IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: OTHMAN, C.J., LUANDA, J.A. And KAIJAGE, J.A

CRIMINAL APPEAL NO. 262 OF 2014

TWALIBU OMARY JUMA@ SHIDA ..... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Nyerere J.)

dated the 16th day of December, 2013
in
Criminal Session No. 11 of 2011

JUDGMENT OF THE COURT

24th October & 3rd November, 2014

KAIJAGE, J.A.:

The appellant was tried on the information of murder of Everline Michael Nyaki (the deceased) contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. He was convicted as charged and sentenced to suffer death by hanging. Aggrieved by the conviction, he lodged this appeal.

We propose to preface our judgment by stating a brief account of evidence which led to the appellant's conviction.

From a total of four (4) witnesses, the prosecution led evidence to the effect that on 14/08/2009 at 1:00 a.m. or thereabout, a group of unidentified armed bandits forcibly gained ingress into the deceased's premises situated at Shirigumgungani area within the District of Hai, in Kilimanjaro Region. That done, the bandits are said to have ransacked both the family shop and the dwelling house after which they shot the deceased to death. The bandits then took to flight to the unknown destination with various items of property allegedly stolen from the deceased and his family members. The deceased was left lying dead in his bedroom and blood was plastered all over the place. According to the Post-Mortem Examination Report (Exh.P2), the deceased sustained bullet wounds on his head.

The undisputed murder incident took place in the presence of the deceased's wife, Florence Nyaki, who was not called to testify, and in the presence of PW1 Elizabeth Emmanuel, a house maid, and PW4 Jimmy Everline Nyaki, the deceased's son. At the material time, both PW1 and PW4 were asleep, only to be awakened by bandits who stormed in their respective rooms asking for the whereabouts of the deceased and the latter's weapons. Both witnesses told the trial High Court that they heard gun shots emanating from the deceased's room,

but PW1 was unable to identify any of the bandits because it was night time and darkness had taken its toll.

In his testimonial account, PW4 advanced a claim of having impeccably identified the appellant as a person who forcibly entered his room, thereby dispossessing him of his pair of shoes and a sliver bracelet with a name 'Nyaki' inscribed thereon. Testifying on how he was able to identify the appellant, PW4 asserted that his room was sufficiently illuminated by a lit torch carried by the former. However, the trial High Court in its decision correctly discounted and discredited this piece of evidence for not having been water tight and for not satisfying the standard guidelines on identification in unfavourable conditions enunciated in a celebrated case of **WAZIRI AMANI v. R.;** (1980) TLR 250 and amplified in **RAYMOND FRANCIS v. R.** (1994) TLR 100. On this aspect of the case, the trial High Court found, correctly in our view, that the appellant was not properly identified at the scene of crime.

The murder incident was reported to the police authorities immediately after its occurrence. PW3 No. C.6024 Dtc/Sgt Khalfan was detailed to investigate the incident. During the same night, he visited the scene of crime together with other police officers. At that time, the

deceased's body had already been taken to KCMC hospital for preservation and other investigative purposes pending burial. In the course of probing into the circumstances surrounding the murder incident, PW3 was told by the wife of the deceased that the bandits made away with *'one shot gun, one pistol, handsets and other small items'.* She made no detailed description of the items stolen.

Testifying on what happened subsequently, PW3 told the trial High Court that during the morning of the 14/08/2009, he was informed that the appellant was arrested in connection with the murder episode in question and that he was restrained in the office of the Regional Crime Officer (RCO). Apparently, the appellant was arrested by PW2 No. E.6619 Dtc/Sgt Gilbert in concert with other police officers who had manned a road block set at KIA area along Arusha - Moshi highway. A decision to set a check point was taken by the police authorities soon after the occurrence of the murder incident. The appellant was arrested at 8:45 a.m. at the said road block when a coaster bus plying between Moshi and Arusha was stopped, and after the passengers therein were ordered to alight therefrom. The appellant was one of the passengers on-board.

PW2 told the trial High Court that following the appellant's arrest, the latter was found in possession of a silver bracelet (Exhb.P3) with an inscription of the name 'Nyaki', three (3) cell phones (Exh.P4),a brownish suit (Exh.P5), one leather coat (Exh.P6), two pairs of trainer shoes (Exh.P7) and a red bag (Exh.P8). The testimony of PW2 further has it that PW4 identified one of the said three (3) cell phones to be his, and the remaining two (2) to be items of properties of PW1 and the deceased. It is worth taking note, at this stage, that evidence was not forthcoming from PW2 as to when PW4 positively identified the three (3) cell phones and on whose custody the items allegedly found in the possession of the appellant were placed.

Besides, PW3, a police officer assigned to investigate the incident, told the trial High Court that in the course of investigations, he found the appellant being restrained in the office of the RCO and in possession of items belonging to the deceased. These were; two (2) cell phones, a bracelet with an inscription of the name 'Nyaki,' a pair of shoes and a hat. His testimony is dead silent on when, how and who identified these items to him as having been owned by the deceased. Similarly, PW3 did not disclose on whose custody these items of property were placed.

Evidence was further led by the prosecution to the effect that in the course of police investigations, PW3 had an occasion to obtain and record the appellant's cautioned statement (Exh.P9). This was on 15/08/2009 at 9:00 a.m. It was recorded slightly over 24 hours ahead of the appellant's arrest on 14/08/2009 at 8:45 a.m. In the cautioned statement (Exh.P9) which was retracted in the course of the trial, the appellant confessed to have been one of the bandits who killed Everline Michael Nyaki on 14/08/2009.

In his defence, the appellant denied any involvement in the murder incident under consideration. However, he admitted the fact of having been arrested during the morning hours of the 14/08/2009 at KIA junction in possession of a suitcase containing personal effects. His arrest was superintended by the RCO, he said. He maintained that immediately after his arrest, he was subjected to torture and beatings by the police and, as a result, he became unconscious. He further asserted that the police applied torture in extracting his confession contained in Exh.P9.

Appellant's trial was conducted with the aid of three (3) assessors. Each one of them returned a verdict of guilty as charged. Relying on the appellant's cautioned statement (Exh. P9), and after invoking the

doctrine of recent possession, the learned trial judge was satisfied, like the assessors who sat with her, that the appellant in concert with other persons who were not brought to book, killed Everline Michael Nyaki, the deceased, with malice aforethought.

The memorandum of appeal lodged by the appellant lists two (2) grounds predicated upon the following grievances:-

"1. That, the learned trial judge erred in law and in fact by callously admitting the cautioned statement recorded out of the prescribed time.

2. That, the learned trial judge erred in law and fact by invoking the doctrine of recent possession to the tampered exhibits."

At the hearing of the appeal, Mr. John Shirima, learned advocate, appeared for the appellant while the respondent Republic which resisted the appeal was represented by Mr. Marcelino Mwamunyange, learned State Attorney.

We think that the first ground of appeal should not detain us. When addressing this ground, both learned counsel were at one that the cautioned statement (Exh.P9) was illegally recorded and obtained from

the appellant. It was obtained from the appellant in violation of the basic period for interviewing persons under restraint provided for under section 50 of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA) which reads:-

> *"50 (1) For the purpose of this Act, the period available for interviewing the person who is in restrain in respect of an offence is –*
>
> *(a) Subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restrain in respect of the offence;*
>
> *(b) If the basic period available for interviewing the person is extended under section 51 the basic period as so extended."*

Where custodial investigation cannot be completed within four hours, the CPA allows extension of time under section 51 which provides:-

"S.51 (1)- where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may-

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) *either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period."*

In this case, it is not disputed that PW3 obtained and recorded the appellant's cautioned statement (Exh.P9) on 15/08/2009 at 9:00 a.m. ahead of the latter's arrest on 14/08/2009 at 8:45 a.m. or thereabout. As correctly submitted by learned counsel representing appellant, Exh.P9 was obtained and recorded from the appellant well beyond

the basic period prescribed under section 50 (1) (a) of the CPA. There being no evidence or any suggestion that such basic period was extended in terms of section 51 of the CPA, we are constrained to find, as we hereby do, that the appellant's cautioned statement was illegally obtained and, for that reason, it was wrongly admitted in evidence by the trial High Court.

In the light of the foregoing, Exh.P9 cannot be safely relied upon to sustain a guilty verdict entered against the appellant by the trial High Court. In similar vein, we have found ourselves constrained to discount this confessional evidence in its entirety as we did in **MUSSA MUSTAPHA KUSA AND ANOTHER v. R.,** Criminal Appeal No. 51 of 2010 and **EMILIAN AIDAN FUNGO @ ALEX AND ANOTHER v. R.,** Criminal Appeal No. 278 of 2008 (both unreported).

Next we proceed to consider the second ground of appeal. The trial High Court is being faulted for having convicted the appellant basing on the doctrine of recent possession. On this aspect of the case, the learned trial judge stated the following in her judgment appearing on page 111 of the record:-

"In the instant case the accused person was found in possession of the chain and mobile phones believed to be the properties of the deceased. The accused person owed this court plausible explanation to his possession. He never gave any; under the circumstances I am satisfied and justified in finding him in possession of stolen properties from the deceased."

The learned trial judge, in her judgment, did not address a fundamental issue of ownership before invoking the doctrine of recent possession against the appellant.

Submitting on the second ground of appeal, learned counsel for the appellant strenuously argued that the unsatisfactory features attending the prosecution case, do not exclude a possibility of the exhibits having been tampered with before they were tendered by PW2 for admission in evidence. In elaboration, he pointed out the apparent testimonial contradictions between the evidence of PW1 on one hand, and the evidence of PW2 and PW4 on the other. He also opined that in the absence of a proper account of the chain of custody of the exhibits which were tendered by PW2, a possibility that the same were tampered

with could not be ruled out. Finally, he was of the view that the case for the prosecution was not proved beyond reasonable doubts.

Submitting in rebuttal, the learned State Attorney who appeared for the respondent Republic contended that a silver bracelet (Exh. P3) and one cell phone (among the three which were collectively admitted in evidence as Exh. P4) were the only items proved to have been stolen in the course of the perpetration of the murder, and that because the same were found in possession of the appellant and proved to be the deceased's items of property, the trial High Court in convicting the appellant properly invoked, as it did, the doctrine of recent possession. He concluded by asserting that the case against the appellant was proved beyond reasonable doubt.

This being a first appeal, it is in the form of a re-hearing. The appellant is entitled, in law, to have our own consideration and views of the entire evidence and our own decision thereon. (See; **JUMA KILIMO v. R;** Criminal Appeal No. 70 of 2012 (unreported) and **D.R. PANDYA v. R.**, (1957) E.A. 336.

We have had an advantage of revisiting the entire evidence on record. Upon our objective re-evaluation of the evidence, were are

satisfied that the misgivings pointed out by the learned counsel for the appellant about the apparent evidential contradictions and the unestablished chain of custody of the exhibits which were adduced in evidence by PW2, are not without substance. We shall begin by briefly examining the doctrine of recent possession.

Admittedly, the law on the doctrine of recent possession is settled. It is a rule of evidence. It operates on the basis that unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft but also, for any other offence however serious. (See; **MWITA WAMBURA v. R;** Criminal Appeal No. 56 of 1992 and **ALLY BAKARI v. R**; Criminal Appeal No. 47 of 1991 (both unreported).

The presumption behind that doctrine has to be applied with great circumspection. On this, the holding in **ALLY BAKARI AND PILI BAKARI v. R.** (1992) T.L.R. 10 is instructive. In that case, this Court said:-

> *".....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...."*

[Emphasis Supplied].

Proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged could be guaranteed by evidence on a proper account of the chain of custody of the stolen thing found in possession of the accused person.

In the course of trial, PW2 and PW4 maintained that the appellant was found with three cell phones (Exh. P4), among other items of property. In her testimonial account, PW1 did not assert any ownership over any cell phone allegedly found in possession of the appellant. But PW2 and PW4 asserted, in their respective testimonies that PW1 was the owner of one of the three (3) cell phones which were collectively admitted in evidence as Exh. P4. Indeed, PW2 and PW4 maintained, in their respective testimonies, that the appellant was found in possession of three (3) cell phones (Exh. P4), but PW3, an investigator of the murder incident told the trial High Court that the appellant was found in possession of two (2) cell phones.

It is significant to take note here that the said contradictory versions which were not addressed and resolved by the trial High Court, have dented the credibility of the prosecution witnesses and have rendered suspect, the prosecution case. The unveiled unsatisfactory feature is compounded by the fact that the chain of custody of the items allegedly found in the possession of the appellant was not established. This court in **PAULO MADUKA AND ANOTHER v. R**; Criminal Appeal No. 110 of 2007 (unreported) underscored the importance of establishing a proper chain of custody of exhibits and held that there should be:-

> *"A chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime....."*

In this case, there is a conspicuous absence of a proper account of the chain of custody of the silver bracelet (Exh. P3) and the cell phones (Exh. P4) allegedly found in the possession of the appellant. After these

exhibits were seized from the appellant at KIA on the day the latter was arrested, the prosecution side was expected to adduce evidence on whose custody the same exhibits were placed pending police investigations and trial. In the absence of such evidence, should we assume that Exh. P3, Exh. P4 and other exhibits were placed in the custody of PW2, an arresting office or PW3 the investigator, or perhaps the RCO who superintended the appellant's arrest? The evidence on record does not provide an answer to this pertinent question.

Admittedly, the evidence touching on who was the owner of Exh.P3 and Exh.P4 was adduced by PW4. However, in the absence of a proper account of the chain of custody of the said exhibits, it is hard to tell when exactly the said exhibits were positively identified by PW4 to be items of property of the deceased. In **ILUMINATUS MKOKA v. R.** (2003) TLR 245 this court made the following pertinent observation:-

> *" in view of those missing links in the instate case, we are of the considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves open the possibility of those exhibits being*

concocted or planted in the house of the appellant."

In this case, the prosecution did not lead any evidence on when, how and where PW4 had an occasion to make a descriptive positive identification of Exh. P3 and Exh.P4 before they were tendered by PW2.

As matters stands, we take it that PW4 disclosed the distinctive marks on Exh.P3 and Exh. P4 when he was testifying in court, and after the same exhibits had been tendered by PW2 and admitted in evidence. A description of special marks to any property allegedly stolen should always be given first by the alleged owner before being shown and allowed to be tendered as an exhibit. (See, **MUSTAFA DARAJANI v. R.**, Criminal Appeal No. 242 of 2008 (unreported) and **NASSOR MOHAMED v. R.,** (1967, HCD 446). It has also been held that before an exhibit is tendered in court the chain of seizure and custody must be established. (See, **HEMED ATHUMAN SILAJU v. R;** Criminal Appeal No. 120 of 2006 (unreported).

Amidst the combination of the foregoing unsatisfactory features besetting the case for the prosecution, we are constrained to go along with the learned counsel for the appellant that in this case a possibility

that the exhibits were tampered with before they were admitted in evidence could not be ruled out. As such, we are settled in our minds that the doctrine of recent possession was improperly invoked by the trial High Court.

In the upshot, we find that the case for the prosecution was not proved on the standard required in criminal cases. Consequently, we allow this appeal. The conviction entered and the sentence passed by the trial High Court are, respectively, quashed and set aside. We order the immediate release of the appellant from the prison custody unless he is otherwise lawfully held.

DATED at **ARUSHA** this 31st day of October, 2014.

M. C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

F.J. Kabwe
DEPUTY REGISTRAR
COURT OF APPEAL