

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J. A., KITUSI, J.A And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 341 OF 2021

NTULUWAMBULA S/O UKENYENGE @ ABBAS S/O CHARLES APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the Resident Magistrate Court of Tabora)

(B. R. Nyaki, SRM EXT. JUR.)

Dated the 15th day of March, 2021

in

Criminal Session Case No. 19 of 2019

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JUDGMENT OF THE COURT

2nd & 22nd November, 2023

LILA, J.A.:

The appellant, Ntuluwambula s/o Ukenyenge @ Abbas s/o Charles, was linked with the disappearance and ultimate death of Masayu s/o Salum @ Shija @ Malele (the deceased). He was therefore charged and convicted of the offence of murder and is now incarcerated in prison to await suffering death by hanging. The charge alleged that the deceased and his motorcycle make SanLg Registration No. T 970 CPV disappeared on 23/7/2014 at noon hours when he went to Usoke Mlimani to pick the appellant and take him to Kiloleni. He is aggrieved and has appealed to this court.

The appellant's arrest and being linked with the commission of the offence started with his being arrested by a traffic policeman one E 20144 CPL Betram who, on 4/8/2014 at 16.00hrs, was on duty and suspected the appellant who was riding a motorcycle Registration No. T 970 CPV make SanLg red in colour. He stopped him and asked him to produce a Registration Card and Insurance Certificate which he did not have. Suspicious of its ownership, he arrested him, took him to police station and later released him so as to allow him time to bring those documents. He said, even the next day the appellant failed to produce such documents hence he left the matter with the Officer Commanding Station (OCS) as, earlier on the same day, some people had appeared and alleged to have identified the motorcycle as being of their missing relative.

Mbogoma Salum (PW2), the deceased's brother, led evidence as to the deceased's disappearance stating that on 23/7/2014 the deceased left with his motorcycle saying that he was called by the appellant who was at Usoke Mlimani so as to take him to Kiloleni but he never returned back something that prompted him and Juma Mtakazambi to report the matter to Usinge Police Station whereat they saw the motorcycle in front of the police station which they claimed to be that of the deceased. He could not, however, tell the Registration Number as he simply said it was T 970... Upon reporting the matter, the police told them that the owner

would soon appear with a Registration card which he had gone home to collect after he was arrested and asked to produce the same. He said, not sooner, the appellant appeared but had no such card and on further inquiry as to how he came by the motorcycle the appellant said he got it after the deceased had been killed following his father's instruction to find someone to kill so that his cattle would increase. He said, then the appellant was arrested but were told to report at Kaliua Police Station. The next day, he said, the appellant was taken to Kaliua Police Station and he led them and police to where the deceased was killed and buried but they found clothes which were a blue 'pensi' and a red shirt as well as bones and gumboots following wild animals digging out the body and eating all the flesh. Sungura Shipembe (PW3) and Mussa Shabani Kasimba (PW4) participated in the exercise and gave the same story. PW4 could, as well, not precisely tell the Registration Number of the motorcycle as he said T 970... Red SanLg.

F 9073 D/CPL Rahim investigated the case and said he interrogated the appellant who admitted killing and was ready to take them to where the killing happened. He tendered the motorcycle and was admitted as exhibit P.1. That, the following day, while together with PW2, PW3 and PW4, the appellant took them to Matanda area where he showed them a hole in which the deceased was buried but they found it dug out and

bones, skull and clothes were around the area which were identified by the deceased's relatives as being of the deceased. That, while there, relatives appeared with a Registration Card which was tendered as exhibit P3. He then drew a sketch map (exhibit P2) and recorded the appellant's cautioned statement but was not tendered in court. That, then he took some of the body remains to the Government Chemist at Mwanza and relatives were allowed to bury the remaining parts.

Fidelis Segumba (PW6), a Chemist at the Government Chemist Head Office Dar es Salaam, examined the skull and bones and was of the findings that they were of a human being and that the clothes had human blood which findings he endorsed in a report (exhibit P5).

The learned trial Resident Magistrate with Extended Jurisdiction was convinced that the above evidence made out a case against the appellant requiring him to enter defence.

In his affirmed defence, the appellant denied killing the deceased and he said that exhibit P.1 belonged to his father who left it with him for safe custody telling him that he was going to Kasulu and would collect it on his return but he did not. He admitted being arrested while possessing it. He denied knowing and killing the deceased as well as leading the police to where the deceased was buried. He admitted taking them to a

place near his father's house and he remained in the car after which the police arrested his father and returned to the car holding a bag with some luggage and were both taken to police station. He claimed that his alleged confession that he participated in killing the deceased with his father was as result of being beaten by police.

The learned magistrate was satisfied that the deceased's death was unnatural and that there was evidence by PW1 and the appellant himself that the appellant was arrested in possession of the deceased's motorcycle. That PW2, too, corroborated such fact. He concluded that such evidence warranted invocation of the doctrine of recent possession citing the cases of **Mwita Wambura vs Republic**, [1992] T.L.R 114 and **Ally Bakari vs Republic**, Criminal Appeal No. 47 of 1997 (unreported). Consequently, he was of the finding that the motorcycle was obtained from the deceased offensively hence calling for a reasonable explanation from the appellant, as to how he legally came by it. He then considered the appellant's defence that he got it from his father and found it unworthy of belief because PW2 and PW3 had told the court that the appellant's father was, at the material time, at his home at Usoke and had participated in tracing the deceased. He, instead, found as being credible the prosecution version that the appellant confessed commission of the offence to PW2, PW3, PW4 and PW5 and led them to the discovery of the

remains of the deceased's body notwithstanding the fact that no cautioned statement was tendered in court. Ultimately, the appellant was convicted and sentenced to suffer death.

The appellant is before us challenging the trial court's finding and has brought to the fore ten (10) grounds of complaints. We are, however, firm that this appeal turns on only four (4) grounds which may be paraphrased thus: -

1. That there was no evidence that the body remains and clothes belonged to the deceased.
2. The doctrine of recent possession was wrongly applied to find the appellant responsible with the deceased's death.
3. That, the crime scene sketch map (exhibits P2), motorcycle Registration Card (exhibit P3) and Government Chemist Report (exhibit P5) were wrongly acted on to ground a conviction because they were not read out after admission as exhibits and listed during committal proceedings as among the exhibits intended to be relied on by the prosecution during trial.
4. That, in the totality, the evidence by the prosecution failed to link the appellant with the commission of the offence.

Mr. Kelvin Kayaga, learned advocate, represented the appellant who was also present in person. The learned State Attorneys, Ms. Alice Thomas and Mr. Joseph Makene, represented the respondent Republic and they supported the appeal.

We, in the first place, take note that it was uncontroverted that there was no eye-witness to the incident and the prosecution relied on circumstantial evidence to prove the appellant's guilt. It is therefore not surprising that all the grounds of appeal are geared towards challenging the trial court's findings on the circumstances relied on by the prosecution. The grounds of appeal are, accordingly, intertwined and we shall therefore consider them somehow generally.

Beginning with ground three (3), both Mr. Kelvin and Mr. Makene were in agreement that the sketch map (exhibits P2), motorcycle Registration Card (P3) and Government Chemist Report (P5) were not read out in court to enable the appellant to understand their contents hence they should be expunged from the record. Mr. Kelvin had relied in the case of **Zabron Joseph vs Republic**, Criminal Appeal No. 447 of 2018 (unreported). This contention needs no binoculars observation to be appreciated. The record vividly shows so at pages 52 to 53, 53 and 58, respectively, and, on the authority cited and **Robinson Mwanjisi and**

3 Others v. R, [2003] T.L.R 2018, they were wrongly relied on to convict the appellant. We expunge them from the record.

Next in line is ground one (1) of appeal. It was agreeable by both counsel that upon exhibit P5 being expunged, there remains no evidence establishing that the body remains and blood in the clothes were of a human being. The Court has occasionally insisted, in situations like the present ones, for the prosecution to lead expert evidence that would enable courts to ascertain whether or not the parts found are of a human being and, in particular, are of the deceased else other assertions remains to be layman's view. The Court did so in a number of cases and, just to pick one, in **Katabe Kachochoba vs Republic** [1986] T.L.R. 170, the Court observed that: -

*"It may be that the heart and kidney were remains, as found by the judge. But that evidence is not conclusive, and better and more conclusive evidence in that respect was available and for reasons which are not clear to us, was not produced. **We are not prepared to accept a layman's view that the kidney and heart and part of the skull were human remains in the circumstances. And naturally we cannot therefore conclude that those remains were without doubt those of Ali Malela, who had been killed and burnt.**" (Emphasis added)*

Expungement of exhibit P5 renders the evidence by PW2, PW3 and PW5 laymen's views which could not be relied on to ground a conviction. Consequently, the assertion that the appellant led the police and other people to where the deceased was buried naturally finds no support to rest on, hence collapses.

We turn to ground two (2) of appeal. The learned advocate and Mr. Makene were at one that the motorcycle (exhibit P1) was not properly identified by the deceased's relative to be of the deceased. Neither of them was able to tell the registration number or any peculiar features distinguishing it from other similar motorcycles. They argued that, even if it is taken, for the sake of discussion, that the appellant was found in its possession yet the doctrine of recent possession could not be invoked for the reason that ownership of the motorcycle by the appellant was not proved and that it was not listed during committal proceedings as one of the exhibits intended to be produced by the prosecution during trial or a notice given to add it during trial in terms of sections 146 and 289 of the Criminal Procedure Act (the CPA), respectively. We entirely agree with the learned counsel for the parties. As clearly shown above the identification evidence by PW2 and PW3 of exhibit P1 was incomplete and hence insufficient. Invocation of the doctrine of recent possession is conditional. Certain factors must be proved for it to apply and ground a conviction.

The factors were set out in **Joseph Mkumbwa and Another vs The Republic**, Criminal Appeal No.94 of 2007 (unreported) to be: -

*"For the doctrine to apply as a basis for conviction, it must be proved, **first**, that the property was found with the suspect, **second**, the property is positively proved to be the property of 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."*

[See also the case of **Mustapha Darajani vs Republic**, Criminal Appeal No. 242 of 2008 (unreported)].

The record bears out and the learned advocate and State Attorney are at one, too, that the motorcycle (exhibit P5) was not listed to be among the exhibits forming the substance of the evidence to be relied on by the prosecution during trial as mandatorily provided under section 246(2) of the CPA hence its production and reliance to ground the conviction was improper (See **Remina Omary Abdul vs Republic**, Criminal Appeal No. 189 of 2020 cited in **Mussa Ramadhani Magae vs Republic**, Criminal Appeal No. 545 of 2021 (Both unreported)). In the event the prosecution inadvertently makes such an omission, the

provisions of section 289(1)(2) of the CPA provide a leeway for the prosecution to cure the ailment by giving a reasonable notice in writing to the accused or his advocate of the intention to produce the same during the trial. It is unfortunate that such course was not taken hence exhibit P5 was illegally produced, admitted as exhibit and acted on to convict the appellant. We, for that reason, expunge it from the record (**See Mashaka Juma @ Ntatula vs Republic**, Criminal Appeal No. 140 of 2022 and **DPP vs Sheriff Mohamed @ Athuman and 6 Others**, Criminal Appeal No. 74 of 2016, (both unreported).

After the expungement of exhibits P2, P3 and P5 followed by our holding that identification of exhibit P1 by the deceased's relatives was insufficient, then there is no evidence proving positively that exhibit P1 belonged to the deceased and was a subject of the charge. The doctrine of recent possession could not, therefore, be invoked. Had the learned trial magistrate assessed the evidence before him properly, he would not have believed the prosecution version and disbelieved the appellant's defence evidence that exhibit P1 belonged to his father.

For the foregoing reasons, we agree with both learned counsel that there was no evidence linking the appellant with the deceased's death and therefore ground four (4) of appeal has merit. We accordingly allow the

appeal, quash his conviction and order that he be set free immediately if not held for another lawful cause.

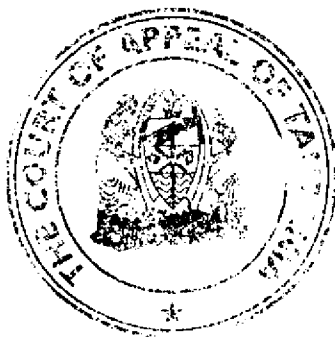
DATED at **DAR ES SALAAM** this 20th day of November, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of November, 2023 in the presence of Mr. Kelvin Kayaga, learned counsel for the Appellant and Ms. Oresta Oresphory, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL