

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 222 OF 2020

MICHAEL MAIGEAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mambi, J.)

dated the 18th day of March, 2020,

in

Criminal Session Case No. 96 of 2014

JUDGMENT OF THE COURT

7th & 24th February, 2023

MASHAKA, J.A:

This appeal stems from the decision of the High Court in Criminal Session Case No. 96 of 2014 sitting at Mbeya where the appellant, Michael Maige was charged with the offence of murder under sections 196 and 197 of the Penal Code [Cap 16 of R.E. 2002] (the Penal Code). It was alleged that on 25th October, 2012 at Karungu hamlet in Makongorosi village within Chunya District and Region of Mbeya, the appellant did murder one Mawazo Mwakamele. The appellant pleaded not guilty to the charge of murder and

a trial ensued in which the prosecution marshalled five witnesses and tendered two documentary exhibits namely the post mortem report (exhibit P1) and sketch map of the crime scene (exhibit P2) to prove the charge levelled against the appellant. During the defence case, the appellant was the only witness who testified and did not tender any exhibits. The conviction against him was substantially founded on circumstantial evidence and the doctrine of recent possession.

The prosecution case unfolded from the following background; the deceased, Mawazo Mwakamele was a businessman engaging in mining activities at Karungu village in Chunya District. On the fateful date the deceased left his home for his usual business using his motorcycle allegedly with his gold metal detector make GP 3500 for his mining activities. While at Karungu village the deceased left his motorcycle in the care of one Shija Likenejo and headed to Karungu forest for mining. On 26th October 2012 the deceased body was found at Mambuzi hamlet in Karungu village with cuts on his head and several parts of his body. Investigation commenced and on 15th November 2012 the appellant was apprehended by G 1595 D/C Casmir Haule (PW2) selling the deceased's gold metal detector machine to one Sauli Solomon Mwalabhila (PW4).

In his defence, the appellant denied to have committed the felony raising the defence of *alibi* that on the fateful date he was at Isawe village making bricks to build his second house. He further denied to know the deceased and that he was not arrested with the gold metal detector machine at the house of PW4 alleging that he was arrested at the bus stop. The trial court convicted the appellant relying on circumstantial evidence and the doctrine of recent possession as alluded to earlier. Consequently, the appellant was sentenced in the manner explained above.

Before us, the appellant earlier raised ten (10) grounds of complaint in the Memorandum of Appeal and later lodged eleven (11) grounds in the Supplementary Memorandum of Appeal challenging the decision of the High Court reproduced hereunder with minor corrections that; **one**, the prosecution failed to prove its case beyond reasonable doubt; **two**, the trial court relied on weak circumstantial evidence which was not corroborated hence reaching to an erroneous decision; **three**, the trial Judge relied on exhibit P3 (the gold metal detector machine) which was not listed in the committal nor the preliminary hearing; **four**, the trial Judge erred to recall PW3 basing on a wrong provision of law section 127 (4) instead of section 147 (2) of the Evidence Act; **five**, that the additional evidence of PW3 was

recorded without oath contrary to the requirements of the law; **six**, the trial Judge relied on evidence of PW5 that he gave exhibit P3 to the deceased without a sale agreement or deed of gift to substantiate his statement; **seven**, the documentary evidence relied upon failed to follow proper procedures; **eight**, the procedures relating to search and arrest of the appellant were not observed; **nine**, the certificate of seizure was not tendered to prove that exhibit P3 was found with the appellant; **ten**, the prosecution witnesses adduced contradictory evidence; and **eleven**, the prosecution failed to establish the chain of custody of exhibit P3.

At the hearing of the appeal, the appellant was present in person, represented by Mr. Ladislaus Rugemalila Rwekaza, learned counsel, whereas the respondent Republic had the services of Ms. Xaveria Makombe, learned State Attorney. Mr. Rwekaza commenced his submission by adopting the Supplementary Memorandum of Appeal lodged on 31st January, 2023 and written statement in support of appeal filed on 02nd February, 2023 to form part of his submission. He reiterated that the written arguments adequately address the eleven grounds of appeal raised from the supplementary memorandum of appeal.

At the outset in reply, Ms. Makombe supported the appeal because of the following three reasons. First, she submitted that the appellant's conviction was based on the doctrine of recent possession of the deceased's gold metal detector machine which was tendered and admitted in evidence as exhibit P3. She argued further that the exhibit P3 was not listed during the committal proceedings which was fatal and liable to be expunged from the record. Bolstering her argument, she referred us to the case of **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported) where the Court held that the failure to list an exhibit during committal proceedings as an intended exhibit to be tendered during trial was fatal and liable to be expunged. She argued further that in this appeal, the prosecution wrongly tendered exhibit P3 as it was not listed during the committal and it should be expunged. She went further and submitted that, none of the prosecution witnesses testified seeing the deceased leaving his home with the motor cycle and exhibit P3. To support further her argument, she cited to us the case of **DPP v. Orestus Mbawala @ Bonge**, Criminal Appeal No. 119 of 2019 (unreported).

On account of the said omission, Ms. Makombe urged the Court to expunge exhibit P3 from the record. Subsequently, it was her submission

that, in the absence of exhibit P3 the conviction of the appellant cannot stand as it was grounded on the doctrine of recent possession of that exhibit as held by the trial court, hence was inapplicable to convict the appellant. Having expunged exhibit P3, Ms. Makombe was settled that there was no remaining evidence connecting the appellant with the offence of murder.

Secondly, Ms. Makombe submitted that the record of appeal does not show any direct evidence adduced by PW2 and PW4 to have seen the deceased leaving his home with his motor cycle and exhibit P3. The only evidence of Obedi Bartholomeo (PW3) was that the deceased went to his mining activities and left his motor cycle at Mzee Mterushwa's place where it was found. PW3 stated that exhibit P3 was used by the deceased in his mining activities. Ms. Makombe concluded that since Mzee Mterushwa was not called to testify, the doctrine of recent possession was not applicable to convict the appellant, referring to our stance in **Director of Public Prosecutions v. Orestus Mbawala @ Bonge**, (Supra) that the doctrine of recent possession is inapplicable where there is no proof that the respondent stole the handset in the course of which the deceased was killed.

Arguing the third reason that before the hearing commenced, after the selection of the assessors, they were not informed their roles in aiding the

trial court. Also, she argued that since the appellant was not involved in the selection process, he was denied a fair trial, which is an uncurable irregularity which renders the trial a nullity, as it was held in **Abdallah Juma @ Bupale**, Criminal Appeal No. 537 of 2017 (unreported). Ms. Makombe also referred us to page 48 of the record where the trial judge had only listed the names of assessors without assigning them their roles and expectations from the trial judge.

Finally, the learned Senior State Attorney concluded that, on account of the stated shortfalls, the charge was not proved to the hilt, prayed the appeal to be allowed and the appellant to be set free. In rejoinder, Mr. Rwekaza had nothing to add.

The appellant raised eleven grounds of complaint, however for the reasons that will shortly be apparent we find no need to determine each of them. Having examined the record of appeal and considered the submissions made by the parties for and in support of the appeal, we will determine the procedural irregularities.

We commence to consider ground three of appeal. The complaint is that the trial judge erred in law and fact to convict and sentence the

appellant by relying on exhibit P3 which was neither committed nor listed among the exhibits to be relied on by the prosecution to prove their case during committal proceedings and preliminary hearing as mandatorily provided under section 246 (2) of the Criminal Procedure Act (the CPA).

Section 246 (2) of the CPA stipulates that: -

"Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial".

As correctly argued by Mr. Rwekaza, exhibit P3 was produced and admitted in evidence and the trial judge founded conviction of the appellant while it was neither committed during the committal proceedings to be among the exhibits to be relied on by the prosecution, referring us to pages 42 and 101 of the record of appeal. He referred us to the case of **The Director of Public Prosecutions v. Sharif Mohamed @Athuman and Five Others**, Criminal Appeal No. 74 of 2016 (unreported), that it is established practice during the committal proceedings the court should not

only list potential witnesses, but also documentary and physical exhibits the prosecution would rely on during trial, emphasizing that it is the mandatory requirement. He prayed to the Court to expunge exhibit P3 from the record. Ms. Makombe conceded to this ground as earlier indicated.

We fully subscribe to the pronouncement we made in **The Director of Public Prosecutions v. Sharif Mohamed @Athuman and Six Others**, (supra) and **Masamba Musiba @ Musiba Masai Masamba v. Republic**, Criminal Appeal No. 138 of 2019 (unreported), where we had this to say:-

" It is borne out of the record of appeal that Exhibits P1, P2, P3 and P4 were not listed during committal proceedings as among the intended exhibits to be relied upon by the prosecution in the appellant's trial. Worse still they were also not listed in the preliminary hearing of the case. The spirit behind such requirement is to guarantee an accused person facing a homicide case a fair trial by affording him the opportunity to know and understand in advance the case for the prosecution for him to mount a meaningful defence. Since the documents were introduced during the trial of the case obviously the

appellant was highly prejudiced hence the exhibits are liable to be expunged”.

In the present appeal, the appellant is questioning the admissibility of exhibit P3. We have considered the evidence presented by the prosecution which relies solely on exhibit P3 to link the appellant to the offence; it is the core link. As we gathered from the pages 36 and 42 of the record of appeal, it is apparent that exhibit P3 was not listed during the committal proceedings and also not listed in the preliminary hearing as one of the intended exhibits to be relied upon by the prosecution. This exhibit P3 should have been made known to the appellant during the committal proceedings and also ought to have been explained and listed to be among the intended prosecution exhibits. Furthermore, the prosecution did not pray to tender exhibit P3 as additional evidence pursuant to section 289 (1) of the CPA. See: **The Director of Public Prosecutions v. Sharif Mohamed @Athuman and Six Others**, (supra). The essence of introducing during committal proceedings and preliminary hearing is to help the appellant to prepare his/her defence and he/she should not be taken by surprise. In those circumstances, the prosecution contravened the mandatory requirements of section 246 (2) of the CPA and exhibit P3 is liable to be expunged. Thus, we

find that exhibit P3 was improperly admitted in evidence and we accordingly expunge it from the record of appeal.

In the absence of exhibit P3, the next question we ask is, whether the remaining oral account can sustain the prosecution case. As correctly conceded to by Ms. Makombe, there is no direct evidence adduced by the prosecution to have seen the deceased leaving his home with his motor cycle and exhibit P3. Having expunged exhibit P3, the only evidence connecting the appellant to the offence of murder considering that the trial judge grounded conviction on the doctrine of recent possession, that he was found in possession of exhibit P3 and failed to give an explanation on how he came into possession of the deceased's property, there is no any other evidence that could ground conviction of the appellant. As correctly, submitted by Ms. Makombe, the charge has not been proved to the hilt.

We find no need to determine the other grounds of appeal as this ground three suffices to dispose of this appeal. We hold that the prosecution failed to prove the offence of murder against the appellant beyond reasonable doubt.

Consequently, we hereby allow the appeal, quash the conviction and set aside the sentence of death by hanging. The appellant is to be released from prison forthwith unless he is held for any other lawful cause.

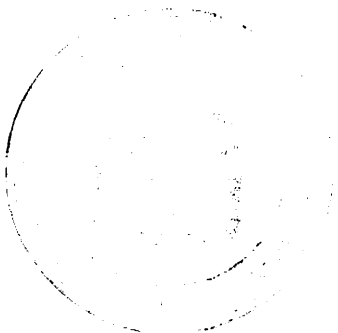
DATED at MBEYA this 23rd day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2023 in the presence of Ms. Jalia Hussein, learned counsel for the Appellant and Ms. Agness Ndazi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.




D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL