IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 119 OF 2019

DIRECTOR OF PUBLIC PROSECUTIONS ..... APPELLANT

VERSUS

ORESTUS MBAWALA @ BONGE ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Songea)

(Arufani, J.)

dated the 25th day of March, 2019
in
Criminal Sessions Case No. 15 of 2018

.....

JUDGMENT OF THE COURT

11th & 18th August, 2020.

NDIKA, J.A.:

On appeal is the judgment of the High Court of Tanzania sitting at Songea (Arufani, J.) in Criminal Sessions Case No. 15 of 2018 acquitting the respondent, Orestus Mbawala @ Bonge, of murder contrary to section 196 of the Penal Code, Cap. 16 RE 2002 ("the Penal Code"). The Director of Public Prosecutions, the appellant herein, contests the acquittal on seven grounds of complaint, which, in essence, raise issues on the applicability of the doctrine of recent possession as well as oral confession as legal basis for a conviction for murder.

We find it crucial to begin with the essential facts of the case in a nutshell. The respondent, Orestus Mbawala @ Bonge, along with two other persons not parties to this appeal namely, Elias Shida Mkuwa @ White and Patrick Mligiliche, stood trial before the High Court of Tanzania sitting at Songea for murder on two counts. It was alleged at the trial that the appellant and his co-accused murdered Fabian Hadson ("Fabian") and Abdallah Karim ("Abdallah") on 18th April, 2016 at Mshangano area within Songea Municipality in Ruvuma Region.

There was no dispute that on 18th April, 2018 in the morning two dead bodies were found lying on a farm at Luhira Primary School along Namanyigu street, ten paces apart. While at the scene, the area's Ten Cell Leader, PW1 Evodius L. Komba, called the police who came shortly thereafter and collected the bodies. The bodies were taken to the Songea Regional Referral Hospital, where they were duly identified to be those of Fabian and Abdallah. The autopsy reports (Exhibits P.6 and P.7 tendered by PW9 Dr. Victor Mchirika and PW10 Dr. Frank A. Maeda respectively) established that the duo died violently on or about 17th April, 2016. While Fabian suffered a smashed spinal cord and a broken neck cutting off brain coordination, Abdallah succumbed to death due to a severe head injury on the medulla area. On this evidence, the High Court rightly found that the two persons

died from unnatural causes. There is no doubt that the crucial question before the trial court was, therefore, whether the respondent and his co-accused were the actual perpetrators of the murders.

In addressing the foregoing question, the prosecution built up its case upon two strands of evidence, the first one being circumstantial evidence. On this aspect, the trial court heard from PW3 Pendo Ernest Milanzi (the deceased Fabian's widow) that Fabian left home on Sunday 16th April, 2016 riding his SANLG motorcycle registered as MC502 AXW. He was using an Itel cellular phone handset (Exhibit P.2) on number 0744141115 registered by PW3 in her name. PW3 had bought the handset on 26th December, 2015, as evidenced by a receipt (Exhibit P.3), and then gave it to Fabian. Fabian never returned home and when his lifeless body was found two days later both the handset and the motorcycle were missing. It was the prosecution case that these two items were stolen at the time Fabian was slayed.

The disappearance of the handset was a lead that police investigators pursued relentlessly. These investigators were PW2 E.8161 D/Cpl Mussa, PW11 D.4429 D/SSgt Lukuba and PW12 D/Cpl Victor. Of most significance, was PW12's testimony. According to him, since Fabian's phone number signified that his cellular phone operator was Vodacom Tanzania Limited

("Vodacom") the police enlisted the assistance of Vodacom, from which they received a call printout or call data record for number 0744141115 for the period between 17th and 18th April, 2016 in which Fabian was believed to have met his death. From that record, which for an obscure cause was not introduced into the evidence, the police were able to identify the IMEI number of Fabian's handset, which was 3519020722227250. An IMEI number, meaning "the International Mobile Equipment Identity" number, is a unique identification or serial number of a cellular phone.

By the means of the aforesaid IMEI, the police established from Vodacom that subsequent to Fabian's death, his handset was operated on 11th May, 2016 at 13:09 hours by a subscriber named Luhu Mpile at Njombe on number 0742557361. This happened to be the first time the handset was operated since the last time Fabian used it. It would appear that the said Luhu did not use the handset again as the trial court was told that it was subsequently being used by another Vodacom subscriber on number 0764089177 named Pendo Orestus Mbawala (PW4) based in Bombambili, Songea. With the aid of GPS, a police contingent that included PW2 and PW11 traced the handset and found it on 19th June, 2016 at a charging facility of PW8 Maria John Haule in Mpitimbi where PW4 had left it for charging. PW4 admitted at the trial that the handset was hers and that it

was given to her sometime in May 2016 by the respondent, who was her father. The respondent was subsequently tracked and arrested the following day (that is, 20th June, 2016). Fabian's widow (PW3) identified the recovered handset (Exhibit P.2), on the basis of its silver/black colour and three dots inscribed by a nail in the battery chamber, as the one Fabian was using. It is also crucial to note that PW12 introduced into the evidence a seven-page call data record (Exhibit P.8) showing PW4's use of the phone between 30th May, 2016 and 19th June, 2016 when she was arrested.

On the basis of the foregoing evidence, the prosecution hypothesized that the respondent, for being found in possession of one of the items stolen from Fabian at the time he was killed, was responsible for the murder. The trial court was, accordingly, invited to apply what is known as the doctrine of recent possession to hold the respondent, in particular, guilty of murder.

The second thread of evidence constituted confessional accounts that the respondent allegedly gave after his arrest. Of these, the first was the evidence by PW2 and PW11 that the respondent confessed to the two murders upon his arrest and by that confession he implicated his two co-accused as his partners-in-crime. Furthermore, PW2 testified that he recorded the respondent's cautioned statement by which the respondent

confessed to the murders and that he was subsequently taken to a Justice of the Peace where he recorded an extra-judicial statement. However, for what seems as an inexplicable cause none of these statements was tendered in evidence.

Besides the confessional declarations as aforesaid, the prosecution led evidence that the respondent and one of his co-accused (Elias Shida Mkuwa @ White) confessed orally to have killed both Fabian and Abdallah. In this regard, the prosecution featured PW1 who recalled that on 25th June, 2016 the respondent and White led the police to the place where the two dead bodies were found. While at that spot, both the respondent and White acknowledged murdering the duo and stealing from them two motorcycles.

In his sworn defence, the respondent denied giving PW4 the handset or ever using it. He also refuted confessing to the murders or implicating his co-accused and bewailed being tortured by the police who sought to extract a confession from him but without success. His two co-accused, too, denied the charges flat out.

After the trial judge had aptly summed up the case to the three assessors who he sat with at the trial, the first and third assessors returned the verdicts of not guilty in favour of the respondent and his co-accused

while the second assessor differed with his fellow assessors as he opined that the respondent was guilty as a charged.

In his judgment, the learned trial judge sided with the first and third assessors holding that the prosecution case was not proven against the respondent and his co-accused to the required standard. Referring to a number of relevant authorities, he was alert that for circumstantial evidence to justify an inference of guilt against an accused person the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the offence with which he is charged.

As regards the doctrine of recent possession, the learned trial Judge held it inapplicable to the case on the following grounds: **one**, that the respondent had neither actual nor constructive possession of the handset (Exhibit P.2); that it was PW4 who had actual possession of the handset. He particularly disbelieved PW4's claim that the respondent gave her the handset, wondering why PW4 was not charged as well. **Two**, that PW3's evidence that she bought the handset as evidenced by Exhibit P.3 and that it had three dotted marks in its battery chamber inscribed by Fabian did not sufficiently establish that the handset was Fabian's property. He was of the view that while the receipt contained no specific particulars linking it to the

handset, the dotted marks, as opposed to the IMEI number, were not so exceptional to differentiate the handset from other Itel handsets of the same size and colour. **Three**, that there was no proof that Fabian was using the handset (Exhibit P.2) at the time he met his death and that it was stolen from him. On this aspect, the learned trial Judge found it fatal that the prosecution did not tender in evidence the call data record on the use of Fabian's handset between 17th and 18th April, 2016 in which Fabian was believed to have met his death. PW12 referred to this crucial evidence as the basis of their tracing of the handset to PW4 and hence the respondent, but he inexplicably did not tender it at the trial although he acknowledged that it was on the police file.

As regards the oral confession by the respondent and White allegedly made at the crime scene on 25th June, 2016, the learned trial Judge found it unreliable as he believed the defence case that the respondent and White did not say anything incriminating at the scene. Crucially, the trial court found it fatal that the prosecution failed or neglected to introduce into the evidence the allegedly incriminating cautioned and extra-judicial statements.

As hinted earlier, this appeal is pegged on seven grounds of appeal, which we reproduce as follows:

1. *That, the Trial Judge erred in iaw and fact for discrediting the evidence of the respondent's daughter Pendo Orestus Mbawaia (PW4) who testified that she was given the cellular phone (Exhibit P.2) stolen from the deceased Fabian Hadson by her father that is the respondent.*
2. *That the Trial Judge erred in law and fact for discrediting Exhibit P.3, the receipt, for purchasing the deceased's mobile phone which bears the name of Pendo Ernest Milanzi (PW3) who was the deceased's wife.*
3. *That the Trial Judge erred in law and fact for holding that the special mark of a hot nail appears in the phone's battery place which was identified by PW3 in Exhibit P.2 was not a unique mark while that special mark cannot be found on any other phone.*
4. *That the Trial Judge erred in law and fact for discrediting the evidence of D/Cpl Victor (PW12) who pointed out that Exhibit P.2 was used by the deceased at his last time before his death and then later it was used by the respondent before it reached the possession of PW4 who is the respondent's daughter.*
5. *That the Trial Judge erred in law and fact for disregarding the Doctrine Recent Possession to convict the respondent of the offence which he was charged with since he was implicated with the property which was recently stolen from the deceased.*
6. *That the Trial Judge erred in law and fact for holding that there are inconsistencies [in] the evidence of the prosecution while the said inconsistencies are minor and did not go to the root of the case.*
7. *That the Trial Judge erred in law by deciding that the prosecution case was not proven beyond reasonable doubt.*

At the hearing of the appeal, the appellant Director of Public Prosecutions had the able services of Ms. Shose Naiman, learned Senior State Attorney, while the respondent, who appeared via a remote link to the High Court at Songea, was represented by Mr. Jally Willy Mongo, learned counsel.

In submitting on the appeal, Ms. Naiman began with the first ground of appeal. She faulted the trial court for discrediting PW4's evidence, that the respondent gave her the stolen handset, without assigning any reason. Citing the case of **Goodluck Kyando v. Republic** [2006] TLR 363, she argued that PW4 was entitled to credence and her testimony accepted because it was not challenged in cross-examination. On the second ground, it was contended that the receipt (Exhibit P.3), issued in the name of Pendo for an Itel handset, had sufficient particulars that proved that PW3, indeed, bought the handset in question even though its IMEI number is not shown on it. As regards the third ground of appeal, the learned Senior State Attorney referred to the decision of the Court in **John Paulo Shida & Another v. Republic**, Criminal Appeal No. 335 of 2009 (unreported) to postulate that the three dotted marks in the battery chamber of the handset,

identified at the trial by PW3, were special marks that differentiated the handset from other similar Itel handsets.

Coming to the fourth ground of appeal, Ms. Naiman initially suggested that the evidence from PW2 and PW12 amply established that the deceased used the handset shortly before he was killed. On being probed by the Court on the fact that PW12 did not tender the call data record he alluded to in his evidence and that there was no record on the use of the handset between 18th April, 2016 until 30th May, 2016, she conceded the futility of her argument. It turned out that she consequently abandoned not just the fourth ground of appeal but also the fifth ground of complaint, both of which being interdependent.

On whether the prosecution case was sufficiently proven, Ms. Naiman made two points: first, she argued that the oral confession by the respondent as averred by PW1 was so reliable that a conviction could be founded on it. In support of this proposition, she relied on **Peter Sanga v. Republic**, Criminal Appeal No. 91 of 2008 (unreported) where the Court referred to its holding in **Twaha Alli & 5 Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported) that an accused who confesses his guilt is the best witness. Secondly, the learned Senior State Attorney contended that apart

from the evidence of PW1, PW2, PW3 and PW4 being incriminating against the respondent, there was further evidence from the respondent's wife (PW6 Esther Vincent Mbawala) that he attempted to flee upon learning that PW4 had been arrested. It was, therefore, posited that his conduct belied his innocence.

On the other hand, Mr. Mongo countered, at first, that Exhibits P.3 and P.8 (the receipt and the call data record respectively) were not read out after being admitted in evidence. On the authority of **Jumanne Mohamed & Others v. Republic**, Criminal Appeal No. 534 of 2015 (unreported), he urged that the two documents be expunged from the record. Without these documents, he added, the prosecution case would be too shaky to support the application of the doctrine of recent possession as the contested ownership of the handset would be clearly unproven. Furthermore, he argued that although PW4 had claimed to have received a triple SIM card Itel handset from the respondent, she disputed, at page 75 of the record, that Exhibit P.2, which was a dual SIM card Itel handset, was the one she was given by her father, the respondent. On the IMEI number of Exhibit P.2, he submitted that while PW12 said at page 146 of the record that the handset's IMEI number ended with 250, he subsequently changed tack at page 171 of the record saying that the IMEI number ended with 244.

As regards the alleged oral confession as narrated by PW1, Mr. Mongo valiantly argued that the alleged statement was no confession in the eyes of the law as it was made when the respondent and his co-accused were not free agents. As such, it could not be relied upon to base a conviction particularly against the backdrop of the prosecution's own failure to tender at the trial the cautioned and extra-judicial statements allegedly made by the respondent.

In a brief rejoinder, Ms. Naiman conceded that the receipt was liable to be expunged on the ground stated by her learned friend. However, she disagreed on the fate of the call data record (Exhibit P.8), contending that PW12 explained in detail the contents of that call data printout as shown at pages 167 through 169 of the record of appeal.

At this point, we wish to state that this being a first appeal, this Court is enjoined by Rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-evaluate the evidence and draw its own inferences of fact or conclusions subject to the usual deference to the trial court's findings based on credibility of witnesses – see also **D.R. Pandya v. R.** [1957] E.A 336 and **Juma Kilimo v. Republic**, Criminal Appeal No. 70 of 2012 (unreported).

In view of the contending submissions of the learned counsel, the main question for our determination is whether the prosecution case was sufficiently proved against the respondent. In resolving this question, we shall address matters arising from or related to two issues: **first**, whether the respondent could be held liable for murder on account of his claimed possession of the handset allegedly stolen from the late Fabian; and **secondly**, whether the respondent could be convicted of murder on account of the alleged oral confession.

Ahead of confronting the above issues, we propose to deal, at first, with Mr. Mongo's contention, on the authority of **Jumanne Mohamed** (*supra*), that the purchase receipt (Exhibit P.3) and the call data record (Exhibit P.8) are liable to be expunged from the record for not being read out at the trial after being admitted in evidence. Indeed, in **Jumanne Mohamed** (*supra*), we referred to our earlier decision in **Robinson Mwanjisi & Others v. Republic** [2003] TLR 218 and reaffirmed the procedural imperative that contents of every documentary exhibit that has been cleared for admission and actually admitted in evidence be read out as the party against whom the document is sought to be proved is entitled to know the contents thereof.

As rightly conceded by Ms. Naiman, it is evident at page 62 of the record that Exhibit P.3 was not read out after it was admitted in evidence, rendering it liable to be expunged from the record. Without ado, we, accordingly, expunge that document. However, as regards the printout (Exhibit P.8) we find no merit in Mr. Mongo's complaint, which we dismiss. It is manifest at pages 167 through 169 of the record that PW12 painstakingly read out and explained the contents of that document.

Adverting to the merits of the appeal, we first deal with the question whether the respondent could be held liable for murder on account of his claimed possession of the handset allegedly stolen from the late Fabian. Naturally, this question requires us to determine whether the trial court rightly held that the doctrine of recent possession was inapplicable to this case. We are mindful that in the course of her submissions, Ms. Naiman abandoned the fourth and fifth grounds of appeal whose thrust was an attack on the trial court's refusal to apply the aforesaid doctrine. Despite this position taken by the learned Senior State Attorney, we propose to re-examine the issue and come up with our own conclusion.

The doctrine of recent possession has been a subject of discussion and application in numerous cases. In **Joseph Mkumbwa and Samson**

Mwakagenda v. Republic, Criminal Appeal No. 94 of 2007 (unreported), this Court restated 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 to be the property of the complainant;* ***third****, that the property was recently stolen from the complainant; and* ***lastly****, that 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 elements."*
>
> [Emphasis added].

In **Chiganga Mapesa v. Republic,** Criminal Appeal No. 252 of 2007 (unreported), we quoted with approval from a decision of the Supreme Court of Canada in **R. v. Kowlyk** [1988] 2 S.C.R. 59, which traced the roots and development of the doctrine of recent possession back to the early nineteenth century, that:

> *" The doctrine of recent possession may be succinctly stated. Upon proof of the unexplained possession of recently stolen property, the trier of fact may--but not must--draw* ***an inference of guilt***

***of theft or of offences incidental thereto**. This inference can be drawn even if there is no other evidence connecting the accused to the more serious offence. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. The doctrine will not apply when an explanation is offered which might reasonably be true even if the trier of fact is not satisfied of its truth."*

[Emphasis added].

Much earlier, the Court of Appeal for Eastern Africa in **Rex v. Bakari s/o Abdulla** (1949) 16 EACA 84 held that the doctrine of recent possession can extend to any offence incidental to or connected with stealing including murder:

*"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but **of murder as well, and if ail the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal**."*

[Emphasis added].

Guided by the above authorities, we now examine if the doctrine of recent possession had any bearing in this matter.

Beginning with whether the handset (Exhibit P.2) was found with the respondent, we recall that the learned trial Judge disbelieved PW4's account and held that the respondent had neither actual nor constructive possession of the phone. On this aspect, we go along with Ms. Naiman in her contention that the learned Judge had no basis to disbelieve PW4's account, which was not shaken in cross-examination. While we agree that it was PW4 who was actually found with the handset, we are cognizant that under section 5 of the Penal Code, "possession" or "being in possession of" or "having possession of" property includes:

> *"(a) not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to, or occupied by oneself or not) for the use or benefit of oneself or of any other person;*
>
> *(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;"*

We are firmly of the view that there was no particular reason for PW4 to lie against the respondent, her father, and thus she was entitled to credence on her testimony that she received the handset from her father. That means, although she had its actual possession when it was recovered by the police on 19th June, 2016, the respondent had constructive possession thereof.

On whether the handset was positively proven to be Fabian's property, we find, without demur, that PW3's identification of the handset by its colour and the three dotted marks in the battery was clearly insufficient. As handsets of any make are goods of mass production, we endorse the trial Judge's view that its IMEI number, in the circumstances of this case, would have uniquely differentiated the phone from others of the same make. That is more so because the dotted marks in the battery chamber could have been inscribed at any time after the handset was retrieved from PW4.

Furthermore, we think that Mr. Mongo dealt a huge block to the prosecution case in his submission that although PW4 alluded to having been given by the respondent a triple SIM card Itel handset, she disputed, at page 75 of the record, that Exhibit P.2, which was a dual SIM card Itel handset, was the phone she referred to. Coupled with the apparent contradiction on

the IMEI number of Exhibit P.2 whether it ended with 250 or 244 as shown at pages 146 and 171 of the record of appeal, as submitted by Mr. Mongo, PW4 casts doubt whether Exhibit P.2 was Fabian's handset that PW3 claimed to have bought and given to her deceased husband.

At this point, it is clear that the absence of proof that Exhibit P.2 was Fabian's property renders the doctrine of recent possession inapplicable to the instant case. However, for the sake of argument, we wish to address the next logical query whether it was established that the handset was recently stolen from Fabian and that his killing was incidental to the stealing.

As hinted earlier, it was the prosecution case that Fabian's phone was stolen from him at the same time he was assaulted and killed. It is common cause that there was no direct evidence of this fact. The testimony by Fabian's widow (PW3) that he left with the handset on 16th April, 2016 is certainly no proof that he still had the phone when he met his death on or about 17th April, 2016 as per the autopsy report (Exhibit P.7). In the circumstances, we endorse the learned trial Judge's view that it was fatal that the prosecution inexplicably withheld from the trial court the call data record on the use of his phone between 17th and 18th April, 2016 upon which PW12 suggested that the stealing of the handset was contemporaneous with

Fabian's murder. In other words, there was absolutely no proof that Fabian's murder was incidental to the stealing. The case, in our considered view, was open for other reasonable possibilities including the probability that the phone was stolen from Fabian many hours before or even after he was killed on or about 17th April, 2016.

Relevant to this case is the decision of the Court in **Paul Bundala and Julius Sunzula v. Republic** [2005] TLR 355, which involved the appellants that had been found in possession of goats proven to have been stolen from the deceased. The trial High Court had convicted the appellants of murder on account of being found with the goats but this Court found it doubtful that it was "a fit case for invoking the doctrine of recent possession to support not only the theft of the goats but also the murder of the deceased" because the theft of the goats was not linked to the death of the deceased. In consequence, the Court refused to extend the inference of guilt against the appellants for the offence of stealing the goats to the charge of murder, as it reasoned that:

> *"In the circumstances,* ***we do not think that the evidence in this case was such that it could, with any degree of certainty be said that the appellants stole the goats in the course of which the deceased was killed.*** *Having regard*

to the fact that it is not certain when the deceased was killed or when the goats were stolen, it is doubtful that this is a fit case for invoking the doctrine of recent possession to support not only the theft of the goats but also the murder of the deceased. Going by the evidence of PW5, the goats could have been stolen any time between 10.00 a.m. when he last saw the goats and 5.00 p.m. when the deceased and the goats were reported missing on 7 September 1998. In similar vein, the deceased could possibly have been killed or forcefully taken from his house any time thereafter of before."

[Emphasis added].

Then, the Court concluded that:

***"It is therefore difficult to link the two incidents, namely the killing of the deceased and theft of the goats as one continuing process which led to the death of the deceased**. Here is where we think, the learned trial judge fell into the error in assuming that it was one and the same transaction of stealing the goats that led to the death of the deceased. This, on the evidence, was not the case."*

[Emphasis added].

We think the above case applies in full force to the instant case, in that there is no scintilla of evidence linking the alleged stealing of the handset and the killing of Fabian (or Abdallah) as a continuing activity. In other

words, there is no proof in the instant case that the respondent stole the handset in the course of which Fabian (or Abdallah) was killed. As a result, we reaffirm our earlier holding that the doctrine of recent possession is inapplicable in this matter.

We now turn to the issue whether the respondent could be convicted of murder as charged on account of the oral confession he allegedly made. This question, we think, poses no difficulty as the law on the validity and reliability of an oral confession is settled. To be sure, an oral confession made by a suspect, before or in the presence of reliable witnesses, may be sufficient by itself to found conviction against the suspect – see for example the **Director of Public Prosecutions v. Nuru Mohamed Gulamrasul** [1988] TLR 82. In **Martin Manguku v. Republic**, Criminal Appeal No. 194 of 2004 (unreported), the Court insisted that such an oral confession would only be valid if the suspect was a free agent when he said the words imputed to him – see also **Posolo Wilson @Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015 (unreported).

In the instant case, whether or not PW1's testimony that on 25th June, 2016 the respondent and White acknowledged, while at the crime scene under police restraint, being responsible for killing Fabian and Abdallah as

well as stealing two motorcycles from them is truthful it is of no moment. As rightly submitted by Mr. Mongo, the said oral statement does not constitute an oral confession in the eyes of the law; for it was clearly not made by the respondent and his co-accused as free agents. It is undoubted that the two suspects had been arrested separately about five days earlier and that they were taken to the scene under the custody of several police officers including PW2 and PW11. Like Mr. Mongo, we are perturbed that the prosecution had to cling to a demonstrably worthless oral confession if, indeed, as averred by PW2 the respondent had given incriminating cautioned and extra-judicial statements. Why the said statements were not introduced into evidence is well beyond comprehension and leaves a lot to be desired. At any rate, this unexplained failure to produce the statements entitled the trial court to draw adverse inference against the prosecution case.

Finally, we recall that in closing her argument, Ms. Naiman contended that apart from the evidence of PW1, PW2, PW3 and PW4 being incriminating against the respondent, there was further evidence from the respondent's wife (PW6) that he attempted to flee upon learning that PW4 had been arrested. As explained above, all that the prosecution could muster against the respondent was his alleged possession of the handset as well as the alleged oral confession, which could not warrant conviction. Equally, his

conduct after learning of the arrest of PW4 might have belied his innocence but it cannot on its own form basis of conviction.

In the upshot, we uphold the trial court's finding that the prosecution failed miserably to establish its case beyond peradventure. Accordingly, we dismiss the appeal in its entirety as it is lacking in merit.

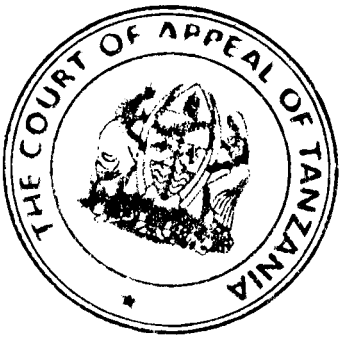
DATED at **IRINGA** this 17th day of August, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 18th day of August, 2020 in the presence of Ms. Tumaini Ngiluka, Senior State Attorney for the Appellant/Republic and in the presence of Respondent in person linked through Video Conference and represented by Mr. Jally Willy Mongo, learned counsel, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL