IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MUGASHA, J.A., KOROSSO, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 105 OF 2020

HEPA JOHN IBRAHIM ..... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Mkasimongwa, J.)

dated the 13th day of December, 2019
in
Criminal Sessions Case No. 30 of 2016

.....

JUDGMENT OF THE COURT

26th May, & 10th June, 2021

KOROSSO, J.A.:

In the High Court of Tanzania, sitting at Tanga, the appellant, Hepa John Ibrahim and Jafari Ibrahim Ally (2nd accused and acquitted at the trial) who is not subject of this appeal, were arraigned for murder contrary to section 196 and 197 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). The particulars in the information were that, on the 14/3/2013 at Mlima wa Simba, Duga Maforoni village within Mkinga District in Tanga Region, the appellant, Hepa John Ibrahim did murder one Adamu Masemo Salimu.

The appellant pleaded not guilty to the information when read. Thereafter, a full trial was conducted and to prove its case the prosecution paraded seven (7) witnesses and seven (7) exhibits while on the defence side, it is the appellant and the 2nd accused who testified.

The facts of this case as presented by the prosecution witnesses is that: Adam Masemo (the deceased) was a friend of Fumbwe Mwandege Hamisi (PW2), a rider of a motorcycle for hire, popularly known as *boda boda* who usually parked at Duga Maforoni. PW2's motorcycle was Kinglion make, red and white stripes in colour with Registration No. T610 BZK. The deceased at times borrowed it from PW2 to ride customers who hired him to various destinations. On 13/03/2013 at 12.00 hrs, while PW2 was at his parking place, he received a call from the deceased informing him about a possible customer who needed transport and that he will come to look for PW2. The customer, (allegedly the appellant) arrived and went directly to PW2, hired him and required to be taken to Mlima wa Simba. The ride ensued until they reached Mlima wa Simba area and PW2 was told to stop and to wait for the client who had left him there. After about an hour of waiting, PW2 called the client asking on his whereabouts, the client came back and paid him the agreed fare of Tshs. 15,000/-.

On 14/3/2013 at 16.00 hrs. the deceased called PW2 informing him that he needed the motorcycle having been hired by the same client to ride him to Mlima wa Simba. PW2 allowed the deceased to take the motorcycle and continued to communicate with him when he was on his routes riding his client to respective destinations. According to PW2, on the 14/3/2013 he had seen the deceased afar driving some passengers including the appellant, but did not come back nor call him again that day despite calling him. On 15/03/2013, PW2's calls to the deceased were not getting any response so he decided to call the customer they had shared (the appellant) since he still had his number. His call to the customer was responded to and he was told that they had a puncture on a tyre and had no information on the whereabouts of the deceased. PW2 got worried and informed some of the *boda boda* riders in the vicinity. Their search was barren of fruits. PW2 also reported the disappearance of the deceased at Duga Maforoni police station.

On 16/03/2013, PW2 accompanied by police officers including PW3, PF 19826 Ass. Insp. Kassim Mbaruku Omari (PW6) and some other people went to Mlima wa Simba to search for the deceased and managed to find a body of the deceased in the bush. The body was taken to hospital for autopsy. The postmortem examination on the deceased body conducted by Dr. Selemani Zuberi Mgonya (PW5)

revealed that the deceased had a broken neck and had bruises on the hand, neck, chest and his body was swollen. The findings posted in the postmortem report admitted as exhibit P3 concluded that the deceased died due to strangulation.

The appellant was arrested on the 28/6/2013 by F.3504 Cpl. Hakika (PW3) along the 15th street within Tanga and put in custody upon receiving information on his whereabouts from an informer. The appellant was interviewed and his statement recorded by PW6. It was from the said information the police gathered that the 2nd accused was also involved in the incident and thus on the night of 1/7/2013, they went to Kwamatuku village in Handeni District to follow-up the information. The appellant was the one who led them to the 2nd accused's house and on finding him they arrested him. It was the 2nd accused who informed the police about the motorcycle which disappeared on the day of the deceased's disappearance, which was usually ridden by PW1 and that he and the appellant had sold the respective motorcycle Reg. No. T 610 BZK at Sakala village in Muheza District to a person known as Omari.

Omari was traced, and whereby it was revealed his full name was Omari Said Salimu (PW7). He admitted to have purchased a motor cycle

from the appellant and showed them a document purported to be a sale agreement (exhibit P4). At the house of the 2nd accused, a motor cycle with Registration No. T610 BZK, make Kinglion, red colour was found and at the trial was admitted in evidence as exhibit P5.

The defence evidence was basically denial of committing the offence or to have been with the deceased on the days PW2 had testified, that is, on the 14-15/03/2013. His testimony also revealed the circumstances of his arrest suspected of murder, at his business place, a charcoal store situated along street No 9 within Tanga City. The appellant denied to have sold the motorcycle said to be ridden by the deceased on the day he disappeared or knowing the 2nd accused before being jointly charged with the offence they faced.

At the end of the trial, the trial Judge found the appellant guilty as charged and sentenced him to the only sentence available for murder charges, that is, death by hanging. The second accused was found not guilty and acquitted.

Aggrieved, the appellant has appealed to this Court challenging both the conviction and sentence. He lodged a memorandum of appeal comprising eight grounds of appeal. Having carefully scrutinized all the grounds of appeal, we have condensed them into mainly the following: -

1. *That the retracted extrajudicial statement (exhibit P1) was wrongly admitted contravening settled law and practice before being relied upon to convict the appellant.*

2. *That the doctrine of recent possession was wrongly applied since ownership of the seized motorcycle Reg. No. T610 BZK Kinglion was not proved and the chain of custody was broken.*

3. *That the sale agreement (exhibit P.4) was wrongly admitted and relied upon in convicting the appellant despite being flawed.*

4. *That the sketch map exhibit P7 was erroneously admitted while it contradicted exhibit P1 with respect to the crime scene.*

5. *That dock identification of appellant (PW2) was faultily relied upon without support of any documentary, physical evidence or the printout from the phone purported to have called the appellant.*

6. *That contradictory, incredible and unreliable prosecution evidence was erroneously relied upon.*

7. *That the postmortem report (exhibit P3) was incorrectly admitted and relied upon to convict the appellant disregarding anomalies therein and being tendered by an incompetent witness PW5.*

8. *That the prosecution case was not proved beyond reasonable doubt as against the appellant.*

At the hearing of the appeal, the appellant was represented by Mr. Switbert Rwegasira, learned counsel, Mr. Waziri Magumbo and Ms.

Elizabeth Muhangwa both learned State Attorneys appeared for the respondent Republic.

The appellant's counsel took off by adopting the memorandum of appeal and written submissions filed by the appellant and informed us that he will only amplify on ground 2 and 8. On ground 1, the gist of the appellant's complaints related to the trial court's failure to conduct a trial within trial to inquire on the voluntariness of the extrajudicial statement after the appellant had raised an objection to its admissibility for reason that it was not voluntary. Further to this, the appellant submitted that exhibit P1 is wanting in that it contradicts other prosecution evidence because there is nothing relating to the appellant having hired a motorcycle, selling it or taking police officers to the person who purchased the motorcycle. Another complaint by the appellant with regard to the content of exhibit P1 was that while the other prosecution evidence described the scene of crime to be Mlima wa Simba, exhibit P1 states the incident occurred at Kidongo Chekundu which are two separate areas. The last complaint against exhibit P1 was that after it was recorded, there is nowhere in the statement showing that the statement was read over to the appellant to verify its correctness or to add anything to the statement.

Ms. Muhangwa responded to the complaints generally upon conceding to the appeal contending that the evidence presented by the prosecution was not sufficient to prove the offence charged against the appellant and thus below the standard of proof required in criminal charges. She also faulted the trial Judge for admitting and relying on the extrajudicial statement because, after it was retracted, there was no trial within trial conducted to determine on its voluntariness. She thus prayed that exhibit P1 be expunged from the record in view of the irregularities in admitting it.

On this ground, it is pertinent to scrutinize what transpired in the trial court and the process of the admissibility of exhibit P1 (at pages 34-38 of the record of appeal). After Mbwana Ally Hamis (PW4) requested to tender the extrajudicial statement of the appellant as an exhibit, the counsel for the appellant objected its admission on ground that it was not voluntarily made. After hearing the parties on the objection. The trial Judge overruled the objection holding that since it was not a cautioned statement made to the police but a statement made to the justice of the peace, an inquiry into its voluntariness was not necessary, he stated:

> "... *Going by the provisions of section 27 of the Evidence Act, the right to repudiate or retract the statement one has in respect of the statement made to a police officer and*

that can clearly be leant from the provisions of section 27(2) of the Evidence Act. Reading sub-section, it is clear that the Extra-Judicial Statement (is that statement made to the justice of the peace) is not subjected to section 27(2) of the Evidence Act. The rationale is that: as the justice of the peace is not interviewing the suspect with a view of ascertaining if he committed the offence, rather than recording what the suspects freely states in confession of the offence, there is no even minimal opportunity for the justice of the peace to compel the suspect to confess to the offence. ***As such any contention by an accused person that the extrajudicial statement was not voluntarily made does not necessarily lead the court to conduct a trial within trial.*** *The defence may take that opportunity in cross examination to ask questions, answers of which may lead that court to a finding that the statement was illegally procured..."* [Emphasis added].

Suffice to say, while it is true that to challenge a cautioned statement on its voluntariness is implicitly provided for under section 27(2) and (3) of the Tanzania Evidence Act, Cap 6 R.E. 2002 (the TEA) as held by the trial Judge as seen in the above excerpt, it is not correct to state that there is no room to challenge voluntariness of extrajudicial statements.

This is because, an extrajudicial statement is a statement made to the Justice of the Peace in compliance with the Chief Justice's instructions published in a booklet titled "A Guide for Justice of the Peace' which contain, inter alia, the manner of taking extra Judicial statements from 1st July, 1964 the date when the Magistrates Courts Act, Cap. 537 came into force. The said instructions have now been revised and updated in a booklet titled "A Handbook for Magistrates in the Primary Courts published by the Judiciary of Tanzania dated January, 2019. Weighed against the guidelines, the statement is admissible and may be proved against the maker pursuant to section 59 of the MCA. (See **Japhet Thadei Msigwa v The Repubic**, Criminal Appeal No. 367 of 2008 (unreported)).

Similarly, this Court has, in many occasions stated that upon an objection being taken against a confession, be it a caution or extra judicial statement the trial court should stop proceedings and conduct a trial within a trial or an inquiry to ascertain its voluntariness. In the case of **Twaha Ally and 5 Others vs Republic**, Criminal Appeal No. 78 of 2004, (unreported) the Court stated:

> "...*If that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession; the court must*

stop everything and proceed to conduct an Inquiry or trial within trial into the voluntariness or otherwise of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."

See also **Robinson Mwanjisi and three others vs Republic** [2003] TLR 218, **Makelele Kulindwa vs Republic**, Criminal Appeal No. 175 "B" of 2013; **Zakaria Kazembe vs Republic**, Criminal Appeal No. 236 of 2013; **Shinje James vs Republic**, Criminal Appeal No. 408 of 2017 and **Yohana Kulwa @Mwigulu and 2 Others vs Republic**, Consolidated Criminal Appeal No. 192 of 2015 & 397 of 2016 (all unreported).

In essence, upon failure by the trial court to conduct a trial within trial to investigate its admissibility in evidence when an objection has been registered against a confessional statement, vitiates the said statement. In all the cases cited above we held that it is improper to admit a disputed confession in evidence without first conducting an inquiry or a trial within trial to verify its voluntariness. Thus, as rightly pointed by the learned State Attorney, exhibit P1, for reasons advanced above, has no evidential value. It is henceforth expunged from the records. We thus find that the 1st ground of appeal is merited.

In ground 2, the appellant faulted the reliance on the doctrine of recent possession by the trial court in relation to exhibit P5, the motorcycle to convict him. He argued that this was not proper because ownership of the motorcycle was not proved nor was there proof that he sold it to PW7 or someone by the name of Omari. He also complained that the motorcycle was not found in his possession but with PW7 and he was the one who took the police officers to PW7. Furthermore, the appellant faulted the fact that it was PW6 who tendered the motorcycle arguing that he was incompetent to do so.

In relation to the evidence on the chain of custody of the seized motorcycle, the learned advocate argued that the prosecution witnesses did not explain how exhibit P5 was stored after it was seized nor mention who was in control of it since no documentary evidence was tendered to support the seizure and storage. He contended that the prosecution witnesses failed to clarify where the motorcycle was stored after it was seized and implored the Court to find that the gaps in the evidence related to the compromised chain of custody should benefit the appellant.

The learned State Attorney for her part, concurred with the appellant's contentions that the chain of custody of the motorcycle was

not intact because the prosecution failed to prove that it was intact leaving doubts in its case.

With respect to the trial court, although there was nothing expressly stating the doctrine of recent possession, in essence, deducing from its finding on possession of the motor cycle, the doctrine of recent possession was invoked in determining the guilty of the appellant. The trial court also found that the chain of custody of exhibit P5 was intact gathered from the findings at page 107 thus:

> "... **Four**: *the motor cycle possessed by the deceased immediately before his death was found sold to Omari Saidi and that it is the first accused who sold it to the buyer.* ***Five****: that it is the first accused who led the Police Officers to the person to whom he had sold the motor cycle and that the motor cycle was found with and seized from the buyer..."*

From the above excerpt it is clear that the learned trial judge considered and relied on the evidence that it is the same motorcycle ridden by the deceased which was sold by the appellant to the person who was found with it but failed to discuss the chain of custody directly. The question is whether the above findings by the trial court were based on the evidence on record.

We find it prudent to restate the factors that govern application of the doctrine of recent possession and chain of custody. With regard to recent possession, in **Joseph Mkumbwa and Samson Mwakagenda vs Republic**, Criminal Appeal No. 94 of 2007 (unreported) the Court expounded the principle thus:

> *"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 form the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused."*

On the other hand, to establish the chain of custody, it is crucial to prove documentation of the sequence of events in the handling of an exhibit from the time it is seized, how it is controlled, transferred, stored until it is tendered and admitted in court at the trial. This has been stated in the case of **Paulo Maduka and 4 Others vs Republic**, Criminal Appeal No. 110 of 2007 (unreported), which was followed in other cases including, **Makoye Samweli @Kashinje and Kashindye**

Bundala, Criminal Appeal No. 32 of 2014 (unreported) and many others we need not mention herein. However, in **Kadiria Said Kimaro vs Republic**, Criminal Appeal No. 301 of 2017 and **Chacha Jeremiah Murimi and 3 Others vs Republic**, Criminal Appeal No. 551 of 2015 (both unreported), the Court stated that it is not in every case that documentation will be the only requirement to prove chain of custody of exhibits. It was stressed that the circumstances of each particular case should be considered to establish authenticity and handling of documents, especially were the nature of the said exhibits is such that they cannot be easily tempered with.

Taking into account the above legal position, undoubtedly, the onus to prove all the above conditions with respect to recent possession and chain of custody lies with the prosecution. In the instant case, gathering from the evidence on record it is clear that there are a lot of gaps with regard to who was in possession of exhibit P5. The pending doubts have not been cleared on whether or not exhibit P5 is the one and the same the witnesses had testified on. While PW2 and PW6 testified that the motorcycle was red in colour with white stripes and make of Kinglion, PW7 recounted that the motorcycle which he was alleged to have bought from the appellant is red in colour and the make being Kinglion and sometimes stating that it is Shanrang. All the

witnesses stated the Reg. No. as T. 610 BZK. The sale agreement (exhibit P4) found at page 127 of the record did not describe the motorcycle by reference to its registration number. We find it pertinent to reproduce it hereunder:

"24/06/2013

Mimi hapa, John nimemuuzia pikipiki yangu ndugu omali said kwa Tsh. Laki Tisa na ishirini elfu Tu. 9,20,000/- aina ya pikipiki ni Kinglion nyekundu.

Leo tar hii Tunapunguza shs. 300,000): Jumatano 27/6/2013'

Muuzaji *Saini yake* *Hepa Joni*
Ibrahimu Eliasi
Antoni Joni

Sahihi ya Wanunuaji

1. *Signed*
2. *JUMA B*
3. *JOHN HENRY*

LEP 27/6/2013

Tunapunguza shs. 5,20,000/=

Laki tano ishilini Elfu baki Laki moja hadi tar 27/7/2013 mashahidi ni hao hao na Tunakabidhiwa pikipiki na sahihi

1. *Signed*
2. *JUMA. B*
3. *JOHN H."*

A scrutiny of the sale agreement shows that the sellers did not sign on anywhere similar to the purchasers who signed on the document. Their names are just mentioned. Similarly, the Registration number of

the motorcycle being sold is not recorded anywhere in the document which could have assisted to verify that it is the motorcycle referred to by PW2 and PW6. There is also the fact that, PW7 who was found to be the purchaser by the trial court, stated categorically that he was not the buyer but a witness to the sale transaction. The actual buyer was not called as a witness.

The learned trial Judge found that it is PW7 who bought the motorcycle from the appellant. Having examined the evidence, we find this statement is with due respect misguided, this is because at numerous times, PW7 refuted to be the buyer of the motorcycle in question. The record of appeal at pages 62, 64 and 65 shows that when queried during cross examination by the counsel for the appellant and the 2nd accused, he stated that he signed the sale agreement as a witness and not the buyer. Indeed, this assertion by PW7 shows a disconnection in evidence with regard to exhibit P5, in essence contradicting the evidence of PW6 who stated that PW7 was the buyer. It also meant that the real purchaser of the motorcycle was not called as a witness to testify on the same in order to link possession with the stolen motorcycle last seen with the deceased. For the foregoing reason, undoubtedly, the doctrine of recent possession was not proved. The trial

Court should not have invoked it in the absence of proof of possession of the motorcycle admitted as exhibit P5.

The above discrepancies in the oral and documentary evidence from the prosecution witnesses leave doubts on whether the alleged motorcycle was really sold as claimed by PW7 and if it was, whether it is the same as the one described by PW2 to have been with the deceased on the day he disappeared.

The evidence available with regard to the chain of custody of exhibit P5 is that of PW6 who testified that after collecting the motorcycle, he handed it over to an exhibit keeper in writing but the relevant document was not tendered in court. The exhibit keeper's name was not disclosed nor was he called to testify. Essentially, what it meant was that upon seizure of the motorcycle, PW6 was in control of it until he left it to the exhibit keeper. There is no oral evidence or paper trail to show who was in control of it up to the time it was handed to the purported owner and subsequently up to the time it was tendered and admitted in court. We gathered from the evidence of PW2 (at page 24 of the record of appeal) that in December, 2013 the motor cycle was handed to owner Omari Mwandege Hamisi and PW2 was entrusted to be the rider up to the time it was tendered in the trial court. The nagging

question is with that evidence can it be said the chain of custody was intact?

Put into context, it meant that there was no evidence on who in effect was in custody of the seized motorcycle for five years and four months. That is, from 2/7/2013 when PW6 handed it to the exhibit keeper and to December 2013 when it was handed to the said owner, and ultimately up to 26/11/2018 when it was tendered in the trial court. Undoubtedly, the chain of custody of the motorcycle was not intact. This leads us to find ground 2 of appeal to have merit.

In view of our discussions in ground 2, we sustain ground 3. Exhibit P4 was wrongly relied upon in convicting the appellant because it had no connection whatsoever to the motorcycle alleged to have been robbed from the deceased.

The appellant's grievance in ground 4 was neither amplified in the appellant's written submission nor in the oral submission of the appellant's counsel except for the second part faulting the trial court for relying on the evidence related to the alleged telephone communication between the appellant and PW2. Our understanding is that, this ground apart from what was submitted by the learned counsel for the appellant, it also challenges the trial court for relying on the PW2's dock

identification of the appellant in the absence of any other supportive evidence.

The learned trial Judge relied on the evidence of PW2, that he had seen the appellant together with the deceased on the material day and that PW2 communicated with the appellant on the telephone (see page 107 of the record of appeal). PW2 testified that he had seen the appellant twice, once driving him to Mlima wa Simba on the 13/3/2013 during the day and on the 14/3/2013, he saw him with the deceased from afar at Duga Maforonya and then identified him on the dock. PW2 acknowledged that it was the first time to see the appellant on 13/3/2013.

The learned trial Judge did not treat PW2's evidence to be mere dock evidence. He found that PW2 properly identified the appellant. This being a second appeal the Court rarely interferes with the concurrent findings of fact made by the courts below unless there is misapprehension of the substance, nature and quality of the evidence as held in **Director of Public Prosecutions vs Jaffari Mfaume Kawawa** [1981] TLR 149 and **Mussa Mwaikunda vs The Republic** [2006] TLR 387. Having considered the evidence of PW2 on identification of the appellant, we are satisfied that it did not satisfy all

the requisite conditions. PW2 did not provide specific description of the appellant, and from his evidence it is clear that the deceased is the one who knew the person who hired them better. Although there is not much doubt on the proximity and the time they spent, there was nothing specific revealed by PW2 who had admitted not knowing the appellant prior to the day he came to hire the motorcycle.

As stated in the case of **Musa Elias and 2 others vs Republic**, Criminal Appeal No. 172 of 1993 (unreported).

> "*It is a well-established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial.*"

No identification parade was conducted to corroborate the dock identification of the appellant in terms of section 166 of the Evidence Act, [Cap, 6 R.E 2019]. We thus find that under the circumstances, there was still a possibility of mistaken identity.

The other concern was the failure of the prosecution to tender the printouts of the telephone communication between the number which PW2 was communicating with when following up on the deceased. PW2

stated that he gave the said number to the investigators but nothing was forthcoming on the same. The said evidence was not tendered in the trial court.

As rightly argued by the learned counsel for the appellant, failure by the prosecution to tender the relevant telephone printouts meant that they were unable to link the said phone communication and corroborate the available evidence on identification of the person who hired PW2 and the deceased on that day. Without any other evidence to corroborate the dock identification of the appellant by PW2, it was unsafe for the trial court to rely only on the evidence of identification of the appellant during the trial court to find he was properly identified. We are of the view that, with due respect, had the trial court warned itself of the eminent danger of relying on such evidence only, it would have arrived at a different conclusion. We hold that with the available evidence the appellant was not properly identified as being the one who hired the deceased's motor cycle.

Since the findings on the above four grounds suffice to dispose of the appeal, we find no need to consider the remaining grounds of appeal.

All said and done, as rightly conceded by the learned State Attorney, the prosecution failed to prove its case to the standard required. We accordingly allow this appeal. The conviction of the appellant is hereby quashed and the sentence imposed set aside. The appellant is to be released forthwith from custody unless he is otherwise lawfully held.

DATED at **TANGA** this 10th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of June, 2021 in the presence of the Appellant in person and Mr. Joseph Makene, learned State Attorney for the Respondent/Republic, is hereby certified as true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL