IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., ORIYO, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 285 'A' OF 2015

RICHARD SHIRIMA @ GODFREY DAUD @
BAKARI JABIR @ RICH @ GODII.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Dar es Salaam)

(Kaduri, J.)

dated the 12th day of June, 2015
in
HC. Criminal Session Case No. 83 of 2011

JUDGMENT OF THE COURT

27th July, & 4th August, 2016

MUSSA, J.A.:

In the High Court of Tanzania, at Dar es Salaam Registry, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. The information laid at his door was to the effect that, on or about the 26th day of September 2009, at Kimara Baruti, within the District of Kinondoni, the appellant murdered a

certain Evans Mathias Kimaro, whom we shall hence forth simply refer to as the deceased.

The appellant denied the accusation but, after a full trial, he was found guilty, convicted and handed down the mandatory death sentence (Kaduri, J.). He is dissatisfied and, presently, seeks to impugn both the conviction and sentence but, ahead of our consideration of the points of contention, we deem it opportune to briefly explore the factual background giving rise to the appellant's arrest, arraignment and his ultimate conviction.

From a total of five witnesses, the case for the prosecution was to the effect that the deceased used to have a fixed abode at Kimara Baruti, Dar es Salaam, where he was putting up with his family. His wife, namely, Lilian (PW2) and a nephew called Emmanuel Julius (PW1), were amongst the family members he used to live with. On the evening of the referred fateful day, the deceased was at his office which is located at Ubungo, Dar es Salaam. Around 8.00 p.m. or so, he called his wife (PW2) to tell her that he will arrive late and that she should buy some drinks for him. A little later, upon knocking off from the office business, the deceased made another call to his nephew (PW1) to inform that he was

on his way home. As it were, the deceased was driving his GX100, Corolla Chaser saloon, Registration No. T125 ADDQ and heading straight home. Within a while both PW1 and PW2 heard a car approaching, whereupon the former opened the gate to facilitate the deceased's entrance. As to what transpired at the gate, we should let PW1 pick the tale in his own words:-

> *"...outside the gate, were five people. One went to the right sight mirror one took a hammer and started breaking the wind screen. One hit my uncle with a hammer on the forehead. One entered into the car through the left door and pulled Evan's head out. He cut him with a masai knife (sime). They prepared to run. I went closer to the car and took my uncle out. One of them ordered that I also be "finished". I ran away leaving my uncle. The bandits started the car and drove away."*

The witness further claimed that he was able to identify the appellant to be amongst the bandits through an electric tube light that

was at the gate, as well as the headlamps from the deceased's car which were on. His account was further to the effect that the appellant was the one who pounded the deceased with a hammer and that he was also the one who ordered the others to "finish" him moments before he ran clear of the scene. He, however, conceded that the appellant was not previously known to him and that he saw him for the first time at the scene.

In the meantime, PW2 had also heard the fracas and took courage to visit the scene. Soon after, she was forewarned by a man who was standing at the gate not to cross over or else she could die. The lady then heard like the sound of a gunshot following which she climbed and jumped over the walled fence of their residence and retreated to a neighborhood. As she later returned home with neighbours, PW1 found the deceased seriously injured. He was immediately taken to Muhimbili National Hospital where he was hospitalized but, unfortunately, he succumbed to the injuries and passed away around 11:15 pm on the following day.

Speaking of the identity of the assailants, PW2 similarly claimed to have identified the appellant through the electric tube light and the motor

vehicle's headlamps. The appellant was not previously known to her but, incidentally, around 7:00 p.m. or so, prior to the fateful incident, she happened to see him sitting at a shop which is close to their residence as and when she visited the shop to buy drinks. PW1 further claimed to have identified the appellant at an identification parade held at the Central Police Station. The detail is seemingly reflected in the identification parade register (exhibit P3).

Following the deceased's demise, on the 29th September, 2009 a police officer, No. D7326, Detective Sergeant Daniel (PW5), visited the scene and drew a sketch map (exhibit P1). The Sergeant also witnessed the post-mortem examination of the deceased's body which culminated in the autopsy report (exhibit P2).

A good deal later, on the 11th day of October, 2009 a police team led by Inspector Gilbert Kalanye (PW3), carried a clampdown on robbery suspects. The team of police officers visited a house at Kiluvya with the aim of having it and its occupants searched. In that regard, the police team solicited the presence of a certain Azaameni Setiel Massawe (PW4), a Ward Counselor, to witness the exercise. As it turned out, the targeted house was home for two occupants: The appellant herein and one

Rachel. It was Rachel's room which was searched first, but nothing of significance was retrieved therefrom. Then, upon a bodily search on the appellant, a driving license was pulled out from one of his trousers' pockets bearing the name "E.J. Mathias," but the photograph affixed to it was that of the appellant. A further search on the appellant's rooms retrieved a hammer, a spare part labeled "Evans" and a host of motor vehicle number plates. At the compound of the residence, there were two parked motor vehicles: A Nissan saloon, silver in colour and a Toyota Corolla Premium, Registration No. T 125 AVQ, white in colour. Strangely though, the site mirror and window glass on the latter vehicle were engraved: T373 BCL instead of T. 125 AVQ. According to PW3, the appellant confirmed that both motor vehicles were his belongings and, at the end of the exercise, PW3 prepared a record of search (exhibit P4) and a list of seized items (exhibit P5).

In her testimonial account, PW2 claimed that she was summoned to Mbezi Police Station where she was asked if she could identify some of the seized items and this is what she told the trial court: -

"I identified the plate number Reg. T 125 AVQ to be the number plate of my late husband car. I

did not know the car. I identified the spares and the driving licence of my late husband."

Thus, against the foregoing backdrop, the appellant was arrested by PW3 and later arraigned for the homicide incident and, that concludes the version as told by the prosecution witnesses during the trial.

In his defence, the appellant completely disassociated himself from the prosecution accusation. He prefaced his sworn evidence with a clarification that his real names are **Godfrey Cyprian Siriwa** to which he sought to confirm through his birth certificate (exhibit D1). The appellant claimed that on the alleged fateful day he was in Moshi where he lives and operates for gain as an electrician. He stated that he was throughout at Moshi till on the 11th day of October, 2009 when he travelled to Dar es Salaam to buy what he called technical items which were, presumably, related to his trade. The appellant's account was further to the effect that he hired a room at Rahaleo bar and guest house which is situated at Kibaha. Whilst resting in his room, the appellant was confronted by twelve policemen who were enquiring about a certain Bakari Dizo. After informing them that he did not know the person the

police officers took him to a neighbouring house where a search was conducted and, eventually, incarcerated him at Central Police Station. The appellant categorically refuted any knowledge of the homicide incident just as he denied knowing the deceased, PW1 and PW2.

On the whole of the evidence, the learned trial Judge was satisfied that the appellant was sufficiently identified by PW1 and PW2 with the aid of the electric tube light and the headlamps of the car which were on. He, additionally, found corroboration in the identification parade registrar (exhibit P3) as well as what the Judge conceived as the appellant's possession of items which were stolen during the commission of the homicide. The appellant's defence of *alibi* was considered but rejected and, in the upshot as and, as hinted upon, he was found guilty, convicted and sentenced to the extent as already indicated. His appeal to this Court is upon a single point of grievance, namely:-

> *"That the trial Hon. Judge erred in law entering conviction without the prosecution proves (sic) the case against the Appellant beyond reasonable doubt."*

At the hearing before us, the appellant was represented by Mr. Juma Nassoro, learned Advocate, whereas the respondent Republic had the services of Mr. Othman Katuli, learned Senior State Attorney. The former commenced his submission with the contention that the medical officer who performed the post-mortem examination was not featured as a witness and, hence, it was his suggestion that the prosecution did not prove the fact and cause of death. The submission prompts an observation from us relating to the manner in which the bulk of prosecutions exhibits, that is, exhibits P1 to P5 were adduced into evidence as well as their evidential status thereof.

According to the High Court record, at the end of the statement of facts which was read over by the prosecution counsel during the preliminary hearing, he prosecution adduced into evidence, without demur from the defence, a sketch map, a report on post-mortem examination, an identification parade register, a record of search and a list of items retrieved in the course of the search which were, respectively, marked as exhibits P1 to P5. Nonetheless, the only fact that was recorded by the court as undisputed was the statement that the accused was charged with murder. That meant that each and every

other prosecution allegation including the contents of the referred exhibits were disputed and had to be formally proved. That being the turn of events, the proper approach, in our view, would have been for the trial court to return the exhibits to the prosecution to enable it to formally feature them in evidence as exhibits. That was not done and the prosecution was seemingly contented and felt it was not obliged to re-adduce the exhibits into evidence. As a result, for instance, the medical officer was not featured to testify on the contents of the post-mortem report. Mr. Katuli correctly advised, in our view, that in such a situation, the referred exhibits were wrongly adduced into evidence and that the same should be expunged from the record of the evidence.

In the absence of the autopsy report, two issues necessarily crop up: The **first** is whether or not there is sufficient material to establish the fact of death of the deceased to the required degree of certainty. If so, the **second** issue would be whether or not such material leads to the conclusion that the death was unnatural. Such are questions of fact that may be established and proved by circumstantial evidence but, as has been previously held, to compel an inference of death, the circumstantial evidence must be inconsistent with any theory of the alleged deceased

being alive with the result that, taken as a whole, the evidence leaves no doubt whatsoever that the person in question is, indeed, dead (see **Kimweri v R** [1968] EA 452).

We need not detain ourselves on the issue respecting proof of the fact of death, much as, we think, there are sufficient pointers on the evidence to establish beyond all reasonable doubt that Evans Mathias Kimaro, the alleged deceased, is, indeed, dead. Three prosecution witnesses told of his death beginning with Emmanuel (PW1), his nephew; Lilian (PW2), his wife; and the Sergeant (PW5), who witnessed the post-mortem examination of the body. As regards the issue whether or not his was an unnatural death, the evidence was to the effect that, on the fateful day, the deceased was alive and kicking up until when he was attacked by the bandits and sustained wounds from which he was hospitalized and died on the morrow of the attack. Thus, taken as a whole, we so find, the evidence compels no other inference than that the death of the deceased resulted from the attack. Nonetheless, the issue of concern is as to the identity of the assailants who terminated his life.

In his submissions, Mr. Katuli contended that the incident occurred at night under unfavourable conditions and that the evidence of visual

identification of the appellant fell short from being watertight. The learned Senior State Attorney argued that it was not enough for PW1 and PW2 to simply say that there was an electric tube light at the scene without giving details of its intensity and the distance from where the tube light was to the point of confrontation. Furthermore, Mr. Katuli criticized the two witnesses for not indicating the distance from where they were standing to the point of confrontation, the time they had the appellant under observation and, more particularly, his attire or physical appearance. These factors, he said, had disquieting effect on the quality of the visual identification claims by PW1 and PW2. To fortify his position, the learned Senior State Attorney referred us to four decisions of the Court: Criminal Appeal No. 1 of 2011 **Salumu Mussa Vs Republic**; Criminal Appeal No. 230 of 2014 – **Isdory Cornery @ Rweyemamu Vs Republic**; Criminal Appeal NO. 318 of 2010 – **Mulangalukiye Augustino Vs Republic**; and Criminal Appeal NO. 69 of 2014 – **Idd Ismail Vs Republic** (All unreported).

With respect to the items that were retrieved from the appellant's house, Mr. Katuli criticized the learned trial Judge for wrongly invoking the doctrine of recent possession. None of the items, he said, were

sufficiently identified to be properties of the deceased which were stolen from the robbery encounter so as to invoke the doctrine. In this regard, the learned Senior State Attorney referred us to Criminal Appeal No. 74 of 2013 – **Samwel Marwa @ Ogonga Vs Republic**. Thus, in sum, Mr. Katuli urged that the conviction was against the weight of the evidence and that the same cannot be sustained.

For our part, and, to begin with, we entirely subscribe to the submission of the learned Senior State Attorney to the effect that the evidence of visual identification was materially inadequate. Apart from the points raised by Mr. Katuli, it is noteworthy, as we have already hinted, that the appellant was not previously known to PW1 and PW2. Although PW1 did mention that she additionally identified the appellant at a police identification parade but, as we have already discounted exhibits P1 to P5 including the identification parade register, there was no prosecution evidence whatsoever on the purported parade. To that extent, the evidence of PW1 and PW2 depreciates to dock identification. In the unreported Criminal Appeal No. 172 of 1993 – **Musa Elias and Two others Vs Republic** it was held: -

"It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."

Viewed from this perspective, we therefore, find the dock identification by PW1 and PW2 to be of little value and, this brings us to the evidence relating to the items which, were allegedly retrieved from the appellant's home. Going by the evidence on record, the deceased's motor vehicle was not recovered. The material items that were retrieved from the appellant's residence were, **first**, the driving licence bearing the name "E. J. Mathias" and having the appellant's photograph affixed to it; **second,** a so-called "female connector" spare part with a label "Evans" tagged to it; and **third**, a motor vehicle number plate No. 125 AVQ. In her testimony, PW2 positively claimed that the driving licence and the spare part were belongings of her late husband. She also related the number plate to the one that was affixed on the deceased's car. As we have already intimated, the learned trial Judge relied upon the evidence

of the seized items which, he said, added weight to the evidence incriminating the appellant.

In this regard, we should express at once that quite apart from the nonedescript and bland assertions of PW2 to the effect that she identified the items, a lot was taken for granted both at the level of the investigation and during the prosecution of this case. Granted, for instance, that the deceased was named "Evans Mathias Kimaro" but that does not necessarily imply that the retrieved driving licence which, incidentally, bore the name "E. J. Mathias", was the deceased's belonging. The prosecution was expected, as, indeed, it was in the best of its interests to adduce evidence that the Class "C" licence No. 1082681 was issued to none other person than the deceased. That they did not do and, it cannot simply be assumed from the incomplete name that the licence belonged to the deceased. That evidence would have been easily availed from the licencing authority. The same is the case with the spare part which was allegedly labeled "Evans". As regards the retrieved number plate, again, there was no evidence which positively asserted that the same was the very one which was originally affixed to the deceased stolen motor vehicle. In the circumstances, we need only

restate what is required to be established before the doctrine of recent possession is applied as was succinctly laid down in the unreported Criminal Appeal No. 94 of 2007 – **Joseph Mkumbwa and Another Vs Republic**: -

> *(i) it must be proved that the property was found in possession of the suspect;*
>
> *(ii)* ***the property seized must be positively identified to be the property of the complainants;***
>
> *(iii) it must be proved that the property was recently stolen from the complainant;*
>
> *(iv) it must be proved that the stolen property corresponds to the subject of the charge against the accused person; and*
>
> *(v)* ***the property must be the one that was stolen/obtained during the commission of the offence charged.*** [Emphasis supplied].

We have supplied emphasis on the foregoing extract to demonstrate beyond question that, in the matter under our consideration, the identification of the items by PW2 was materially inadequate just as the items were not shown to be the very ones stolen from the robbery incident.

Thus, for the reasons we have endeavored to explain, we are of the settled view that the conviction and sentence meted against the appellant cannot be sustained. The appeal is, accordingly, allowed with a consequent order that the appellant should be released forthwith from prison custody unless he is held on some other lawful cause. It is so ordered.

DATED at **DAR ES SALAAM** this 3rd day of August, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL