IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MJASIRI. J.A, MUGASHA, J.A. And LILA, J.A.)

CRIMINAL APPEAL NO. 293 OF 2014

RAMADHANI S/O SHINJE @ MIJA ..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Mruma, J.)

dated the 3rd day of July, 2014
in
Criminal Sessions No. 101 of 2009

JUDGMENT OF THE COURT

5th & 19th February, 2018

MJASIRI, J.A.:

In the High Court of Tanzania at Tabora, the appellant Ramadhani s/o Shinje @ Mija was charged with the offence of murder contrary to section 196 [Cap 16 R.E. 2002] of the Penal Code. He was convicted as charged and was sentenced to death by hanging. Dissatisfied with the decision of the High Court he has appealed before this Court against both conviction and sentence. It was the prosecution case that on November 7, 2008 at about 20:00 hours at Indekelo Village within Shinyanga Rural

District and Region Ramadhani s/o Shinje and Selemani s/o Salu murdered one Benjamini s/o Joseph. The body of the deceased was found in a well near the house of the appellant. The body had already decomposed when it was found in a 25 feet well. There was no eye witness and the prosecution case depended wholly on circumstantial evidence and confessions of the accused persons. Selemani Salu was found not guilty by the High Court.

At the hearing of the appeal, the appellant was represented by Mr. Yusuf Mwangazambili learned advocate while the respondent Republic had the services of Mr. Rwegila Deusdedit, learned State Attorney. The appellant had initially filed five grounds of appeal. However, the appellant's advocate later filed a three point memorandum of appeal which was argued in Court in the course of hearing the appeal. It is reproduced as follows:-

1. *That in the absence of cause which led to the death of the deceased on evidence on record, the Hon. Trial Judge was wrong to convict and sentence the Appellant as he did.*
2. *That the Hon. Trial Judge was wrong in law to admit the said caution statement of the Appellant, Exhibit*

P.5 and Extra Judicial statement Exhibit P.7 to form part of Court record and proceeded to convict the Accused Person/Appellant.

3. *As to the evidence on record the Hon. Trial Judge was wrong in law and fact upon holding that the prosecution evidence had proved the case against Appellant beyond reasonable doubt.*

In relation to ground No. 1, the counsel for the appellant did not have much to say on it and counsel seemed to have put emphasis on the second and third grounds of appeal.

On ground No. 2, the learned counsel for the appellant strongly submitted that the trial court wrongly relied on the cautioned statement and the Extra Judicial Statement.

In relation to the cautioned statement Exhibit P.5, counsel for the appellant submitted that, section 50 (1) (a) and (b) of the Criminal Procedure Act, Cap 20, R.E 2002 was not complied. The statement was supposed to be recorded within a period of four (4) hours after the arrest of the appellant. The record does not show the specific time of arrest of the appellant nor the time, the confession was recorded. According to page 111 of the record, the cautioned statement was taken from 3:30

hours. He relied on the case of **Janta Joseph & three Others v. Republic**, Criminal Appeal No. 95 of 2006 (unreported), which emphasized the importance of ensuring that the cautioned statement is recorded on time. He asked the Court to expunge the cautioned statement.

In relation to the Extra – Judicial Statement, Exhibit P.7, he stated that the Justice of the peace was not listed in the committal proceedings.

In relation to ground No 3 – that the Hon. Trial Judge was wrong in law and fact upon holding that the prosecution has proved the case against the appellant beyond reasonable doubt. Mr. Mwangazambili submitted that the conviction of the appellant was based on the confessions and the doctrine of recent possession in respect of the door which was found on the appellant's house, alleged to have been removed from the deceased's house. According to him, the evidence has no basis and is not sufficient to conclude that the door belonged to the deceased. No specific marks were shown. The appellant cannot also be linked with the sale of grain alleged to have been stolen from the deceased.

The learned State Attorney on his part did not support the conviction. According to him, the charge was not proved beyond reasonable doubt.

The main evidence linking the appellant with the offence was the cautioned statement Exhibit P.5 and the Extra Judicial Statement Exhibit P.7. Exhibit P.5 was taken out of the prescribed time and in respect of Exhibit P.7, the Justice of the peace was not part of the committal proceedings. The only evidence remaining once Exhibits P.5 and P.7 are expunged is recent possession. However the criteria was not met. PW1 at page 30 only identified the door, neither description of the door was given nor any distinguishing mark. There was a mention of two sacks of maize and two tins of rice. These are such common items and could not be directly linked to the appellant. PW3, PW4 did not clearly establish that it was the appellant who gave them the items. He relied on the case of **Kashinje Julius v. Republic,** Criminal Appeal No. 305 of 2015 (unreported).

After carefully going through the record and the submissions made by counsel, we are of the considered view that the main issue for determination and decision is whether or not the prosecution has proved the case against the appellant beyond reasonable doubt.

As earlier pointed out by counsel, the major evidence relied on by the trial judge in founding the conviction against the appellant is Exhibit P.5, P.7 and the evidence of recent possession.

In their submissions in Court both the counsel for the appellant and the learned State Attorney were in agreement that the cautioned statement of the appellant was taken outside the prescribed time of four (4) hours after his arrest which is contrary to the requirement under section 50 of the Criminal Procedure Act [Cap 20, R.E 2002] the CPA. They urged the Court to expunge the statement from the record. Given the circumstances we are in agreement with counsel that the cautioned statement was wrongly relied upon by the trial Judge in basing his conviction of the appellant. In relation to the Extra – Judicial Statement, the Judge rightly concluded that Exhibit P7, cannot be relied upon given the fact that PW9 Jovit Kato was not amongst the prosecution witnesses who were listed during the preliminary hearing. Neither his statement nor his substantive evidence were read at the committal proceedings. No notice in writing was given to the appellant or his advocate on the need to call an additional witness as is required under section 289(1) of the CPA.

Section 289 (1) provides that:-

> *"No witness whose statement or substance of evidence was not read at the 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 a witness."*

See for instance **Selina Yambi and Two Others v. The Republic**, Criminal Appeal No. 94 OF 2013. In the case of **Hamisi Meure v. Republic** [1993] TLR 213, the High Court admitted the evidence of the Justice of the Peace which had not been read over at the committal proceedings and no notice had been given to the appellant or his advocate. The Court stated thus: -

> *"It having been accepted by the prosecution and the judge himself that PW2 did not feature in the record of the committal proceedings, he should not have been allowed to give evidence in contravention of the provisions of section 289 which are mandatory".*

The Court concluded that the said statements like the cautioned statements were to be expunged.

In convicting the appellant, the trial Judge also relied on the doctrine of recent possession. He concluded that the door found in the appellant's house was the one which was removed from the deceased's house. We must state that no evidence was brought before the Court that the door found in the appellant's house had specific marks and was identified as the property of the deceased. Secondly, the tins of rice and maize, involved such common grains and could not be directly linked with the deceased's death.

In the case of **Joseph Mkubwa & Samson Mwakagenda v. Republic**, Criminal Appeal No. 94 of 2007 which was cited in **Abdi Mollel @ Mollel Nyangusi & Another v. Republic,** Criminal Appeal No. 107 of 2006 (unreported), the Court provided the necessary conditions to be met before the doctrine of recent possession can apply. The conditions were as follow:-

> *"first, 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 the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be*

the owner of the property does not relieve the prosecution to prove the above element."

Taking into account that the cautioned statement as well as the Extra Judicial statement are inadmissible in evidence, the same are expunged from the record.

There being no other evidence to sustain the conviction of the appellant we hereby order the appellant to be released from prison forthwith unless, he is detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 14th day of February, 2018.

S. MJASIRI
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL