IN THE COURT OF APPEAL OF TANZANIA
AT MOROGORO

(CORAM: MWARIJA, J.A., MASHAKA, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 452 OF 2022

HASHIMU KOMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Morogoro

(Ngwembe, J.)

dated the 13th day of September, 2022

in

Criminal Session No. 52 of 2022

.....

JUDGMENT OF THE COURT

8th May & 29th November, 2023

MAKUNGU, J.A.:

In the High Court of Tanzania sitting at Morogoro, the appellant, HASHIMU KOMBA, was charged with the offence of murder of one RAMADHANI KAFUKU MNENWA (the deceased) contrary to section 196 of the Penal Code, Cap. 16. The particulars of the offence alleged that on 06/06/2017 at Gezaulole area, (Gwata Village) in Morogoro District of Morogoro Region, he murdered the deceased. After his trial, the High Court (Ngwembe,J as he then was) convicted and sentenced him to suffer death by hanging. This appeal arises from that conviction and sentence.

On 10/2/2023, the appellant filed five grounds of appeal. In essence, we paraphrase his complaints as follows:

(1) *That, the learned trial judge erred in law to convict him based on the cautioned statement (exhibit P3.) while the extra-judicial statements which was read out at the committal proceedings was not tendered in evidence.*

(2) *That, the learned trial Judge erred when he relied on the exhibit P.2 (Motorcycle Hanjou MC. 691 BPM) which was seized illegally, contravening section 38(3) of the Criminal Procedure Act, Cap. 20.*

(3) *That, the learned trial judge erred to convict him based on weak evidence of PW4 and PW5.*

(4) *That, the learned trial judge erred for his failure to draw an adverse inference to the prosecution for its failure to tender in Court crucial exhibits, viz; knife and extra judicial statement.*

(5) *That, circumstantial evidence which the learned trial judge relied on to convict him was insufficient to prove the prosecution case beyond reasonable doubt.*

Events leading to the appellant's arrest and subsequent conviction began around 10:00 hrs in the morning of 6/6/2017. F. 129 Sgt. Samwel (PW4), a police officer from Mikese was on patrol with G. 6723 Pc. Magige at Kitungwa bridge on the way to Morogoro town. They saw a motorcyclist riding towards Morogoro without wearing a helmet. They

arrested him and took him to Kingoiwira police post for interrogation. They established his name to be Hashimu Komba (the appellant).

At his arrest, the appellant possessed a black motorcycle (Registration No. MC 691 BPM) (Exhibit P2) which he was riding before being caught up with him. He was also found in possession of another property, to wit; a cell phone make Huawei. Upon inquiries he failed to account for how the properties came into his possession.

The appellant was taken to Central Police of Morogoro for interrogation. He was interrogated by one F. 3214 D/Cpl. Anold (PW5) where he confessed to have committed the offence. On 7/6/2017 the appellant was taken to the Justice of peace one Janne Meela, a Magistrate at Chamwino Primary Court where he also confessed to have killed the deceased.

PW5 interrogated and recorded the appellant's statement (Exh. P3), where the appellant told him that the motorcycle (Exhibit P2) was his property which he got it from his father. Later the appellant changed his story and told PW5 that he robbed it from someone in Gwata area after murdering him.

The deceased body was found by Asha Ramadhani (PW1) at the tranches on her way to her morning routine. She then called her husband, who called Stephene William Nambali (PW2) who saw the deceased body having lied down facing the ground. They saw wounds on his neck at left side while holding a knife. PW2 called the police who arrived at the crime scene and took the deceased body to the Morogoro Referral Hospital.

A medical officer, Joel Alex Kalula (PW3) from Morogoro Hospital performed a post mortem examination on the deceased body. Apart from his report, which he tendered as exhibit P1, PW3 testified that the deceased suffered a deep wound on left hand side of his neck from what appeared to be caused by a sharp object.

In his defence, the appellant denied involvement in the death of the deceased. He insisted that the prosecution had fabricated this case against him. He disputed the prosecution evidence placed him along Kitungwa bridge on the way to Morogoro town and was arrested by traffic police while riding a motorcycle. He insisted that the same day he was at "Bwawani mkono wa Tembo" doing his farming activities. Thereafter two persons came to his home with a motorcycle, and introduced themselves to him as police officers by the names of Samwel

and Magige. They took him to Kingolwira police post and later to the Central Police Station Morogoro. Having considered the prosecution and the defence evidence the learned trial Judge found that the case been proved beyond reasonable doubt against the appellant. He was therefore convicted and sentenced as stated above.

Being aggrieved by his conviction and sentence, the appellant came to this Court. At the hearing of this appeal on 8/5/2023, Mr. Laiton Mhesa, learned Principal State Attorney, assisted by Ms. Chivanenda Luwongo, learned Senior State Attorney and Ms. Veronica Chacha, learned State Attorney, appeared for the respondent Republic. Mr. Marwa Masanda learned advocate appeared for the appellant who was present in Court.

Mr. Masanda, the learned advocate for the appellant, combined grounds 1 and 4 and argued them together because they relate to the failure of the prosecution to tender in court crucial exhibits. He submitted that the extra-judicial statement was listed during the committal proceedings but was not tendered in evidence. He added that the act of non-tendering of the evidence was prejudicial to the appellant. He surmised that prosecution did not tender it because the same would have been detrimental to the prosecution case. In ground

4 the learned advocate, referred to the evidence of the knife as a crucial evidence, which the prosecution should have presented to prove its case.

The appellant's learned advocate also pointed other crucial evidence which the prosecution had to collect the fingerprint evidence to prove that it was the appellant who killed the deceased. He argued that, whether the appellant stole the motorcycle and killed the deceased would be solved by uplifting fingerprints on the knife. He thus argued that, the failure by the prosecution to tender those exhibits weakened the prosecution case and created doubt which should favour the appellant. He urged the Court to allow these two grounds.

At the onset Ms. Luwongo the learned Senior State Attorney took the floor supporting the conviction and sentence. In her reply to the above grounds, she conceded that the prosecution did not tender those two exhibits. She was, however, quick to point out that, the prosecution is not compelled to tender any evidence which does not establish anything. She argued that, failure to offer the said evidence did not affect the weight of the case in which the prosecution built on the strength of doctrine of recent possession and circumstantial evidence. She referred to our decision in **Justine Hamis Juma Chamachine v.**

Republic, Criminal Appeal, No. 669 of 2021 (unreported). She urged us to dismiss grounds 1 and 4 for lack of merit.

In considering the above grounds, it is obvious that the extra-judicial statement and the knife were not tendered during trial. However, through other evidence adduced in trial including the cautioned statement of the appellant (Exhibit P3) in which the appellant confessed to have killed the deceased was relied on by the trial court to convict the appellant. Thus, we think that the omission to tender the alleged exhibits was not fatal since the available evidence managed to prove the offence. We also agree with the learned Senior State Attorney that, the prosecution was at liberty to choose the kind of evidence it wishes to use in proving its case. In **Justine Hamis Juma Chamashine v. Republic**, (supra) the Court held that:

> *"We have considered exciting submission in support of grounds 1,5,6 and 10 by Mr. Mwansoho. Much as the learned advocate for the appellant regarded DNA and fingerprint evidence to be so vital, we think the prosecution had the discretion regarding which witness to call and which type of evidence to produce as long as they comply with the laws governing the admissibility of evidence, relevancy,*

competence and compellability of witnesses to testify. In other words, subject to any written law applicable, choosing which witness to present to court was a matter of prosecution's trial strategy. Mr. Mwansoho cannot impose his evidential preferences on the prosecution's trial strategy."

With the above position, the prosecution was free to determine which form of evidence to prove its case and which, however, probative, to discard. We find grounds 1 and 4 devoid of merit, and we dismiss them.

Another appellant's complaint is that a certificate of seizure of exhibit P.2 was not prepared by PW4 during the arrest, the subject of ground 2. The appellant's counsel submitted that the certificate of seizure was supposed to be prepared by PW4 but was not. That, he argued, offended the provisions of section 38 (3) of the Criminal Procedure Act, Cap. 20 (the CPA). In the premises, he urged that exhibit P2 should be expunged.

Mr. Mhesa, learned Principal State Attorney addressed the appellant's complaint over exhibit P2 which police seized from the appellant on his arrest. He urged us to shrug off this complaint because

the appellant was arrested on the road for a traffic offence as he was riding the motorcycle without wearing a helmet. He argued that, section 38 (3) of the CPA requires that a receipt be issued after search, where there is a search warrant. He added that in the circumstances of this case there was no search warrant and therefore, the provisions of section 38(3) did not apply. He referred us to the case of **Gitabeka Giyaya v. Republic,** Criminal Appeal No. 44 of 2020 (unreported).

We did not see any problem with the evidential value of exhibit P2. From the evidence of PW4, it is clear he stopped the appellant on the road for a traffic offence. He later arrested him and searched him as an emergency under section 42(1) and (3) of the CPA. After interrogation PW4 arrested the appellant with exhibit P2. We cannot question the legality or evidential value of exhibit P2 that was in possession of the appellant. We agree with the submission of the learned Principal State Attorney that in the circumstances of this case, the provisions of section 38(3) of the CPA does not apply. We accordingly dismiss this ground of appeal.

Mr. Masanda, learned advocate for the appellant, combined grounds 3 and 5 and argued them together because they relate to the insufficiency of prosecution evidence to convict the appellant. He blamed the trial judge for convicting the appellant on the basis of

weakness of his defence instead of convicting on the strength of the prosecution evidence. According to the learned advocate, the trial judge ignored sections 3(2) and 110(2) of the Evidence Act, Cap. 6, which place on the prosecution a duty to prove its case beyond reasonable doubt, even when the defence evidence is weak. When we probed him to elaborate on where the trial court exploited the weakness in defence evidence, he quickly pointed at the defence of alibi, that the time the police claimed to arrest the appellant on the road, he was at his home. The trial judge disregarded that alibi. This, he said, was prejudicial to the appellant.

Mr. Masanda urged us to allow the appeal because the prosecution brought weak evidence, which is insufficient to apply the doctrine of recent possession to convict the appellant.

Replying on those grounds, Mr. Mhesa, the learned Principal State Attorney, insisted that the trial court did not convict on the weakness of the defence evidence but after the prosecution had proved its case beyond reasonable doubt. He added that, there was sufficient circumstantial evidence that irresistibly pointed to the guilt of the appellant.

Mr. Mhesa, disagree with the argument that the prosecution brought weak evidence which is insufficient for the trial judge to apply

the doctrine of recent possession to convict the appellant. He submitted that, the trial judge was correct after finding that there was no eye witness or direct evidence to the murder of the deceased and relied on the doctrine of recent possession. He prayed the two grounds be dismissed and the entire appeal to be dismissed for lack of merit.

After a careful analysis of the evidence on record, we are inclined to agree with the learned Principal State Attorney that, the charge against the appellant was proved beyond reasonable doubt. In proving its case, the prosecution tendered the cautioned statement (Exh.P3) in which the appellant confessed to have killed the deceased. It is on record that, exhibit P3 was not objected to by the appellant when it was tendered. In the case of **Vivian Edigin v. Republic,** Criminal Appeal No. 455 of 2015 (unreported), the Court made the following observation:

> *"There could have been no better evidence than that of the appellant who literally confessed her crime."*

We do not agree with the submission of the learned advocate for the appellant that the trial judge misapplied the doctrine of recent possession to convict the appellant. Several decisions of the Court have

dealt with the issue of applicability of the doctrine of recent possession. One such decision is **Joseph Mkumbwa & Samson Mwakagenda v. Republic,** [2011] TZCA 118 TANZLII, where the Court restated the position of the law on recent possession:

> *"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 positively be proved,* ***first*** *that the property was found with the suspect,* ***second,*** *that the property is positively the property of the complainant;* ***third,*** *that the property was recently stolen from the complainant; and* ***lastly,*** *that the stolen thing in possession of the accused constitutes the subject of a charge against the accused. It must be the one that was stolen/obtained during the commission of the offence charged. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

Relating the four factors to the record of evidence in this appeal, **firstly,** a motorcycle (Registration No. MC 691 BPM) is the property

that PW4 found in the appellant's possession after his arrest. **Secondly,** the Motorcycle Registration Card (Exhibit P4) proved that its registered owner is Ramadhani Mnenwa Kafuku (the deceased). **Thirdly,** on 6/6/2017 the deceased was killed, and on the same day around 10:00 am, PW4 arrested the appellant, who was riding the same motorcycle of the deceased. **Fourthly,** the prosecution charged the appellant with the murder of the deceased because the police found him riding a motorcycle stolen from the deceased.

Like the learned trial Judge, we can see no conclusion other than the appellant's involvement in the killing of the deceased to steal his motorcycle. The appellant has not explained how the motorcycle (Exhibit P2) came into his possession, leaving Ramadhani Mnenwa Kafuku dead. The prosecution evidence that led to the appellant's arrest was not shaken by the appellant's defence of alibi.

The appellant, who was arrested by PW4 in possession of the motorcycle (Exhibit P2), gave a conflict account of how he came into its possession a few hours after the deceased, who had control, was brutally killed. He initially told PW4 that he got the motorcycle from his father. Later he confessed that he got it after killing the deceased. During his defence, the appellant offered an alibi that he was at home

when the police arrested him. We agree with the learned trial Judge that the appellant failed to explain how the motorcycle stolen from the deceased came into his possession. We find that the learned trial Judge was correct to draw inference that it is the appellant who killed the deceased. For these reasons, grounds 3 and 5 are also devoid of merit, and we dismiss them.

In the light of the foregoing, this appeal is hereby dismissed.

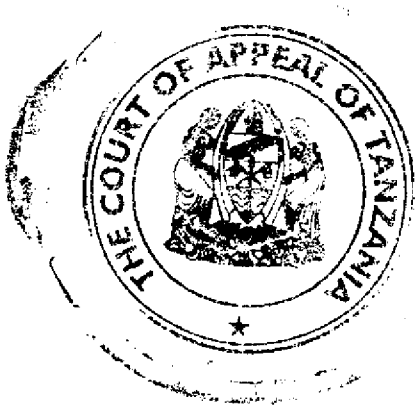
DATED at **DAR ES SALAAM** this 27th day of November, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 29th day of November, 2023 in the presence of Appellant in person via virtual from Ukonga Prison Dar es Salaam and Ms. Neema Haule, learned Senior State Attorney for the 2nd Respondent/Republic via virtual from Attorney General Chamber Office in Morogoro, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL