IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO 187 OF 2006

MSAFIRI JUMANNE.....1ST APPELLANT
PETER MASINA KWACHA.....2ND APPELLANT
KAFUBA MWANGILIPI.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)
(Mrema, J.)
dated 17th May 2006
in
Criminal session No 35 of 1990

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JUDGMENT OF THE COURT

30th September & 13th October, 2010

KIMARO, J.A.

The three appellants were convicted by the High Court of Tanzania at Mwanza with the offence of murder contrary to section 196 of the Penal Code, [CAP 16 R.E 2002]. They were alleged to have jointly and together murdered Sospeter Sammwel on 31st of January 1988 at the Regional Engineer's office (Ujenzi) within the Municipality of Mwanza as it then was.

The appellants were aggrieved by the conviction and the sentence and hence this appeal.

The evidence that was relied upon to convict the appellants is as follows: The 3rd appellant, Kafuba Mwangilindi, the deceased, Sospeter Samwel and one Adam, were all, at the time the offence was committed, employed as watchmen at Ujenzi. On 31/01/1988 the trio were on duty starting from 6.00 p.m. During that night a group of bandits stormed into the Ujenzi premises, opened the doors of the store and stole there from, motor vehicle spare parts and tyres. The stolen items were loaded in an Isuzu lorry belonging to Ujenzi bearing registration No.STG 4852. The lorry was later found abandoned near Fella Railway Station along the Mwanza Shinyanga Highway. The deceased was found dead on the next day and according to the post mortem examination report which was admitted in evidence without objection as exhibit P1, the deceased died a violent death. Some pieces of rugged clothing material were inserted into his mouth thus suffocating him to death.

According to Det. Stg. Sampon, (PW1), on 2nd of February 1988 himself and his team, while on patrol along Mwanza Shinyanga road, at Nyegezi, they saw a motor vehicle with registration No. MZG166, a land rover. It was being driven by Simon Stephen (PW2). Seated with (PW2) on the driver's cabin was the 1st appellant and Joseph Gasper. Another

passenger in the motor vehicle was one Simon. Loaded in the motor vehicle were six big motor –vehicle tyres, and two small ones. These were collectively admitted in evidence as exhibit P14. It was the testimony of PW1 that all persons found in the motor vehicle were arrested and taken to the police station. As PW1 interrogated the 1st appellant, he admitted that he stole the property from Regional Engineer's office, Mwanza. He also mentioned the 2nd and the 3rd appellants as participants in the commission of the crime. The 1st appellant also led PW1 to a house of one Kishamawe Bulima of Buhongwa village where PW1 recovered more of the stolen items. The 3rd appellant was also found hiding in that house. The property that was found in the house was seized and taken to the police station. The 3rd appellant was also arrested.

An extra judicial statement made by the 1st appellant was admitted in court unopposed as exhibit P6. The 1st appellant also made a detailed cautioned statement unveiling how he had organized the whole plan and how it was executed. It was admitted in court as exhibit P11 after a trial within trial was conducted. Exhibit P11 revealed that the 3rd appellant who knew the 1st appellant before the commission of the offence, and he, the 3rd appellant, was used to facilitate the commission of the offence. He

was instructed to give his co watchmen who were on duty with him at that night, namely the deceased and Adam, sedated meat, which would make them fall deadly asleep. The 3rd appellant was warned not to eat that meat. That sent his co watchmen in a deep sleep to the extent that they were unable to perform their function. That left room for the 3rd appellant to give the bandits an easy access to the Ujenzi premises where they managed to steal the motor vehicle spare parts and the tyres. According to exhibit P11 the original plan was to steal bundles of corrugated iron sheets but they found none in the store.

At the time of the commission of the offence, the 3rd appellant was ordered to wake up Adam. The 1st appellant and Adam were ordered to lie on their stomachs in the motor vehicle where the bandits loaded the stolen items. The bandits blind folded Adam and pretended to do so for the 3rd appellant. After loading the properties in the motor vehicle, the 3rd appellant sat in the motor vehicle in the driver's cabin and they left. On the way, the 2nd appellant disembarked from the motor vehicle, went to a certain house and returned with one person who was identified as Mnyaruanda by tribe. Then the lorry proceeded to Buhongwa village where the stolen property was off loaded and kept in the house of one old

man known as Kashamawe Bulimba. The 3rd appellant was also left there and he was arrested when the 1st appellant took PW1 there to collect the stolen property.

In his defence the 1st appellant denied totally the commission of the offence claiming that he suffered assaults and starvation in the hands of Hamadi Koshuma (PW9) who recorded his cautioned statement exhibit P11. However, he did not deny that the signature on exhibit P11 was his. After hearing submissions from both sides the learned trial judge rejected the defence of the 1st appellant. The analysis of the evidence by the learned trial judge was that, the murder took place in the early hours of 31st January 1988. The 1st appellant was found in a motor vehicle carrying some of the stolen property. He told PW1 that he was involved in the commission of the offence. In his cautioned statement, exhibit P 11 the 1st appellant admitted showing PW1 the house where the stolen property was kept, and when PW1 went there, he actually recovered that property from there. Also taken into consideration by the learned trial judge, was the doctrine of recent possession. The property was stolen on 31st January 1988 and was recovered on 2nd February 1988, the third day after the commission of the offence. Given this factual situation, the learned trial

judge was satisfied that there was no way in which PW9 could have falsified the 1st appellant's detailed explanation on the events that took place from the time the offence was committed to the time of the arrest of the 1st and 2nd appellants and the recovery of the stolen property. He found the 1st appellant guilty and convicted him of the offence of murder on the doctrine of recent possession.

As for the 2nd appellant the evidence against him was a cautioned statement he made to the police which was admitted as exhibit P12. His extra judicial statement was also taken and marked as exhibit P7 but it was excluded from the proceedings because of procedural irregularities. It was not admitted in evidence nor did it feature in the proceedings during the trial. The learned trial judge admitted that the 2nd appellant's cautioned statement was not a confession to murder but he said it implicated him in some respects for instance being in the lorry that transported the goods to Buhongwa.

In his defence the 2nd appellant raised the defence of alibi that he was busy with ritual mourning over the death of his mother but the learned trial judge rejected it under section 194(6) of CAP 20 for a procedural irregularity. No prior notice was given by the 2nd appellant that he was

going to rely on that defence as required by section 194(4) or (5) of the Criminal Procedure Act. Relying on the case of **Tuwamoi Vs Uganda** (1967) E.A.84 the learned trial judge said he had cautioned himself and was satisfied that he could convict the 2nd appellant on the incriminating statements of the 1st appellant and also his (2nd appellant's) cautioned statement.

As already indicated, the 3rd appellant was an employee of the Ujenzi and he was on duty on the date the offence was committed. He was also found hiding in the house where the stolen property was kept in custody after being stolen, and according to the statement of the 1st appellant; he was the facilitator of the whole plan at the scene of crime. There was also his extra judicial statement he made before the Justice of Peace that was admitted in evidence at the stage of the preliminary hearing, as exhibit P8. In his defence he told the court that he was kidnapped by the thugs and forced to board the lorry while blind- folded and taken to the house of Kichawale Bulimba and he was ordered to remain in that house until when he would be told what to do next. According to him, the kidnappers threatened to kill him if he disobeyed their order. In fear of that threat, he obeyed that order and stayed in that house until his arrest.

In convicting the 3rd appellant the learned trial judge wondered why the 3rd appellant did not report the incident of his kidnapping to the village authorities after the bandits had left. He found his defence to be a scapegoat and he convicted him of the offence of murder as charged, also relying on the doctrine of recent possession. The learned judge was not satisfied that his explanation was reasonable.

As already stated the appellants were aggrieved and they filed this appeal.

Mr. Seraphion Kahangwa learned advocate is representing the 1st appellant Msafiri Jumanne and he has four grounds of appeal. In the first ground of appeal the complaint is on the admissibility of the extra judicial and cautioned statement of the 1st appellant. It is contended that they were wrongly admitted in evidence as they were not voluntarily made. In the second ground the learned trial judge is faulted for failure to omit in the summing up to address the assessors on the crucial aspect of the free and voluntariness of the repudiated statements of the appellant. This, it is contended, denied the assessors an opportunity to give their opinion and hence the trial judge sat without assessors. The third ground of appeal is a complaint that it was wrong to invoke the doctrine of recent possession

in convicting the appellant. In the fourth ground the learned trial judge is faulted for shifting the burden of proof to the appellant.

The 2nd appellant Peter Kwacha was represented by Mr. Sylveri Byabusha, learned advocate. He filed five grounds of appeal. In the first ground of appeal the complaint is that there were no descriptive marks showing that the property was stolen from Ujenzi. In the second ground the learned trial judge is faulted for treating the caution statement of the second appellant as a confession. As for the third ground the trial judge is faulted for convicting the appellant on uncorroborated statements of the co appellants. The last ground relates to the inadmissibility of the cautioned statement as the same was recorded out of time.

The 3rd appellant is advocated by Mr. Salum Magongo, learned Advocate. His grounds of appeal are five. In the first ground, the complaint is on exhibits P6, P11 and P12 that they did not amount to a confession and so the court erred in relying on them to convict the 3rd appellant. That the content of exhibit P8 and the defence of the 3rd appellant are similar and so the trial court had no reason to disbelieve the appellant. In the third ground the complaint is that most of the findings and conclusions against the appellant are not supported by the evidence

on record. As regards the fourth ground, it is contended that the evidence on record does not justify the conviction against the appellant. Lastly is a complaint that since the learned advocates addressed the court partly by written submission and there is no proof that the submissions were brought to the attention of the assessors, the trial was not fully conducted with the aid of assessors.

The respondent Republic was represented by Mr. Edwin Kakolaki learned Senior State Attorney and he supported the convictions and the sentence meted out in respect of all the appellants.

Arguing the appeal in respect of the 1st appellant on the first ground, Mr. Kahangwa, learned advocate said both the extra judicial statement (exhibit P6) and the cautioned statements (exhibit P11) were inadmissible in evidence for three reasons. First, the 1st appellant was not informed that he could have the presence of an advocate or a relative at the time of recording his statement. Second, it was not shown on the cautioned statement when the recording was completed and this offended sections 50 of CAP 20. We were referred to the case of **Emmanuel Malahya Vs R** Criminal Appeal No. 212 of 2004. Third, the extra judicial

statement of the 1st appellant was not voluntarily made because when his body was inspected he was found with fresh wounds.

On the second ground the learned advocate said in summing up to the assessors, the learned trial judge did not give the assessors a direction on the involuntariness of the statements and so they were denied the right to assist the court under section 265 CAP 20. As for the 3rd ground the learned advocate said the doctrine of recent possession was wrongly invoked as there was no evidence linking the 1st appellant with the stolen property. As already indicated above, in the fourth ground of appeal the learned advocate said contrary to the procedure of burden of proof, which requires the prosecution to prove its case beyond doubt, the learned trial judge shifted the burden of proof to the 1st appellant to explain about his failure to account for his conduct.

Responding to the submissions in support of the appeal in respect of the 1st appellant, the learned Senior State Attorney said the extra judicial statement of the 1st appellant was admitted in evidence without objection and so the learned trial judge had no reason not to rely on it. Regarding the caution statement, the learned State Attorney requested the Court to disregard what the learned advocate said because at the time it was

tendered in evidence, that objection, that the statement did not cover section 50 of CAP 20 was not raised. In his opinion the caution statement is so detailed that it can be nothing but a true account of what took place. He said there was also corroborative evidence from exhibit P6 which explained how they went to Buhongwa village where the stolen property was recovered. In addition, the learned Senior State Attorney said, the evidence of PW1 explained how the 1st appellant was arrested and how he assisted to show the house where the stolen property was kept. He referred the Court to the cases of **Steven Jason Vs R** CAT Criminal Appeal No. 79 of 1999(Unreported)and **Dotto Ngasa Vs R** CAT Criminal Appeal No. 6 of 2002.

On the second ground of appeal the learned Senior State Attorney conceded that the learned trial judge did not address the assessors on the voluntariness of the statements. The omission, in his opinion, did not vitiate the proceedings. In any event, Mr. Kakolaki contended, that is a question of the law and the assessors would not have rendered any useful assistance.

The learned Senior State Attorney's reply on invoking the doctrine of recent possession was that there was no dispute that the 1st appellant was

found in possession of the stolen items. On shifting the burden of proof the learned Senior State Attorney said there is nothing on the record indicating that the learned trial judge shifted the burden of proof. Regarding the complaint on a misdirection in the summing up to the assessors, Mr. Kakolaki said this ground is not supported by evidence. He prayed that the appeal in respect of the 1st appellant be dismissed.

Admittedly, there was no direct evidence linking any of the appellants with the commission of the offence. The prosecution case was based entirely on circumstantial evidence. The prosecution relied on the evidence of the arrest of the 1st and the 3rd appellants with some of the stolen property on 2nd February 1988, the confession of the 1st appellant though it was retracted/ repudiated, but the trial court admitted it saying that it was voluntary, and it was incriminating to the 2nd and 3rd appellants, and also the statements of the appellants which the learned trial judge said they implicated each other with the commission of the offence.

Coming to the first ground of appeal, we note that the extra judicial statement of the 1st appellant was among matters not in dispute when the preliminary hearing was conducted on 28th February 1992. It was admitted in court without objection on that day. In fact Mr. Matata, learned

advocate who represented the 1st appellant during the preliminary hearing informed the learned judge who conducted the preliminary hearing as follows:

> *"My Lord, the following matters are not in dispute.*
>
> *1 That the deceased is dead and he died violently*
>
> *2 Contents of Exh. P1 (Post Mortem report) and those of Exh. P2 (Sketch plan).*
>
> *3 Extra judicial statement of the 1st accused (Exh.P6)*
>
> *4 That the first accused was among the passengers in M/V MZG 166."*

The cautioned statement of the 1st appellant was admitted in court as exhibit P11 after the trial court conducted a trial within trial. We have read the ruling of the trial within trial. What the trial court said was at issue was:

> *"This ruling is the result of a full conduct of a trial within trial held in the absence of assessors for the purpose of determining whether or not the alleged statements made by the 1st accused Msafiri Jumanne*

and the 2nd accused Peter Kwacha to the then Ass. Insp. of Police , one Hamad Koshuma (PW9) were voluntarily made and, hence, admissible in evidence against the accused persons within the meaning of section 27(1) of the Tanzania Evidence Act , 1967. "

The question of non compliance of the sections under which the cautioned statement of the 1st appellant was recorded was not raised during the trial within trial. What the trial court was requested to test was the voluntariness of the statements but it was not the procedure for recording that statement. The extra judicial statement of the 1st appellant was also admitted in court undisputed. But that statement is not an extra judicial statement because the same was made before No. 9088 D/C CPL FERDINAND who was a police officer. Powers for recording an extra judicial statement are an exclusive reserve of a Justices of Peace. The extra judicial statement was therefore wrongly admitted in evidence. It is expunged from the record.

In the case of **Zakayo Shungwa Mwashindi & Others** CAT Criminal Appeal No. 78 of 2007 the Court said that if during the trial the provisions of section 169 (1) of the CAP 20 are not invoked in challenging the admissibility of admission of certain evidence that cannot be raised at the appellate level. In this case an objection was not raised in respect of the procedure that was used in recording the cautioned statement of the 1st appellant and the trial court did not have an opportunity to adjudicate on that matter. That point cannot be raised at the appellate level. The first ground of appeal in our considered opinion is an afterthought. It has no merit.

On the second ground of appeal that the learned trial judge did not address the learned assessors on the voluntariness of the statement of the 1st appellant we will also say that the ground has no merit. The learned Senior State Attorney pointed out correctly, that the question of voluntariness of the statements was a question of the law. Moreover, in determining the question of voluntariness of a confession the court does not sit with assessors. In the case of **Hatibu Gandi and others V R** [1996]T.L.R. 12 there was a complaint that the learned trial judge failed to give adequate summing up to the assessors. The Court said:

"We cannot interpret the word "may "used under section 283(1) of the Criminal Procedure Code (now section 298(1) to mean "shall ". To do so would be to violence to clear statutory provisions. Therefore the question whether summing up to assessors is mandatory is no longer an issue in this Court. "

In terms of section 298(2) of CAP 20 the opinion of the assessors is not even binding. This ground therefore lacks merit.

Regarding the conviction of the 1st appellant on the doctrine of recent possession, it was not disputed that it was the 1st appellant who unveiled the whole plan on how the commission of the offence took place. It was a matter not in dispute at the preliminary hearing that the 1st appellant was found in the motor vehicle MZG 166. According to the evidence of PW1 which was also not disputed, the motor vehicle carried tyres which the 1st appellant told PW1 that they were stolen from the Ujenzi. That was on 2nd February 1988. The theft took place on 31st January, 1988. The 1st

appellant also took PW1 to the house where more of the stolen property was recovered. The properties stolen from Ujenzi, namely tyres and spare parts, are rare commodities to be found in a house of a peasant in the villages. It was the information given by the 1st appellant to PW1 and his caution statement exhibit P11 that led to the discovery of the property that was stolen from Ujenzi. In the case of **Mawazo Madundu & Another V R [1990]** T.L.R.92 the appellants were found in possession of stolen property a few hours after the watchman of the shop where the property was stolen was found dead. They were charged with murder and convicted by the High Court. On appeal to the Court, it was held that it was a fit case to invoke the doctrine of recent possession to support not only the shop breaking but also the murder. Similarly in the case of **Dotto Ngassa V R** CAT Criminal Appeal No. 6 of 2002 the Court held that:

> *"The appellant having retracted the confession of the statement , the learned trial properly directed himself on the applicable legal principle relating to retracted confessions. He looked for corroboration and found such corroboration*

in the evidence of PW1 to the effect that

the appellant led to the discovery of the murder

weapon and the clothes that the appellant was

wearing at the time of the incident. These items

were found hidden in such places that only the

one who was either involved in hiding the items

or had knowledge of the places would be in a

position to show."

In this case there was no way in which PW1 could have known where the properties were, had the 1st appellant not led the way. He could not have led the way if he had no knowledge of the whole transaction. Thus, like the learned trial judge, we are satisfied that the cumulative effect of the evidence that was adduced by the prosecution stands incompatible with the 1st appellant's innocence. In the case of **Twaha Alli & 5 Others V R** Criminal Appeal No. 78 of 2004(Unreported), the court held that an accused person who confesses his guilt is the best witness. See also section 31 of the Evidence Act and the cases of **Inota Gishi and three**

Others V Republic Criminal Appeal No. 5 of 2008 (Unreported) and **Richard Mgaya @ Sikubali Mgaya V The Republic** Criminal Appeal No.335 of 2008 (Unreported). From the foregoing, we find the appeal by the 1st appellant has no merit. It is dismissed in its entirety.

To give this judgment a good flow, we find it convenient to go to the appeal by the 3rd appellant first and then we will finish with the 2nd appellant. In respect of the 3rd appellant, Mr. Magongo learned advocate for the 3rd appellant contended that the extra judicial statement (axhibit P6) and the caution statement (exhibit P11) of the 1st appellant and exhibit P12 the caution statement of the 2nd appellant were not confessions because the appellants did not admit commission of murder. He said the admissibility of the statements is governed by section 33 of CAP 6 but the statements did not meet the requirement laid down in that provision. The learned advocate said the statement of the 2nd appellant does not even mention the 3rd appellant.

On exhibit P8, the extra judicial statement of the 3rd appellant, the learned advocate said the defence of the 3rd appellant tallied with exhibit P8 and so there was no reason why the court should disbelieve the contents of exhibit P8 that the 3rd appellant was hijacked. In his opinion,

the court erred in allowing the prosecution to disown their own evidence. As for ground three of the appeal Mr. Magongo's general observation was that the court imputed into the judgment matters which did not form part of the evidence and he specifically mentioned exhibit P11.

As for the written submissions made by the advocates, the learned advocate said they were not read over to the gentlemen assessors and hence they were denied an opportunity to make their comments. This omission, said the learned advocate, affected the trial as it contravened section 265 of CAP20 which requires the court to sit with assessors. It was his contention that on this aspect the trial court was not assisted by the assessors in reaching it decision. He cited the case of **Otieno Vs R** (2006) E.A. 263 to augment his submission.

In respect of ground four, his assessment of the evidence was that it does not justify the conviction of the 3rd appellant. In particular, the learned advocate referred to the evidence of PW4 -Lyabangi Kachwele the wife of the person where the stolen property was recovered. He said PW4 was neither listed during the committal proceedings, nor during the preliminary hearing as being among the witnesses to be summoned. Legally, her evidence was not admissible and even if the same was

admissible she came to the scene too late. The learned advocate said the prosecution had the opportunity to use section 34B of CAP 6 and produce the statement of the witnesses who died before giving his evidence but not to summon a person who was a stranger to the proceedings. He relied on the case of **Mohamed a& Others Vs R** 1990-1995 E.A.376.

On the use of the doctrine of recent possession, the learned trial judge was faulted for relying on it in convicting the 3rd appellant because he gave a reasonable explanation and the prosecution did not dispute it. The learned advocate said that, apart from the evidence of PW1 who said that the 3rd appellant was found at the house where the stolen property was recovered; there is no other evidence to link him with the commission of the offence. He prayed that the appeal be allowed.

The learned Senior State Attorney's response on the submission made by the learned advocate for the 3rd appellant was that the first ground of appeal has no merit. The statement of the 1st appellant, contended the learned Senior State Attorney, is so detailed that it could not be a concoction but the truth of what took place.

As to why the trial court relied on the doctrine of recent possession, it was the contention of the learned Senior State Attorney that the 3rd appellant was found in the house where the stolen property was kept. The learned Senior State Attorney said the assertion by the learned Advocate that the assessors failed to give their opinion because the written submission made by the advocates were not supplied to them cannot hold water because the learned trial judge highlighted the evidence to them. Regarding the evidence of PW4, Mr. Kakolaki admitted that the witness was not listed as one of the witnesses for the prosecution but he said even if her evidence is expunged from the record, there will still be other evidence to hold the 3rd appellant liable. He said the 3rd appellant failed to offer reasonable explanation why he was in that house where the stolen property was found. He prayed that the appeal by all appellants be dismissed.

On our part, we need not waste time on the first ground of appeal because the word confession is defined in section 3(1) of the law of Evidence Act, CAP 6. The section says:

> *"Confession means:-*
>
> *(a) Words or conduct , or a combination of both*

words and conduct , from which , whether taken alone or in conjunction with other facts proved, an inference may be reasonably drawn that the person who said the words or did the act or acts constituting the conduct committed an offence; or

(b) *A statement which admits in terms either an offence or substantially that a person making the statement* has committed an offence; or

(c) *A statement containing an admission of all the ingredients of the offence with which its maker is charged, or*

(d) *A statement containing affirmative declarations in which incriminating facts are admitted from which, when taken alone or in conjunction with the other facts proved, an inference may be reasonably be drawn that the person making the statement has committed an offence."*

From the definition of confession as given above, we agree with the learned advocate for the 3rd appellant that the extra judicial statement of the 3rd appellant did not amount to a confession. However, the cautioned statement of the 1st appellant exhibit P 11 was a confession within the meaning of sections 3(1) (a), (b) and (d) of CAP 6. We have discussed in detail the effects of exhibit P11 when dealing with the 1st appellant's grounds of appeal and we need not repeat it here. This ground has merit.

As for the second ground of appeal it is true exhibit P8, the extra judicial statement of the 3rd appellant was admitted in evidence at the preliminary hearing and it formed part the record of matters not in dispute. However, in our considered opinion the statement was wrongly admitted in evidence because the 3rd appellant did not sign anyway in the statement, indicating that he agreed to make the statement. After the Justice of Peace had asked him whether he wanted to make any statement, he had to sign indicating his willingness to give a statement. The omission by the 3rd appellant to put his signature on exhibit P8 before giving his narration as to what he wanted to say is fatal. We expunge exhibit P8 from the record.

On whether the assessors were availed of the opportunity to read the written submission and render their opinion to the learned trial judge, this ground has already been answered when dealing with the same scenario in respect of the 1st appellant. See the case of **Hatibu Ghandi** (supra).

The complaint that the evidence of PW4 was wrongly taken because she was a stranger to the proceedings was conceded to by the learned Senior State Attorney. Section 289 (1) of CAP 20 says:

> *"No witness whose statement or substance of evidence was not read at the committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

The record of appeal at page 53 does not show that there was compliance with the said provision. It is a mandatory provision. As the learned advocate for the 3rd appellant said, the prosecution could have

invoked the provisions of section 34B of the Evidence Act , CAP 6 to tender the statement of Kishamawe Bulingwa who died before his evidence was received in court. For reasons best known to the prosecution, they did not do so. Since the evidence of PW4 was wrongly admitted in court, we expunge it from the record.

On the ground that the assessment of the evidence on record did not justify the conviction of the 3rd appellant, we wish to say, and with respect to the learned advocate for the 3rd appellant, that we do not agree with him. According to the oral confession of the 1st appellant to PW1 and his written confession exhibit P11, the 1st appellant admitted that the properties that were found in the motor vehicle in which the 1st appellant was found, were stolen from Ujenzi. The 1st appellant led PW1 to the house of Kishamawe where the 3rd appellant was found hiding. Part of the stolen property was also found there. The 3d appellant was an employee of the Ujenzi, Mwanza. He was supposed to be at his place of work. Yet he was found hiding, taking care of property that was stolen from his employer, at a place where such commodities are rarely found. The property was stolen on 31st January 1988 and on 2nd February 1988 it was recovered. The only explanation that the 3rd appellant gave was that he

was hijacked and threatened to be killed if he escaped. But PW1 said when he went to the house he did not find the 3rd appellant in the conditions he explained. He was not under any restraint. Following the case of **Mawazo Madundu & another** (supra) and exhibit P11 which implicated the 3rd appellant that he was the one who facilitated the whole plan, we are satisfied that he was properly convicted on the doctrine of recent possession. The explanation that the 3rd appellant gave was not reasonable. His appeal is dismissed.

In support of the appeal for the second appellant, the learned advocate for the second appellant Mr. Byabusha, submitted in respect of the first ground that the identification and tendering of the properties in evidence did not comply with the law. Challenging the evidence of PW3, the learned advocate said that all that the witness said was that the property bore the marks. According to him that was not enough. By use of bill cards, the witness had to show what was in the store before the theft and what went missing after the theft. He cited the cases of **Nassoro Mohamed Vs R** [1967] H.C.D.446 and **Fadhili Mohamed Vs R** (1974) LRT 5 to support his argument.

On the second ground of appeal the learned advocate for the 2nd appellant said the caution statement of the 2nd appellant which was admitted as exhibit P12 was not a confession as it did not meet the ingredients of a confession as given in section 27 of the Law of Evidence Act, [CAP 6 R.E. 2002]. He said it is not indicated anywhere in exhibit P12 that the 2nd appellant admitted involvement in the commission of the offence.

Still faulting the statement of the 2nd appellant , the learned advocate for the 2nd appellant said in respect of ground three of the appeal that there was no compliance with **sections 50, 57 and 53 of CAP 20** because the appellant was not informed of his rights. He said even the statement does not show when the recording was completed. The learned advocate cited the cases of **Ally Nuru Diree & Another Vs** R CAT Criminal Appeal No162 of 1990 to support his arguments but it is a dissenting judgment.

Complaining on the evidence upon which the 2nd appellant was convicted, the learned advocate said the conviction of the appellant was based on uncorroborated confessions of co accused namely exhibit P6 which was unlawfully admitted in evidence as it was made before a police

officer, who purported to be a Justice of Peace. He said the powers of recording an extra judicial statement are exclusively vested to the Justice of Peace. Furthermore, the learned advocate said, the extra judicial statement does not even implicate the appellant.

On the last ground of appeal, the learned advocate said the cautioned statement of the 2nd appellant was recorded out of time and hence it was not admissible in evidence in terms of sections 48(1) (a) and (b) and section 50 (1) of CAP 20. Whereas the 2nd appellant was arrested on 31st January 1988 at 11.00 am, his statement was recorded on 2nd February at 12.00 noon. The court was referred to the case of **Emmanuel Makahya Vs R** (supra). Since he was not found in possession of the stole property, but was only mentioned by his co accused, the learned advocate prayed that the appellant's appeal be allowed.

On his part, the learned Senior State Attorney said in respect of ground one of the appeal that, the description of the property was given. Making reference to the evidence of PW3, Mr. Kakolaki said the witness said the tyres have marks TG meaning Tanzania Government hence they could not be supplied by any other supplier apart from the government. On the caution statement of the 2nd appellant, the learned advocate said

that although it is not as detailed as that of the 1st appellant, but to a certain extent it gives the role he played in the commission of the offence and it is corroborated by the caution of the 1st appellant. He said corroboration need not be direct. It can be circumstantial.

Referring to the case of **Paschal Kitigwa Vs R**, [1994] T.L.R.65 the learned Senior State Attorney said the appellant told lied and his defence of alibi was disregarded by the trial court. He said the complaint on the cautioned statement of the 2nd appellant that it was inadmissible in evidence lacked substance because that issue did not arise during the trial. He recalled that what the 2nd appellant said was that he was promised a discharge from criminal proceedings. He referred Court to the case of **Moses Msaki Vs R** [1990] T.L.R 90.

On the confession of the 1st appellant, Mr. Kakolaki said he was an accomplice and the court could convict without corroboration. He was of the opinion that the case of **Paschal Kitigwa** (supra), offers an answer to the argument raised by the learned advocate for the 2nd appellant. It was his opinion that under the circumstances of the case, section 22 of the Penal Code can be inferred to establish a common intention in respect of all the appellants. As for the last ground the learned State Attorney said

like in ground two, there was no violation of section 50. He prayed for the dismissal of the appeal.

In our considered opinion the first ground of appeal has no merit. It was not disputed that the 1st appellant was found in a motor vehicle which carried some of the stolen property. He made oral admission to PW1 that the property was stolen from Ujenzi. He also made a cautioned statement explaining about the whole plan and how it was executed. He went and showed the rest of the properties which were also seized. In his caution statement, exhibit P11 the 1st appellant said he was with the 2nd appellant. In view of the case of **Twaha Alli & 5 others V R** (supra) we find this ground has no merit.

Given the definition of what amounts to a confession, the second ground of appeal that the caution statement of the 2nd appellant was not a confession has merit. The statement of the 2nd appellant does not fall within the definition of a confession as given in section 3 of CAP6. This ground has merit.

On the 3rd ground which is a complaint on non compliance of the procedure in recording the cautioned statement of the 2nd appellant, we

wish to say this ground was answered while dealing with the grounds of appeal by the 1st appellant. There was no objection raised on non compliance of the procedure in recording the statement of the 2nd appellant during the trial. The trial court did not litigate on this point. That omission cannot be raised at the appellate stage. In **Elisa Mosses Msaki V R** [1990] E.A. 90 the Court held when deciding an application for leave to appeal to the Court of Appeals held that:

> *"The Court of Appeal will only look onto*
>
> *matters which came up in lower courts*
>
> *and were decided; not on matters which*
>
> *were not raised nor decided by either the trial*
>
> *court or the High Court on appeal."*

See also **Zakayo Shuma Mwashilindi & Two others** (supra). Moreover, given what we have said in respect of ground two, that his caution statement is not a confession this ground was unnecessary.

The fourth ground of appeal related to the conviction of the 2nd appellant that it was based on uncorroborated statement of the 1st

appellant, namely his extra judicial statement, exhibit P6. As already said, exhibit P6 was wrongly admitted in evidence and we have expunged it from the record. What now remains on record implicating the 2nd appellant is the cautioned statement of the 1st appellant; exhibit P11. The learned State Attorney referred us to the case of **Paschal Kitigwa** (supra) claiming that the 2nd appellant was properly convicted on accomplice evidence. In the said case, the Court held:

> *"Evidence from co-accused as in this case*
>
> *is accomplice evidence and a court may convict*
>
> *on accomplice's evidence without corroboration*
>
> *if it is convinced that the evidence is true, and*
>
> *provided it warns itself of the dangers of convicting*
>
> *on uncorroborated accomplice's evidence."*

In convicting the 2nd appellant , the learned trial judge said:

> *"Although the accused's statement does not admit*
>
> *confession of murder of the deceased, the*

himself, admitted was not a confession. So what remains on record as evidence against the 2nd appellant implicating him with the commission of the offence, is the cautioned statement of the 1st appellant. In our considered opinion it is higly unsafe to convict the 2nd appellant solely on the evidence of accomplice without corroboration, which in this case we failed to find none. See section 33(2) of Cap 6. This ground of appeal has merit and it is allowed.

Having given our finding on ground four of the 2nd appellant's grounds of appeal, we see no need for going to ground five. In any event this ground has already been answered while dealing with ground three. Having regard to what we have said in respect of the conviction of the 2nd appellant, he was entitled to a benefit of doubt and be acquitted. We thus give him that benefit, allow his appeal, quash the conviction and sentence and order his immediate release from prison unless he is held there for any other lawful purpose. It is ordered.

DATED at MWANZA this 11th day of October, 2010.

N. P. KIMARO

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

W. P. Bampikya

SENIOR DEPUTY REGISTRAR