Criminal Session Case No. 181 of 2012

JUDGMENT OF THE COURT

11th & 19th April, 2016

MWARIJA, J.A.:

The appellant was arraigned before the High Court at Tabora on information for murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. He was convicted and sentenced to suffer death by hanging.

The prosecution depended on the evidence of six witnesses. According to PW1 Dedan Abednego Semwenda the deceased's father, on 1/1/2010, in the morning, the deceased who was until the material date of his death living with him (PW1) at Nyasa Mpya, Nzega, left home for work. He was operating a commercial motorcycle business. The motorcycle, he said, belonged to the deceased's brother, one Emmanuel Dedan Semwenda who was at the material time studying at a College known as St. Aggrey. As to the evidence of ownership of the property, PW1 said that the registration card of the motorcycle was in the name of one Geoffrey Godfrey Maliyawone who purchased the property from a certain shop in Kahama.

At about 22.00 hours on that date, PW1 received information that the deceased had been admitted at Nkinga Hospital following a stab wound inflicted on him by an unknown person. When PW1 arrived at the hospital, he found that the deceased had died. In February, 2011 information was received that the motorcycle in question was sold to one person at Maganzo, Shinyanga. PW1 went there with a police officer and found a motorcycle which he identified to be the one which was being operated by the deceased. It was found with one mechanic who told them that the

same was taken to him for repair. The mechanic led them to one Yasintha Leornard Ishengoma (PW3) who, upon being questioned, said that she bought it from the appellant vide a sale agreement dated 2/2/2011 signed in the presence of the Ward Executive Officer, Bugoro Ward.

The Ward Executive Officer (WEO), Petro Masunga (PW6), agreed that he prepared the sale agreement. He said that when the appellant and PW3, who were known to him before, appeared before him for the purpose of signing an agreement for sale of a motorcycle, he demanded to be shown the motorcycle's registration card. He was told by the appellant that he left the card at Busangwa Village and that when he later asked for it, he was told by his brother that it was lost. The WEO then advised the appellant to go to police and obtain a loss report. After the appellant had obtained that report and the TRA receipt witnessing payment of the requisite fee for a duplicate card, PW6 "attested" the agreement. According to his evidence, PW3 paid Shs 1,300,000/= to the appellant as a purchase price of the motorcycle.

On her part, PW3 said that she went with the appellant to police station so that he could obtain a loss report as advised by PW6. At police station they met a Police Officer No. F.3076 D/CPL Geoffrey Tibakyenda

(PW2) whom she had known before. According to her evidence, the said police officer also came to realize later that PW3 was her sister as she hailed from Bukoba. He opened a loss report after he had seen the motorcycle. He also inquired about the shop where the motorcycle was bought. He was told by the appellant that it was bought from a shop in Shinyanga, and on that information he went to that shop in the company of PW3 and the appellant. The shopkeeper explained that the motor cycle was sold from that shop's branch at Kahama. PW2 appeared to have been satisfied with that explanation and thus left PW3 and the appellant to go ahead with preparation of a sale agreement.

After a period of about a week, PW2 was informed by the OCD that the motorcycle was stolen during a murder incident. The transaction which he assisted to accomplish thus turned out to have its origin in a suspicious criminal act. He initiated investigation by contacting PW3 and inquired from her about the motorcycle. He was informed that she had sent it to a mechanic for repair. PW2 went together with PW3 and PW1 to where the motorcycle was being repaired and thereafter arrested the mechanic and PW3. The appellant was later arrested and charged while the mechanic and PW3 were released.

As to PW3, her side of the story goes thus: One week after she had concluded the sale agreement, the police arrived at her home in Mwigubi and told her that the motorcycle which she had bought was a stolen property. To exonerate herself, she assisted the police in the arrest of the appellant by leading them to where she believed he could be found. The appellant was later arrested at Nyasaba area. She maintained that she bought the motorcycle from the appellant. On interrogation by NO.E.8195 D/CPL Kanasi (PW4) who was the investigator of the case, the appellant explained that he bought the motorcycle from one Majaliwa, a resident of Ziba.

In his defence the appellant denied the offence. He blamed PW2 contending that he cooked the case out of a grudge which existed between them. According to his evidence, he was employed by PW2 to sell fuel. It happened that on 10/2/2011 at around 11.00 a.m. while on duty at the PW2's kiosk, certain police officers arrived there and arrested him on the allegation that he was trading without business licence. He told them that the business was owned by PW2 and that he (appellant) was a mere employee. The police released him but took away the fuel. When he was informed about what had happened, PW2 went to the kiosk and contrary

to the appellant's expectation, he found himself being scolded by PW2 without any justification.

According to the appellant, what befell him thereafter was to him a clear manifestation of the grudges harboured against him by PW2. He said that on the next day at 9.00 a.m., he was arrested by one police officer called Lameck and sent to police station, Shinyanga. On 12/2/2011, he was taken to a room where he was shown to a certain woman and on 15/2/2011 he was sent to Igunga Police Station and locked-up. On 16/2/2011 while in police lock-up, he said, he was tortured by being severely beaten and as a result of the torture, on 17/2/2011 he was admitted in hospital until on 22/2/2011. He was later charged in this case.

After a full trial, the High Court found the appellant guilty as charged. He was convicted and sentenced as herein above stated. Aggrieved by conviction and sentence, he has preferred this appeal. In the memorandum of appeal filed by his counsel, the appellant raised three grounds protesting his innocence:

"1. *That the learned trial judge erred in law in invoking the doctrine of recent possession to convict the appellant.*

2. That the learned trial Judge erred in law in holding that the circumstantial evidence on record irresistibly pointed at the Appellant as the person who killed the deceased DICKSON S/O DEDAN @ SEMWENDA.

3. That the learned trial Judge erred in law and in fact in holding that the prosecution has proved the case against the Appellant beyond reasonable doubt."

At the hearing of the appeal, the appellant was represented by Mr. Mugaya Mtaki, learned counsel while the respondent Republic was represented by Mr. Iddi Mgeni, learned State Attorney. Submitting in support of the first ground of appeal, Mr. Mtaki argued that the learned trial judge erred in invoking the doctrine of recent possession to convict the appellant. Had the learned judge considered the applicable test for

founding conviction on the doctrine, the learned counsel argued, the doctrine would not have been applied to convict the appellant. Citing the case of **Kefa Rashid & 4 others v. The Republic**, Criminal Appeal No. 68 of 2013, he stressed that since the prosecution did not establish the factors which are essential for the doctrine of recent possession to apply, the High Court wrongly founded the appellant's conviction thereon. He said that in order for the doctrine to apply, the appellant must firstly, be found in possession of the property, secondly, the allegation that the property belonging to the deceased must have been proved, thirdly that it must be proved that the property was recently stolen and fourthly, that the property was the one which was stolen in the course of commission of the offence charged. Mr. Mtaki submitted that, all the above stated factors were not proved and for this reason, he said, the doctrine was wrongly applied.

On the 2nd ground, Mr. Mtaki submitted that there was no direct evidence implicating the appellant with the death of the deceased. It was because of this reason, Mr. Mtaki argued, that the appellant's conviction was also based on circumstantial evidence. He argued that in this case, the factors stated in the case of **Simon Musoke v. R,** (1958) E.A 515

were not established. when he was required by the Court to submit on whether or not the assessors were directed on the point concerning circumstantial evidence, the learned counsel argued, that although the learned trial judge based conviction on circumstantial evidence, he did not direct the assessors on the nature of such evidence and the situations in which the court may base conviction thereon.

On the 3rd ground, Mr. Mtaki challenged the prosecution evidence arguing that the same was to a large extent, unreliable. He said, for example, that the evidence of PW2 and PW3 was contradictory as regards the person who arrested the appellant. Furthermore, the learned counsel argued, the evidence of PW2 was not credible on the account that he physically participated to assist the appellant and PW3 to make payment to the TRA for processing a duplicate card of the motorcycle. He added that the evidence was generally lacking as regards the ownership of the motorcycle.

In response, Mr. Mgeni indicated at the outset that the respondent Republic supported the appeal. He agreed with the submission made by the learned counsel for the appellant in support of all grounds of appeal and the point of law raised by the Court on whether or not the

assessors were directed on the nature and scope of circumstantial evidence before the learned judge applied it to convict the appellant. He argued that while the doctrine of recent possession was not properly applied, the High Court wrongly based the appellant's conviction on circumstancial evidence because it did not direct the assessors on it.

With regard to the 1st ground of appeal, Mr. Mgeni agreed with Mr. Mtaki that the doctrine of recent possession was misapplied because the appellant was not found in possession of the motorcycle. He said that the property was found in possession of PW3 who was initially arrested but was later released. He cited the decisions in the cases of **Joseph Mkumbwa & Anr v. R,** Criminal Appeal No. 94 of 2002 and **Abeid Malifedha & Anr. v. R,** Criminal Appeal No. 403 of 2013 (both unreported) and urged us to find that the doctrine of recent possession was improperly applied.

On the finding by the trial High Court that the doctrine was applicable on the basis of constructive possession Mr. Mgeni faulted that finding arguing that it is erroneous because ownership of the property was not at all established. He referred us to the missing link in the prosecution evidence; that the motorcycle's registration card was not tendered and also

that Emmanuel Dedan Semwanda who was alleged to be the owner of the motorcycle was not called as a witness to prove ownership of the property. For this reason, Mr. Mgeni argued, the finding that the appellant was in constructive possession of the motorcycle was erroneous.

On the 2nd and 3rd grounds, he submitted that, it was imperative for the learned judge to state in the judgment, the reasons for his finding that the available circumstantial evidence had met the necessary test before he acted on it to convict the appellant. On the required test for application of the doctrine, he cited the case of **Simioni Musoke v. R** (1958) 1 E.A 715 and argued that in this case, the learned trial judge did not make a finding before it convicted the appellant on the basis of that evidence.

On the arguments concerning the weight of the prosecution evidence, the learned State Attorney agreed that the evidence was lacking in many aspects, firstly, that some vital witnesses were not called, such as the shopkeeper of the shop at Shinyanga who told PW2 that the motorcycle was sold at Kahama branch and secondly, that the evidence of PW2 and PW3 was materially contradictory as regards the time and the manner in which the appellant was arrested.

We have duly considered the arguments put forward by the learned counsel for the parties. With regard to the 1st ground of appeal, it is trite law that an accused person's conviction may be based on the doctrine of recent possession. The position extends to a person charged with the offence of murder. In the case of **Rex v. Bakari Abdulla** (1949) 16 EACA [cited by the Court of Appeal of Kenya in **Ogendo v. Republic** (2003), E.A 222], the then Court of Appeal for Eastern Africa stated as follows:-

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

In the case of **Ally Bakari & Pili Bakari v. Republic** (1992) TLR 10, this Court stated the conditions for application of the doctrine as follows:-

> *"To be sure, if upon a charge for murder it is proved that the deceased was murdered in a house and that the accused stole goods from the house, as was the case here, and that the accused was few days afterwards found in possession of the stolen goods, that raised 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."*

That position was also stated in the case of **Manazo Madundu & Anr. v. R** (1990) TLR 92.

Although it would appear from the above cited authorities, that the doctrine applies when the offence of murder is committed in the course of stealing a property from a house, the position is that the application of the

doctrine is wide enough to cover an accused person who committed murder in the course of stealing under other circumstances, not necessarily in a house. Where therefore, an accused person is found in possession of a recently stolen property of a deceased murdered in a field, conviction may be founded on the doctrine. In the case of **Mustapha Maulidi Rashid v. The Republic**., Criminal Appeal No. 241 of 2014 (unreported) the appellant was found guilty of murder after it had been established that he was found in possession of a motorcycle shortly after the deceased had been murdered. The appellant hired the motorcycle operated by the deceased, took him to the field and murdered him.

Having stated the position of the law on the application of the doctrine, the crucial matter for determination on the first ground of appeal is whether or not under the circumstances of this case, the doctrine was properly invoked by the trial Court. From the arguments advanced by the learned counsel for the parties, we agree that the learned trial judge erred in basing the appellant's conviction on the doctrine. As submitted by Mr. Mtaki, before it could rely on the doctrine, the Court must have satisfied itself that the necessary factors for application of the doctrine were proved. The factors which require proof were aptly stated in the case of **Joseph**

Mkubwa & Anr. v. The Republic, Criminal Appeal No. 94 of 2007 (unreported) cited by Mr. Mgeni. In that case, the Court stated as follows:-

> *"For the doctrine to apply as a basis of conviction, it must positively be proved,* ***first*** *that the property was found with the suspect,* ***second*** *that the property is positively the property of the complainant,* ***thirdly*** *that the property was recently stolen from the complainant, and last that the stolen thing in possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen /obtained during the commission of the offence charged."*

Where therefore, the factors stated above are not established, the doctrine cannot be safely applied. In his judgment, the learned trial judge stated generally that the prosecution had adduced sufficient evidence to meet the requisite test for application of the doctrine. With respect, we do not find that such was the position. This is because firstly, contrary to the finding of the trial Court, the motorcycle was found in possession of PW3, not the appellant and secondly, its ownership was not at all proved. The

appellant was connected to the possession of the properly by PW3's allegation that she purchased it from him. There were different versions of evidence on the question of ownership of the motorcycle. It was in evidence that the motorcycle belonged to Emmanuel Dedan Semwenda but also that the registration card bears the name of Geoffrey Godfrey Maliyawone. Failure to tender the registration card or to produce evidence from the shop where the property was sold rendered the prosecution evidence weak on the aspect of ownership of that property which was the subject of the charge. Without establishing these factors, the doctrine of recent possession cannot be applied, not even a constructive possession, because the owner of the property shall first be clearly disclosed and the fact that it was recently stolen must be established.

With regard to the 2nd and 3rd grounds, we agree also with the counsel for the parties that the appellant's conviction was improperly based on circumstantial evidence. It is a correct factual position that according to the record, the assessors were not properly directed on circumstantial evidence for the learned judge to get their opinion before basing conviction thereon. In the summing up, the learned judge addressed the assessors as follows:-

"In a case, the Court can base conviction on circumstantial evidence or direct evidence if it is satisfied that such evidence pin points the guilt of accused and is incapable of any other explanation to the contrary."

With respect, apart from being informed of the scope of circumstantial evidence, the assessors were entitled to a summing up on how that evidence featured in the case, its nature and the conditions under which it may found an accused person's conviction. Failure to direct the assessors on that vital point of law is a fatal omission. In the case of **Tulubuzya Bituro v. Republic,** (1982) TLR 264, having drawn inspiration from the decision in the case of **Bharat v. The Queen** (1959) A.C. 533, this Court stated as follows on the effect of a failure to direct or misdirect assessors on a vital point of law.

*"Since we accept the principal in **Bharat's case** as being sensible and correct it must follow that in a Criminal trial in the High Court where assessors are misdirected on a vital point **such trial cannot be construed to be a trial with the aid of***

assessors. The position would be the same where there is non-direction to the assessors on a vital point." *[Emphasis added].*

Since therefore, in this case, the assessors were not properly directed on the circumstantial evidence, the trial is deemed to have been conducted without the aid of assessors. The effect of the omission is to render the trial a nullity.

Having so found, the proper course would have been to order a retrial. Having however, considered our finding on the first ground, we think the order will not be appropriate. We held on that ground that the prosecution had failed to prove the allegation that the appellant was found in possession of the motorcycle and that the same belonged to the deceased. We are further reinforced in that view by the nature of the available evidence on record. We are, without hesitation, in agreement with the counsel for the parties that apart from being insufficient, the prosecution evidence is materially contradictory, in particular the evidence of PW2 and PW3 who were crucial witnesses for the prosecution. They gave contradictory evidence as regards the manner and the place at which the appellant was arrested. On her part, PW3 stated as follows:-

"We went to Nyasaba ... on seeing us, the accused opted to run away, the police opened fire (shot on the air) and they managed to arrest him."

And when she was cross-examined, she said:-

"It is not true that PW2 has arrested the accused and took him in motorbike."

On his part, PW2 stated as follows:-

"We went to Bunambiyu Village and I saw the accused stood at the Bus Stop. I arrested him and tied his hands."

On cross-examination, he said:-

"I was not armed when I arrested the accused."

As stated above, that contradiction is material and obviously, it raises doubt on the credibility of the two witnesses.

Having said so, we find in conclusion, that on the basis of the foregoing reasons, an order of retrial will not be appropriate. For this reason in the exercise of the powers conferred on the Court by S. 4 (2) of the Appellate Jurisdiction Act (Cap.141 R.E. 2002) therefore, we hereby quash the proceedings and judgment of the High Court and set aside the

sentence. The appellant shall be released from prison unless he is otherwise lawfully held.

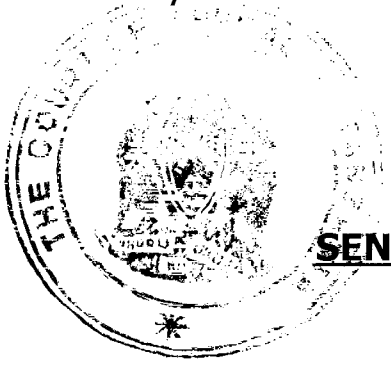
DATED at TABORA this 18th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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



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