

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL SESSIONS CASE NO. 38 OF 2018**

REPUBLIC

VERSUS

ALLY s/o ATHUMAN MSONGOLE

JUDGMENT

Dated: 1st April, 2022

KARAYEMAHA, J

Lackston Kajila was found dead on 19/01/2017. His body was found laying aside the Isongole – Mpemba road around 6:00hours by PW1 (Venance Kaungo), PW2 (Maitare Msongole), PW3 (H. 5029 D/C Juma), PW4 (G. 1686 D/CPL Charles) and PW6 (Ally Muyombe). Exhibit P4 the post mortem examination report tendered by PW7 (Lusajo Raphael Mwakajoka) confirms that death was caused by injuries on the right cheek with a cut up to the bone, fracture of maxilla **was fractured** which depressed inside ward, fracture of the right upper jaw and a swelling in the air path.

The deceased was a businessman selling fried chicken meat. According to PW2 the deceased's wife testified that on 18/01/2017 the

deceased left the house with a bicycle (exhibit P3) and the platter, pot, plates and a water jerry cane, equipment he used in serving his customers. However, on inspecting the scene of crime only the equipment, were found at a distance from the deceased's body except the bicycle make *bambucha* or *kamongo*. It was evidenced that the deceased was gifted that bicycle by PW6 (Ally Muyombe). PW6 told the court that he was dealing with the business of hiring out bicycles. His business name was "*muache aende mkurya.*" Each bicycle's chain box had these words and was numbered. So he gave the deceased a bicycle with No. 45. Therefore, the chain box had words "*muache aende Mkurya No. 45.*"

It is evident that after the murder incident, the wheels of investigation led to the arrest of the accused person with exhibit P3 at Mbalizi. PW6 said he was tipped of that by Dan Mkubwa a driver on 29/01/2017. On seeing the accused with the deceased's bicycle at Mbalizi, he (PW6) reported at Mbalizi Police Station. Being suspected of involvement into murder, the accused person was arrested by PW5 (D/SGT Ivan) and taken to Ileje Police Station where the incident occurred on 01/02/2017. He is now charged with murder contrary to section 196 and 197 of the Penal Code Cap. 16 of the R.E. 2002 [now R.E. 2019]. The indictment is that on 19/01/2017 at Isongole village

within Ileje District in Songwe Region the accused murdered Lackston Kajila.

On summing up to assessors, I informed them that the prosecution evidence pegs on circumstantial evidence because none of the witnesses saw the accused killing the deceased. I similarly informed them that the accused person is linked to the offence of murder because he was found with the deceased's bicycle. In the same spirit, I informed them that having in possession of bicycle recently stolen; the accused was properly charged for the aggravating crime of murder and must give a reasonable explanation on how he came into possession of the bicycle stolen soon after the deceased was murdered.

All two assessors unanimously entered a verdict of not guilty on account that no witness testified to have seen the accused killing the deceased. They also said that the accused hired the bicycle to Kiwango and was told that he was dead.

In this case there is no dispute that the deceased died unnatural death. He bled to death due injuries on the right cheek with a cut up to the bone, fracture of maxilla which depressed inside ward, fracture of the right upper jaw and a swelling in the air path. Hitting one's head to that extent indicates an intention to cause harm. Malice can be inferred

from that act. Considering the evidence before me, there is no doubt that the assailant had malice aforethought. The issue for determination, therefore, is whether it is the accused person who murdered the deceased.

As alluded to above, there is no witness who testified that he saw the accused person inflicting fatal blows to the deceased. The circumstance which heavily implicates the accused person is that he was arrested in possession of a bicycle which was identified by PW6 to be the deceased's property. PW6 said it was him who gifted the said bicycle to the deceased which bore his business name that "*muache aende Mkurya No. 45.*" PW6 gave this unchallenged description and said it was among the 100+ bicycles he had in his business of hiring out the same. In my view the identification and of the deceased's bicycle was positive and was ably described by the prosecution witnesses. Although PW5 said there was a hot dispute on ownership of the bicycle, the accused said he did not deny that the bicycle was not his. It was his defence, that that he hired the bicycle from one Kiwango to go to Mbeya airport at Mbalizi to talk to his relatives who were going to Mkushi – Zambia. Since they had left he spent a night at Mbalizi. On the next day when he was going to the airport, he was arrested with the bicycle and was informed that he killed someone and stole it. According to his defence

evidence he thought he killed Kiwango and so he could not bring him to testify in his favour. After all being in remand his communication with the outside people was cutoff. So, whatever he was told was true to him.

In my view, the fact that after the death of the deceased the accused was found in possession of the deceased's property is an indication that the deceased was killed first and the bicycle stolen. It is further an indication that the accused might have killed the deceased or received the bicycle knowing that it was recently stolen. The rule of the thumb is that for the doctrine of recent possession to apply as a basis for conviction it must be proved **first**, that the property was found with the suspect, **second**, that the property is positively proved to be the property of the complainant which was recently stolen from the complainant and **third**, that the stolen thing constitutes the subject matter of the charge against the accused as was decided in the case of ***Joseph Mkumbwa and Samson Mwakagenda v Republic***, Criminal Appeal No. 94 of 2007.

In the instant case there is water-tight evidence that the deceased's bicycle was found with accused person. The prosecution has also positively proved that the bicycle belonged to the deceased through the evidence of PW1, PW2 and PW6. The evidence on display proves

that the bicycle was stolen after the deceased was assaulted and killed. It constitutes the subject matter of the charge in the following manner. The accused was found with the fruits of a crime recently after it was committed. Therefore, such presumptive evidence against the accused person is not only on the charge of theft or receiving with guilt knowledge but for any aggravating crime of murder and there is reason for believing that such aggravated and minor crimes were committed in the same transaction. In this position I am strengthened by decisions of the Court of Appeal in ***Mniko Gisengi Romara, Richard Nyaruboti @ Mombi, Magori and Mwita Machage Mwita v Republic***, Criminal Appeal No. 213 and 214 of 2012 and ***Akili Chaniva v Republic***, Criminal Appeal no. 156 of 2017 (both unreported).

A general rule is that, the accused person is liable for conviction when he is found in possession of the deceased's property without proof of ownership and fails to give a plausible account of how he came into contact with that property. In principle the accused is only required to give an account of his possession by at least giving an explanation which may reasonably be true. This rule is clearly articulated in the decisions of ***Twaha Elias Mwandungu v Republic***, Criminal Appeal No. 80 of 1995.

To hammer home what I said earlier, the circumstance heavily linking the accused with murder of the deceased is that he was arrested with the deceased's bicycle. In his defence, the accused has not denied that he was found with the said bicycle and that it was not his. He said he hired it from one Kiwango. He said that he hired it on 16/01/2017 morning when he was preparing chicken for cooking. He testified further that the agreement was to help him go Uganda in lieu of giving him money. He was later arrested on 19/01/2017. In my view, though it is in record that the accused is not in the right mental condition and was sometimes losing points, has managed to offer plausible account of how he came into possession of the bicycle. In my considered opinion, I am inclined to believe him and give him a benefit of credence. Since nobody saw him committing the offence, the hypothesis is that anyone could have killed the deceased, retained the bicycle and hire it out to the accused.

I am of that line of thinking and satisfaction because there is no extra evidence to back up the sole evidence on recent possession. It was expected, for instance, for the investigators to take a step a mile further and have finger prints extracted from the deceased's body or deceased's equipment which, in my sober conviction, could reveal whether it was the accused or another person(s) who assaulted the

deceased. Collection of evidence was to extend to such equipment because in my view since they were on the bicycle the assailant had to untie them and carry them from the bicycle's carrier. The evidence shows that they were found at a distance from where the body was. This means they were carried from that point to a distance which is from 20 meters to 200 meters. Putting reliance on single piece of evidence was, in my view, harmful and dangerous to the to the prosecution case.

Following what I have discussed above, I am destined to a singular conclusion that the prosecution has failed to prove the case beyond reasonable doubt. This conclusion draws a concurrence with all lady assessors who were all of the settled opinion that the accused person was not guilty of the charged offence of murder. Accordingly, I find and hold that the accused did not murder the deceased. In the fine, I find him not guilty and acquit him of the charges of murder contrary to section 196 of the Penal Code, Cap 16 of the R.E. 2019. His liberty once lost, is henceforth restored.



Dated at **Mbeya** this **1st** day of **April, 2022**.

A handwritten signature in blue ink, appearing to read 'J.M. Karayemaha'.

J.M.KARAYEMAHA
JUDGE