IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 194 OF 2018

(CORAM: MKUYE, J.A., SEHEL, J.A. And KITUSI, J.A.)

1. MSAFIRI EMMANUEL DANIEL
2. JAILOS AIDAN .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 25th day of March, 2013
in
Criminal Session No. 52 of 2009
.....

JUDGMENT OF THE COURT

24th November, & 24th December, 2020

KITUSI, J.A :

Msafiri Emmanuel Daniel and Jailos Aidan, were jointly tried for murder under section 196 of the Penal Code, allegedly for unlawfully causing death of one Ally Seleman Hemed, in the course of executing robbery of a motor vehicle which the deceased had been driving immediately before he met his death. The prosecution's central story was that the culprits were found in possession of that stolen motor vehicle and

later confessed to have committed what lead to the death of the said Ally Seleman Hemed.

The High Court convicted Msafiri Emmanuel Daniel and Jailos Aidan and sentenced them to death. They both appealed to the Court, but Jailos Aidan's appeal abated upon proof that he had died before the said appeal was called on for hearing. Therefore, Msafiri Emmanuel Daniel is the only appellant. At the hearing he entered appearance by video link form Prison as well as through Mr. Merkior Sanga, learned counsel. The respondent Republic was represented by Ms. Anunciatha Leopold, learned Senior State Attorney.

The appellant had lodged a four-ground memorandum of appeal on 21st February, 2019 and later on 2nd May, 2019 a supplementary memorandum of appeal consisting of eight grounds. However, Mr. Sanga condensed them and argued only two grounds. First, he attacked the cautioned statement allegedly for having been recorded outside the statutory time. This is the complaint in ground 1 of the original memorandum of appeal and ground 1 of the supplementary memorandum of appeal. Secondly, the learned counsel attacked the application of the doctrine of recent possession on the ground that the prosecution did not

establish the identity of the motor vehicle. This complaint features in ground 3 of the original memorandum of appeal and grounds 2 and 3 of the supplementary memorandum of appeal. We shall set out the arguments in relation to those grounds after giving a brief background of the matter.

The deceased was a Taxi driver and he was using a motor vehicle Registration Number T.864 AHQ a Nissan Cetaro which belonged to Seleman Hemed (PW2), his father. On the other hand, PW2 acquired that motor vehicle as a gift from one Mbarouk Seif Kihelef (PW5). On 9/11/2013 the wife of the deceased informed PW2 that her husband had not returned home since he left the previous day and that he was not accessible even on his mobile phone. Enquiries were made in a bid to trace him but there was no lead. Eventually PW2 reported his son's disappearance to the Police at Buguruni Station in Dar es Salaam.

On the same date D/CPI Dotto (PW1) reported on duty at Buguruni Police Station and was informed that a motor vehicle had been spotted on the previous night from which a person was thrown out. PW1 and his fellow officers went to a place near Kiwalani area where they found a badly injured male groaning in pain and incapable of talking. The Police took the

man to Amana Hospital from where he was later transferred to Muhimbili National Hospital where he subsequently died. That man turned out to be Ally Seleman Hemed, the deceased in this case.

Meanwhile on 11/11/2013 at night, Rajabu Hassan Khalfan (PW6) a commercial motorcyclist popularly known as "bodaboda" operating at Chalinze township in the Coast Region, was riding along Chalinze - Arusha Road. About a kilometre from Chalinze centre, he saw a motor vehicle that had parked off the road, and one of the occupants motioned him to stop. When PW6 stopped he could see that there were about six people in that motor vehicle. The man who had motioned PW2 to stop asked him to go and get a mechanic who would fix a defect in the motor vehicle. PW2 agreed and the two exchanged telephone contacts as he left.

While PW6 was out looking for a mechanic, the man who had requested for that service called him and asked him to get a buyer of scrap motor vehicles in alternative to a mechanic. Suspicion got the best of PW6 after being given that option, because he felt that those people were up to something illegal. He therefore went to Police at Chalinze and reported the matter. Assistant Inspector Uledi (PW7) who attended PW6 had to pose as the interested buyer of scrap motor vehicles when he and PW6 went to the

place where the motor vehicle was. When they got there, only two people were found at the place as opposed to the six PW6 had seen earlier. The two people were the appellant and Jailos Aidan. According to PW1, PW2, PW3, PW4, PW6 and PW7, the motor vehicle bore registration number IT 1340, temporary registration numbers used for motor vehicles being transported to other countries. However, there were other plate numbers inside that motor vehicle, including T. 864 AHQ, the same as the one that had been stolen from the deceased.

The Police arrested the two on suspicion of being in possession of property suspected to have been stolen or otherwise unlawfully acquired. However, when the Chalinze Police got to know that there was a case involving the same motor vehicle in Dar es Salaam, they handed over the suspects to their counterparts from Dar es Salaam. D/CPL Ismail (PW3) and CPL Mselemu (PW4) are the ones who went to Chalinze in the company of PW2. PW2 identified the motor vehicle as the one he had given to the deceased to use for taxi business. That was on 12th November, 2013 and on the same day PW3 and PW4 left for Dar es Salaam with the suspects and the car.

PW4 testified that they arrived in Dar es Salaam at night and during the same night he recorded the statement of the appellant in relation to the offence of stealing. However, on 17/11/2013 Ally Seleman Hemed died whereupon PW4 interrogated the appellant again in relation to the offence of murder. That, according to PW4, was on 18/11/2013. He said it was in the morning of 18/11/2013 when he was assigned to record the statement but he recorded it from 17:20 hours because he had to supervise preparation of a Post mortem report and burial permit first.

At the hearing, Mr. Sanga submitted that the law mandatorily requires recording of cautioned statements to be within four hours of the arrest of the suspect unless an extension of time is sought and granted under section 51 (1) (a) or (b) of the Criminal Procedure Act [Cap R.E. 2002] (the CPA). He submitted that since no such extension was obtained, the cautioned statement of the appellant (Exhibit P3) should be expunged for being recorded beyond four hours in violation of the law. The learned counsel cited the case of **Selina Yarubi & 2 others v. Republic & 2 others v. Republic,** Criminal Appeal No. 94 of 2013 (unreported) to support his argument.

On the other hand, Ms. Leopold maintained that the statement was recorded within the time prescribed by the law because the circumstances of this case were complicated. This is because, she submitted, the news about the victim's death was communicated to the police at night and the following morning PW4 had to take care of the Post mortem report and burial permit. The learned Senior State Attorney made other alternative arguments which included the fact that the appellant did not object to the admission of the statement as an exhibit and that he did not raise the complaint in his defence nor did he cross examine PW4 on it. It was her submission that the appellant was not prejudiced by the tendering and admission of the cautioned statement.

The learned Senior State Attorney invited us to follow our previous pronouncement in **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), cited in **DPP v. James Musumle @ Jembe & 4 others,** Criminal Appeal No. 397 of 2010 (unreported). The case is an authority for the proposition that not every violation of the CPA automatically leads to exclusion of the evidence concerned.

We are certain that the learned Senior State Attorney is not suggesting that the principle in **Nyerere Nyague** (supra) will apply

irrespective of the circumstances. While in **Nyerere Nyague**, the investigators had to stop interrogations so as to go arrest other suspects who had been implicated in the course, in this case there was nothing of the sort. What we have here is a police officer deciding to shelve a statutory duty which has to be performed within a statutory time limit, and he undertakes to supervise preparations of documents that could have waited. Such disregard for procedural laws that guarantee the rights of suspects must not be left unchecked, in our view.

We therefore agree with Mr. Sanga that the statement was recorded outside the statutory time and we do not go along with Ms. Leopold that the investigation of this case was so complicated as to justify the delay. Her argument that the appellant did not raise the complaint in his defence, cannot hold because the appellant's silence cannot be a waiver to compliance with mandatory provisions of the law. We thus expunge Exhibit P3 from the record.

We think an opportunity has presented itself for us to reiterate our conventional position on non-compliance with section 50 & 51 of the CPA. In **Pambano Mfilinge v. Republic,** Criminal Appeal No. 283 of 2009 (unreported) we stated: -

"Upon numerous occasions, this Court has been confronted with situations similar to the one at hand. (see the unreported) decisions of the Court in Criminal Appeal No. 278 of 2008 – ***Emilian Aidan Fungo @ Alex and Another v. R;*** *Criminal Appeal No. 51 of 2010 –* ***Mussa Mustapha Kusa and Another v. R.;*** *Criminal Appeal No. 126 of 2011 –* ***Hamisi Juma @ Nyambanga and others v. R;*** *Criminal Appeal No. 261 of 2011* ***Majuli Longo and another v. R****). In all these decisions the Court held that the non-compliance vitiated the particular cautioned statement."*

Later in the case of **Juma Nyamakinana and Another v. Republic,** Criminal Appeal No. 133 of 2011 (unreported) the Court cited the case of **Mussa Mustapha Kusa & Another v. Republic** (supra) and reproduced the following paragraph which we also want emphasized:-

"We should quickly point out that these elaborate provisions were not superfluously added to the Act. They had a specific purpose. Having been enacted after the inclusion of the basic right of equality before the law, in our constitution, they were purposely added as procedural guarantees to this right. For this reason, therefore police officers recording suspects cautioned statements under

both sections 57 and 58 of the Act have an avoidable statutory duty to comply fully with these provisions. They cannot, at the risk of rendering the statement invalid, choose and pick which requirement to comply with and which ones to disregard. The conditions stipulated in these two sections are cumulative and the duty imposed is mandatory."

It is obvious that in this case and many others the police did not take seriously the recording of cautioned statements, or PW4 would not have given priority to routine duties when the clock was ticking against him. That is enough for the cautioned statement.

Having expunged the cautioned statement we now turn to consider the complaint that the doctrine of recent possession was wrongly invoked. Mr. Sanga attacked the trial court's application of this doctrine on a number of fronts. Basically, the doctrine is part of the rule of circumstantial evidence and it simply means that there will be a presumption of guilt against a person who is found in possession of an item which has recently been stolen from a victim of an offence. That doctrine has been a subject of our many decisions such as; **Joseph Mkumbwa and Another v. Republic**, Criminal Appeal No. 94 of 2007 and **Amitabachan Machaga**

@ **Gorong'ndo v. Republic,** Criminal Appeal No. 271 of 2017 (both unreported).

Mr. Sanga attacked the doctrine in a number of aspects.

The first complaint under this ground of appeal is that the prosecution did not exhibit in court a certificate of seizure which the police ought to have prepared in terms of section 38 (1) (c) of the CPA. Mr. Sanga's submission is that the number plates which were allegedly found in the vehicle were wrongly admitted in exhibit because they had been wrongly seized.

The other complaint is that there were contradictions between PW2 and PW5 as to the description of the motor vehicle. The learned counsel faulted the learned trial Judge for finding conviction on the testimonies of these two witnesses. The third complaint is that, since the motor vehicle bore number plates which are ordinarily used by motor vehicles that are on transit to other countries, it was imperative for the prosecution to prove by evidence from Tanzania Revenue Authority that the motor vehicle in question had been registered in Tanzania.

Responding to these submissions Ms. Leopold argued that the search of the motor vehicle was an emergence one, covered under section 42 of the CPA thus it was not possible to prepare the order. She submitted that it was an emergency because according to PW6 the suspects were all out to dispose of the motor vehicle.

As regards ownership of the motor vehicle the learned Senior State Attorney submitted that proof of ownership came from PW2 and PW5. Further she submitted that during the trial no one else claimed ownership of that motor vehicle so there was no need to conduct an official search with the Tanzania Revenue Authority.

In a short rejoinder Mr. Sanga responded to our question whether what was at issue was possession of the motor vehicle or ownership of the same. The learned counsel submitted that he was interested in the ownership so as to be able to tell if, in the first place, the motor vehicle had existed before it was allegedly stolen.

Our view of this complaint is that although the doctrine of recent possession is a legal concept, it is, in essence, an issue of evidence. Therefore, there are two basic questions to be resolved by evidence. One, whether there is evidence that immediately before he met his death the

deceased had been in possession of that vehicle (Exhibit P1). Two, is there evidence that the appellant and others were subsequently found in possession of that motor vehicle?

The evidence of PW2 that his son, the deceased, was using the motor vehicle to earn a living as a taxi driver, and that on the material date he went missing, was not challenged. Neither did anyone contradict PW2 and PW1, the police officers from Buguruni police station, that when the deceased was found in a bad shape, the motor vehicle was missing. Thus, there is evidence that immediately before his death the deceased had been in possession of the motor vehicle in question.

As for the second question, we have the testimonies of PW6 and PW7 that the appellant and others were found at Chalinze in possession of the motor vehicle which PW2 and PW5 later identified as the same the deceased had been driving. What did the appellant say in defence in relation to this thread of evidence? He testified that he was randomly arrested by the police at Ukonga area in Dar es Salaam, meaning that he was not at Chalinze where the motor vehicle was found. Therefore, the prosecution's case that the motor vehicle found at Chalinze is the same as the one the deceased had been driving is not controverted. The defence

case was that the appellant was not anywhere near the spot where the motor vehicle was found.

To begin with, we agree with the learned Senior State Attorney that the search was an emergence one. When going to the place where the motor vehicle had been seen by PW6, neither PW6 himself nor the police were certain that a crime had been committed, therefore the decision to search was an emergence one. We are fortified by our earlier decisions on emergence search, in **Moses Mwakasindile v. Republic**, Criminal Appeal No. 15 of 2017, cited in **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (both unreported).

Regarding the description of the motor vehicle by PW2 and PW5, the learned trial Judge found them to be truthful witnesses. We agree with him, first because these two witnesses are entitled to credence, and secondly because there is evidence of PW6 and PW7, who are also entitled to credence, that within that vehicle there was found a plate number matching the one described by PW2 and PW5.

Our conclusion is that Mr. Sanga's good submissions on ownership and registration of the motor vehicle cannot contradict the appellant's testimony on the point. Since the appellant stated that he had nothing to

do with the motor vehicle, it cannot now be said on his behalf that the same motor vehicle was not identified. We go along with Ms. Leopold that during the trial no one raised the issue, and we must add that, submissions by counsel is not evidence. See the case of **Morandi Rutakyamirwa v. Petro Joseph** [1990] TLR 49. On our fresh evaluation of the evidence we find no reason to fault the learned trial Judge.

What we need to finally determine is whether the appellant was arrested at Chalinze where the motor vehicle was found, as the prosecution alleges, or at Ukonga in Dar es Salaam as the appellant stated. This again, is a matter of evidence. Our starting point is PW6 who stumbled onto the information that gave rise to all this. First of all, PW6 is a totally independent witness whose antennae picked a suspicious conduct from people who were stranded along Chalinze- Arusha road. These people were apprehended by the police acting on PW6's tip and they are the same people he identified in court during trial. According to PW7, initially the police at Chalinze were holding the suspects including the appellant on account of being in possession of a motor vehicle suspected to have been stolen, until the police from Dar es Salaam came about. The learned trial Judge accepted this version as true and rejected the defence case, rightly

in our view. We find the story that the appellant was a victim of random arrests at Ukonga in Dar es Salaam, too fanciful to accept. It is therefore our conclusion that the appellant was arrested at Chalinze, being in possession of the motor vehicle that the deceased had been driving before he met his death.

In view of those conclusions, we find no merit in the complaint that the doctrine of recent possession was not correctly invoked. We, therefore, dismiss this ground of appeal for the reasons stated. In the end, it is our judgment that this appeal has no merit and we accordingly dismiss it.

DATED at **DAR ES SALAAM** this 23rd day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of November, 2020 in presence of the Appellant via video link Maweni Prison Tanga and Ms. Dhamiri Masinde, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL