

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
SITTING AT BARIADI**

CRIMINAL SESSION CASE NO. 41 OF 2017

REPUBLIC

VERSUS

BUCHALATA S/O JOSEPH..... ACCUSED

MUSA S/O METUSELA @ GOLANI MAKOYE..... ACCUSED

JUDGMENT

7th & 11th March 2022

MKWIZU, J

Accused were on diverse date arrested in connection of murder of the Maduhu Kweja a motorcyclist. Facts brought by the prosecution are that on 1/9/2016 the two accused person with another who is not in court hired the deceased Maduhu Kweja at Nkololo village to take them to Gasuma Bariadi. They on the way, attacked the deceased, killed him, and pierced his eyes using a screwdriver. They looped his legs and tied both hands together with his neck and left the body in the bush and took with them the motorcycle(boda-boda). The deceased body was later discovered by the passerby five days after the incident that is on 5/9/2016 at around 17.00hrs. The incident was as usual reported to the police. Respiratory failure was indicated in the medical examination

report as the cause of death. The sketch map plan was drawn, and investigation was mounted.

At all these times, the murderers were not known until after the arrest of PW1 and PW2 on 10/9/2016 with the motorcycle in question. These two witnesses named Buhalata Joseph (1st accused) and one Kilangi Faustine as persons from whom they bought the motorcycle. Accused were arrested on diverse dates and according to the prosecution case, confessed to have committed the said murder. Both accused refuted the accusations.

During trial, Ms. Upendo Malulu, senior State Attorney represented the Republic while Mr. Robert Masige and Samwel Lugundiga advocate were for the 1st and 2nd accused respectively. To prove their case prosecution called upon eight witnesses and the defence had a total of three witnesses.

As introduced above, deceased went missing on 1/9/2016. His loss distressed his relative including his father, Kweja Nsumo (Pw3) and PW6, Lulenda Nila Yakusesa (deceased uncle) who initiated the searching of

their son on 2/9/2019 . The matter was then reported to the police and motor cyclists center. Mwano was raised and villagers engaged into searching the deceased. According to PW3 and PW4 a decomposed deceased body was discovered on 4/9/2016 at Bulumbaka village in bushes, lying near the river with his legs, hands and neck tied. The scene was inspected by the police, the deceased body was examined before, relatives were allowed to proceed with the burial arrangements.

PW6 stated further that they later got information that deceased had carried two passengers towards Masewe Village and he was killed on the way and the murderers escaped with the motorcycle. An informer had disclosed to him that the deceaseds motorcycle is at Bunda. PW6 together with Majani Masanja, Limbu Luhepa and Maduhu Masanja went to Bunda to search for the said motorcycle. They, while at Bunda behaved like motorcycle customers and managed find Mayala Kulwa (PW2) with the deceased motorcycle. They, blocked Mayala and informed him of their concern. They verified the chassis number and Engine numbers through the original motorcycle registration card they had and the chassis and Engine numbers on the motorcycle found with PW2, Mayala Kulwa matched the one in the registration card (Exhibit P2). He described the chases number with the last numbers 81 and the Engine number with its

last number 59. He also named the motorcycle as Sunlg red in colour. PW6 said, Mayala Kulwa told them that he bought the motorcycle from Buhalata Joseph (1st accused). They then took the motorcycle together with Mayala Kulwa to the police station Bunda.

PWI is MHANGWA NJIKU, Resident of Bunda, peasant and bodaboda cyclist since 2011. His testimony was that on 5/9/2016 while at his Bodaboda center was requested by his uncle, Mayala Kulwa to find a motorcycle for him. Later that very day at 15:00hrs 1st accused told him that he had a motorcycle for sale. Mayala Kulwa was informed, and parties agreed on a purchase price of 1,300,000/= and that the transaction was concluded in the presence of Kilangi Faustine. PW1's evidence disclosed that, they only paid 100,0000 after they had rejected the motorcycle registration card which was not matching with the chassis and engine number of the motorcycle. The agreement was that the remaining amount would be paid after the handing over of the original card by the seller. According to this witness, on 6/9/2016 they paid the remaining balance after the seller, 1st accused had handed them the correct registration card.

On 9/9/2016, stated Pw1 he received a call from Mayala Kulwa informing him of his arrest and that he was held at Bunda Police station. He went to Bunds police where police wanted to know the people from whom they had purchased the motorcycle. Assisted by the police, PW1 went to the 1st accused house where they found Kilangi Faustine and a motorcycle belt. From there, PW1 himself, Mayala Kulwa (PW2), Kilangi Faustine plus the motor cycle were transferred to Bariadi police where he learnt of the murder charges at Bariadi Police station connected to the mentioned motorcycle.

When questioned during cross examination as to the status of the sale agreement, PW1 said the sale agreement was oral and it was not witnessed by any of the village leader.

PW2: MAYALA KULWA,'s story on how they came into possession of the motorcycle is similar to that of PW1 and part of his evidence on how he came about PW6 is similar to that of PW6 so I will not reproduce his evidence here.

ASSISTANT INSPECTOR NOELIA, featured in this case as PW3. She was one among the three investigators of this case. She was on 10/9/2016

assigned the file for investigation where they learnt that Maduhu Kweja was killed on 5/9/2016 at Gulumbaka Gasuma, witnesses' statements were already recorded, sketch map plan was in the file and the deceased body was already examined. They on the same date received information of the arrest of three suspects namely Kilangi Faustine, Mhangwa Njiku and Mayala Kulwa. Together with her fellow police officers including Coplo Vedastus went to Bunda on that same day where three suspects namely kilangi Faustine, mayala Kulwa and Mhangwa njiku plus the motorcycle sunlg red in color with Reg. No. MC. 966 BEQ were handed to them. She tendered in court the motorcycle sunlg with Reg. No MC. 966 BEQ as **exhibit P1.**

PW3 informed the court further that on interrogation, PW1 and Pw2 told them that they had bought the motorcycle from Kilangi Faustine and Buhalata Joseph. Through the information from the motorcycle registration card obtained from the deceased's relative, they verified the details of the motorcycle and found them matching with the chassis and Engine numbers appearing on the motorcycle in court (Exhibit P1). The Registration Card No. 6951246 motorcycle with Reg. No. MC 144 BCR was tendered in court as Exhibit P2. She said, accused were on diverse date arrested and brought to court.

PW3 admitted during cross examination, that they did not consult the TRA for verification of the registration of the motorcycle in question, that 1st and 2nd accused were not arrested with any exhibit connecting them with the murder of Maduhu Kweje, they did not visit the accused's residency and that according to exhibit P1(motorcycle registration card) the owner is wu-zhou Investment Co. Limited.

Another witness for the prosecution is PW7: ASSISTANT INSPECTOR VEDUSTUS, a police officer at Bariadi police – Investigation department. He was among the investigators of this case. Like Pw3, he received a police file with Registration IR 1475/2016 for investigation purposes on 10/9/2016 with all preliminary stages of the case complete including inspection of the scene, post mortem examination of the deceased body , drawing of the sketch map plan as well as recording of witness statements. He was also among the police officer who went to Bunda for the accused and the exhibit on 10/9/2016.

PW7 said at Bunda, three suspects Mayala Kulwa, Mhangwa Njiku and Kilangi Faustine and the motorcycle sunlg red in color with Reg. No. MC 966 BEQ were handed to them. They matched the information on the card, obtained from the deceased's relative and that on the motorcycle and realized that the Engine number appearing on the motorcycle are similar to the one on the motorcycle registration card. He managed to mention part of the chasis numbers as ...54F9012481 and the Engine numbers as SL15966759 both appearing on the motorcycle and the Registration card. He identified the motorcycle Exhibit P1 and exhibit P2 by its type and colour. PW7 also identified the registration No Reg. No. MC 966 BEQ appearing on the plate number to exhibit P1.

PW7 went further to stating that at Bariadi Police station, the Motorcycle was given to the exhibit keeper who marked the motorcycle with exhibit register number 91/2016 and labeled it with the case number Bariadi/IR/1475/2016

PW7 said, Mayala Kulwa and Mhangwa Njiku named Kilangi Faustine and Buhalata Joseph (1st accused) as the person from whom they bought the motorcycle. Later, Buhalata Joseph was arrested at Nanjilinjji – southern

part of Tanzania and the second accused Musa Metusela @ Golani Makoye was arrested at Sengerema in Zelagula Island fishing on 2/2/2017 . After his arrested, stated Pw7, 2nd accused was brought to Bariadi police on 4/2/2017 at around 11:00hrs and that he personally recorded the accused's cautioned statement where accused confessed to have murdered Kweja Maduhu in partnership with his fellow Bulahata Joseph, Buhalata mdogo @ Sylvester and another person resident of Matongo village on 1/9/2016 at around 19:00hrs. 2nd accused had disclosed to him that they hired the deceased in view of killing him and steal the motorcycle. They then strangled the deceased looped his legs, and tied both his hands and neck together and that using a screw driver, 1st accused pierced the deceased eyes and threw the deceased body in the bush and left with the motorcycle to Bunda where they sold the motorcycle and escaped.

On cross examination, Pw7 testified that the motorcycle (exhibit P1) was found with Mayala Kulwa and Mhangwa Njiku who were freed by the court and that they had purchased the same from Bulahata Joseph and Kilangi Faustine but had no document to that sale transaction .PW7 admitted that no seizure certificate was given to them at Bunda police. He also admitted that exhibit P1(motorcycle) is marked with two IR numbers

BAR/IR/1475/2016 and BAR/IR/147/2016 but was of the view that the second IR number might have been erroneously inserted on the exhibit

PW8 is KEZIA JERALD MANYAMA, a retired Primary Court magistrate and a justice of peace. Guided by the Chief Justice's directives, she recorded the extra judicial statements of the accused by the name of Musa after he was brought to him by a police officer PC Hassan with Police Force No H8262 on 4/2/2017 at around 14:00hrs at Somanda Primary Court. She stated that accused confessed to have murdered a bodaboda rider at Nkololo Village. The statement was admitted as exhibit P4 after a trial within a trial.

On cross examination, PW8 informed the court that PC Hassan told her that accused was being accused of murder, had confessed before the police and he wishes to record his extra judicial statement. She admitted that exhibit P4 contains no statement showing that accused had told her if he is free to make his statement and that she did not sign on item 8 of the statement (exhibit P4). PW8 denied having knowledge of what transpired at the police before accused was brought into her office.

In his sworn defence, DW1 BUHALATA JOSEPH, resident of Bukole village in Bunda District denied having committed the offence. He relied on a defence of alibi. He deposed that, in months of August, September and October 2016 he was at Bukole within Bunda District and that on 5/9/2016 he received a phone from his brother Kilangi Faustini telling him that he was under arrest at Bunda Police Station. He visited his brother at Bunda Police and was told that his brother would be transferred to Bariadi Police where he would know the accusation against him. At the police Bunda, stated Dw1, they were three suspects Mayala Kulwa (PW2), Mhangwa Njiku (Pw1) and Kilangi Faustine. On 10/9/2016 Kilangi Faustine and his fellow were taken to Bariadi and therefore he came to Bariadi but was told that his brother is facing unbailable offence of murder.

This witness informed the court that, one day on his way back from the prison visiting his brother Kilangi Faustine, just on the road near Bariadi Prison, he was arrested by the police and taken to Bariadi police. He remained under police custody for six days before he was taken to court where he was joined with other accused person in a murder case. Three months later, 1,2 and 3 accused persons namely Mayala Kulwa, Kilangi Faustine and Mhangwa Njiku were acquitted leaving behind two of them himself, Buhalata Joseph and Musa Metusela (2nd accused person).

DW1 said, he is accused of murder of Maduhu Kweja of Nkololo after being named by Mayala Kulwa, Mhangwa Njiku and Kilangi Faustine alleging that he sold them the motorcycle robbed in a murder incident. He complained that PW1 and PW2 failed to tender the card alleged he gave to them on the said sale transaction and that prosecution failed to tender the 2nd accused's cautioned statement in which he is alleged to have been mentioned as a murderer. He also attacked exhibit P4 for not mentioning the name of the deceased, that the ownership of the motorcycle was not proved, failure by the prosecution to tender any document proving that they indeed got the said motorcycle from Bunda police, and non-calling by the prosecution the arresting officer who found him at Nanjilinji -southern part of Tanzania as alleged. DW1 denied completely to have been at Nkololo and prayed for an acquittal.

Second accused, MUSA METUSELA NZUMBI gave his defence as DW2. He had also at the commencement of the hearing raised a defence of alibi. He testified that he is a resident of Bukole Bunda and that on 31/8/2016 he, together with his brother Samweli Makoye travelled to Ukerewe to visit their sister Shida Enos. They travelled by bus trading as Bunda Holding and stayed at Ukerewe from 31/8/2016 to 7/9/2016 when

he went back to Bunda using a private vehicle owned by his brother. Bus ticket dated 31/8/2016 was admitted as exhibit D1.

According to this witness, on 2/2/2017 he was in Sengerema District at Itabagumba village. He was arrested by two police officers including Isaya Momba. He was beaten by the police during the arrest before he was conveyed to Bariadi police. He said, from Sengerema to Mwanza they used a private vehicle and at Mwanza they boarded a police vehicle to Bariadi Police where they arrived at around 17:00hrs. After 30 minutes of his arrival at Bariadi Police, afande Isaya Momba and Vedastus all police officers took him to a separate room containing different items/weapons namely clubs, ropes, and iron bars. He was tortured and later was informed that he is accused of murder. After an extensive torture, he was asked if he know Buhalata, the answer which was yes because Buhalata is a person well known to him. He was then informed that Buhalata has mentioned him as his associate in a murder case at Nkololo village on 1/9/2016. He was forced to confess the accusations. On 4/2/2017 at around 9.00hrs, stated DW2, while at Bariadi police, Afande Vedastus brought him documents for signature and that he would repeat the same torture in case of any resistance. DW2 said, because of the pain and fear of torture he signed the documents without knowing its content. He

denied having been taken before a justice of peace. He challenged PW8's evidence for failure to identify him in court. He said, prosecution has failed to connect him with murder and /or the motorcycle.

DW3 is SHIDA ENOS NZUMBI a resident of Mwanza. She only told the court of the DW2's visit to her home between 31/8/2016 to 7/9/2016. When parties counsel was invited for their final closing submissions, both had none and left the matter for the court's decision.

When approached for their opinion, after a proper summing up of the evidence, issues, and points of law in relation to the matter, three honourable assessors were of the view that prosecution case failed to establish the guilty of the accused persons. They advised the court to find them Not Guilty.

Having considered the charge, evidence by the prosecution and defence, the main issue is whether the prosecution has proved its case to the required standards. Section 196 of the Penal code under which the accused persons stand charged creates three ingredients of murder which must be proved for the prosecution to secure a conviction namely.

1. That there is death of a person

2. That death was caused by an unlawful act or omission of the accused.
3. That murderer/accused persons acted with malice aforethought.

Death of the deceased was proved. PW4 and PW6 stated that they saw dead body lying in a bush near the river at Bulumbaka Vilage in Nkololo. PW4 was so specific that, he identified the deceased body as that of his own son Maduhu kweja and that after police had completed their work, they were allowed to bury the deceased body. Dr James Joseph (PW5) who visited the scene on 5/9/2016 with the police for purposes of conducting postmortem examination said, a male human body was lying in bushes near a river with all legs looped together and so for the hands and neck. According to this witness, the body had started to decompose. His examination revealed that death was due to lack of air, and he tendered in court the postmortem report as exhibit P3. There is no dispute therefore that Maduhu Kweja is indeed dead and that his death was not natural death.

On the second issue, prosecution is required to lead evidence connecting the accused persons with the death of Maduhu Kweja. There is no

eyewitness in this case who saw the accused person committing the alleged offence. The prosecution has relied on circumstantial evidence backed up by a doctrine of recent possession and 2nd accused's confession made before Pw7 and a justice of peace (PW8). It is settled that in a case depending conclusively upon circumstantial evidence, the Court must, before deciding upon a conviction, find that the exculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. See for instance a reported decision in **Simon Musoke v. Republic** (1958) EA 718.

I will begin with the doctrine of recent possession for it is the main theme in the prosecution's evidence. The prerequisite under the doctrine of recent possession is unless a person found in possession of property recently stolen gives reasonable explanation as to how he had come by the same, the court may legitimately presume that he is a thief or a guilty receiver. This doctrine has been said to extend to murder cases as well. Four precondition for the doctrine's applications were established in the case of **Mustapha Maulidi Rashidi Vs. The Republic**, Criminal Appeal No. 241 of 2014, where the Court of Appeal of Tanzania held that:

"For the doctrine of recent possession to apply as a basis of 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; Third, that the property was recently stolen from 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."

It is evident from the prosecution evidence that the motorcycle in question was found with PW1 and PW2 on 9/9/2016 eight days after the disappearance of the deceased and five days after the discovery of his body at Burumbaka Village in Nkololo. The two prosecution witnesses had informed PW6, Pw3 and Pw7 that they purchased the motorcycle from 1st accused and another person named Kilangi Faustine. It is a common knowledge that motorcycles are goods in common use, therefore prosecution are required to prove not only that the seized motorcycle belonged to the deceased or was in his possession during his death, but also that it was the accused person in court who robbed the said

motorcycle from the deceased and caused his death. I am supported by the decision of the Court of Appeal in **Ally Bakari and Pili Bakari V R** [1992] T.L.R. 10 where it was held that;

"... the presumption of guilt can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof ..."

In this case, prosecution ought to have led evidence showing (i)ownership and /or possession of the motorcycle in question before death(ii) description of the motorcycle before seizure(iii) identification and seizure of the motorcycle in question (iv) Sale transaction between the accused person and PW1 and PW2 (v) connection of the motorcycle with both the murder incident and the accused persons in court.

PW4, deceased's father claimed to be a legal owner of the motorcycle (exhibit P1) and that he purchased it from Musa Maduhu in August 2016 at a purchase price of 1950,000. He also said he was given a motorcycle Registration card bearing a Company name and that he was yet to change the card into his name. He had no written agreement nor receipt of the

said transaction. The rest of the prosecution witnesses said the motorcycle is the property of the deceased Maduhu Kweja. PW6 who searched for and arrested PW1 and PW2 had used the motorcycle Registration Card to verify the details of the motorcycle and on confirmation, he took Pw1 and the motorcycle to Bunda police. However, this witness did not tell the court how he came about the original card and where he had handed it to after the incident.

Neither PW3 nor Pw7 disclosed to the court the person from whom they got the motorcycle card from. And this is more serious because despite the facts that the murder incident was reported to the police early on 3/9/2016 before the discovery of the deceased body. The motorcycle description was not given either to the Police Bariadi or Bunda and that PW4 search was without police involvement. In **Yohana Paulo Vs. The Republic**, Criminal Appeal No. 281 of 2012 the court said the victim of theft must have given a description of his stolen items for him to claim later that the recovered items are those which were stolen from him. This was not the case here. The description given by the police came after the seizure of the motorcycle in question.

Prosecution evidence also lacks the information on how the ownership of the motorcycle was verified. It is on the evidence that PW1 and PW2 were, during the alleged sale, given a card bearing the details of the physical motorcycle. That card was never brought in court for comparison with the alleged original card (exhibit P2) and the motorcycle exhibit P1. It is therefore not certain whether exhibit P2 (registration card) is the original card of the motorcycle in question or is the same card given to PW1 and PW2 on the alleged sale transaction. The prosecution was expected to go a step ahead in verifying the ownership status of the motorcycle by consulting the Tanzania Revenue Authority or even by calling the person responsible to the Company appearing on the Registration card and /or the second owner Musa Maduhu to testify on whether the seized motorcycle is the same motorcycle robbed from the deceased or not. In this case, TRA was not consulted and neither the original owner, or responsible officer of the company appearing on the registration card, nor Musa Maduhu was brought before the court.

As hinted above, the motorcycle in question was found with PW1 and PW2 alleging to have bought it from the 1st accused and Kilangi Faustine but nothing was brought to court to substantiate this serious allegation. During their evidence in chief PW1 and Pw2 admitted having not reduced

the sale agreement into writing and that the said transaction was without any witness from the local authorities. More surprisingly, one of the mentioned Seller Kilangi Faustine was not either joined as a core accused nor brought in court as a witness.

It should be stressed here that, to connect the accused person in court with the stolen motorcycle and ultimately murder incident under the above doctrine of recent possession, all the ingredients of the doctrine must be proved. The prosecution in this case did abrogate their duty as a result there was no linkage between the motorcycle seized from PW1 and PW2, the motorcycle robbed during the murder incident and the one brought before the court as exhibit P1. Without this connection, the entire prosecution case remains without proof more so in a murder case like this where the standard of proof is beyond reasonable doubt.

Prosecution also relied on 2nd accused's confession both before PW7 and extra judicial statement made before the justice of peace. I should outrightly state here that, the confession was repudiated. The extra judicial statement was only admitted after a trial within a trial. It is a rule of practice that a conviction cannot rest solely upon an uncorroborated confession, especially when retracted or repudiated. Courts will ordinarily only act on a confession if it is corroborated by independent evidence

unless the court is fully satisfied, after considering all the material points and surrounding circumstances, that a confession cannot but be true. This was stated in the case of **Hatibu Gandhi and Others Versus Republic** [1996] TLR 12)

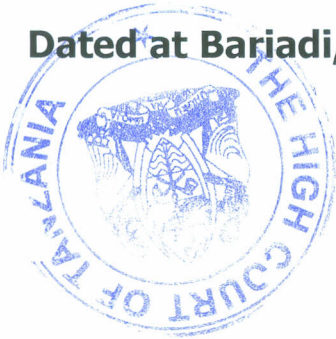
I have evaluated the extra judicial statement (exhibit P4) and PW8's evidence. As correctly stated by DW2, this witness named the accused whom she recorded the statement by one name Musa alleging to have forgotten the rest of his names and she did not identify the accused here in court. I think this is not a minor omission as it goes to supporting the 2nd accused defence that he never made a statement before PW8. I for that reason disregard the extra judicial statement. Having so done, I find the remaining evidence on the records nothing but mere suspicion against the accused person which cannot at any standard ground accused's conviction.

Given the situation above, I am constrained to hold, like the honourable assessors that prosecution has failed to prove the case beyond reasonable doubt. As a result, the accused persons **BUHALATA JOSEPH AND MUSA METUSELA @ GOLANI MAKOYE** are acquitted of the offence of

murder. It further directed that accused persons are to be released forthwith from prison unless they are otherwise lawfully held.

The motorcycle (exhibit P1) together with the Registration Card (Exhibit P2) to be returned to PW2.

Dated at Bariadi, this 7th March 2022




E.Y. MKWIZU
JUDGE
7/3/2022

COURT: Right of appeal explained.


E.Y. MKWIZU
JUDGE
7/3/2022