IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CORAM: LILA, J.A., KITUSI, J.A. And KAIRO J.A.

CRIMINAL APPEAL NO. 599 OF 2017

MOSES EDWARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bukuku J.)

dated the 11th day of December, 2017

in

Criminal Session No. 27 of 2013

.....

JUDGMENT OF THE COURT

24th November & 1st December, 2021

LILA, JA:

The appellant, Moses Edward, together with four other suspects were arraigned for the accusations of committing two offences. In the first count; they faced a charge of murder. The allegation was that they murdered one Francis Stephano Jingu. In the second count; they were charged with attempting to murder and the victim was one Godfrey Zacharia (PW2). Both offences were allegedly committed in the course of the armed robbery incident that took place on 7/1/2012 at Kitangiri Minazi Mitatu, within Ilemela District in Mwanza Region.

As good luck would have it, two out of the five accused persons were acquitted for no case to answer and the other two were acquitted after a full trial for insufficiency of evidence linking them with the charged offences. Only the appellant was shrouded into the web of the prosecution evidence and was convicted in both offences. The deceased's cell phone (Exh. P4) allegedly stolen at the scene of crime and which the appellant allegedly gave it to his lover one Linda (PW4), from whom it was allegedly retrieved, was sufficient to move the learned trial judge to invoke the doctrine of recent possession and hold that the appellant was responsible with the charged offences. The appellant was sentenced to only one sentence; to suffer death by hanging. The present appeal is his manifestation of his grievance with the decision of the trial judge in both conviction and sentence.

A brief background to the matter will be useful in appreciating the essence of the appeal before us. However, as the appellant's conviction was founded on a phone (exhibit P4), the background is restricted to evidence which allegedly formed the said link. Prior to the incident, PW2 and the deceased worked with M-Pesa at Bwiru corner, Mlezi Bar near Tai Five Hotel which business they usually opened at 7:00am and closed at 10:00pm. On the fateful date, they closed at 8:45pm and together with Yona Stephano Jingu and Salum left for home. On the way, at

Minazi Mitatu, Kitangiri area, they were invaded by bandits who grabbed PW2 and the deceased. The other two companions ran away leaving the two struggling with the bandits. In the course, PW2 was thrown in the ditch and later heard a gunshot. He then fell unconscious only to recover while in Bugando Hospital. He did not identify any of the bandits. A policeman one Patrick visited the scene and was given the mobile numbers used by the deceased who had tigo, airtel and Vodacom numbers. He visited Vodacom offices but was not availed with the print out. Instead, it was shown to him and told that the deceased's phone was being used by another customer. He called that new customer through Vodacom asking her to report to the police station but the customer never co-operated claiming that she was not guilty. Together with the OCD for Ilemela District, they arrested the new customer at TFB offices and took her to police station. The lady turned out to be Linda Lubowa (PW4). According to PW3, upon interrogation, PW4 admitted having the cell phone. She was asked to bring the phone and she did so on 26/2/2012 in the presence of one Rashid Ahmed Karushaka (PW5), her father. PW4 told PW3 that she was given the phone by her lover one Edward Moses (Bonge) (the appellant) because her phone got lost in the new-year eve. PW3 prepared a seizure certificate (exhibit P3) in which the phone retrieved from PW4 was

recorded to be Nokia, model 1208, black in colour with serial number 355735027839250 (exhibit P4). He went further to state that on 26/2/2012, they requested PW4 to call the appellant and upon being told he was at Kirumba garage, they went to arrest him. He denied having any affairs with PW4. According to PW4, she was given the phone by her lover one Edward Moses (the appellant) and she did not see any mark on the phone which she described as a used Nokia phone ("tochi") black in colour with a loose cover and by the time she was arrested she had stayed with it for one and a half week and had already sold it to her neighbour from whom the police retrieved it but did not arrest him. She called the appellant using her phone and he was arrested at Kirumba garage. She denied having affairs with one Patrick (PW3). PW5, on his part, said he was present when the appellant was arrested at the garage and he admitted giving the phone to PW4 and that he got the phone from his friend.

PW3 is also on record saying that he called the deceased's relatives among them being his wife Happiness Mosha (PW8) and one Yona Steven who told him that the deceased used to mark his phone with mark F.M.J. below the battery.

PW8 stated that on 28/2/2012 she was called by PW3 and was shown a small Nokia black in colour with no cover and she told him to

remove the battery to verify if the mark FMJ which stood for Francis Mura Jingu could be seen and it was seen. She described it further as being Nokia No. 1208, on top it is black and at the back it is brownish.

On the basis of these witnesses (PW3, PW4, PW5 and PW8) and invocation of the doctrine of recent possession, the trial judge was convinced that there was nexus between the stolen mobile phone at the robbery incident and the appellant. The appellant's defence was found to be implausible and unable to account for his recent possession of the phone. She accordingly found that the charge against him was proved beyond reasonable doubt.

Being aggrieved, he has accessed this Court seeking to challenge the decision of the High Court. Two sets of memoranda of appeal are in Court record; one lodged by the appellant on 27/2/2019 comprising five grounds of appeal and the second one lodged on 19/11/2021 by Ms. Rose Edward Ndege, learned advocate who represented the appellant, with five grounds of appeal also. However, Ms. Ndege abandoned the memorandum of appeal lodged by the appellant.

Before we had proceeded to hearing the appeal on merit, having noted that the learned trial judge had omitted to append her signature after recording the evidence of each witness, Ms. Ndege sought leave of the Court to raise the attention of the Court on that infraction and argue

that new grounded not included in the memorandum of appeal under Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Ms.Mwamini Yoram Fyeregete, learned Senior State Attorney, who represented the respondent Republic, had no qualm with the prayer sought. It being a legal point, we acceded to the prayer sought by Ms. Ndege. We accordingly invited the learned counsel to address us on that legal point.

Addressing the Court, Ms. Ndege took us through the record while pin-pointing the pages at which the learned trial judge did not sign after the witnesses had completed testifying as being at page 20 where PW1 completed testifying, page 23 after PW2 had finished giving evidence, page 32 for PW3, page 36 for PW4, page 39 for PW 5, page 47 for PW6, page 50 for PW 7, page 56 for PW8, page 62 for PW9, page 68 for PW10, page 72 for PW11 and page 76 for PW12. On the defence case, Ms. Ndege referred us to page 87 for DW1, the appellant (then 1st accused), page 88 for DW2 (then 2nd accused) and page 91 for DW3 (then 3rd accused). She was of the view that absence of the judge's signature after each witness's testimony rendered the evidence unauthentic hence a nullity. She advised us to exercise powers of revision bestowed to the Court pursuant to section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (AJA) to quash and set aside the

whole evidence, the judgment and the conviction and then set aside the sentence. She referred us to the Court's recent decision in the case of **Sabasaba Enos @ Joseph vs Republic**, Criminal Appeal No. 411 of 2017 (unreported) to support her argument.

To the above view, Ms. Fyeregete, was in full agreement with Ms. Ndege and to cement the legal position she referred the Court to another decision of the Court in **Mhajiri Uladi and Another vs Republic**, Criminal Appeal No. 234 of 2020 (unreported).

We are in complete agreement with the views expressed by both Ms. Ndege and Ms. Fyeregete. While section 210(1)(a) of the CPA, in an unambiguous terms puts as an imperative requirement that a magistrate should append his signature after recording the evidence of each witness, section 215 of the CPA vests the High Court with powers to make rules prescribing the manner the evidence or the substance thereof shall be taken down. By virtual of that authority, GN. Nos. 28 of and 286 of 1956 (the Rules) were enacted and Rule 3 provides for the manner of recording evidence.

Apparently though, the Rules did not make it mandatory that the trial judge should append his signature after recording the evidence of each witness [See **Sabasaba Enos @ Joseph vs Republic** (supra)]. In **Yohan Mussa Makubi vs Republic**, Criminal Appeal No. 556 of

2015 (unreported) the Court had an occasion to consider the obtaining incompatibility of the manner of recording witness evidence in the magistrates courts and the High Court and resolved that appending a signature by a judge after recording each witness' evidence is a long-established rule of practice which should be adhered to even by the High Court. The Court went further to hold that failure by the judge to append his signature after taking down the evidence of every witness subjects the evidence to question as to its authenticity. That has been our holding consistently. [See **Sabasaba Enos @ Joseph vs Republic** (supra), **Mhajiri Uladi and Another vs Republic** (supra) and **Chacha Ghati Magige vs Republic**, Criminal Appeal No. 406 of 2017 (unreported)].

With respect, guided by the aforestated position of the law, with the apparent total omission by the learned judge to append her signature after every witness's evidence, in the present case, the purported testimonies by both the prosecution and defence was a nullity. It could not be acted upon to anchor the appellant's conviction. Accordingly, we invoke the revisional powers under section 4(2) of AJA to quash and nullify the evidence and judgment, quash the conviction and set aside the sentence.

Ms. Ndege and Ms. Nyeregete parted ways on what course to take; to order a retrial or not. Ms. Ndege was not in favour of an order for retrial. She reasoned that looking at the evidence as a whole there is no evidence linking the appellant with the mobile phone (exhibit P4) allegedly stolen at the crime scene. Identification of exhibit P4 was seriously attacked by Ms. Ndege arguing that, while PW4 to whom the phone was allegedly given by the appellant and stayed with it for one and a half week said she did not see any mark, PW8 said it had FMJ mark in the battery. In another angle, Ms. Ndege argued that had that mark been there, the same would have been reflected in the seizure certificate (exhibit P3). In addition, Ms. Ndege argued that there was a discrepancy as from whom the phone was retrieved that is to say, while PW3 said it was taken to the police by Linda (PW4), PW4 said the police seized it from her neighbour whom she had already sold it to. The more so, Ms. Ndege expressed concerns as to why the said neighbour was not arrested so as to explain if he had in any way dealt with it. In all, she contended that the chain of custody was broken and the chances of tempering could not be overruled as PW3 stayed with it for almost five years. She referred us to the case of **Hepa John Ibrahim vs Republic**, Criminal Appeal No. 105 of 2020 (unreported). Finally, she beseeched the court to set the appellant free.

Ms. Fyeregete seriously opposed Ms. Ndege's submission. She contended that the evidence by PW3, PW4, PW5 and PW8 and exhibit P4 seriously incriminated the appellant. She argued that according to PW3, exhibit P4 was retrieved from Linda (PW4) and PW3 stayed with it all along till he tendered it in court hence eliminating the chances of tempering. Further, she argued that exhibit P4 bore the same serial number recorded during retrieval and it was the same phone PW4 said she was given by the appellant. On that, the case of **Marceline Koivogui vs Republi**c, Criminal Appeal No. 2017 (unreported) was referred to us. Regarding identification of exhibit P4, she argued that PW8, the deceased's wife identified it by mark FMJ which was written in the battery proving that it belonged to the deceased and as PW4 said she was given it by the appellant, then the appellant's link with the murder was established.

In our objective examination of the prosecution evidence it is plain that central to the appellant's link with the charged offence is exhibit P4. In the circumstances, the prosecution was obligated to lead evidence establishing that it belonged to the deceased, was the very same one that was retrieved and was in constructive possession of the appellant. So, sufficient evidence on identification of it and retrieval was crucial.

We have duly considered the contending views by the learned counsel of the parties as well as read the cited cases. With respect, we find no difficult in holding that the evidence on both aspects was problematic. We shall begin with identification of exhibit P4. According to PW3, no sufficient cooperation was accorded to him by the service provider for Vodacom and was not issued with a print out of the communication done through the appellant's Vodacom mobile phone number when he requested the same by way of a letter dated 7/2/2012. Instead, he at page 28 of the record, is recorded to have said that he visited the vodacom offices and was only showed the print out which indicated that the deceased phone number was being used by another customer. Clear as he was, PW3 was hereby definitely referring to the sim card and not the cell phone. We are alive to the fact that the appellant is linked to the commission of the offence by cell phone (exhibit P4) and not the sim card. Had PW3 been serious, he was supposed to ask to be availed by the service provider with the serial number of the cell phone of the deceased. Unfortunately, that was not done. The serial number of the deceased phone was therefore not made known to PW3 by the service provider. Consequently, there misses a link between the deceased cell phone and the cell phone with serial number No. 355735027839250 (exhibit P4) recorded in exhibit P3. Worse still,

PW8 identified the phone by the mark FMJ on the battery which mark was not seen by PW4 who stayed with it for two and half weeks. That mark was also not seen by PW3 and PW4 when exhibit P3 was prepared otherwise it could have been reflected in in exhibit P3 as rightly argued by Ms. Ndege. This is something which creates doubts as to when the mark FMJ was inserted in the battery. In addition, while PW3 described exhibit P4 as being Nokia model 1208 black in colour, PW8 described the deceased phone she knew this way:-

"If I see the phone today, I can remember it. It is a Nokia No. 1208, and has that mark. On top it is black and at the back it is brownish."

With these clear discrepancies on the identification of exhibit P4, it cannot be said that PW3, PW4 and PW8 were talking of the same mobile phone. We would add that all along the phone linking the appellant with the offence was being referred to as Nokia "tochi" which is, no doubt, a common item able to change hands easily. The record is clear that PW4 sold to her neighbour the phone and according to PW4 it was retrieved from the neighbour who was, however, not arrested so as to explain if it was the same phone PW4 sold to him. Under these circumstances, even taking it that the appellant gave a phone to PW4 which fact was however not admitted by the appellant, yet it is uncertain if exhibit P4 is

the phone stolen from the deceased in the robbery incident which resulted in the deceased death.

Secondly, evidence on the retrieval of exhibit P4 left a lot to be desired. Whereas PW3 was clear in his testimony that PW4 is the one who, on 26/2/2012, took the exhibit P4 to the police upon being asked to do so on 25/2/2012, the latter said it was retrieved by police from his neighbour who she had sold it to but was not arrested. Going by the evidence on record by PW3 and PW4, it seems clear to us that the serial number of the phone was recorded in exhibit P3 after the retrieval. It is thus evident that prior to retrieval, the serial number was not known. Besides the apparent serious and material contradiction from who was exhibit P4 retrieved, again the question as to whether or not exhibit P4 is the very phone stolen from the deceased arises.

Finally, the unresolved issues demonstrated above renders the present case unfit for making an order for retrial. Making such an order will be against the spirit embraced in the often cited decision by the defunct East African Court of Appeal of **Fatehali Manji vs Republic** [1966] E. A. 341). It will accord an opportunity to the prosecution to correct and fill up the gaps demonstrated above in the prosecution case.

For the foregoing reasons, we allow the appeal. We refrain from making an order for retrial. The appellant be released from prison forthwith unless detained for another lawful cause.

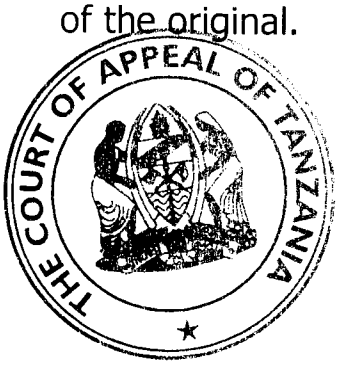
DATE at MWANZA this 1st day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2021 in the Presence of appellant in person and Ms. Georgina Kinabo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL