IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 271 OF 2017

AMITABACHAN S/O MACHAGA @ GORONG'ONDO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Muruke, J.)

Dated the 07th day of March, 2014
in
Criminal Sessions Case No. 94 of 2012

JUDGMENT OF THE COURT

21st February & 10th March, 2020

KITUSI, J.A.:

Amita Bachan Machaga @ Gorong'ondo the appellant, and Ayoub Salum Ngozi were charged with Murder contrary to section 196 of the Penal Code, [Cap 16 R.E. 2002], it being alleged that the two murdered Laurent Salehe @ Mkombozi on 22nd September 2009 at Baga village in Morogoro District. On the basis of the evidence before it the High Court found the appellant and Ayoub Salum Ngozi guilty and proceeded to sentence them to suffer death by hanging.

The appellant is challenging the decision of the High Court. We have been reliably informed that Ayoub Salum Ngozi who was the first

accused at the trial has since died, causing the separate appeal that he had earlier preferred, to abate. There is therefore only one appellant.

The story that allegedly points an accusing finger to the appellant begins with Fabian Rashid (PW1) who said that Laurent Salehe Mkombozi, the deceased, was his elder brother, and that he was physically challenged therefore needed assistance in carrying out his tasks. Because of that, PW1 used to visit his place of abode three times or more per week to help him with some chores. On 20th September 2009, PW1 paid the deceased one of those visits and after helping him with some domestic work including untying and taking the deceased's goats back home, he left. When PW1 visited his brother two days later, he found him dead, with his body stuffed in a pit latrine and the hole of the latrine covered by a stone to conceal the said body.

He said that he managed to trace the body to the latrine by following the blood trail from the main house to the pit latrine, and that this discovery was in the presence of one Focus Makenge, the village Executive Officer whom he called when he could not see his brother and worry got the best of him. PW1 and Focus Makinge reported the matter to the police. DC Salum (PW2) testified in support of this part of the story that on 22/9/2009 while on duty at Matombo Police Station he

received information about the death of Laurent Salehe. PW2 further stated that on 26/9/2009 the police received information that the appellant was involved in the murder of Laurent Salehe, and that on that date he was proceeding to Matombo. The police laid a trip to nab him.

So, the police apprehended the appellant and found him carrying a bag in which there were items allegedly implicating him with the murder. These items are, a radio cassette, a cassette with Saida Karoli songs (Exhibit P2) and a torch (Exhibit P3). PW2 stated that these items were identified by George Robert (PW4) as belonging to the deceased who happened to be his grandfather. On the other hand, the appellant would later be heard claiming that those items belong to him and he has nothing to do with the murder of Laurent Salehe @ Mkombozi.

The case seems to occupy this narrow but tricky territory, in our view.

PW4 said he was also a frequent visitor at the deceased's house and he would also give him a hand in accomplishing some chores. In that role he has ever taken the deceased's radio to a radio repairer who had to fix a problem with it. The radio repairer fixed the problem by applying welding in the inner part of the radio, leaving a mark in it. He identified the radio by that special mark when it was shown to him in

court. And yet on another occasion PW4 took the same radio to a repairer to fix another problem of volume. As regards the torch, PW4 stated that he could identify it from its silver colour and the rust on it. He also pointed at a mark on the bottom.

On the other hand, the appellant maintained that the radio belongs to him and he was arrested as he was proceeding to a repairer to fix some problem. He admitted that at the time of his arrest he was in possession of the radio, torch and a cassette with Sauda Karoli's songs recorded in it. However, he maintained that these items belonged to him and his two wives knew them well. The appellant stated that he purchased the radio from one James Ally who lives at Tabata area in Dar Es Salaam, although he did not have the document of sale with him.

The appellant was subjected to cross examinations by the prosecuting Attorney, during which he maintained that the items belonged to him even though he did not call his wives to testify in support of his contention. When asked why he did not want to call members of his family to support his case, the appellant said he did not want to disturb them. There was also an attempt by the prosecution to bring up the appellant's previous involvement in crime, but he stood by

his assertion that he did not have anything to do with the murder of Laurent Salehe.

The High Court appreciated that the case hinges on the doctrine of recent possession, then it proceeded to analyse the evidence in relation to that doctrine. It accepted PW4's testimony regarding the deceased having been the owner of the radio and the torch. Then it rejected the appellant's story because he did not call witnesses to support the contention that the items belonged to him.

In essence this appeal challenges that decision. Originally the appellant had filed a memorandum of appeal containing ten grounds of appeal drawn by himself, but later Mr. Ngasa Ganja Mboje, learned advocate, who acted for him in this appeal, substituted it with a fresh memorandum of appeal containing six grounds. We may summarize the grounds as follows; **One,** the post mortem report (exhibit P1) did not prove death of Laurent Salehe @ Mkombozi. **Two**, that the trial court failed to analyse the evidence of ownership of the stolen items. **Three,** that the rules regarding seizure of articles and admissibility of evidence were violated. **Four,** that the rules as to chain of custody were violated. **Five,** that the doctrine of recent possession was wrongly applied. **Six,**

the prosecution did not prove the case against the appellant beyond reasonable doubt.

At the hearing, Ms. Ester Kyara, Senior State Attorney and Ms. Imelda Mushi, State Attorney represented the Republic, whereas Mr. Mboje learned advocate represented the appellant as earlier indicated. Before hearing went to full swing, Ms. Kyara drew our attention to the fact that the appellant was not convicted by the trial High Court. This is plain from the record of appeal and Mr. Mboje saw the omission and conceded.

Ordinarily we would have remitted the record to the High Court for it to enter the conviction so as to make the matter be properly before us for determination on the merit. [See the case of **Nemes Muyombe Ntalanda v. Republic**, Criminal Appeal No. 403 of 2013 (unreported)] cited by the State Attorneys in their list of authorities. However, both attorneys, for the appellant and for the respondent, urged us to proceed with the hearing and determination of the appeal to its logical conclusion because on the merit, the justice of the case militates against remitting it to the High Court. We readily agreed. Although we are aware that an appeal is not properly before us where no conviction has been entered by the trial court, we think it is not always that such omission to enter a

conviction will necessarily lead to an order of remission of the record to the trial court especially, as in this case, where the justice of the case demands otherwise. In other cases, it has been considered prudent to treat the omission as a mere slip and the Court has deemed the conviction to have been entered. See the case of **Imani Charles Chimango v. Republic,** Criminal Appeal No. 382 of 2016 (unreported). We shall therefore ignore the omission and proceed with the determination of the appeal on the merit.

Submitting on the first ground of appeal, Mr. Mboje pointed out that the Post mortem Report (Exhibit P1) had three defects which water down its evidential value. He cited the defects as being the variance of names in that the exhibit shows the name of the deceased as being Laurent Salehe Mkombo instead of Laurent Salehe @ Mkombozi. The other defect is the date when the examination was conducted, being more than a year after the alleged murder. The last defect is the omission to read over the exhibit after it had been admitted in evidence.

In response to this ground of appeal Ms. Kyara while agreeing that the Post mortem Report was wrongly acted upon and should be expunged, she submitted that death may be proved otherwise than by medical evidence. She cited the case of **Mathis Bundala v. Republic,**

Criminal Appeal No. 62 of 2004 (unreported) then proceeded to argue that there was evidence of PW1 and PW4, the relatives, that Laurent Salehe had indeed died.

Our take on this issue is that both the Senior State Attorney and Mr. Mboje are correct that the post mortem report was wrongly acted upon by the trial court basically because it had dates that rendered it irrelevant to the case at hand, and for not being read over after its admission. Since there is evidence that the deceased was buried within a week or so of his death in September 2009, the report purporting to be a result of the examination conducted on the deceased's body in 2011 or 2012 could not have any bearing to this case. Besides, it is settled law that the contents of an exhibit must be read over in court after admission so as to enable the accused prepare his defence. See **Issa Mfaume v. Republic**, Criminal Appeal No. 120 of 2017 (unreported).

However, even if we expunge exhibit PW1, there is still the uncontroverted evidence of PW1 and PW4 that the deceased died an unnatural death. The learned Senior State Attorney submitted that the trial court believed these witnesses on that account. These witnesses are entitled to credence and we agree that there is no evidence to

contradict them. On the basis of that evidence we agree with Ms. Kyara and conclude that despite there being no Post mortem Report, the deceased died an unnatural death. The case of **Mathias Bundala v. Republic** (supra) has a passage that is relevant to this case, at page 21;

> *"In our considered opinion the manner the deceased was surreptitiously buried in a half-filled saw pit leads to an irresistible inference that she did not die a natural death."*

And so are the circumstances under which the deceased's body was found in this case. They leave only one inference that he died an unnatural death.

