IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 156 OF 2017

AKILI CHANIVA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mambi, J.)

Dated 16th day of May, 2017

in

Criminal Session No. 21 of 2014

JUDGMENT OF THE COURT

21st & 29th October, 2019

MZIRAY, J.A.

The appellant, Akili Chaniva, was convicted of murder contrary to section 196 of the Penal Code by the High Court (Mambi, J.) sitting at Mbeya. He was sentenced to suffer death by hanging. He was aggrieved by the conviction and sentence, hence this appeal. The information filed on 24/3/2014 alleged that on 25/8/2013 at Shoga village in Chunya

District, Mbeya Region, the accused (now the appellant) did murder one Bryson s/o Kanzungala. The appellant denied this charge.

The fact which culminated to the indictment of the appellant before the trial court are simple and straight forward. They feature well in the decision of the trial court. We place them in this outline. It is in evidence that on 24/8/2013 PW1 Yusuph Brown Mwakelepe who was acquainted with the appellant, agreed with the latter that he will hire his motor-cycle to collect some gold stones but when they met the next day which was on 25/8/2013, the appellant told him that he has changed his mind and he preferred hiring the deceased who was to ferry him to Usangu. At that moment the appellant was pointing at the deceased, a *bodaboda* rider, as a person he had chosen to hire him to go to Usangu area within Mbarali District. The facts reveal that on that day the deceased never returned home. Efforts were made by the deceased's relatives and other people to search for the deceased but they ended up in vain. On 2/9/2013 the appellant was seen with the deceased's motor-cycle at Madabaga area in Mbarali District. The facts and evidence indicated that when the appellant was interrogated by the relatives of the deceased as to where he got the

said motor-cycle, he replied that the deceased sold it to him at shs 500,000/= and that the deceased had left to Makambako.

The deceased relatives and other close people were not satisfied with the explanation, hence reported the incident to police where the appellant was arrested. Efforts to search the deceased continued, and on 3/9/2013 he was found dead at Shoga area in Chunya District. The body had a big wound in the forehead. The appellant was interrogated and according to the evidence, he confessed in his cautioned statement and extra-judicial statement. He also made an oral confession to the people who participated in the search. The appellant was subsequently arraigned before the trial court and on the strength of the evidence before the court he was convicted as charged and sentenced to suffer death by hanging. He is aggrieved by the conviction and sentence and he has come to this Court by way of an appeal seeking redress which will result to his release from gaol.

At the hearing of the appeal, the appellant was present in person, represented by Mr. Victor Mkumbe, learned advocate, and the respondent Republic had the services of Ms. Prosista Paul assisted by Mr. Ofmedy

Mtenga, learned State Attorneys. Mr. Victor Mkumbe adopted the memorandum of appeal he filed earlier on and in the process he abandoned the first ground and proceeded with the remaining grounds, together with the written submissions he filed on 10/9/2017. He had nothing more to add. We find no compelling need of reproducing in details the substance of the written submissions.

It will suffice to say that as indicated in the appellant's memorandum of appeal and amplified in the written submissions, the appellant's complaints are basically anchored on four points. **One,** he is not disputing the fact that the deceased died of unnatural cause but in the absence of a postmortem report showing the cause of death, it cannot be established with certainty that it was the appellant who murdered the deceased. **Two,** the appellant's conviction was unsafe on account of the fact that both the cautioned statement and the extra-judicial statement (exhibits P2 and P4 respectively) had serious and incurable irregularities. **Three,** there was no justification to dismiss the appellant's defence of alibi. **Four,** and lastly, it was an error in law and fact for the trial court to hold that the appellant had been found in possession of the deceased's motor-cycle.

In response to the grounds of appeal and the submissions made, Ms. Paul was brief. At the outset, she did not support the appeal. However, she admitted that the prosecution side did not tender the report on the autopsy conducted on the deceased's body to establish the cause of death. It is her contention that the evidence of PW1, PW2, PW3, PW4 and PW5 has established that the deceased had sustained a big wound on he forehead which caused his death. She went on to submit that it is not the requirement of the law that the cause of death must be established in every murder case by the production of a postmortem report. She defended that position by citing our decision in **Seif Selemani v. R,** Criminal Appeal No. 130 of 2005 (unreported). She concluded by stating that the evidence of the above aforementioned five witnesses has been reinforced by documentary evidence of the cautioned statement and the extra judicial statement which were tendered after successfully passing the test in the two mini trials (trials within trial) conducted to determine their admissibility. She therefore faulted the appellant's learned counsel's assertion that the two statements had serious and incurable irregularities. Still on the two statements, the learned State Attorney submitted that they corroborated the evidence of PW1 to the effect that the appellant was the

last person to be seen with the deceased when he saw him hiring the deceased at Shoga Village until his body was found abandoned in the mountain of Usangu forest. It is her contention that as the appellant failed to give a plausible explanation leading to the death of the deceased, then he was a party to the killing. To buttress her stance, she referred us to our case of **Mathayo Mwalimu and Another v. R,** Criminal Appeal No. 147 of 2008 (unreported).

On the complaint that the trial court erred to hold that the appellant had been found in possession of the deceased motor-cycle, she was quick to respond that in so long as the appellant failed to give a reasonable explanation of the possession, the trial court was justified to invoke the doctrine of recent possession. It is her submission that PW1, PW2, PW3, PW4 and PW5 who were involved in the search of the deceased explained how the appellant was found in possession of the motor cycle and all of them identified it by giving descriptions like its registration number and its colour. She went on to submit that the defence did not object to its admissibility and above all the veracity of these witnesses was not disturbed during cross-examination.

In answer to the complaint in respect of the defence of alibi raised by the appellant, the learned State Attorney was of the view that the said defence was considered but rejected by the trial court. It was rejected in two aspects. **One,** the appellant failed to convince the trial court that at the material time he was at Kyela and **two,** his evidence materially contradicted the evidence of DW2 Mary Chaniva.

Submitting on the complaint in respect of the alleged unexplained delay to send the appellant to court, the learned State Attorney briefly submitted that this was completely a new ground which was not discussed before the High Court, hence it cannot be raised at this stage of appeal. She invited the Court to disregard this ground.

In a short rejoinder, Mr. Mkumbe insisted that it was essential to have the postmortem report because it could have clearly shown the actual cause of death. He ended by submitting that the appellant was not involved in the death of the deceased and the entire prosecution case is built up on suspicion which in law cannot act as a basis to ground a conviction.

Having heard the rival submissions, we wish to discuss the fate of this appeal in line with the four complaints posed by Mr. Mkumbe in his grounds of appeal and the submissions made in support thereto. It is clearly demonstrated in the evidence that in the case at hand there is no direct evidence to show that the appellant participated in the commission of the offence but it is vividly seen that the case for the prosecution is built more on circumstantial evidence due to the conduct of the appellant prior to and after the incident. We shall discuss the issue of circumstantial evidence together with the doctrine of recent possession on account of the fact that the appellant was the last person to be seen with the deceased and was arrested in possession of the motor cycle owned by the deceased shortly after the alleged murder.

The evidence which tend to implicate the appellant heavily, and which apparently was used by the trial court to convict him is the oral evidence of PW1, PW2, PW3, PW4 and PW5 in one set, and in the second set, is the documentary evidence in the form of cautioned statement and extra judicial statement. In the evidence adduced by PW1, PW2 and PW5 it clearly shows that the appellant through aiding and abetting participated in

procuring the deceased to be sacrificed at the scene. He had earlier arranged a trip with PW1 but he cancelled this trip at the last minute and he informed him that his choice was for the deceased and nobody else to convey him to Usangu. This witness saw the appellant boarding the motor cycle of the deceased and the two left. Since that day the deceased was not seen until his body was recovered dumped in a ditch. In our considered view the above circumstance leaves no doubt that the appellant had the knowledge that the deceased Bryson Kanzungala was going to be killed and was procured by the appellant for such purpose.

Another circumstance which heavily implicates the appellant with the murder of the deceased is that he was arrested in possession of the motor cycle which relatives of the deceased identified it. They gave the descriptions of the motor cycle. Upon being interrogated the appellant failed to give a reasonable explanation. In our view, and as rightly found by the trial court, the fact that after the death of the deceased the appellant was found in possession of the deceased's property, without any proof of his ownership and his failure to give a plausable account of the motor cycle, are clear incriminating circumstances which lead to an

irresistible inference that the appellant was a party to the murder of the deceased. These facts, in our view, provide overwhelming evidence of the appellants participation in the commission of the offence. The trial court was therefore justifiable to invoke the doctrine of recent possession. This doctrine is applicable also to aggravated offences like murder. We find support of our finding in the case of **Mniko Gisengi Romara**, **Richard Nyaruboti @ Mombi, Magori and Mwita Machage Mwita v. Republic,** Criminal Appeal No. 213 and 214 of 2012 (unreported) where we said,

> *"The doctrine of recent possession means that the unexplained possession by an accused person of the fruits of a crime recently after it has been committed,* ***is presumptive evidence against the accused not only on the charge of theft, or receiving with guilt knowledge, but of any aggravated crime like murder,*** *when there is reason for believing that such aggravated and minor crimes were committed in the same transaction".*

The other aspect which link the appellant with the charged offence is the fact that he was the last person to be seen with the deceased. PW1 testified that on 24/8/2013 he met the appellant and the two agreed to meet the next day where he was to do a certain work for the appellant. On the agreed date the appellant changed his mind and opted instead to take the deceased for the work. PW1 saw the appellant and the deceased moving towards the direction of Usangu. The deceased was not seen again until when his body was picked abandoned in the forest. In the case of **Mathayo Mwalimu and Another v. R,** Criminal Appeal No. 147 of 2008 (unreported), it was held that:

> *"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain the circumstances leading to the death, he or she will be presumed to be the killer..."*

In the instant case, the appellant did not dispute before the trial court the assertion by the prosecution that he was the last person to be seen with the deceased until the time of his death. He did not give any explanation to explain the circumstances leading to the death of the

deceased. Based on the principle enunciated in the case of **Mathayo Mwalimu** (supra) the reasonable inference to be drawn is that the appellant participated in the killing of the deceased.

It is not in dispute also that the appellant gave a cautioned statement (exhibit P4) before the police and an extra-judicial statement (exhibit P2) before a Justice of Peace. He also confessed before PW1, PW2, PW3 and PW4 who participated in the search party. This oral confession was made immediately upon his arrest. In exhibit P2 and P4 the appellant confessed to have been hired by one Venance to take the deceased to the area where the killing took place at a fee of Tshs one million and given Tshs 30,000/= upfront. He witnessed the killing and retained the deceased's motor-cycle. Oral confession as authorities have it is sufficient to mount a conviction against the maker. We find solace in this stance in our decision in **Posolo Wilson @ Mwalyego v. R**, Criminal Appeal No. 613 of 2015 (unreported). In that case we relied in our previous decisions in **DPP v. Nuru Mohamed Gulamrasul** [1989] TLR 82 and **Mohamed Manguku v. R,** Criminal Appeal No. 194 of 2004 (unreported). In **Posolo Wilson** (supra) we observed:

"It is settled that an oral confession made by a suspect, before or in the presence of reliable witnesses, be they civilians or not, may be sufficient by itself to find conviction against the suspect".

As rightly pointed out by the trial court, the documentary evidence corroborated the oral testimonies and heavily implicated the appellant in the death of the deceased. We agree with the findings of the trial court on this point.

The appellant raised a defence of alibi to exonerate himself from criminal liability. He alleged that at the material time he was at his home place at Kyela assisting his sister DW2 Maria Chaniva who had given birth at Kyela District Hospital. The assistance he rendered included washing her clothes. DW2 gave a different version that it was her neighbour who was washing her clothes. The appellant stated also that he paid for a bus fare to Kyela but in another version he said that he got a free ride in the journey to Kyela. The contradictions which have surfaced in the testimony of the appellant is a vivid portrayal that he lied on oath when testifying

before the trial court. His credibility therefore is doubtful. We find it hard to believe his defence of alibi and we doubt if the appellant had ever visited his sister at Kyela at the material time. On the contrary, there is sufficient evidence to establish that the appellant was at the scene of crime and certainly participated in the commission of the charged offence.

In the written submissions of Mr. Mkumbe, he raised a ground of appeal to the effect that there was unexplained delay to arraign the appellant in court for two years. He complained that the prosecution has not explained this inordinate delay. We think that this issue should not unnecessarily detain us. We fully support Ms. Paul that this is a completely new ground which has no forum before us simply because it was not one among the issues raised in the High Court. (See **Sadik Marwa Kisase v. Republic,** Criminal Appeal No. 83 of 2012, **Hassan Bundala @ Singa v. R.,** Criminal Appeal No. 416 of 2013 and **Yusuph Masalu v. R.,** Criminal Appeal No. 163 of 2017 (all unreported) cited in our recent decision in **Rajabu Ponda v. R.,** Criminal Appeal No. 342 of 2017 (also unreported).

Following what we have discussed above, we find no merit in the present appeal. It is accordingly dismissed in its entirety.

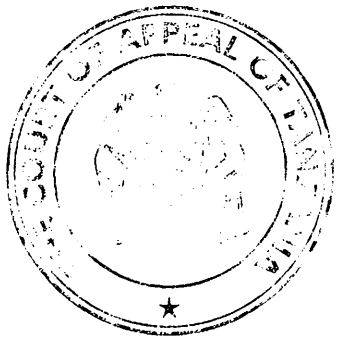
DATED at **MBEYA** this 25th day of October, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 29th day of October, 2019 in the presence of Mr. Akili Chaniva appellant in person, unrepresented whereas the Respondent/Republic was represented by Ms. Prosista Paul, State Attorney is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL