

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT MOROGORO**

ORIGINAL JURISDICTION

CRIMINAL SESSIONS CASE NO. 75 OF 2015

REPUBLIC

VERSUS

YOHANE CYPRIAN MGUNGA

RULING

MUNISI,J

This is a ruling on whether or not the accused person Yohane Cyprian Mgunga has a case to answer in terms with the provisions of section 293(1) of the Criminal Procedure Act following the closure of the prosecution case. The accused person stood before this court charged with the murder of one Hamadi Nassoro @ Msangira. It was alleged that on 21/10/2013, at ibingu – Lumuma Village within Kilosa District in Morogoro Region, the accused murdered one Hamadi Nassoro Msangira. When the charges were read over to the accused person he disputed the charges and pleaded his innocence. The prosecution thus called nine witnesses to prove the offence.

PW1 was Pilimo Michael Msanjila, a resident of Lumuma. He told the court that Hamadi Nassoro Msanjila was his brother and was a motorcycle (bodaboda) driver. On 24/10/2013, he learnt that Hamadi had gone missing since 21/10/2013 after his wife reported the incident to Hamadi's Parents. Following this information, the family started

looking up for Hamadi and even reported the matter to the police. On 9/11/2013 they received news from an anonymous number that there was a body seen at Ibingu Village. He thus left with his two sisters Monica and Sielewi and proceeded to the area and after searching for a while, they discovered some remains of a human being. In view of the clothes they found alongside the remains i.e. a white shirt and pants jeans they were satisfied it was Hamadi their relative. Information of the discovery of the remains was relayed to relative and the police who came to the scene within a short while. After the necessary procedures, the remains were handed over to the relatives for burial.

Upon being cross examined by Mr. Tarimo, PW1 said he did not know who killed deceased.

PW2 was Ibrahim Michael Msanjila, he also learnt of the disappearance of Hamadi from his wife. His testimony regarding the discovery of the remains was similar to that of PW1. He added that Hamadi used to drive Motor cycle, Felkon, Reg. No. T599 CMJ. He said on 19/11/2013 he received a phone call from one Richard who informed him that Hamadi's motorcycle had been seen at Mikumi. He thus made a follow up and under the assistance of the police, the same was recovered on 20/11/2013 at Mikumi weighing bridge being driven by one Vicent Kidabuje. The driver and the motorcycle were taken to Mikumi Police station and later to Kilosa.

Upon being cross examined by Mr. Tarimo, learned counsel, PW2 admitted that he did not witness the killing of Hamadi or know the person who killed him. He said he was the one who gave the police

the motorcycle registration card and he obtained the same from Hamadi's wife, Magdalena.

Answering to questions by Lady Assessors, PW2 said when Vicent Kidabuje was arrested, he heard him tell the police that the motorcycle was handed over to him by Mgunga but he did not know him.

PW3 was James Augustino Nyauringo, a resident of Ihombwe Village. He said he know the accused, Yohane Cyprian Mgunga as he went to his house one day in October 2013, he identified him in the dock. He came driving a motorcycle Felcon, red in colour with Reg. No. T599 CMJ, white plate. He asked for the direction to Kisanga and left. He came back at around 20.00 with a passenger and asked for directions to Kilombero which he was shown and left again. According to PW3, Mgunga came back the following morning and in the afternoon around 3.00pm, the two of them went together to Mikumi whereby on coming back Mgunga asked to spend the night at PW3's house. On the next day, PW3 went to his farm leaving Mgunga behind and when he came back, he found Mgunga had left and discovered that his two phones and cash 52,000/= Shs were missing. He thus reported the theft of his missing items to the police. In the meantime, he kept seen Mgunga's motorcycle at the village being driven by Vicent George. He saw Vicent again at the police station when he got arrested and the police called him to go to the station.

Upon being cross examined by Mr. Tarimo, learned counsel, PW3 admitted that he only suspected Mgunga and had no concrete

evidence to substantiate the theft. He Admitted also that he had no proof that he reported the theft to the police. He conceded that Mgunga was not his friend hence the sudden familiarization between them which he explained in court appeared strange. He maintained that he had memorized the registration number of the motorcycle because he saw it several times.

Answering to questions from Lady Assessors and the court, PW3 said from Kilosa they came with the said motorcycle in the same motorvehicle. Further that although he did not know Mgunga before, when he came to his house, he trusted him as a fellow youth.

PW4 was Vicent George Kidabuje. He told the court that he knows Yohane Mgunga and he identified him in court. He said he came to his house on 11/11/2013 but before that he had been seen him in their village as he was staying at the house of Augustino Nyauringo. He said on that date, Yohane Mgunga came with a motorcycle - Felkon Reg. No T599 CMJ, red in colour and wanted him to operate it as a bodaboda on agreement that he will pay him Shs 7,000/= per day and send the said money by mobile to his phone as he was going to Iringa to attend an emergency. He said he agreed and on the same day he left with Yohane Mgunga to Mikumi stand where he left him and went on with his bodaboda business. On 20/11/2013, he was arrested at Mikumi weighing bridge and taken to the police and that is when he learnt that the motorcycle was involved in problems. He facilitated the arrest of Mgunga by camouflaging that the motorcycle had broken down therefore he came and that is how he got arrested. Upon arrest, he heard Mgunga admitting before the

police that he was the one who handed over the motorcycle to him. PW4 said he was kept in the lock up for about four weeks before he was released.

On being cross examined by Mr. Tarimo, learned counsel, PW4 maintained that the motorcycle was handed over to him by Mgunda whom he had known for about two weeks the period he stayed at Mzee Augustino Nyauringo's residence. He admitted that the handing over was witnessed only by his wife and there was nobody else and that he was not given the registration card or any other document such as an agreement. He said Yohane Mgunga confirmed to him that the motorcycle was his property which he bought with his relative after selling their crops.

PW5 was Augustino Nyauringo, the father of PW3, James Nyauringo. He told the court he knows Yohane Mgunga as he came to his house one day in October 2013 looking for his son James asking for directions, however he could not identify the accused person in court. He said Mgunga came with a motorcycle Reg. No. T 599 CMJ.

On being cross examined by Mr. Tarimo, learned counsel, PW5 said he only saw Mgunga once and that he memorized the registration number of Mgunga's motorcycle.

PW6 was Sauda Mohamed the wife of Vicent George. She told the court that on 11/11/2013 she was present when Mgunga came to their house and she witnessed when he handed over the motorcycle to her husband.

Upon being cross examined by Mr. Tarimo, learned counsel, PW6 said she did not see any document that day and the handing over was

not witnessed by anybody else. She said Mgunga was staying at Mzee Nyauringo before that day and that James had driven the said motorcycle for about a month prior to her husband.

PW7 was Richard Leonard Moshi. He told the court that he lived in the same village with deceased Hamadi and had heard the news regarding his death. He said on 19/11/2013 while at Mikumi he overheard people discussing about a motorcycle associated with the Lumuma murder which they were saying was in Mikumi in the hands of one youth. Upon paying attention he managed to get a youth named James who gave him details of who had the motorcycle and its particulars. He thus transmitted the news to Ibrahim a relative of deceased in Lumuma and the latter gave him the details of the deceased's motorcycle which upon comparing they matched with what James told him. PW7 thus advised Ibrahim to follow up the issue on the next day which he did and the motorcycle was recovered.

PW8 was DC Oscar, a police officer who investigated the case. He said in October 2013 he attended two youths Michael and Ibrahim who had reported about their missing brother who was a bodaboda driver one Hamadi Nassoro Msanjila. He learnt from the two youths that the said Hamadi before he went missing he was driving a red Felkon motorcycle, Reg. No. T 599CMJ. He thus gave them RB Number and his phone number just in case they will get any news. On 9/11/2013 he received information from Ibrahim that remains of the body of Hamad had been found and upon going to the scene with a doctor, the police also saw those remains and the doctor conducted his examination and the remains were handed back to relatives for

burial. He went on that after sometimes, he received information from Ibrahim that he had information that deceased's motorcycle had been seen in Mikumi. Consequently, he got in touch with the OCS Mikumi and asked him to facilitate the arrest of the motorcycle. He later learnt that the motorcycle was arrested in the hands of one Vicent Kidabuje at Mikumi weighing bridge. Later he was informed that there were two suspects arrested and was sent by his boss to go to Mikumi to collect them. Upon going to Mikumi he found the arrested suspects were Vicent Kidabuje and Yohane Cyprian Mgunda he thus took them together with the motor cycle to Kilosa. He said the motorcycle was Felkon, red with Reg. No T599 CMJ and he brought them to Kilosa. PW8 said after gathering evidence, he charged the accused with murder. He was recalled by the prosecution to tender the motorcycle which he identified as the one which he took from Mikumi together with its Registration Card and the same were admitted as exhibit P3 and P4 respectively.

Upon being cross examined by Mr. Tarimo, learned counsel, PW8 maintained that after recording the witness statements, he was satisfied that Yohane Mgunga was the right person to be charged.

Answering a question posed by the court, he said the statements of James Nyauringo, Vicent George and Sauda were the ones that influenced his decision.

The last witness for the prosecution was Sgt. Ally, a police detective who seized the motorcycle at the Mikumi weighing bridge. He told the court that on 20/11/2013, he was working in the Traffic Department stationed at Mikumi Police station. In the course of his

duty, he arrested a bodaboda driver by one Ibrahim Michael. After interviewing him, he learnt that Ibrahim was following up the whereabouts of a motorcycle involved in the murder of his brother in Lumuma Village and the latter was missing. He thus gave him his number with instructions that if he sees the said motorcycle he should inform him. After a while he received information from Ibrahim that he had located the motorcycle and it was heading to Morogoro road. PW9 made a follow up and managed to arrest the said motorcycle at Mikumi weighing bridge being driven by one Vicent George and upon matching its particulars in the registration card Ibrahim had, he was satisfied it was the same motorcycle. He said the motorcycle he arrested was Felkon, red in colour Reg. No. T599 CMJ. He identified it in court together with the registration card and the two were admitted for identification purposes and were marked ID1 collectively.

The above was the evidence presented by the prosecution. The issue is whether the same establishes a prima facie case against the accused to warrant calling upon the accused person to enter his defence in terms with the provisions of section 293(2) of the Criminal Procedure Act. In the case of **Jonas Nkize V R (1992) TLR 213**, this court held:

"the trial court is enjoined to direct its mind to the evidence adduced by the prosecution when it has closed its case, and if it appears to the court that, the case is not made out against the accused person sufficiently to require him to make a defence,

the court shall dismiss the charge and acquit the accused person."

I do subscribe to the above lucid position of the law. In that regard, it is my duty now to assess the prosecution evidence so as to establish whether a case against the accused person has been made sufficiently to require him to make his defence.

It is important to note that the accused person is charged with the murder of one Hamadi Nassoro Msangira who allegedly died on 21/10/2013. From the evidence of PW1 and PW2 deceased had gone missing from 21/10/2013 until 9/11/2013 when some remains were recovered and relatives identified the clothes found nearby to belong to deceased by their colour i.e. white shirt and jeans pants. I wish to say that such identification is hardly credible because it is of a general nature and no peculiar feature was given by the two witnesses to establish conclusively that those were indeed the clothes worn by the deceased the day he disappeared. Unfortunately, the wife of the deceased was not called to give evidence. In that regard, there was no conclusive evidence to establish that the remains found on 9/11/2013 were of Hamadi Nassoro Msangira. Further, from the contents of the postmortem report – exhibit P2, the cause of death was not known, even the time of death could not be determined by the doctor. In that regard it cannot be said for certain that deceased was murdered or even that he was killed on 21/10/2013. For those two reasons I am satisfied that the prosecution evidence did not establish conclusively that the remains found were those of Hamadi Nassoro Msangira.

The above notwithstanding, from the testimonies of PW1 and PW2 it looks like relatives of deceased have not seen Hamadi since he went missing on 21/10/2013, it is for that reason that under the provisions of section 205 of the Penal code, I am entitled to presume that deceased who has not been seen for over five years is dead.

From the evidence presented by the prosecution, it is apparent that nobody witnessed the killing of the deceased or saw the person who killed him. The accused person was implicated because through the testimonies PW3, PW4, PW5 and PW6, they all connected him with motorcycle Felkon red in colour, Reg. No. T599 CMJ which he was alleged to been seen with in Ihombwe Village. According to James Nyauringo, PW3, accused person - Mgunga came with the said motorcycle to his residence and his father PW6 confirmed that. Later the same motorcycle was handed over to PW4 and PW6 witnessed the handing over. On 20/11/2013, the same was arrested in the hands of PW4 and was positively identified by PW2 Ibrahim Msanjila to be that of the deceased.

From the above analysis, it is clear that the accused person was not found in possession of the alleged motorcycle but rather only mentioned by PW4 as the person who handed it over to him on the understanding that the later will operate it as a bodaboda and pay him 7,000/= daily which was to be posted to him through his mobile phone. The prosecution however did not bring any evidence to show those transactions nor did PW4 tender any document signifying the agreement to the effect. If such evidence was produced by the prosecution, the court could have verified the information which if

true, then the court would have been entitled to invoke the doctrine of recent possession against the accused person because the requisite nexus to the motorcycle would have been established. Otherwise as the evidence stands, there is nothing to establish concretely that the accused person handed over the motorcycle Felkon, Reg. No T599 CMJ to PW4. There is a possibility that he handed over a motorcycle, however, without any supporting document it cannot be said for certain that it is the one claimed by the prosecution.

From the circumstances narrated in the instant case, the nexus between the motorcycle and the accused person has not been established. From a plethora of authorities including **Joseph Lusinde VR, Criminal Appeal No 144 of 2011**, **JumaMarwa V R, Criminal Appeal No. 71 of 2007** and **Mkubwa Mwakagenda V R, Criminal Appeal No 94 of 2007** the doctrine of recent possession could be invoked where:

1. The property was found with the suspect
2. The property is positively proved to be the property of the complainant
3. The property was recently stolen from the complainant
4. The stolen thing constitutes the subject of the charge against the accused

I am thus satisfied that since the accused person was not found in actual or constructive possession of motorcycle- Felkon, Reg. No. T599 CMJ alleged to be the property of deceased and no evidence whatsoever was adduced to show that it was the accused Yohane

Cyprian Mgunga who handed the said motorcycle to PW4 Vicent George, then the doctrine could not be invoked against the accused person who was not found in possession of the motorcycle, rather it could have safely been invoked against PW4 who the prosecution opted not to charge. I wish to make it clear that it is the court that determines in an appropriate situation whether the doctrine could be invoked after receiving evidence in a trial and not the law enforcement as it seems to have been the case in the case at hand. Consequently, from the foregoing analysis, I am satisfied that there is no prima facie case established by the prosecution to require the accused person to be called upon to enter his defence in terms with the provisions of section 293 of the Criminal Procedure Act. I thus find the accused person Yohane Cyrian Mgunga with no case to answer and I dismiss the charge of murder contrary to section 196 of the Penal Code preferred against him and acquit him of the offence of murder. Accordingly, he is to be released from prisons forthwith unless otherwise lawfully held.

It is so ordered.




A. MUNISI
JUDGE
5/3/2018