IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL No. 4 of 2016

ABRAHAM SPIA @ MUSHI ---------- 1st APPELLANT

QUEEN YONA MALE @ ROSE-- ---------- 2nd APPELLANT

HAMADI ATHUMANI ----------3rd APPELLANT

Versus

THE REPUBLIC---------- RESPONDENT

(Appeal from the judgment of the High Court of

Tanzania at Moshi)

(Mwingwa, J.)

Dated the 30th day of January, 2015

In

CRIMINAL SESSION NO. 20 OF 2013

JUDGMENT OF THE COURT

13th &15th Dec. 2017

MWANGESI, J.A.:

In the High Court of Tanzania Moshi District Registry, the three appellants stood arraigned for the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002. The facts of the case were to the effect that, on the 12th day of February, 2012 at TPC area within the Rural District of Moshi in the Region of Kilimanjaro, the trio did jointly and

together murder one Pius Baltazar Swai. All appellants did protest their innocence.

In establishing the commission of the offence by the appellants, the prosecution paraded five witnesses and three exhibits, while in their defence, the appellants relied on their own sworn and affirmed testimonies. The learned trial Judge being assisted by gentle assessors after evaluating the evidence from both sides was of the considered view that, the case was established beyond reasonable doubt against all accused persons/appellants. They were therefore convicted of the charged offence and sentenced to the mandatory penalty of death by hanging. In this appeal, the appellants are challenging the verdict of the trial Court. And in her memorandum of appeal, the second appellant listed five grounds of appeal which can be summarized to read:

1. *That, the trial Court erred in law and in fact, when it failed to note that, the circumstantial evidence relied upon by the prosecution was weak.*
2. *That, the trial Court erred in law and in fact, when it failed to note that, there was no evidence from the prosecution witnesses, which established the role played by the second appellant in killing the deceased.*

3. *That, the evidence by PW1 to the effect that, he identified the bandits on the fateful night was weak.*
4. *That, the trial Court erred in failing to find that, the doctrine of recent possession did not apply to her because she was not found with the motor cycle of the deceased.*
5. *That, the trial Court erred in law and in fact in admitting the cautioned statement of the appellants which were recorded outside the period prescribed by the law.*

On their part, the first and third appellants prepared a joint memorandum of appeal containing four grounds of appeal which read as follows:

1. *That, the trial Judge erroneously acted upon dock identification evidence of the prosecution witnesses who claimed to have identified the first appellant to be the one who hired the deceased's motor cycle as if they were the coordinators of the deceased's trip.*
2. *That, the trial Judge erred in law and in fact, in not drawing an adverse inference against the prosecution for deliberately failing to call Ramadhani Temba before invoking the doctrine of recent possession against the third appellant.*
3. *That, the trial Judge erred in law and in fact, by acting upon the confession of the third appellant (exhibit P1), which was obtained beyond the prescribed time.*

4. *That, the trial Judge erred in law and in fact by acting upon the evidence of PW 5, who was not listed among the intended witnesses contrary to section 289 (1) of the Criminal Procedure Act, Cap 20 R.E 2002.*

When the appeal was called on for hearing on the 13th December, 2017, Ms Mary Lucas learned State Attorney, did enter appearance to represent the respondent/Republic whereas, the appellants who were all present in Court, were ably advocated for by Mr. Modest Njau, Ms Rebecca Peter and Professor Jonas Itemba, all learned counsel respectively.

In his submission, Mr. Njau abandoned the fourth ground of appeal and submitted on the remaining three grounds of appeal seriatim. He argued on the first ground that, the first appellant and his colleagues were arrested and charged first with the offence of causing grievous harm to the deceased. At the material time the deceased was still alive getting treatment at KCMC Hospital. He argued that, at that particular point in time, there was possibility for the prosecution to let the deceased identify the one who had inflicted injuries on him and robbed his motor cycle, by conducting an identification parade. Nonetheless, such an opportunity was never utilized by the prosecution until when the deceased passed away

some ten days later or so. Such failure by the prosecution created a lacuna on the part of the prosecution evidence, which has to benefit the appellants.

In regard to the doctrine of recent possession which falls in the second ground of appeal, Mr. Njau argued that, the doctrine was invoked because of the motor cycle that was alleged to have been found in possession of the third appellant at the premises of one Iddi Kijangwa, who was a mechanic and testified as PW 2. In his testimony, PW 2 informed the Court that, the motor cycle was taken to his premises by the third appellant, who was a stranger to him, in the company of one Ramadhan Temba, who was a resident of that place and well known to him. On his part, the third appellant told the Court that, the said motor cycle belonged to Ramadhan Temba with whom they were together while arriving at PW2.

However, to their surprise and for reasons best known to the prosecution, the said Ramadhani Temba was neither co-charged with the appellants, nor was he called as a witness for the prosecution. It was the argument of Mr. Njau that, the said Ramadhani Temba would have resolved the issue of ownership of the motor cycle. And the fact that

nothing was heard from him, the issue of ownership of the motor cycle was left unresolved. Under the circumstances the doctrine of recent possession could not be invoked to the third appellant, he did submit.

The challenge by the appellants to the decision of the High Court in the third ground of appeal is in respect of the cautioned statements of the second and third appellants. Mr. Njau did refer us to page 66 of the record of appeal, where detective corporal Abdalla Mkomwa Makungu, who happened to be the officer who investigated the case, told the court when asked by the gentle assessor that, all the accused/appellants never confessed. With such statement from the concerned investigation officer, there was no question of cautioned statement of either the second appellant or the third appellant.

On the basis of the shortfalls pointed out above to the evidence from the prosecution witnesses, Mr. Njau strongly urged us to find that, the case against the appellants was not proved beyond reasonable doubt and as such, the appeal be allowed by quashing the decision of the trial Court and setting them at liberty.

On her part Ms Rebecca on behalf of the second appellant, was in agreement with her learned friend and had nothing to add in respect of the third and fourth grounds of appeal of the second appellant. As regards the first and second grounds, she argued that the evidence relied upon by the prosecution in founding conviction to the appellants was circumstantial evidence. Nevertheless, the chain of circumstances leading the appellants to be held culpable was never established. She submitted that, the evidence from the prosecution witnesses was so disconnected and thereby, failing to meet the requirement needed for the principle to apply.

Submitting on the cautioned statements of the second and third appellants, she argued that, the learned trial Judge erred to receive the same as evidence because they were recorded outside the period prescribed by the law. While the appellants were arrested on the 12th day of February, 2012, the alleged cautioned statements were recorded on the 27th day of February, 2012 that is, after the elapse of about fifteen days and thereby contravening the provision of section 50 of the Criminal Procedure Act, which sets a period of four hours. She therefore joined

hands with her learned friend in requesting the Court to allow the appeal by quashing the decision of the trial Court and setting the appellants free.

Professor Itemba who was representing the third appellant on his part, had little to submit for the reason that, his client who lodged a joint memorandum of appeal with the first appellant, his grounds of appeal had already been argued by Mr. Njau. In addition to what was submitted by Mr. Njau, he observed that, the learned trial Judge erred in basing his conviction on the weakness of their defence as reflected at page 168 of the record of appeal. It was his view that, that was against the cherished legal principle because always the burden is on the prosecution, to establish the guilt of the accused beyond reasonable doubt. He urged us to fault the position taken by the learned trial Judge.

On her part, the learned State Attorney on behalf of the respondent/Republic did not support the conviction of all appellants. She concurred in all fours with the submissions of her learned friends. She added that, besides failing to establish the invocation of the doctrine of recent possession against the appellants as regards the motor cycle alleged to belong to the deceased, there was no evidence adduced by the

prosecution to establish that, the said motor cycle belonged to nobody else other than the deceased. She argued that, the attempt that was made by PW1 to identify it by its colour and make was insufficient.

And with regard to the circumstantial evidence relied upon by the learned trial Judge in holding the appellants culpable to the charged offence, she cited the decisions in the case of **Ally Bakari and Pili Bakari Vs Republic** [1992] TLR 10, and the unreported cases of **Ally Rajabu and Four Others Vs Republic,** Criminal Appeal No. 43 of 2012 and **Slaa Hintay Vs Republic**, Criminal Appeal No. 179 of 2008, to back up the submissions that were made that, the chain was not established. In conclusion, the learned State Attorney reiterated what was prayed by her learned friends that, the Court be pleased to quash the findings of the trial Court, set aside the sentence meted out to them and set them at liberty.

From the three grounds of appeal lodged by the first and third appellants and the five grounds lodged by the second appellant, there are basically four issues that stand for our determination that is, first, whether or not the appellants were properly identified to be the ones who killed the deceased. Second, whether or not the doctrine of recent possession was

properly invoked by the learned trial Judge. Third whether or not, the evidence contained in the cautioned statements of the second and third appellants were correctly used by the learned trial Judge in founding conviction of the appellants. And fourthly, whether or not, the circumstantial evidence from the prosecution witnesses did meet the threshold so as to justify conviction of the appellants.

We will answer the issues seriatim. According to the judgment of the learned trial Judge at page 166 of the record of appeal, he held that Hamadi Bakari Bendera (PW1) and Waziri Iddi Kachikawe (PW3), both motor cycle riders, properly identified the first and second appellants as the people who approached them at where they had parked their motor cycles, in need of hiring their motor cycles so that they could be taken to TPC. And that, they were not hired because they had other commitments and thereby, leading the two to hire the deceased, who was later stabbed by a knife leading to his death.

In our view, the issue of identification of the first and second appellants at that particular moment was not crucial. This is from the fact that even the appellants themselves did not resist the fact that, they hired

the deceased to take them to TPC and that, he did indeed take them to their destination where they parted peacefully. What was needed was the evidence to link the appellants to the act of stabbing the deceased. And such an issue is to be resolved while dealing with the question of the motor cycle said to be of the deceased, which is alleged to have been found with the third appellant. The same is the gist of the second issue. As there was no eyewitness to the act of the deceased being stabbed, we think the issue of identification was of no relevance.

On the issue of the doctrine of recent possession, it was the holding of the learned trial Judge that, because the third appellant was found in possession of the motor cycle which had been robbed from the deceased after being stabbed with a knife, he and his colleagues were to be held culpable on what had happened to the deceased. Here we find two questions which do arise in respect of the motor cycle. The first question is whether the motor cycle was indeed found in possession of third appellant.

According to the testimony of PW 2, the motor cycle was taken to his premises for repair by the third appellant, who was in the company of one Ramadhani who appeared to be his host because the said Ramadhani

Temba was well known to him and was a resident of that area. Such averment by PW2 was not resisted by the third appellant, who however added that, such motor cycle belonged to Ramadhani Temba. Unfortunately, the said Ramadhani Temba was neither charged in respect of the said motor cycle, nor was he called as a witness for the prosecution. Such failure by the prosecution to involve Ramadhani Temba in either way to the case, left the question of ownership of the motor cycle unresolved.

The second question is whether it was fully established that, the motor cycle alleged to have been found in possession of the third appellant was the property of the deceased. As submitted by the learned counsel and the learned State Attorney, there was no evidence to establish so. There was an attempt by PW 1 to identify it through its colour that it was black, and its make that it was Linkein. In our view, such identification was insufficient because there are many black motor cycles of make Linkein, which could not be differentiated from the one alleged to belong to the deceased. What could have easily differentiated it from others was its Registration Number. Since no efforts were made by the prosecution to

that effect, we hold that, it was not fully established that the motor cycle belonged to the deceased.

The situation under which the doctrine of recent possession can be invoked was stated in the case of **Joseph Mkumbwa and Samson Mwakagenda Vs Republic,** Criminal Appeal No. 94 of 2007, where it was stated that:-

> *"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 be the property of the complainant.* ***Third,*** *that the property was recently stolen from the complainant. And* ***fourthly*** *that, the stolen thing constitutes the subject of the charge against the accused ---"*

From the evidence received in the impugned decision, the principles laid in the above cited case were not met and therefore, the doctrine of recent possession could not apply. The same was therefore improperly

invoked by the learned trial Judge. We answer the second issue in the negative.

On the question of the cautioned statements of the second and third appellants, it is on record that, while the appellants were arrested on the 12th day of February, 2012, their alleged cautioned statements were recorded on the 27th February, 2012, which was after the elapse of 15 days. As submitted by Ms Rebecca, this was grossly beyond the stipulated period of four hours. The position of law is that, any statement of the suspect recorded outside the period stipulated by the law is invalid and has to be expunged from the record. See: Unreported cases of **Salim Petro Ngalawa Vs Republic**, Criminal Appeal No. 84 of 2004, **Peter Kindole Vs Republic Vs Republic**, Criminal Appeal No. 69 of 2011 and **Emanuel Malabya Vs Republic,** Criminal Appeal No. 212 of 2014. To that end, we answer the third issue in the negative.

The fourth issue is whether or not, in view of the circumstantial evidence received from the prosecution witnesses in the impugned decision, there was justification for the trial court to found conviction of the appellants. The principles under which circumstantial evidence can apply

were enumerated in the case of **Jabil Mohamed Vs Republic,** Criminal Appeal No. 103 of 2013 (unreported). They are:

1. *The evidence must be incapable of more than one interpretation.*
2. *The facts from which inference of guilt or adverse to the accused is sought to be drawn, must be proved beyond reasonable doubt and must clearly be connected with the facts from which the inference is to be drawn or inferred.*
3. *Where expert evidence is produced, it should furnish the court with the necessary criteria for testing the accuracy of its conclusion.*
4. *Before the accused person can be convicted, the court must find/establish that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of the explanation upon any other reasonable hypothesis than that of guilt.*
5. *And it is necessary before drawing the said inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.*

We have shown above that, the evidence from the prosecution witnesses was so disconnected and inconsistent and thereby, miserably failing to meet any of the principles which have been listed in the above

cited case. In no uncertain terms, we answer the fourth issue in the negative.

Consequently, we hold that, the appellants were improperly convicted by the learned trial Judge on the offence of murder which they stood charged with. We quash such findings and set aside the death sentence which was imposed on them. We order that they be set at liberty forthwith unless they are legally held for any other justifiable cause.

Order accordingly.

DATED at **ARUSHA** this 14th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL