

**IN THE HIGH COURT OF TANZANIA  
MBEYA DISTRICT REGISTRY  
AT MBEYA  
CRIMINAL JURISDICTION  
CRIMINAL SESSION NO. 54 OF 2022.**

**REPUBLIC**

**VERSUS**

**1. DAINA D/O MKONDYA**

**2. LWIBA S/O AMANYISYE @ HAONGA**

**JUDGMENT**

*Date of Last Order: 21/03/2023*

*Date of Judgment: 27/04/2023*

**NDUNGURU, J.**

The above two accused persons are together and jointly charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 R.E 2002, now R.E 2022. It was stated in the particulars of offence that on 21<sup>st</sup> day of November, 2016 the accused persons did murder one Aliko s/o Mwampashi. The accused persons pleaded not guilty to the offence.

In the facts read before this court during Preliminary Hearing on 25/07/2022 state that the deceased Aliko Mwampashi was a motorcyclist

operating motorcycle business of transporting passengers commonly known as (bodaboda). He used a motor cycle T-BETTER make, with Registration No. MC 579 ACL. That in the night of 20<sup>th</sup> November 2016 he parked near a pombe shop of one Hilda Songa. That the incidence of killing the deceased occurred on 21<sup>st</sup> November at Itumba within Ileje District in Songwe region.

It was also stated that the accused persons were drinking liquor at Hilda's pombe shop. That on the same date (20/11/2016) during night time the accused persons hired the deceased to transport them by his motor cycle. On the next day (21/11/2016) the deceased body was found lying on the road in a pool of blood with injuries at the rear head. After the information being relayed to the police station at Ileje, police officers and a doctor visited a scene thereafter made a post-mortem examination. The examination report revealed that the deceased death was caused by severe bleeding.

It was further stated that the 1<sup>st</sup> accused person was arrested on 23<sup>rd</sup> November 2016 whereas the 2<sup>nd</sup> accused was arrested in Malawi country with the Motorcycle of the deceased. In the memorandum of undisputed facts both accused persons admitted to have been at Hilda's

pombe shop drinking alcohol. The 2<sup>nd</sup> accused also admitted to be arrested in Malawi with the motor cycle of the deceased.

During the trial of the case, the prosecution was led by Ms. Prosista Paul assisted by Mr. Joseph Mwakasege both learned State Attorneys. Whereas the 1<sup>st</sup> accused had a legal representation of Ms. Tumaini Amenye, learned counsel and the 2<sup>nd</sup> accused was represented by Mr. Felix Kapinga also a learned counsel.

To prove the case, the prosecution lined up five (5) witnesses; Lucia Lidiwelo Mwampashi (PW1), G.1686 D/C Charles (PW2), Ally Halikumbeye Mwampashi (PW3), Hilda Songa (PW4) and Nikusubila Mwampashi (PW5). Also, tendered three (3) Exhibits; the Motor Cycle (P1) a cash sale receipt of the motorcycle (P2) and a Registration Card of the Motor Cycle (P3). On the part of defence, the accused persons were only witnesses on their behalf. They did not call any other witness nor tender any exhibit.

PW1 testified that she is a sister of the deceased person. That the deceased was riding a motor cycle of their brother, one Ally Mwampashi. That on 19/11/2019 was a last day to see each other with deceased while alive. That on 21/11/2016 was informed that the deceased has incurred an accident. She went at the scene found the deceased lying on the road

put on the helmet but was bleeding on the rear of his head. When police arrived, they closely checked him only found that he has been injured.

PW1 went on stating that at the hospital the examination found that the rear head had an opened wound and the brain was out. That in the wound four round ammunitions (golori) were removed. That the motor cycle of the deceased was not found at the scene but they were later told that the same was found in Malawi.

PW2 gave evidence that on 21/11/2016 while at police station at Itumba- Ileje they received a report of death of the deceased along Itumba- Yenzegwe road. That he relayed the information to the OCCID one ASP Kwileka they then visited the scene. That at the scene they found the body of the deceased laying on the road in a pool of blood. That the deceased had put on helmet on his head but when closely looked at the rear head they found a hit wound which was still bleeding and the helmet was fractured. That the motor cycle was not found at the scene.

PW2 also said that they took the body of the deceased at Ileje District Hospital for investigation. That the investigation was made in the presence of the deceased relatives including Nikusubila Mwampashi and Rehema Nzokola. That during post mortem examination and after removing the helmet they found big wound on the rear head and the brain

was mixed with blood. PW2 testified further that four round ammunitions (gorori) were removed from the wound which suggested that the wound was caused by a local made gun commonly known as gobole or short gun.

He went on giving evidence that according to the medical examination the deceased's death was unnatural, caused by excessive bleeding and brain damage due to head fracture. That their further investigation revealed that the accused persons on 20/11/2016 were drinking at the area known as 'form six' clubs in Hilda's pombe shop. That on the same day during night about 2100 hours the deceased left with the accused persons as passengers to the direction of Itumba - Yenzebwe road. That they arrested the 1<sup>st</sup> accused while hiding at her home in Yenzebwe village. That when the 1<sup>st</sup> accused was interrogated, stated that on 20//11/2016 she was with the 2<sup>nd</sup> accused drinking brew at Hilda's pombe shop. She also said that they hired the deceased to take them at Yenzebwe village.

PW2 testified to have also been told that the 2<sup>nd</sup> accused was previously living at Yenzebwe village but later shifted to Malawi. That on 27/11/2016 OCCID went to Malawi where he returned with the Motor cycle which was used by the deceased which its registration number is MC 579 ACL, T-BETTER make Red-in colour. That the motor cycle was

ridden by the deceased but was owned by one Ally Mwampashi. PW2 told this court that he knew the motor cycle was owned by Ally Mwampashi upon him producing a contract he entered with the deceased for operating bodaboda business. That Ally Mwampashi also produced a registration card and the purchasing receipt and insurance card. That the 2<sup>nd</sup> accused was arrested in Malawi. PW2 tendered a motor cycle T-BETTER make, red in colour with registration number MC 579 ACL which was admitted as exhibit P1. When cross examined he said that he did not involve in the process of transporting the accused and the motor cycle from Malawi to Tanzania but the OCCID did.

PW3, one Ally Mwampashi said that he is the owner of the motor cycle which was used by the deceased. That his motor cycle is T- BETTER make, red in colour, with registration number MC 579 ACL. That he bought it in 2014 from Mlowo in Mbozi district. That he handed the motor cycle to the deceased on 28/10/2016 for business purpose. That on 21/11/2016 he got informed that Aliko/the deceased was found dead at Yenzebwe. That he reported the matter to the Police Station. That him with the police went to the scene. That at the scene the deceased's body was bleeding on the head and the motor cycle was not found there. That on the closely check of the police to the body he saw the helmet fractured and the rear

head bleeding. That he witnessed post mortem examination where he saw a medical officer removing four round irons (gorori). He said that the medical officer one Doctor Kabuje has passed away.

PW3 went on testifying that on 27/11/2016 he was asked to take documents of ownership of the motor cycle to the police station. That at the police station he identified his motor cycle which had registration number MC 579 ACL, T-BETTER make, red in colour. PW3 tendered a purchasing receipt which was admitted as exhibit P2 and a registration card bearing his name and the registration number of the motor cycle. The same was admitted as exhibit P3. He testified further that the motor cycle was recovered in Malawi but he was not told to whom it was found. He identified the said motor vehicle before the court.

PW4, Hilda Songa gave evidence that in 2016 was running a business of selling local alcoholic drink at Itumba in Ileje. That on 20/11/2016 the accused persons drunk at her pombe shop. That the 2<sup>nd</sup> accused arrived at her shop by bicycle and was carrying a red bag which he kept near her radio in the pombe shop. That the deceased told her that he was outside waiting for the accused persons to ferry them to Yenzebwe village by his motor cycle. That at the time of closing the shop the deceased carried the accused persons taking them to Yenzebwe

village. That the bicycle the 2<sup>nd</sup> accused came with was left at the shop but was later taken by Watson Haonga.

PW4 further evidenced that since it was night hours the deceased told her that he was taking the accused persons to Yenzebwe, in case of anything she be aware. That she received information on 21/11/2016 that the deceased was found dead on the road from Itumba to Yenzebwe where his motor cycle was missing. That she suspected the accused persons to be the assailants. That she went to the scene of crime and found the deceased in the pool of blood with injuries on the rear head. That she suspected the accused being the killer as they were the ones who left with the deceased from her pombe shop. That at the time of leaving the place there was electricity light. That she was also told that the 2<sup>nd</sup> accused was arrested with the motorcycle of the deceased in Malawi. PW4 also told this court that she knew the 1<sup>st</sup> accused before but the 2<sup>nd</sup> accused introduced his name to her while in pombe shop and said that he resides in Malawi.

PW5, Nikusubila Mwampashi testified that Aliko was his young brother operating bodaboda business. That the motor cycle used by the deceased belonged to Ally Mwampashi. That on 21/11/2016 he got an information from PW1 that his young brother Aliko has been murdered.



That him and other people went to the scene at Yenzebwe found the deceased body on the road. That the body was put on the helmet but the place had full of blood and the deceased's rear head was still bleeding. That he accompanied the police to Ileje District hospital and witnessed post mortem where a medical officer found four round iron pieces (golori) in the wound on the rear head. That medical officer's observation was that the deceased was killed. That after burial process and at the funeral there was information that the deceased left with the accused persons on the fateful date.

PW5 continued stating that when he got an information that a person who killed the deceased was in Malawi and after getting the registration number of the motor cycle which the deceased used and after being told that the deceased left with two persons one living in Malawi; on 25/11/2016 having processed immigration permit, he went to the police station in Malawi at Tanzania-Malawi border reported the incidence. The Police in Malawi mounted an investigation by the aid of an informer who was assisting in tracing the 2<sup>nd</sup> accused residence. PW5 also said that he knew the 2<sup>nd</sup> accused before as he lived in Yenzebwe village before him and his parents shifted to Malawi. That thereafter the police traced the place where the 2<sup>nd</sup> accused resided that is in Zamamba village in

Chitipa District in Malawi. When reached there the police asked the 2<sup>nd</sup> accused about the motor cycle. That the 2<sup>nd</sup> accused showed it as it was kept in his house.

PW5 continued testifying that when the police took the motor cycle outside, he (PW5) saw the registration number MC 579 ACL, T-Better make, red in colour. That the motor cycle and the 2<sup>nd</sup> accused were taken to Chitipa police station in Malawi. Then he returned in Tanzania reported to the police station in Ileje about what transpired in Malawi. Upon his report to the police in Tanzania, on 27<sup>th</sup> /11/2016 they went in Malawi there they were given the said motor cycle then transported it back in Tanzania. PW5 identified the said motor cycle in the court to be red in colour, T-BETTER make with registration number MC 579 ACL. When cross examined, he said that he did not witness signing of any document of retrieving the motorcycle from the 2<sup>nd</sup> accused's house. And that he did not know the procedure which was applied in bringing the motor cycle in Tanzania.

On the defence side, DW1, Daina Simon Mkondya stated that her parents are from Yenzebwe village. That she used selling local brew at the pombe shop owned by one Kibona at Itumba. That on 20/11/2016 she went at 'form six' area for normal shopping. That she met with her in

law one Mwazembe who invited her to take some brew in the pombe shop of one Hilda Songa. That in the shop she found other persons including the 2<sup>nd</sup> accused and Watson. That they took the drink until got finished in Hilda's shop. Then, they moved with her in law in another pombe shop. That about 4:00Pm she went back home. That later on with her husband they went in another pombe shop of one Rajabu were she received a phone call informing about the sickness of her mother but she did not manage to go to attend her as she was drunk.

DW1 continued giving evidence that she returned home with her husband. That she got information in the next day morning that one Aliko, a bodaboda rider has been found killed on the road from Itumba to Yenzebwe but she could not attend funeral or burial activities as she was at hospital nursing her sick mother. That in the next day she returned her mother in Yenzebwe village and she was preparing to go to the funeral when three police officers arrested her. That she was taken to the police station. There at she met Hilda who was asked by the police if she was Daina, Hilda responded positively. That, then she was told by the police that she boarded the motor cycle of the deceased the fact she denied. That she told the police that she was living at Rungwa area in Itumba.

DW1 went on stating that she was implicated in the case due to the grudge between her and Hilda since Hilda was denied a Radio which she (Hilda) wanted to borrow from DW1's pombe shop. DW1 totally denied any involvement in killing the deceased.

On his part, DW2, Lwiba Amanyisye Haonga, said in his evidence that he was living in Malawi Country at Zamamba village in Chitipa District Kalonga Region. That formally he had been living at Yenzebwe Village in Ileje District. That they shifted to Malawi in 2000. That on 20/11/2016 when at his home in Malawi was phone-called by Watson Haonga (his uncle) at pombe shops area known as for six. That he left from Malawi to Ileje by bicycle arrived at noon. That he entered the pombe shop which he did not know a runner of it. That in the pombe shop he found other persons including the 1<sup>st</sup> accused.

DW2 further said that at the pombe shop he had a talk with Watson who told him the plan of giving him a motor cycle to run bodaboda activities at Malawi. That thereafter Watson left the place by his (DW2) bicycle afterward he (Watson) brought a motor cycle red in colour, T-BETTER make with registration number MC 759 ACL. That having being handed with the motor cycle he left with the same to Malawi when it was

about 19.30 hours. That there at Malawi he kept the motor cycle at his home.

DW2 continued with evidence that after few days, on 26/11/2016 he was arrested by Malawian Police at his home. That they were asking about the motor cycle. That he told the police that his motor cycle has been hired by one Milton then police took it from the said Milton. That he was taken to Chitipa Police station after being interrogated he was taken to another police station at the Malawi-Tanzania boarder near Ileje. That while there, the police offices from Tanzania arrived then started interviewing him about the where he got the motor cycle. That he replied that he got from one Watson Haonga. That the motor cycle was brought in Tanzania by the police officers of Tanzania.

DW2 further told this court that he then faced a charge in Malawi for running boda boda business in Malawi but the proceed being brought in Tanzania. That he was convicted and sentenced to three years' imprisonment after he completed his imprisonment term on 3/8/2020 was brought in Tanzania to face the instant charge. DW2 also testified in this court that when he left the place (form six) with the motor cycle Daina was not there. Further that he did not know Hilda before, he knew her when attended her pombe shop and after she asked him his name. Also,

that he had a bag which he carried tomatoes and onions in it. DW2 said that the motor cycle which was tendered in court was not the same he was arrested with at Malawi because it has different registration number. When cross-examined he replied positively that the motor cycle which was tendered in court was the one allegedly found in his possession. He also said that Watson Haonga is alive. That when he was handed the motor cycle no other document was given as he trusted the giver. That he had no grudge with Hilda so she could not implicate him in such capital offence.

Being the end of the Prosecution and defence case, the ball is left rolling for the court to decide on whether the prosecution has discharged his noble duty. The court in its decision will deal with the main issue that is, whether the prosecution has managed to prove the case to the standards required by the law. In determining the above main issue, I will start with a minor issue of whether the accused persons murdered the deceased.

Before I resort into resolving the minor issue of whether the accused persons murdered the deceased, I am of the considered view that according to the evidence adduced by PW1, PW2, PW3, PW4, PW5 and DW1 there is no doubt that the deceased real died. It is also not in dispute

that the deceased died unnatural death. This is because PW2, PW3 and PW5 who witnessed post mortem examination told this court that the deceased was found with a wound on the rear of his head and that round ammunition (golori) were removed from the wound. PW2 being a police officer said that the four round iron/ammunitions suggested that the deceased was killed by being shot with either a local made gun commonly known as gobole or by a shot gun.

More so; PW2, PW3 and PW5 told this court that when medical officer made medical examination he said that the death of the deceased was caused by severe bleeding due to head injury and brain fracture. Also, there was evidence from PW1, PW2, PW3, PW4 and PW5 that the deceased's body was found put on the helmet which was fractured on the rear. No, doubt that there is no post mortem report tendered by the prosecution side. Nonetheless, oral evidence of the prosecution witnesses lives no doubt that the deceased actually died and his death was unnatural.

Now, back to the issue whether the 1<sup>st</sup> and 2<sup>nd</sup> accused killed the deceased. From the evidence by the prosecution's witnesses in my considered view, there is no direct evidence that the two accused persons

killed the deceased. This means that there is no witness who said she/he saw the accused persons killing the deceased.

However, the evidence adduced by the prosecution witnesses in proving the offence of murder in this case is generally relying on the doctrine of recent possession. In the circumstance, the question for determination at this juncture is whether the doctrine of recent possession can be applied and base a conviction of the accused persons in this case.

The doctrine of recent possession is the law in our jurisdiction through case laws which provides that, if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver; see **D.P.P. vs Joachim Komba** (1984) T.L.R. 214.

In the same case of **Joachim Komba** (supra) at page 216 quoted with approval the case of **R. v Bakari s/o Abdallah** [1949] 16 EACA 84 where it was observed that:

*"Cases often arise which possession by an accused person of property proved to have been stolen has been held not only to support a presumption of burglary or breaking and entering but of murder as well, and if all circumstances of*



*a case point to no other reasonable conclusion the presumption can extend to any charge however penal."*

The same spirit was stressed by the Court of Appeal of Tanzania in the case of **Manazo Mandundu and Another v. R**, (1990) TLR 92 where it was held that in befitting circumstances, the doctrine of recent possession could be invoked not only to support shop breaking and theft, but also murder, and that since the killing was so as to effect the stealing, it was quite proper to infer malice aforethought.

See also **Ally Bakari and Pili Bakari v. Republic** (1992) TLR 10, where the CAT held that:

*"To be sure; if upon a charge for murder it is proved that the deceased was murdered in a house and that the accused stole goods from the house, as was the case here, and that the accused was few days afterwards found in possession of the stolen goods, that raised the presumption that the accused was the murderer, and unless he can give a reasonable account, of the manner in which he became possessed of the goods, he would be convicted of the offence."*

In **Joseph Mkumbo and Another v. R**, Criminal Appeal No. 94 of 2007 the Court of Appeal of Tanzania stated the conditions for applying of the doctrine as follows:

*"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, **thirdly** that the property was recently stolen from the complainant, and **last** that the stolen thing in possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen /obtained during the commission of the offence charged."*

In this case, the subject matter is a motor cycle T-BETTER make, with Registration number MC 579 ACL, red in colour. This is because the evidence of the prosecution witnesses which was not contradicted or resisted was to the effect that the deceased was a motorcyclist for business of carrying passengers. That he was found dead on the road in a pool of blood while the motor cycle he was riding missing and its whereabouts was unknown. Which means that the deceased's death was committed in process of robbing the motor cycle.

Now, applying the doctrine's conditions as stated herein above, with the instant case, I wish to start testing them in connection with the 2<sup>nd</sup> accused person. To start with the first condition, that is whether the 2<sup>nd</sup> accused was found in possession of a motor cycle of the deceased person. First and foremost, there was no dispute that the 2<sup>nd</sup> accused was arrested in Malawi in possession of the deceased motor cycle. I say that this fact was undisputed putting in consideration that the 2<sup>nd</sup> accused expressly admitted this fact at the time of preliminary hearing which was conducted on 25/7/2022. The fact was also included in the memorandum of undisputed facts which was crafted by this court and after being explained to the accused persons the 2<sup>nd</sup> accused admitted to be correct, he then signed the same and his counsel.

I am well aware of the provisions of section 192 of the Criminal Procedure Act, Cap. 20 R.E. 2022 (the CPA) in respect of the rationale and consequences of the preliminary hearing. That is to accelerate trials and where a fact is agreed then it is deemed to be proved. Section 192(3) and (4) of the CPA, reads thus;

*(3) At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over*

*and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed.*

*(4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved.*

I have however taken into consideration that during the preliminary hearing the 1<sup>st</sup> and 2<sup>nd</sup> accused persons had one advocate representing both of them. During trial each accused person has been represented by her own advocate and that the learned advocate who engaged in preliminary hearing is different with the one involved in the trial. In the circumstance, I will not dwell on the memorandum of agreed facts only. I am going to consider if the prosecution led evidence to the fact that the 2<sup>nd</sup> accused was found in possession of the deceased's motor cycle.

PW5 was the one who told this court that having heard an information at the mourning/funeral that the killer was in Malawi and having been given the registration number of the motor cycle he went to report to the Police at Malawi country. That the police at Malawi upon the tips from a certain informer in Malawi they knew the residence of the 2<sup>nd</sup> accused. Then the police found him at his home at Zamamba village in Chitipa district and where the motor cycle was retrieved in his home.

Actually, in his defence the 2<sup>nd</sup> accused did not deny to be arrested in Malawi nor deny the fact that he was found in possession of the motor cycle. The 2<sup>nd</sup> accused only denied that the motor cycle which he was found in possession was different from the one tendered by the prosecution (Exhibit P1). And that he was handed with a motor cycle by his uncle one Watson for bodaboda business. He qualified that the registration number of the motor cycle he was found in possession was MC 759 ACL. What this court is observing is that all other contents of Exhibit P1 such as colour (red colour), make (T-BETTER) and registration ACL are not disputed but the arrangement of numeric numbers only. That is 759 instead of 579. What coincidence of the resemblance of the motor cycles was this?

Notwithstanding the denial by the 2<sup>nd</sup> accused of the registration number of the motor cycle, the same was tendered as exhibit by the PW2 without any objection. The law is trite that the contents of an exhibit which was admitted without any objection from the accused or his advocate, were effectually proved on account of failure to raise an objection at the time of its admission in evidence. See: **Emmanuel Lohay and Udagene Yatosha vs Republic**, Criminal Appeal No. 278 of 2010, **Kilombero Sugar Company Ltd Vs Commissioner General (TRA)**, Civil Appeal No. 261 of 2018 and **Makubi Dogani vs Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (all unreported). In the latter case the Court of Appeal emphasized as follows:

*"..... It is apparent, at pages 72 to 74 of the record of appeal that during the trial, the appellant did not object to the admissibility of the said exhibits. It is settled law that contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of absence of any objection. Therefore, since the appellant did not utilize that opportunity, challenging the said exhibits at this stage is nothing but an afterthought..."*

In this case, when exhibit P1 was tendered it was said that it was the same motorcycle found in possession of the 2<sup>nd</sup> accused. It was clearly described to be red in colour, T-BETTER make, with registration number MC 579 ACL. As much the same was tendered and admitted without objection as far as its registration number. The defence by the 2<sup>nd</sup> accused that exhibit P1 was not a motorcycle found in his possession is nothing but an afterthought.

In my considered findings the prosecution has managed to prove that the 2<sup>nd</sup> accused was found in possession of the motor cycle (E exhibit P1) of the deceased. The defence evidence of the 2<sup>nd</sup> accused has not casted any doubt to the prosecution evidence. Though the 2<sup>nd</sup> accused had no duty of proving his innocence, in my considered view, since he told this court that he was handed the motor cycle by his uncle Watson, it was upon him to call him as his witness. In the upshot his defence remains a mere denial with the view of exculpating from the strong evidence of the prosecution.

As regard to the second condition, whether the motor cycle was proved to be of the deceased in the instant case. In my view the answer is in positive. This is because, PW1 and PW3 specifically told this court

that the deceased was riding a motor cycle which belonged to PW3, Ally Mwampashi.

Again, Ally Mwampashi testified as PW3, he told the court that he is the owner of the motor cycle which was used by the deceased. He justified his oral evidence by adducing documentary evidence which are exhibit P2 and P3. Exhibit P3, a registration Card/ blue card is clear that the motor cycle is T-BETTER make, Red in colour, registration number MC 579 ACL. This tallies with exhibit P1 thus, no doubt by this court that Exhibit P1 is indeed a motor cycle that was used by the deceased. Though during cross examination, there arose a confusion as far as the date on which the motor cycle was registered contained in registration card and the date it was purchased contained in the sale receipt. To my finding the confusion is very negligible as it does not go to the root of the case so long the witness has proved to be the owner of the motor cycle and it is the one the deceased used as boda boda.

As to the third condition, whether exhibit P1 was recently stolen. This also will not consume much time in resolving it. This is because, according to PW1, PW2, PW3, PW4 and PW5 the incident of killing the deceased was committed on 21/11/2016. The 2<sup>nd</sup> Accused according to PW5 which was supported by the 2<sup>nd</sup> Accused himself in his testimony is



that he was arrested at Malawi on 26/11/2016. This means that only five days lapsed from the date of the commission of stealing the motor cycle and killing of the deceased. Which in my view was moderately very recent.

Lastly is whether the motor cycle of the deceased was stolen during the commission of the offence of murder. In accordance with the evidence of the prosecution witnesses, left no doubt that the deceased was killed and his motor cycle was missing. Thereafter, the said motor cycle was found in possession of the 2<sup>nd</sup> accused in Malawi country. This makes this court to believe the evidence of the prosecution that the deceased was killed as result of robbing his motor cycle.

Having resolved the conditions in connection with the 2<sup>nd</sup> accused person then I revert back to connect the same with the 1<sup>st</sup> accused person. In this case the only evidence connecting the 1<sup>st</sup> accused with the deceased is that of PW4 (Hilda) who said that the accused persons left with the deceased during night about 2300 hours on 20/11/2016. There is also the evidence of PW2 who said that when they arrested the 1<sup>st</sup> accused and interrogated her, only told them that they left with the deceased but did not say anything what went on thereafter. Nevertheless, the 1<sup>st</sup> accused in her defence said that she left Hilda's pombe shop early at 4:00 PM leaving the 2<sup>nd</sup> accused drinking in the same pombe shop. Also,

the 2<sup>nd</sup> accused said that when he left from the pombe shop the 1<sup>st</sup> accused was not there.

Considering all this evidence I find no any connection between the death of the deceased and the possession of the motor cycle by the 1<sup>st</sup> accused. In the event the doctrine of recent possession against the 1<sup>st</sup> accused person does not apply.

Having tested the application of the doctrine of recent possession against the 2<sup>nd</sup> accused person my final analysis will dwell on the main issue of whether the prosecution managed to prove the case beyond reasonable doubt.

Generally, as above said, this case is constructed on the doctrine of recent possession. I have found the circumstances of this case substantially the same to the case of **Kija Nestory @ Jinyamu vs Republic**, Criminal Appeal No. 455 of 2007 CAT at Tabora. In that case the accused was found in recent possession of the cattle stolen and murder committed. In his defence the accused did not deny of being found in possession of the cattle but said that the cattle he was found with had different mark "11" from those in subject of the case. At the end he was found guilty and convicted of the offence. Confirming the conviction, the Court of Appeal of Tanzania had this to say:

*"The murder of the three deceased persons occurred on 20th August, 1999. Three days later, on 23rd August, 1999 the appellant was found with the cattle which were stolen from the scene of crime. The cattle were satisfactorily identified to be the property of the first deceased, Masigana Nundu. The appellant did not claim ownership of the cattle. Nor did anybody else do so. The appellant failed to explain how he came to be in possession of the said cattle with mark "14". In this respect we are satisfied that the appellant was properly convicted, basing on the doctrine of recent possession and we cannot fault the learned trial judge on his finding."*

In the same case the Court of Appeal in its another analysis observed that:

*"The brutal death of the deceased persons occurred on 20th August, 1999. More than 50 heads of cattle bearing marks "14" were stolen from the house in which the murder was committed. Since the appellant failed to account for his possession of the 22 herds of cattle, he was the killer."*

The evidence adduced in this case fits squarely within the ambit of the doctrine of recent possession against the 2<sup>nd</sup> accused. It was established by the prosecution evidence that the deceased was motorcyclist of the motorcycle with registration number MC 579 ACL. He was found dead while the motorcycle missing. Five days later, on 26/11/2016 the 2<sup>nd</sup> accused was found in possession of the said motor cycle though he said that the motor cycle had number 759 instead of 579. In my considered opinion the 2<sup>nd</sup> accused did not adduce any reasonable explanation about how the motorcycle came into his possession. He said that he was given a motor cycle by one Watson but did not call him as witness. He however told this court that the said Watson is alive. Did not even bother to adduce any document to prove that really there existed a motor cycle with registration number he said. The denial of registration number this court undoubtedly finds that is mere denial in the process of protesting his innocence. Lastly, the time lapse between the commission of the offence and the recovery of the motor cycle was short for the same to have changed hands.

Owing to the above analysis, this court finds that the prosecution has managed to discharge its duty of proving the case beyond reasonable doubt against the 2<sup>nd</sup> accused person that he is the murderer of the

deceased (ALIKO s/o MWAMPASHI). That being the case the 1<sup>st</sup> accused is found not guilty of the offence thus, is acquitted. Whereas the 2<sup>nd</sup> accused, LWIBA s/o AMANYISYE @ HAONGA is found guilty of the offence. I hereby therefore, convict him of the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E 2002, Now R.E 2022.

  
**D.B. NDUNGURU**

**JUDGE**

**27/4/2023**

### **SENTENCE**

The offence of Murder has only one sentence. The sentence is provided under section 197 of the Penal Code. The said section provides:

*"**197** A person convicted of murder **shall be** sentenced to death"*

(emphasis added)

From the wording of the statute the sentence imposed is a mandatory not discretionary one. That being the position of law, I have no alternative rather to impose the statutory sentence.

I hereby sentence the accused person one Lwiba s/o Amanyisye @  
Haonga to suffer death as per section 197 of the Penal Code, (Cap 16  
R.E 2002)

I further direct that he shall suffer death by hanging as provided under  
section 26(1) of the Penal Code, (Cap 16 R.E 2002)

Order accordingly.



  
**D.B NDUNGURU**  
**JUDGE**  
**27/04/2023**