Mr. Mboje argued grounds 2, 4 and 5 together, and we consider the approach convenient because these grounds are too interwoven to be addressed separately. Ground two is in relation to proof of ownership of the stolen items. Ground four is in relation to chain of custody of the seized items, whereas ground five attacks the applicability of the doctrine of recent possession. The learned counsel submitted that Exhibits P2 and P3 were improperly identified and the special marks shown at the dock, while no descriptions had been made prior to the tendering. The cases of **Twalib Omari Juma @ Shida v. Republic**,

Criminal Appeal No. 262 of 2014 and; **Hassan Said v. Republic**, Criminal Appeal No. 264 of 2015 (both unreported), were cited to support the point.

Mr. Mboje went on to submit that even the trial court's evaluation of the evidence was not evenly balanced. He submitted that, while it ruled against the appellant that he did not prove ownership of the items by documentary evidence, it did not apply the same standards in respect of the deceased. The learned counsel submitted further that ownership of an item is a key factor in the application of the doctrine of recent possession, in support of which he cited the case of **Mustapha Darajani v. Republic**, Criminal Appeal No 277 of 2008 (unreported).

Ms. Kyara was principally in support of the appeal. In relation to grounds two, four and five she submitted that the doctrine of recent possession was wrongly applied because there was no prior report of the items having been stolen nor was there proof that the deceased had owned those items. She supported Mr. Mboje's complaint that the seizure procedures were violated citing Section 38 of the Criminal Procedure Act, Cap 20 RE 2002 and the case of **Paulo Maduka and Others v. Republic,** Criminal Appeal No. 110 of 2007 (unreported).

This is the main area of controversy in our view, and must lead to the determination of this case one way or the other. We are going to combine our consideration of these three grounds with ground three which is all about seizure and admissibility of Exhibits P2 and P3 to which the learned Senior State Attorney has already alluded. Mr. Mboje submitted that these exhibits were admitted upon being tendered by the prosecuting attorney instead of a witness, which was patently wrong. We agree with both counsel that not only were Exhibits P2 and P3 wrongly admitted after rules of seizure and chain of custody had been violated, but they were improperly used in relation to the doctrine of recent possession.

We agree with the trial High Court that the determination of this case depends on the doctrine of recent possession. We also go along with the learned Judge's appreciation of the key factors of the doctrine, appearing in her decision at pages 89 to 90 of the record of appeal;

> *"It is settled law that in criminal cases in which the evidence is based on the doctrine of recent possession, in order for a court to find a conviction on such evidence, it must be conveniently proved that;*
>
> i. *That the property was found with the accused person*
> ii. *That the property is positively identified to be of the complainant (deceased)*

iii. *That the property was recently stolen from the complainant (deceased)*

iv. *That the property must relate to the one in the charge sheet."*

Invariably this is what the Court said in **Chiganga Mapesa v. Republic**, Criminal Appeal No. 252 of 2007 (unreported), citing the Canadian Supreme Court in, **Rv Kowlyk** [1988] 2 SCR. 59, which had this to say in relation to the doctrine: -

> *"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 guilty 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. When the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor of it will be for the trier of fact upon consideration of all the circumstances to decide which of the 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 the truth. "*

We wish to add that for the purpose of this case the relevant elements are the second and third factors, concerning proof of ownership and proof that the items have been stolen recently. Now, how did the learned Judge resolve the issue of ownership?

It was PW4's word against the appellant's, we think. PW4 stated that Exhibits P2 and P3 belonged to the deceased while the appellant stated that they belonged to him. However, the trial Judge did not believe the appellant's story on the ground best stated by quoting from her judgment at page 92 when discussing the appellant's testimony;

> *"He said the radio was known by villagers and family including his two wives and 9 children but none came to support his case. when asked by State Attorney he said he did not want to disturb them. This court wonders!! Accused is facing serious charge of murder which is capital offence. If real (sic) 2nd accused wanted his defence to be believed, the answer should not have been that he did not want to disturb his family members".*

Yet at page 94 the learned Judge took this view;

> *"As noted earlier the prosecution case is based on the Doctrine of Recent possession. Once proved that a person is found with items immediately stolen, he/she will be responsible for the stealing and other consequences arising out".*

This conclusion by the trial court has been challenged by both the appellant and the learned State Attorney for the respondent, and justifiably so in our view. First of all, as submitted by Ms. Kyara, PW4 who purported to refer to special marks at the time of adducing evidence, had not mentioned those marks before the exhibits had been tendered in exhibit. Even then, while PW4's word as regards ownership of the items was taken as true without any other evidence to support it, that of the appellant was rejected because it lacked support. We increasingly feel that the burden of proof was wrongly shifted onto the appellant's shoulders, because even in cases depending on the doctrine of recent possession, the duty of the prosecution n to prove allegations remains there. This is evident in what the Court stated in **Ally Bakari and Pili Bakari v Republic** [1992] TLR 10, cited in **Paulo Maduka v Republic** (supra). The Court stated inter alia;

> *"...the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged,* ***and no doubt, it is the prosecution who assumes the burden of proof..."***
> [emphasis ours.]

There are also manifest double standards in evaluating the evidence of PW4 and that of the appellant, which is unwelcome as we stated in **Richard Wambura v. Republic,** Criminal Appeal No. 167 of 2012 (unreported). The following excerpt from that case will illustrate our point;

> *"Why was the evidence of PW1 Shera and PW2 Filomena not considered when the issue of Magoti's identification was under scrutiny? Why was it conveniently avoided by the learned trial Resident Magistrate? If PW4 John did not give elaborate explanation on the identification of Magoti, this shortcoming ought to have covered the appellant also. Justice must not be rationed at all".*

Applying that analogy to the case at hand, we find no justification for concluding that the appellant's account was insufficient on the ground that it was not supported by other witnesses, but the same deficiency did not adversely affect the testimony of PW4. This approach is more disturbing in view of the fact that the appellant had no duty to prove his innocence.

In the Canadian case of **R v. Kowlyk** (supra) which we just cited above it was stated that it may not matter that the explanation given by the accused is not believed by the accuser. Again, the account given by

the appellant as to how he came by the items may not have been wholly true in the eyes of the trial court, but it is settled law that one is never convicted because of one's lies for, lies are told for a variety of reasons. In **Hassan Fadhili v. Republic,** [1994] TLR 89, it was held that people sometimes lie for a just cause or out of shame or just to conceal a disgraceful behavior. For a lie to be corroborative of the prosecution case it must be material to the issue.

Our conclusion on this point is that the prosecution did not prove to the required standards that Exhibits P2 and P3 belonged to the deceased.

We now consider whether there was evidence that Exhibits P2 and P3 had been stolen from the deceased, and perhaps this is horse before the cart. This is because having concluded that there is no proof that the deceased was the owner of those items, the question whether the same were stolen from him becomes moot. However, for the purpose of clarity we shall consider this issue.

In the first place, there is no evidence that at the time of reporting the death of the deceased, there was also a report that some of his property had been stolen. There is therefore nothing to justify PW2's alleged sixth sense that made him apprehend and search the appellant

when he was on his way to Matombo, because how did it occur to him that the appellant would be carrying things about which he was yet to receive report of being stolen?

Therefrom, the rules as to chain of custody were violated, and the procedure of admitting these items in evidence was equally not observed. In the end there was nothing on which the doctrine of recent possession could be validly applied to ground the appellant's conviction. And as the case was solely dependent on the doctrine of recent possession, there was no proof of the case beyond all reasonable doubt when two factors of that doctrine were not established.

In the end, having found merit in grounds two, three, four, five and six of appeal, we allow the appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release if he is not being held for some other lawful cause.

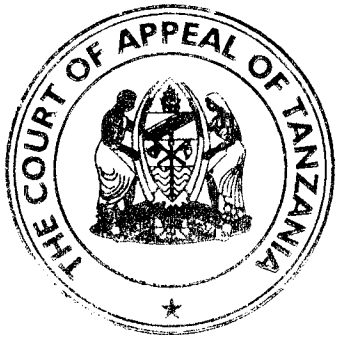
DATED at **DAR ES SALAAM** this 9th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 10th day of March, 2020 in the presence of the Appellant in person and Ms. Monica Ndakidemi, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL