IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 311 OF 2015

RAMADHANI MASHAKA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Tabora)

(Mruma, J.)

Dated 3rd day of November, 2014
in
Criminal Session Case No. 101 of 2012

JUDGMENT OF THE COURT

12th & 18th October, 2016

MBAROUK, J.A.:

The appellant and another, not subject of this appeal, were arraigned before the High Court of Tanzania sitting at Tabora for the offence of murder contrary to section 196 of the Penal Code [Cap 16 of R.E. 2002]. He was the only one convicted and sentenced to suffer death by hanging.

The facts of the prosecution case relied on the evidence of eight (8) witnesses. Their evidence was to the effect that on 26th November, 2011 at evening hours, the appellant went to the house of Martha d/o Elias @ Bunyoro which is situated at Uzunguni area within Nzega Township and strangulated her to death before stealing her Toyota Rav 4 motor vehicle and her various domestic appliances.

Looking at the record of proceedings, it is evident that there is no witness who saw the appellant killing the deceased or robbing her properties. That means, the prosecution case generally relied on circumstantial evidence.

In this appeal, Mr. Kamaliza Kayoga Kayaga, the learned advocate represented the appellant. Whereas Mr. Iddi Mgeni, learned State Attorney represented the respondent/Republic.

At the hearing, Mr. Kayaga requested to withdraw a memorandum of appeal preferred earlier on by the appellant himself and remain with the memorandum of appeal preferred by him which contained four grounds of complaint as follows:-

"1. That the appellant was denied of a fair trial as the Postmortem Report (Exhb.P.1) was not read to him and informed his statutory right to require the person who made it for cross-examination.

2. *That the Caution Statement of the Appellant (Exh. P.6) was wrongly admitted in evidence and wrongly relied upon by the Honorable trial Judge in convicting the appellant.*
3. *That the statement of MOSHI S/O SELEMAN @ KASEO (Exh.P.7) was wrongly admitted in evidence.*
4. *The Doctrine of recent possession was wrongly invoked by the Honorable trial Judge."*

Before we discuss the merit of the appeal, we wish to point out that, the Court on its own at some stage in the hearing of the appeal discovered four prosecution witnesses namely PW2 PW3, PW7 and PW8 gave evidence without their statements or substance of their evidence read at the stage of committal proceedings. That was wrong. It infringes Section

289 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA). The section reads:

> *"289 – (1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.*
>
> *(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give."*

This Court in the case of **Hamisi Meure v. Republic** [1993] TLR 213 held as follows:-

> *"(i) The learned Trial Judge erred in law in allowing evidence of the Justice of the Peace to be given at the trial when his statement had not been read at the*

committal proceedings and no notice had been given to the appellant or his advocate, and therefore, the extra-judicial statement was wrongly admitted;

(ii) Section 289(2) of the Criminal Procedure Act, 1985, makes it mandatory for not only the name and address of the witness to be supplied, but also the substance of the evidence which he intends to give;"

Both learned counsel supported the Court on that discovery.

Arguing in support of the 1st ground of complaint, Mr. Kayaga submitted that the record shows that at the preliminary hearing when the Postmortem Examination Report was tendered as an exhibit (Exhibit P1), section 291 (3) of the CPA ought to have been complied with even if there was no objection for it to be tendered on the part of appellant's advocate. He further submitted that, the trial court was duty bound to explain to the appellant that he could have called the author who wrote the said postmortem report for cross

examination if he desired. Mr. Kayaga added that, the contents of Exhibit. P1 ought to have been read at the committal proceedings, but the trial court has failed to do so. In support of his contention, he cited the decision of this Court in the case of **Ramadhani s/o Hamisi Mwenda v. The Republic**, Criminal Appeal No. 116 of 2008 (unreported). For such non-compliance of section 291(3) of the CPA, Mr. Kayaga urged us to expunge it from the record as the appellant was denied a fair trial.

Arguing in support of the 2nd ground of appeal which is to the effect that the cautioned statement (Exhibit P.6) was wrongly admitted, Mr. Kayaga submitted that, even if the learned advocate for the appellant at the High Court did not object for its admission, he said, the trial court should have ascertained the propriety of the cautioned statement, its voluntariness or truth of the contents of the statement. In support of his argument he cited the decision of this Court in the case of **Juma Kaulule v. The Republic,** Criminal Appeal No. 281 of 2006 (unreported). Mr. Kayaga added that, there

is evidence to the effect that PW1 and PW5 arrested the appellant on 29-11-2011 as shown at pages 18 and 58-62 of the record of appeal. However, he said the record also shows that the appellant's cautioned statement was recorded on 3-12-2011 which means it was recorded after five days from the day he was arrested. He said, this was contrary to section 50 (1)(a) and (b) of the CPA. In support of his submission, he cited to us the decision of the Court in the case of **Mashaka Makesha v. The Republic,** Criminal Appeal No. 13 of 2014 (unreported). He said as there was no extension of time or an explanation given, he prayed for Exhibit P.6 to be expunged.

In his submission to support the 3rd ground of appeal, Mr. Kayaga submitted that the requirement under section 34B (2) of the Evidence Act was contravened. He said, this is because for Exhibit P.7- the statement of Moshi s/o Selemani @ Kaseo to have been admitted in evidence, the prosecution had first to prove that the entire requirements laid down in that section were complied with. After all, he said the maker of that statement was dead and he could not have been called as a

witness. To support his averment, he cited the decision of this Court in the case of **Ramadhan s/o Hamisi Mwenda v. The Republic,** Criminal Appeal No. 116 of 2008 (unreported). He therefore urged us to expunge that statement tendered by PW.8.

As to the 4th ground of appeal, Mr. Kayaga submitted that the doctrine of recent possession was wrongly invoked as the properties which were allegedly stolen from the deceased were not found in possession of the appellant but from other prosecution witnesses. He said, other than a mobile phone allegedly belonged to the deceased, the appellant was not found with anything stolen from the deceased. He further contended that as shown at page 186 of the record in the judgment, the trial court reached to a conclusion that the prosecution has failed to establish that the mobile phone belonged to the deceased because, they have failed to produce its line which they claimed to have seized together with the handset. In support of his submission, he cited to us the decision of this Court in the case of **Joseph Mkumbwa**

and Another v. Republic, Criminal Appeal No. 94 of 2004 (unreported).

All in all, Mr. Kayaga was of the view that the prosecution evidence was very weak to prove the offence of murder. He therefore urged us to allow the appeal and set free the appellant.

On his part, the learned State Attorney from the outset indicated not to support the appeal. In his reply to the 1st ground of appeal, the learned State Attorney submitted that, as far as the appellant was represented and his advocate had no objection for the postmortem report to be tendered, the trial court correctly used its discretion to allow that exhibit to be admitted as an exhibit. He therefore urged us to find that the 1st ground of appeal is devoid of merit.

As to his reply to the 2nd ground of appeal, the learned State Attorney simply submitted that as far as there was no objection when the cautioned statement was tendered, even if the requirements under section 50(1) was violated, that ground of complaint has no merit. He added that, as far as no

trial with trial was conducted, they had no chance to explain why the police was late in recording the cautioned statement of the appellant.

As regards his reply to the 3rd ground of appeal, he readily conceded that the statement of Moshi s/o Seleman@ Kaseo who was dead was wrongly admitted in evidence.

Finally, in his reply to the 4th ground of appeal, the learned State Attorney submitted that, the appellant was found with a mobile phone belonging to the deceased. Also he said that, PW6 recognized the fan sold to him by the appellant and that PW2 recognized items such as the TV and the car as they belonged to the deceased and they were seen with the appellant.

Having examined the submissions made by both sides, the following is our decision on each ground of complaint. As to the 1st ground of complaint, we agree with Mr. Kayaga that the trial court was duty bound to explain to the appellant that he could have the doctor called who examined the deceased for cross examination if he desired. This is a pre-condition set

in compliance with section 291 (3) of the CPA. Failure to inform the appellant who was the accused of his right of calling a person who made that report renders the report produced to be invalid, and that leads such a report liable to be expunged as the appellant would have been denied a fair trial. As the trial court has failed to inform the appellant of his right to require the person who authored the post mortem report that renders the report invalid and we hereby expunge it. After having expunged it that means the cause of death was not well established.

As for the 2nd ground of appeal, we are of the considered opinion that, there is no doubt that the cautioned statement of the appellant has violated the requirements of section 50(1) (a) and (b) of the CPA. As pointed out by Mr. Kayaga, the record shows that the appellant was arrested on 29-11-2011 by PW.5. However, the record also shows that his cautioned statement was recorded on 3-12-2011 which means five days have passed. It is now settled that a cautioned statement recorded outside the prescribed time under section

50(1) (a) and (b) renders it to be incompetent and liable to be expunged. This Court in the case of **Morris Agunga and Two others v. The Republic,** Criminal Appeal No. 100 of 1995 (unreported) stated as follows:-

> *"In our view an alleged confession made after such considerable and unexplained lapse of time is not consistent with the view that the confession was made voluntarily."*

In the case of **Janta Joseph Komba, Adamu Omary, Seif Omary Mfaume and Cuthbert Mhagama v. Republic,** Criminal Appeal No. 95 of 2006 (unreported), the Court stated as follows:

> *"We agree with learned counsel for the appellants that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. The legislature did limit the time within which a suspect could be in police custody for investigative purposes and we believe that this was done with sound reason."*

In this case there is no doubt that the cautioned statement was taken five days after the appellant's arrest which was well beyond the initial period of four hours prescribed by section 50 (1)(a)of CPA. There is also no doubt that no extension was requested from the court and no explanations were furnished why the appellant had to be restrained for five days before the police took his cautioned statement. See **Meshaki Abel Ezekiel v. Republic**, Criminal Appeal No. 297 of 2013 and **Martin Manguku v. Republic,** Criminal Appeal No. 194 of 2004 (both unreported) to name a few.

In addition to that, in the instant case, the record shows that when the cautioned statement was tendered at the trial court, the advocate for the appellant had no objection for it to be tendered. However, this Court in the case of **Morris Agunga** (supra) held that a trial judge has a duty to consider the admissibility of the alleged confession notwithstanding that its admissibility in evidence was not objected. In the circumstances, we are of the opinion that as the trial judge has failed to consider as to whether the confession was

voluntary notwithstanding that its admissibility was not objected, hence that omission renders the cautioned statement to have been wrongly admitted and liable to be expunged. For that reason, we hereby expunge it.

As to the 3rd ground of appeal, we are of the view that the statement of Moshi Seleman @ Kaseo (Exh.P.7) was wrongly admitted in evidence. This is for the reason that PW8 WP 5710D/C Rahel was not listed and her statement not read at the committal proceedings as required under section 289(1) of the CPA. As pointed out earlier according to the case of **Hamisi Maure** (supra) as stated by section 289 (1) of the CPA, that a witness whose statement or substance of evidence was not read at the committed proceedings, shall not be called by the prosecution unless a notice of writing to the accused or his advocate to call such a witness is given. Hence, for such noncompliance with the requirements under section 289(1) of the CPA, we are constrained to expunge PW8's evidence.

As to the last ground of appeal, as found in the 3rd ground, the evidence of PW2 who recognized TV and a car as they belonged to the deceased. However, according to section 289(1) of the CPA he could not have been called as a witness because his statement or substance of evidence was not read at the committal proceedings. Hence, we expunge his evidence. Also the evidence of PW3 John Mwambeki, who testified that the deceased acquired a loan in order to buy the Rav 4 car and that he used to see the deceased driving that car is hereby expunged as her statement or substance of his evidence was not read at the committal proceedings as required by section 289 (1) of the CPA.

As to the evidence of PW6 Mitimingi Dickson who testified that a fan was sold to him by the appellant, we decline to accept such evidence as there was no description given to prove that the fan tendered at the trial court was the same as that owned by the deceased. This Court in the case of **Alhaji Ayub Msumari and others v. Republic,** Criminal Appeal No. 136 of 2009 (unreported) held as follows:-

"...before a court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal Case,... it must positively be proven, ***first,*** *that the property was found with the suspect;* ***secondly,*** *that the property is positively the property of complainant;* ***thirdly,*** *that the property was stolen from the complainant, and lastly that the property was recently stolen from the complainant.*

In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and any discredited evidence on the same cannot suffice, no matter from how many witnesses."

Also See **Ally Mbelwa v. Republic** Criminal Appeal No. 109 of 2015 (unreported).

As pointed out herein above, it clearly shows that the conditions stated in the case of **Alhaji Ayubu Masumari** (supra) were not positively proven by the prosecution. We

therefore find the doctrine of recent possession was improperly invoked by the trial court.

Considering all what we have stated herein above, we find that the prosecution has failed to prove their case beyond reasonable doubt. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant to be released from prison forthwith, unless he is lawfully held in connection with another matter.

DATED at **TABORA** this 15th day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL