

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 467 OF 2015

KANDI MARWA MASWE APPELLANT
VERSUS
THE REPUBLIC RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 2nd day of April, 2006 in
H/C Criminal Session Case No. 121 of 2006

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JUDGMENT OF THE COURT

11th & 19th October, 2016

RUTAKANGWA, J.A.:

The appellant and one Juma Sabula @ Chacha s/o Kichere, were arraigned before the High Court sitting at Mwanza ("the trial Court") for the murder of one Mayenga s/o Regu @Matimo on the night of 6th March, 2004, at Juma Island in Lake Victoria.

The two accused persons denied the charge. The prosecution had to call seven witnesses in its bid to prove the murder charge. These were PW1 Charles Mwita, PW2 Marwa Mwita Magori, PW3 Bazili Mkobe, PW4 No. F 115 S/Sgt. Elisante, PW5 No. B 9792 D/Sgt. Chrisostom, PW6 WP. No. 3485 D/Cpl. Eliaichi and PW7 Dr. Msekela Nyakiroto.

As of March, 2004, PW1 Mwita was living at Juma Island, earning his living from the business of fishing. In this business, he had two fishing boats and the actual fishing in the lake was being done by the deceased Mayengo and one Gibson.

On the fateful night the two fishermen went fishing with the two boats one of which was fitted with an outboard 15 HP Yamaha engine. According to PW1 Mwita, he had hired the said engine with serial No. 509186 from one Ihonde Charles, who had issued him with the engine's receipt. However, the cash receipt No. 1557 of 5/5/1998 which he tendered in evidence as Exh. P1, bore the name of Madori Ihonde, who according to the evidence are two different persons. The two fishermen, according to PW1 Mwita, did not return home at the scheduled time. Out of sheer apprehension, he sent persons, whose identities he failed to disclose, in search of the two fishermen. However, in due course, Gibson was brought home by other fishermen. He had sad tidings.

Gibson reported to PW1 Mwita that while they were going on with the fishing during the night, they had the misfortune of falling into the hands of lake pirates who not only physically assaulted him, but also robbed the engine and worse still threw Mayenga into the lake, thereby drowning him. As recounted by PW1 Mwita, the said Gibson, told him that he had not identified the robbers.

On 26th March, 2004, PW1 Mwita was informed that the stolen engine had been recovered and was at Katunguru Police Station. He hastened to Katunguru, where he allegedly positively identified his earlier on robbed boat engine. Without

showing the said engine's serial number, its brand name, or any other identifying mark, PW1 Mwita, as the record of proceedings in the trial court shows at page 15, after "looking at the boat engine in court", tendered one engine in court which was accepted as P2. All the same and very significantly, while under cross-examination from Mr. Njelwa, learned advocate for Juma Sabula, he tellingly said:-

"The number of the engine is not there and therefore the stolen engine is not before the court."

Furthermore, while responding to a question put to him by one of the assessors, he had said:-

"The plate number of the engine is missing in Exhibit P2.

When I went to the police the plate No. was also not there..."

It was PW2 Magori and PW3 Mkobe who testified on how they were led by the appellant to a place where they unearthed two boat engines which had been hidden there and the same were handed to the police. PW1 Mwita was not present then. It is, indeed, noteworthy that these two witnesses did not identify exhibit P2 to be one of the two recovered engines. Their evidence, therefore, did not in any way incriminate the appellant.

The evidence of PW4 No. F 115 D/Sgt. Elisante related to the exhumation of the body of the deceased Mayenga Regu on 6th May, 2004, and on how PW7 Dr. Msekela Nyakiroto had performed a post-mortem examination on it. The said examination had established that the cause of death was "severe head injury".

Again, the evidence of these two witnesses did not implicate the two accused persons with the murder of Mayenga Regu.

The apparently damning evidence came from PW5 No. B 9792 D/Sgt. Chrisostom. It was the evidence of this witness that the appellant readily confessed to have been involved in the murder of Mayenga and tendered in evidence the alleged confessional statement of the appellant as exhibit P3. PW6 WP3485 D/Cpl. Eliaichi gave identical evidence.

Although PW6 D/Cpl. Eliaichi testified to have been present when two stolen engines were allegedly recovered, she did not identify at all exhibit P2 as one of those engines. The evidence of PW5 D/Sgt. Chrisostom regarding exhibit P2 is more significant for his bold assertion that:-

“I know PW1 and he came at Katunguru Police station to write his statement. PW1 did not come to identify his stolen engine.”

[Emphasis is ours].

In their sworn evidence both accused denied complicity in the robbery which led to the death of Mayenga. The appellant categorically denied having voluntarily confessed to anybody of murdering Mayenga.

After an elaborate summing up to the two assessors who had aided the learned trial judge, the unanimous verdict was too unequivocal to miss. Each assessor gave her/his own opinion as mandatorily required under section 298(1) of

the Criminal Procedure Act. Cap. 20, Vol. 1 R.E. 2002

The assessors opined thus:-

“1. Hawa Swedi:

In my opinion, the first accused is not guilty of murder. This is from the fact that, he was only found with the engine but no one saw him killing the deceased.

As regard the second accused I find him not guilty to the charged offence as there is no evidence to implicate him to the charged offence.

1. Sospeter Mukanza:

Upon having heard the evidence from the pros. there is no evidence to establish that the accused did kill because the offence occurred at night.

As such, I pray that both accused be acquitted and set at liberty.”

In his judgment, the learned trial judge found Juma Sabula @ Chacha s/o Kichore not guilty and acquitted him. However, he was convinced of the guilt of the appellant and accordingly convicted him, notwithstanding the unanimous verdict of the assessors to the contrary.

We have found the route taken by the learned trial judge before reading the guilty verdict, a very unique and tortuous one.

The learned trial judge partly reasoned as follows:-

As regards the first accused as submitted by learned State Attorney Tibilengwa, the evidence relied upon by the prosecution to implicate the accused to the charged offence is the doctrine of recent possession of the stolen property. The property alleged to have been found in the possession of the first accused is the engine which was robbed on the fateful night. The first thing thus for the Court to resolve is whether, the engine that was tendered as exhibit P1, was sufficiently identified to be the one which had been in the possession of the deceased before the incident leading to his death. The identification that was made in Court by PW1 to the engine before he tendered it as exhibit as well as the tendering of the receipt which had been used to purchase it that was admitted by the Court as exhibit P2, convinces this Court to hold that, the engine that was robbed from the deceased was the one that got tendered in Court.

The subsequent question from the foregoing is whether the said engine that is, exhibit P2, had been in the possession of the first accused. It has been the contention of the first accused that, he was not in possession of the alleged boat engine and that, even during its recovery at

where it had been buried, he was not involved in anyway. On the other hand, there have been the testimonies of PW2, PW3, PW5 and PW6, all of which have told the Court that, they were led by the first accused from the Police Post of Katunguru to the place, where two engines were unearthed. Upon dispassionately observing their testimonies, I have failed to find any glimmer of reason as to why I should doubt their testimonies. I am thus convinced that, the first accused was the one who enabled the recovery of exhibit P2 and the other engine, both of which had been buried under the ground. Under the circumstances, the doctrine of being found in possession of recently stolen property in terms of the holding in the case of Paulo Maduka (supra) can properly be invoked.”

Thereafter the learned judge comfortably concluded thus:-

“As opined by the gentle assessors an opinion which I do share the first accused is held culpable to the charged offence of murder and is accordingly convicted of the same.”

Following the conviction, the appellant was sentenced to suffer death by hanging. He was aggrieved by the conviction and death sentence, hence this appeal.

In this appeal, the appellant was represented by Mr. Constatine Mutalemwa, learned advocate, who had also advocated for him in the trial court. The respondent Republic was represented by Mr. Mamti Sehewa, learned Senior State Attorney.

Mr. Mutalemwa had lodged a memorandum of appeal containing four specific grievances.

Before we let counsel for both sides to canvass these grounds of appeal, we found ourselves constrained to ask them to address us first, on the soundness of the trial of the appellant and his conviction on account of the patent failure by the learned trial judge to consider the unambiguous opinions of the two assessors totally exonerating the appellant of the murder of Mayengo. We did so having regard to the mandatory provisions of sections 265 and 298 (1) of the CPA.

The above provisions of the CPA read as follows:-

“265. All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit.

298-(1) When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge and record the opinion.”

The undoubted invaluable role of the assessors in trials before the High Court does not demand an elaborate exposition from us. It is as respected as it is indispensable. Discharging in good faith this rule, they are the eyes and ears of justice when determining issues of fact in any trial with assessors. For this reason, it has long been settled law that although the trial judges are not bound by the assessors' opinions:-

- (i) Where an assessor who has not heard all the evidence is allowed to give an opinion on the case, the trial is a nullity: see, for instance, *Joseph Kabai v. Reg.* (1959) 21 EACA 260;
- (ii) A trial which has begun with the prescribed number of assessors and continues with less than two of them is unlawful: see, for instance, *Clarence Gikuli v. Reg.* (1959) 21 EACA 304; *Nyehese Cheru v. R.* (1988) TLR 140, etc;
- (iii) Where the trial judge does not agree with the opinion of an assessor, or assessors he/she should record his reasons, or else the omission might lead to the vitiation of the conviction: see, for instance, *Baland Singh v. Reg.* (1954) 21 EACA 209;
- (iv) It is a sound practice which has been

consistently followed and should be followed, to give an opportunity to an accused person to object to an assessor:

see, *Tongeni Maata v. R.*, (1991) T.L.R. 59;

- (v) Denying the assessors the opportunity to put questions to witnesses means that the assessors were excluded from fully participating in the trials: see, *Abdallah Bazamiye and Others v. R.*, (1990) T.L.R. 42;
- (vi) Where in a trial with the aid of assessors, there is no summing up of the case to the assessors and as a consequence their opinion not taken, the trial is a nullity: see, *Khamis Nassoro Shomar v. S.M.Z.* (2005) T.L.R. 228; and
- (vii) Where there is inadequate summing up, non-direction or misdirection on ... a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. See, *Said Mshangama @ Senga v. R.*, Criminal Appeal No. 8 of 2014 and *Masolwa Samweli v. R.*, Criminal Appeal No. 206 of 2014 (both unreported), etc.

In the case of *Washington s/o Odingo v. R.*, (1954) 21 EACA 392, the Court of Appeal for Eastern Africa stated that the opinion of assessors is of great value and assistance to a trial judge. Taking a cue from this observation, this Court, in *Abdalla Bazimiye* (supra), held that a trial judge has a duty to take “into judicious account all the views of his assessors”.

The Court went further and succinctly held that:-

“We think that the assessors’ full involvement ... is an essential part of the process, that its omission is fatal, and renders the trial a nullity. We wish to add another thought to this exposition: for our purpose in the Court of Appeal, the informed and full views of the assessors become further necessary when we have to rely on what we might call the *Segesela* principle, that is in the event of the trial judge disagreeing with the unanimous views of his assessors we shall want to determine whether he was entitled to do so. In order to enable us to make that determination meaningfully we must know the judge’s reasons for so disagreeing, and to appreciate those reasons we would have to gauge them against the full and informed views of the assessors ... This need for a judge to give his reasons for disagreeing with the unanimous views of his assessors was annunciated in *Charles Segesela v. R.*, Criminal

Appeal No. 13 of 1973, from a case tried in Tanzania, and we wish to express our approval of it.

For reasons we have endeavored to explain, the High Court proceedings in the case giving rise to this appeal are a nullity...”

It was on account of all these firmly established legal principles on the full and effective involvement and utilization of assessors in trials under the CPA, that we found ourselves compelled to resolve at the outset the pertinent legal issue of whether or not the mandatory provisions of S. 265 of the CPA were complied with by the learned trial judge before finding the appellant guilty of murder and convicting him accordingly.

We are convinced that our task would have been much lighter had we been contending with the issue of infraction of s. 265 of the CPA from the perspective of the principles enunciated above. As is already obvious, that was not the case. This was, in our respectful view, a clear case of a distortion of the unanimous opinions of the two assessors who aided the learned trial judge. Whereas they categorically opined that the appellant and his co-accused were not guilty at all, the learned trial judge, unfortunately, took a contrary view and proceeded on the basis that the assessors had advised him to find the appellant guilty of murder as charged and proceeded to convict him.

Both Mr. Mutalemwa and Mr. Sehewa were forthright in their unanimous opinion. The learned judge did not consider the opinions of the assessors in respect

of the appellant, they stressed. It was their strong submission that this was an incurable irregularity which vitiated the trial of the appellant. The appellant, they pressed, was not tried and convicted with the aid of assessors.

We agree. This is because a trial under the CPA, concludes with either the acquittal of the accused person or his conviction and sentence and the assessors opinions are an inseperable part of the entire process. Where such opinion or opinions is/are not considered at all or are, for whatever reason, distorted to the detriment of any party to the proceedings, the trial cannot be said to have been conducted with the aid of assessors. It becomes a nullity. That was the case here. We accordingly nullify the trial of the appellant, quash his conviction and set aside the death sentence imposed on him.

It was Mr. Mutalemwa's submission, with which Mr. Sehewa was in agreement, that all things being equal, they would have urged us to order a re-trial. But for what appears to us to be obvious reasons, they did not press for a retrial. This was primarily because the prosecution case against the appellant, as admitted by the prosecution counsel at the trial and the learned trial judge, was solely predicated on the "doctrine of recent possession of stolen property," that is exhibit P2 which was wrongly invoked. We share their sentiments.

We believe we have a duty here to re-state what we take to be trite or banal, regarding circumstances under which this doctrine will be successfully invoked in all criminal trials. We are saying so deliberately because, the law on the subject is, upon a plethora of cases, well settled.

In the case of Joseph Mkumbwa and Another v. R., Criminal Appeal No. 94 of 2007, this Court succinctly held thus:-

“For the doctrine to apply as a basis of conviction, it must be positively 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, the property was recently stolen from the complainant, and lastly, that the stolen thing in the possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commission of the offence charged. 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.”

See also, Ally Bakari and Another v. R., (1992) T.L.R 10, Mwita Wambura v. R., Criminal Appeal No. 56 of 1992, Alhaj Ayub @ Msumari and Others v. R., Criminal Appeal No. 136 of 2009, Romara s/o Murosu and Wambura s/o Kingwama v. R., Criminal appeal No. 115 of 2005, Joseph Sera Liumile v.R., Criminal Appeal No. 304 of 2013 (all unreported), George Edward Komouski v. R., (1948) 1 TLR 322 etc.

As this Court lucidly reiterated in Joseph Sera Liumile (supra):-

“... the presumption of guilt can only arise where there is cogent proof that the stolen thing which is possessed by an accused is the very one that was stolen during the commission of the offence... and, no doubt, it is the prosecution which assumes the burden of such proof, irrespective of the event where the accused does not claim ownership of the property.”

As correctly submitted by both counsel in this appeal, even assuming without deciding that the appellant was found in constructive possession of exhibit P2 the prosecution abysmally failed to prove the second and third ingredients of the doctrine as elucidated in the Joseph Mkumbwa case (supra). This is obvious from the evidence of PW1 Mwita and PW5 No. B. 9792 D/Sgt. Chrisostom as already shown above. Indeed PW1 Mwita, the purported owner of exhibit P2, disowned, the said exhibit unequivocally declaring that:-

“... the stolen engine is not before the court.”

Need we say more? We believe not.

From the above analysis, it is increasingly obvious that the doctrine of recent of possession was wrongly invoked here to implicate the appellant with the murder of Mayenga Regu @ Matimo. In our respectful opinion, had the learned trial judge properly evaluated the evidence on record and considered the unanimous opinion of

the assessors, he would not have convicted the appellant of murder or any other kindred offence.

All said and done, we allow this appeal in its entirety. The appellant should be immediately released from prison unless he is otherwise lawfully held.

DATED at MWANZA this 18th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

I certify this is a true copy of the original.

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL