IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 82 OF 2022

MOHAMED SELEMAN KIDARI @ NDWATA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania Arusha Sub Registry, at Babati)

(Gwae, J.)

dated the 8th day of March, 2022

in

Criminal Sessions Case No. 16 of 2016

.....

JUDGMENT OF THE COURT

6th & 23rd February 2023

GALEBA, J.A.:

In Criminal Sessions Case No. 16 of 2016, before the High Court of Tanzania sitting at Babati in Manyara Region, Mohamed Seleman Kidari @ Ndwata, the appellant was charged under the provisions of section 196 of the Penal Code, for the murder of one Shaibu Ramadhani (the deceased), who was a motorcycle rider. The offence, according to the information, was committed on 20th July, 2013 at Njoro Village in Kiteto District within Manyara Region. After the full trial, the appellant was convicted for the offence and was sentenced to death.

The facts of the case giving rise to this appeal, according to the prosecution are that; the deceased was owner of a motorcycle with registration No. T947 BFA black in colour. That on the material day around 21:30 hours, while at Godown Centre where he was parking his motorcycle waiting for passengers with other motorcycle riders, the deceased was hired by the appellant to a destination that no one knew, but the direction that was taken was towards Sekii. A few minutes later, Nyange Shabani (PW2), was approached by a passenger who was to be conveyed to Sekii, that is the same direction as that taken by the deceased. PW2 rode his passenger to Sekii and on his way back he met, two people on a black motorcycle moving at a high speed towards Sekii direction, a destination he was coming from. He did not identify the people on the motorcycle nor did he identify the motorcycle itself, save for its colour. Upon covering about 1 to 2 kilometres towards Godown Centre, PW2 noted someone lying down by the roadside unconscious and profusely bleeding from an injury on the head. With the aid of the light from his motorbike, he identified the injured person to be the deceased who had been hired by the appellant at Godown Center, before his own trip to Sekii. He tried to call the injured person but the latter would not respond, for he was unconscious. PW2 decided to proceed to Godown Centre, which was about 4 kilometres from the

scene of crime, in order to report the matter to his colleagues. Adam, a person who knew better the deceased, together with Seleman Hussein Jodayo (PW1), went to the scene of crime and took the deceased to Kiteto District Hospital and later to Dodoma Hospital where he passed away two days later on 22nd July, 2013. According to the Report on Postmortem Examination (PE1), the appellant's cause of death was documented to be haemorrhage following head injury and fracture of the skull.

In retrospect, as PW1 and Adam were taking the deceased to Kiteto District Hospital, PW2, Twalib Shabani (PW3), Kassim and Samwel made a decision to pursue the route towards Sekii direction to which PW2 had seen the black motorbike riding in full speed. This pursuit was in anticipation that the four would pick a clue along the way, which would lead to the discovery of the whereabouts of the deceased's motorbike. Luckily, they traced the tyre marks of the motorbike together with the foot prints of people which led them to Matui Village at a single room house owned by Yusuph Athuman (PW4), the appellant's half-brother, as they shared a mother, but each with a different father. They surrounded the house and demanded that whoever was inside ought to come out and surrender himself. This time was around 03:00 hours after midnight, and no evidence was tendered on whether there was any light

or any source of it. Two people, one of them being the appellant, rushed out from the house and took to their heels in an attempt to escape the furious mob which had gathered and surrounded the house in a mood that indicated nothing except danger, in case one was to easily surrender himself to the mob. PW2 and PW3 decided to pursue the appellant, who, in order to avoid the imminent arrest, stabbed PW2 with a sharp object on the head, and the latter started to bleed profusely. That stance thwarted and neutralized PW2's spirited drive to arrest the appellant. Nonetheless, PW3 managed to arrest the appellant and brought him back to the house of PW4. In the house, there was found a motorbike with registration No. T947 BFA, black in colour. The motorbike was seized and impounded and was taken to Kibaya Police Station. Because, the motorbike in PW4's house had been brought by the escaped suspect in company of the appellant, and as the same motorcycle was found to be that of the deceased, who was at the time unconscious in hospital following a brutal attack on him, the appellant was thus charged of his murder.

However, according to the appellant, a woodcutter and resident of Pori No. 2 within Kiteto District in Manyara region, on 20th July, 2013, from around 10:00 hours he travelled from his home aiming to go to Matui to buy an axe for his woodwork, through Njia Panda area. The

means of transport was a min bus which entertained mechanical breakdown on several occasions enroute. He thus arrived at Njia Panda at 24:30 hours in the night of the same day. At that point a motorbike rider (the escaped suspect) passed by and the appellant hired him to drive him to his half-brother, PW4 who was living at Matui Village, in a single room house. On the way, like the min bus, the motorbike broke down and the escaped suspect requested the appellant to assist him as to where they could both sleep so that he could repair his motorbike the next morning, and proceed to his destination. The appellant agreed to the request, in anticipation that the request would also be acceptable to PW4, the owner of the house where the appellant was heading to. They dragged the motorbike till they reached the house of PW4, where the latter invited them and all three of them had a rest. A few minutes after they slept, a group of people stormed the place and threaten them, demanding that the house be opened and the occupants surrender themselves to the mob. PW4 opened the door, whereupon the appellant and the escaped suspect, took to their heels as a means to save their lives as the people outside were in a state of extreme rage and anger.

In the process of escaping from the mob justice, he was arrested and the owner of the motorbike was never arrested up to the date of the trial. Thus, the appellant's point was that he did not murder the

deceased, leave alone stealing his motorcycle. According to him the motorcycle was of the escaped suspect.

The trial court having considered the above competing cases of the prosecution and of the defence, it made a finding of fact which may be captured from that court's judgment from page 201 to 203 of the record of appeal, which is the following:-

> *"Considering* ***the prosecution evidence that the accused was identified by PW2 at Njoro village especially at Kijiweni where the deceased parked his motorcycle on the material day waiting for passengers, thought this piece of evidence requires corroboration, nevertheless the same is sufficiently corroborated by the PW2 evidence of seeing two persons embarking into a motorcycle which was in high speed*** *followed by undisputed fact that the accused and another pushed the motorcycle from a certain area (Lala), till the house of the accused's brother, PW4. The corroborative evidence of PW4 that the accused was taller than that other person who went with the accused at his residence, this piece of evidence corroborates the evidence of PW2 who testified that the one who hired the deceased was tall. Credibility of PW2 whose testimony is found to have not been tainted by any ill motive,* ***as he did not purport to have***

identified the accused while he saw two persons on the motorcycle in black colour (the deceased's property) *as well as that of PW4 whose evidence is credible and the same is plainly found to have not been tainted with any ill wishes. Had PW4's evidence been tainted with ill motive against the accused, he would have testified that the accused told him that the motor cycle brought to his house was a fruit of robbery instead, he was told by the accused that the motorcycle was the property of the accused's colleague.*

The accused's version that he hired the motorcycle at Njia Panda with a view of exonerating himself from being the one who robbed the deceased, I find this version to be an afterthought, the prosecution evidence is so direct and irresistibly connecting the accused with the offence.

As it is, I find that ***there were no co-existing circumstances which would weaken the prosecution evidence or raises serious doubt."***

[Empasis added]

Based on the above finding, the appellant was convicted and sentenced as above. This appeal has been mounted to challenge the above finding, and it is based on 6 substantive grounds of appeal which may be summarised as follows:-

"1. That, the appellant was convicted based on circumstantial evidence which did not exclusively point to his guilty.

2. That, the appellant was convicted without sufficient proof of ownership of the alleged robbed motorcycle.

3. That, the appellant was convicted relying on the doctrine of recent possession whose requirements were not met.

4. That, the appellant was convicted by relying on the evidence of PW2 whose evidence was inconsistent with his former statement made at Police Station.

5. That, the appellant was convicted by placing reliance on insufficient evidence of visual identification.

6. (abandoned).

7. That, the prosecution did not prove the case against the appellant, beyond all reasonable doubts."

At the hearing of this appeal, the appellant was represented by Mr. Fridolin Bwemelo, learned advocate, whereas the respondent Republic had the services of Ms. Tarsila Gervase Assenga, learned Senior State Attorney, assisted by Ms. Neema Mbwana and Ms. Helena Sanga, both learned State Attorneys.

At the outset, Mr. Bwemelo abandoned the sixth ground of appeal and argued the rest in clusters of grounds 1 and 5, 2 and 3, and grounds 4 and 7.

Now, before delving deep in the grounds of appeal and arguments of learned counsel for the parties, we wish to state that not all matters and facts were at dispute as between the parties. Matters that were not and still are not disputed are such as; **first**, that the deceased died an unnatural death on 22nd July, 2013 following a deadly attack and injuries which were inflicted on him during the night of 20th July, 2013. **Second**, that on 20th July, 2013 the appellant together with another person whose whereabouts and identity are both unknown (the escaped suspect), went to the residence of PW4 with a mechanically broken-down motorcycle. **Third**, that after they got to the residence of PW4 and slept, the house was rounded up by an angry mob of people who were tracing a motorcycle with registration No. T947 BFA, black in colour, which had been robbed from the deceased and; **fourth**, as no one witnessed the murder of the deceased, the prosecution evidence before the trial court was purely circumstantial. With that understanding, we will then proceed to consider the grounds of appeal and arguments for and against them.

Although Mr. Bwemelo started off with grounds 2 and 3, on our part, to be logical and consequential, we will start determination of ground 5. The complaint in that ground of appeal was that the trial court erred in law to convict the appellant by placing reliance on the evidence of visual identification of PW2 at Godown Centre, which evidence was not credible or reliable. In respect of that ground, the learned counsel submitted that there was no sufficient evidence of a credible identification at Godown Centre, where the appellant was alleged to have hired the deceased to take him to an unknown destination along Njoro – Sekii road. His point was that PW2 whose evidence of identifying the appellant at Godown Centre, fell short of the threshold conditions of an accurate visual identification as enunciated in this Court's celebrated case of **Waziri Amani v. R (1980) 250.** He thus implored us to hold that the evidence of PW2 was not credible because although the witness stated that he identified the appellant, he did not state the source and the brightness of light, which might have assisted him to identify the appellant. He too did not mention the distance from him to the appellant and the time he spent observing him before he was to board on the deceased's motorcycle. On that basis, learned counsel implored us to allow the 5th ground of appeal.

In reply to the learned advocate's submission, Ms. Assenga argued that the identification of the appellant at Godown Centre, was very proper although there are condition that were set in **Waziri Amani** (supra) which were missing in the evidence of PW2. She submitted that, whereas in the above case there are about 7 conditions to be positively affirmed by the identifying witness, in this case, there were only 3 conditions which were mentioned by PW2 in his evidence. Her argument was that PW2 stated that there was sufficient light from the godown which aided PW2 to identify the appellant as to his complexion and height. The learned Senior State Attorney was thus convinced that the appellant was sufficiently identified at the time he was hiring the deceased to take him to a destination no one knew along Njoro- Sekii road. She stated also that later on in the same night PW2 identified him at the residence of PW4 for the second time. All in all, it was Ms. Assenga's position that the appellant was accurately identified, by PW2 particularly at Godown Centre.

In order to resolve the contested 5th ground of appeal, the issue for determination is whether the appellant was indeed identified at Godown Centre as a man who hired the deceased to ferry him to a destination towards Sekii area. On its part, the High Court was of the view that PW2 managed to identify the appellant at Godown Centre

because the former testified that there was sufficient light. At pages 185B to 186 of the record of appeal, in its judgment, the trial court observed: -

> *"According to the prosecution evidence, it was PW2 who was able to identify the accused to be tall and brownish. According to him,* ***he identified the accused at Kijiweni (Godown) where motorcyclists used to park their motorcycles through a help of electrical tube lights. The accused also is said to have been identified when he was running from the mob justice in order to rescue himself.*** *These two identifications of the accused by PW2 are also reflected by DE1, the statement of PW2."*
>
> [Emphasis added]

These findings are also the same arguments as Ms. Assenga's, in advancing the respondent's cause in this appeal that there was sufficient light that assisted PW2 to clearly identify the appellant at Godown Centre.

Notably, hearing of the first appeal preferred from the High Court to this Court, like it is in this case, takes a form of a rehearing as per this Court's decisions in **Lukanguji Magashi v. R,** Criminal Appeal No. 119 of 2007 and **John Balagomwa and Two Others v. R,** Criminal

Appeal No. 56 of 2013 (both unreported). Coupled with the powers vested in the Court by the provisions of rule 36 (1) (a) of the Tanzania Court of Appeal Rules 2009 (the Rules), in this appeal, not only in respect of this ground, we will take up the matter, reevaluate and reconsider the evidence of PW2 and other witnesses as and when it will be necessary so to do. However, as for the identification of the appellant at Godown Centre, the only relevant evidence is that of PW2, since he is the only witness who testified in that respect.

For purposes of clarity only, it is to be noted well that, in the previous proceedings which were nullified by this Court on 25th February, 2021, PW2 had testified on 5th September, 2017 at page 41 of the record of appeal, that there was plenty of light at Njoro Godown, but since we cannot rely on nullified proceedings, we have considered the evidence of PW2 adduced on 14th February, 2022, as his authentic version of the evidence for purposes of this judgment.

The evidence of PW2 runs from pages 142 to 147 of the record of appeal. The scanty identification evidence of the appellant at Godown Centre is reflected at pages 142, 145 and 146 of the record of appeal. At page 142, the relevant text of PW2's evidence is this:-

"On 20.7.2013 at about 21:00 hrs while at Godown waiting for passengers, ***there came one passenger, who wanted to hire a motorcycle. My colleague whose name I have forgotten. That client was tall, brownish (maji ya kunde),*** *my colleague took that passenger and immediately thereafter I also secured a passenger to Sekii area."*

[Emphasis added]

Then at pages 145 to 146 of the record of appeal, PW2 continued:

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"One Swalehe Juma was the one who was approached by the accused person who came to hire the deceased. ***I only know the accused by physical appearance, he was brownish (maji ya kunde) in colour."***

[Emphasis added]

These are the only places in the evidence of PW2 from the beginning of his evidence to its end, on the issue of identifying the appellant. In other words, not only that PW2 did not mention any source of light, the witness did not mention whether there was any light at all which aided him to identify the appellant at 21.00 hours in the night.

Notably, times without number, this Court has always warned against hasty convictions based on visual identification in circumstances unfavourable to human vision, because of that evidence's susceptibility to error. In the case of **Abdul Farijalah and Another v. R** [2008] T.L.R. 7, this Court held that:-

> *"The law is well settled that in a case involving evidence of visual identification,* ***no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is watertight.*** *(Waziri Amani v. R, (1980) 250; R v. Eria Sebwato [1960] E.A. 174; Abdallah Bin Wendo and Another v. Rex [1953] E.A. 166 followed.)"*
>
> [Emphasis added]

See also **Hamis Said Butwe v. R**, [2010] T.L.R. 159 on the same subject.

Legally, a complete and satisfactory elimination of possibilities of mistaken identity in the evidence of an identifying witness, entails a proper account of numerous factors as per this Court's land mark case of **Waziri Amani** (supra), in which case, it was observed that the evidence of visual identification of a suspect is one of the weakest kind. The conditions necessary to gauge whether the possibilities of mistaken

identity have been eliminated include, a proper account of the identifying witness of the following factors: **One**, the source of the light which assisted the witness to identify the suspect; **two**, the brightness or intensity of the light from the mentioned source; **three**, the size of the premises illuminated; **four**, the distance or proximity between the identifying witness and the suspect at the time of the observation and; **five**, the duration or the time frame that was spent by the witness while observing the suspect. **Six**, whether or not the suspect was familiar to the witness previous to the observation day, and if he was; for how long had the witness known the suspect or how frequent had he been meeting the suspect. This list is not exhaustive, but short of a clear account of the above conditions, or any of them which may be relevant to the case at hand, a superficial or casual narrative of an identifying witness that he identified the suspect, would, in law, amount to nothing more than a piece of rhetoric.

In actual fact, the law does not even end with the factors of accurate identification above, the law of Evidence has many facets. From the perspective of the evidence tendered, the conditions above could be met, but in addition to them, the witness should as well, and as a matter of necessity, be credible and dependable. If the credibility of a witness who gives an account of the factors above is questionable or

otherwise tainted, trial courts are advised to refrain from convicting a suspect based on the evidence of such a witness. In **Jaribu Abdallah v. R**, Criminal Appeal No. 220 of 1994 (unreported), this Court stated that:-

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification.* ***Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence.***"

See also, **Joseph Mkumbwa and Another v. R**, Criminal Appeal No. 94 of 2007 (unreported).

Nonetheless, we will examine the evidence of PW2 in light of the factors favouring accurate identification, in order to satisfy ourselves whether his evidence identifying the appellant, was watertight and free of any material errors. In this case, we quoted above the observation of the trial court at pages 185B to 186 of the record of appeal saying that PW2 stated that there was electricity light at Godown Centre which assisted him to identify the appellant's height and complexion. However, we have painstakingly studied the entire evidence of PW2 running from page 142 to page 147 of the record of appeal, unfortunately we did not manage to trace anywhere, where PW2 makes any reference not only to

any source of light, but also that there was any light at all. Briefly, throughout the evidence of PW2, the witness did not mention any of the factors necessary for accurate identification of the appellant at Godown Centre.

With that finding we do not only find it logical, but also fair to conclude that the observation by the trial court that PW2 testified that there was electricity light at Godown Centre, and that such light assisted him to identify the appellant, was an extraneous matter not borne out of the record of that court.

Thus, based on the above discussion on the aspect of visual identification, we are of the firm position that the appellant was not at all identified at Godown Centre, contrary to what was argued by Ms. Assenga. Conversely, this Court associates itself with Mr. Bwemelo's submission that there was no credible identification of the appellant at Godown Centre. Our conclusion is therefore that, legally there is no evidence that the appellant hired the deceased to take him to some destination along the Njoro – Sekii direction. In view of that, the 5th ground of appeal succeeds and we allow it.

Next, we will proceed to tackle ground 2 challenging the trial court for having convicted the appellant based on the doctrine of recent possession because there was no proof that the motorcycle that was

found at the residence of PW4 belonged to the deceased and was found in possession of the appellant.

In respect of that ground, Mr. Bwemelo submitted briefly that because the motorcycle in question was not tendered before the trial court, its ownership cannot be said to have been established. He added that neither its registration card nor any report from the Tanzania Revenue Authority was tendered before the court. In that case, he argued, the doctrine of recent possession ought not to have been invoked and relied upon. He cited several cases to us, including the case of **Joseph Mkubwa** (supra) and **Emmanuel Magembe and Two Others v. R,** Consolidated Criminal Appeals No. 262, 263 and 264 of 2012 (unreported), to support his point.

In reply, Ms. Assenga submitted that there was no one to tender the motorcycle because PW1 testified that the deceased's father who was given the motorcycle after the first trial, died in 2021 before the case was to be tried again in the High Court, in 2022. She submitted further that the motorcycle was not easily traceable, but in any event, she contended, considering all the circumstances of the case, the deceased was the special (constructive) owner of the said motorcycle and thus, the doctrine of recent possession was properly invoked. The

learned Senior State Attorney implored us to dismiss the said ground of appeal.

Having considered the submissions of parties on this issue, first we agree that the position of the law is that for the doctrine of recent possession to be invoked, the issue of ownership of the item in question must be proved to be of the complainant. This position has been maintained in many decisions of this Court including **Magesa Chacha Nyakibali and Another v. R** [2014] T.L.R. 387 at 388, where the Court held thus:-

> *"Before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, it must positively be proved, first that the property was found with the suspect; secondly,* ***that the property is positively the property of the complainant****; thirdly, that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant."*
>
> [Emphasis added]

In this respect, we propose to start with a clear premise that the person with the primary obligation to prove ownership of any property, is the owner of the property whose ownership is to be established. In this case such a person ideally would be the deceased. However, one of

the matters not in dispute is the fact that that deceased died at Dodoma Hospital on 22nd July, 2013. So, in 2022, during the trial he was dead, and there are no human efforts that would be employed to procure him to come and prove ownership of the motorcycle he was riding before he died.

Nonetheless, we will dissect the evidence of all witnesses from PW1 to PW5 in order to see whether ownership of the deceased's motorcycle was established, be it actual ownership or special ownership. We will as well, refer to the evidence of DW1, the appellant. In the process, we will also discuss the credibility of a given witness should that be necessary, particularly that of PW3. We will thus, start with PW1.

As for PW1, he just stated at page 140 of the record of appeal that the deceased's motorcycle was registration No. 941 BFA, make T Better, and that when they went to the scene of crime, they found the deceased lying down unconscious but they did not find the motorcycle. This evidence is of no use as far as finding the deceased's motorcycle in the appellant's possession, because he does not say that he went to the residence of PW4, where the alleged motorcycle was found. In any event, the witness refers to the wrong motorcycle registration number,

for the correct number was T. 947 BFA. So, the evidence of this witness to ground two is not relevant.

Like PW1's evidence, PW2 knew that the motorcycle registration No. 941 BFA, make T Better, was owned by the deceased, but he did not give any evidence to the effect that he found the motorcycle in possession of the appellant; and we will explain. After PW2 and other people got to the house of PW4, while outside, there was a commotion amidst which PW2 stated at page 144 of the record of appeal:-

> *"We then started counter attacking by using our sticks. We were three in number. Thereafter, those who were inside the house got out of the room and started running. There were two persons who emerged out of the hut. We chased them and one went to a different direction, but we continued chasing one culprit eventually I was able to apprehend one. I then hit him with a stick on his neck. He then stabbed me with a knife on my head in revenge...**I did not make any further tracing of the culprit as I was seriously injured and I was to be sent to Hospital for medication...I was also informed that the deceased's motorcycle was impounded from the hut.**"*
>
> [Emphasis added]

From the above evidence, it is clear that although PW2 went as far as PW4's house, the witness did not see the motorcycle at that house because it was inside the house. And he did not testify anywhere that he entered in the house. What we hear from him is that he was informed later that the motorcycle was recovered from the house of PW4. In our view, it cannot be held that PW2 witnessed any motorcycle, leave alone the deceased's, at PW4's residence. So, this evidence is equally helpless.

PW3 along with other people from Godown Centre participated in the tracing of the motorcycle from the scene of crime to the residence of PW4. Like PW2, he rushed to chase the two escapees from the house of PW4 when the house was opened. This witness has issues on what he says. We indicated that we will discuss his credibility and assess whether his evidence is reliable. The **first** point denting his credibility is this; at page 149, he said:-

> *"The said Nyange was seriously injured on his head...at the house where the stolen motorcycle was impounded there were many people after the accused's arrest....We were handed over the motorcycle, that is six persons namely;* ***Nyange****, Adam, Samwel, I and Kasim. We then handed over the stolen motorcycle to Police."*
>
> [Emphasis added]

Here the issue is with reference to Nyange who is PW2, being referred to as one of those to whom the motorcycle was handed over. PW2 himself in the above quoted text had told the court that after he was injured, he was rushed to hospital and he came to be notified that the motorcycle was recovered from the house of PW4 much later, after the incidence had occurred. That is, PW3's statement that PW2 was one of those who received delivery of the motorcycle from the house of PW4, tainted PW3's reliability.

The **second** point is traceable on the same page. That is page 149 where he, PW3 says:-

> *"We found the motorcycle in the house, to the destination of our tracing.* ***The motorcycle was impounded by the police and the house owner.***"
>
> [Emphasis added]

The highlighted statement is equally problematic as to authenticity, when considered with the evidence of PW4. It is incompatible and diametrically opposed to the evidence of PW4, the house owner himself, who testified at page 153 of the record of appeal. He stated:-

"...the accused person and his colleague got out and started running. Those people also started running after them or chasing them. The accused and the other person left the motorcycle inside my house. I also decided to run in order to save my own life by going to the jungle first. I used not more than five minutes to get out of my residence while in a pair of shorts leaving behind the motorcycle. I proceeded to the residence owned by Juma, my elder brother and narrated the incident fully. Having told my brother, I remained at the residence of the said Juma till when I decided to go to Soya Village to my cousin Yahaya to whom I also explained what happened at my residence. It was about 13:00 hours and I stayed there for three days. Thereafter I returned to Juma's residence where I was arrested by the police officers on the allegations relating to the motorcycle."

Contrary to what PW3 said that he received the motorcycle from PW4, PW4 himself says, when the crowd ran after the appellant and the escaped suspect he also escaped, went to the bush first, later to Juma's place, then to Yahaya's and then back to Juma's residence where he was this time arrested. PW4 does not say that he handed over any motorcycle to anybody. So, PW3's story does not agree with PW4's.

The **third** point where the evidence of PW3 mismatches with the evidence of another witness, is where he said that the motorcycle was impounded by the police. At page 158 of the record of appeal, PW5, the police investigator of the case, gives the following confusing account surrounding the identity of the motorcycle and the manner it was impounded from the house of PW4. He said:-

> *"I did not know the one who handed over the motorcycle in hand. There is no certificate of seizure in connection with the motorcycle nor was there chain of custody that was tendered. The motorcycle was kept at the police exhibit room. I received information of the court's session on 14/02/2022 but I did not know if I would be asked the name of the accused or a motorcycle as an exhibit. I did not ascertain if it is true that the motorcycle was handed over to the said deceased's father...* ***What I remember is that the motorcycle was brought by civilians from Matui Village.*** *The motorcycle was registration number. That is all."*
>
> [Emphasis added]

According to this piece of evidence, the motorcycle was taken to the Police by civilians, but PW3 said the same was recovered from the house of PW4 by the Police and PW4. If the motorcycle was seized from PW4's house by the Police, we do not see how would it have been taken

to the Police by civilians as testified by PW5 above. In our view, if it is true that when the escaped suspect and appellant escaped, PW4 also escaped from his house, and if it is true also that the motorcycle was taken to the police by civilians, the evidence of PW3 that the motorcycle was seized by PW4 and the Police is nothing else, but sheer lies.

In view of the above, one cannot ascertain when PW3 was telling lies and when he was not. He had statements contradictory to his own evidence and the evidence of PW2, PW4 and PW5 on multiple occasions, and we have demonstrated that. Convicting a suspect based on evidence of such a witness, is a legal risk, that we are unable to associate ourselves with.

Further, the quality and credibility of the evidence of PW5 above, as a police investigator, like that of PW3, leaves a lot to be desired, as to the identity of the motorcycle which was the central object that would link the appellant and the death of the deceased. The witness was casual on the subject on all fronts. If there is no search warrant or seizure certificate and if there is no exhibits' register in which the details of the motorcycle which was taken to the police from PW4's residence was recorded, in circumstances where there is obscurity as to who exactly seized the motorcycle from PW4's house, what kind of faith, in all fairness, should any court have in the face of such confusion. In the

case of **Salum Ally v. R,** Criminal Appeal No. 106 of 2013 (unreported), this Court quoted with approval our earlier decision in **Abdala Teje @ Malima Mabula v. R**, Criminal Appeal No. 195 of 2005 (unreported), where this Court held that any credible evidence has to pass the following tests; **one**, the evidence must be legally obtained; **two**, it must be credible and accurate; **three,** the evidence must be relevant, material and competent and; **four**, it must meet the standard of proof requisite in a given case, otherwise referred to as the weight of evidence or strength of believability. These tests have been applied by this Court on many occasions including in our recent decision in the case of **Method Leodiga Komba @ Todi and Another v. R,** Criminal Appeal No. 150 of 2021 (unreported).

In this case by not going any far, only the fact that the motorcycle was seized without a search warrant or a seizure certificate is enough to shoot down the exhibit even if it would have been tendered in court, because the evidence would have been illegally obtained. That means the exhibit would have failed the test on the first criteria listed above. According to law, evidence recovered without any search warrant is illegal and has no evidential value. See this Court's decisions in **Shabani Said Kindamba v. R,** Criminal Appeal No. 390 of 2019; **DPP v. Doreen John Mlemba,** Criminal Appeal No. 359 of 2019; and recently, **Ayubu**

Mfaume Kiboko & Another v. R, Criminal Appeal 694 of 2020, (all unreported). The point we want driven home is that the evidence of PW3 and PW5 who were key witnesses to the identification of the motorcycle at the house of PW4 did not pass the tests set in the case of **Abdala Teje** (supra).

The other piece of evidence which directly advanced the appellant's case from the prosecution side is the evidence of PW4. At page 153, he stated:-

> *"It is true that the accused told me that he hired the motorcycle* ***and that other person did not dispute the facts narrated by the accused while at my residence...***"
>
> [Emphasis added]

So, it was the prosecution case that the owner of the vehicle which was found at PW4's residence was the property of the escaped suspect. This is on record, from the prosecution side. If this was the evidence of the prosecution, why should any court hold otherwise. Why should any court doubt the appellant's story, since it has an assent from the prosecution side.

In conclusion, considering the above discussion, we are unable to agree with Ms. Assenga that indeed, there was any credible witness who

had clarity as to whether or not the motorcycle that was recovered at PW4's residence was the deceased's. This weakness of the prosecution on the identity and handling of the motorcycle that was recovered at PW4's residence, is complemented by the failure of the prosecution to trace and arrest the escaped suspect. The cumulative effect of all that, strengthens the appellant's defence as to his explanation that the motorcycle was the escaped suspect's. We say this being well aware of the position of this Court as pronounced in **Kobelo Mwaha v. R** [2010] T.L.R. 196 at 197, namely that:-

> *"The position of the law is that recent possession of the property that had belonged to the murdered person* ***raises the presumption that the accused was the murderer, and unless he can give a reasonable account of how he became possessed of the property he could be convicted of the offence."***
>
> [Emphasis added]

The point that can be derived from the above authority is that, if a suspect can offer an explanation that is sufficient to exonerate him from the guilt, like that of the appellant in this appeal, by explaining his position, a trial court should not convict the man. In **Goodluck Kyando v. R** [2006] T.L.R. 363, this Court stated that every witness is entitled to

credence and his evidence must be believed unless there are good and cogent reasons for not believing the witness. Considering the quality of the evidence surrounding identification of the motorcycle, there is nothing credible to seriously challenge the position put forth by the appellant as to his explanation. On this aspect too, we are supported by this Court's decision in the case of **Olfam Mathias @ Mnola v. R** [2012] T.L.R. 304 at 305, where this Court observed that where there are two possible views on the evidence, one pointing to the guilty of the accused and another to his innocence, a court of law must adopt the one favourable to the accused.

Based on the above discussion, we are inclined to agree with Mr. Bwemelo that ownership of the motorcycle was not proved to the certainty legally acceptable. Thus, the second ground of appeal is upheld and we allow it.

It is proposed that we proceed to ground 3. Resolution of this ground is not complicated and cannot take much time. That is so because, when we were resolving the 2nd ground of appeal a while ago, we observed that the seriousness and the manner of identifying and handling of the motorcycle which was recovered at PW4's residence, was a total confusion and a clear failure to prove that indeed the motorcycle was the deceased's. The position of the law as was held in

the case of **Magesa Chacha Nyakibali** (supra), and; **Matola Kajuni and Three Others v. R**, Criminal Appeal No. 145 of 2011 (unreported), is that for the doctrine of recent possession to form a basis of a conviction, the property recovered must be proved to have been of the complainant. In this case, we have amply demonstrated that proof of ownership of the motorcycle was too poor to deserve any credence.

In view of the above, we agree with Mr. Bwemelo, that it was wrong to rely on the doctrine of recent possession in convicting the appellant. Thus, we uphold the 3rd ground of appeal.

And lastly, the 1st ground of appeal. The appellant is challenging his conviction based on circumstantial evidence, in this ground. Mr. Bwemelo's point was that, the evidence was not watertight, whereas his counterpart, Ms. Assenga was of a contrary view. We will briefly highlight the basic principles when it comes to circumstantial evidence, and then make our findings on the ground.

In this case, it is beyond doubt that there is not a single witness who witnessed the appellant killing or participating in the murder of the deceased. That, in law, means the case was decided on circumstantial evidence. In this jurisdiction, it is a settled position that where a conviction is to be solely reliant on circumstantial evidence, such evidence must be watertight, unerringly and conclusively pointing to no

one else except the accused person as the offender. Facts relevant in a conviction based on such evidence must not only be exceedingly compelling, but also, they must be adding up with mathematical precision permitting not a single chance of error, leading to only and only one conceivable theorem; the guilt of the accused person. To get the details of the above circumstances, in the case of **Bahati Makeja v. R,** Criminal Appeal No. 118 of 2006 (unreported), this Court stated that:-

> *"All in all, a survey of decided cases on the issue in this country and outside jurisdictions, establishes that such evidence must satisfy these tests:-*
>
> *(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established beyond reasonable doubt;*
>
> *(2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused;*
>
> *(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else; and*

(4) the circumstantial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence."

See also **Mathias Bundala v. R** [2007] T.L.R. 53, **Hamida Mussa v. R** [1993] T.L.R. 123; **Safari Anthony @ Mtelemko and Another v. R**, Criminal Appeal No. 404 of 2021 and; **Zakaria Jackson Magayo v. R**, Criminal Appeal No. 411 of 2018 (both unreported), just to mention, but a few.

In this case, we discussed at length when determining ground 5 which we determined first, how the appellant could not be identified at Godown Centre by examining the evidence of PW2, who did not mention any source of light leave alone other factors favouring accurate identification. Further, in discussing ground 2 above, we have demonstrated how PW3 and PW5 were not clear of themselves on the issue of identification of the motorcycle. We also indicated how the evidence of PW4 supported the appellant's case and referred to the explanation of the appellant, and stated that the possibility that the motorcycle was the property of the escaped suspect cannot be overruled absolutely. In such circumstances, a person cannot be convicted based

on circumstantial evidence. In view of the above, the 1st ground of appeal, also succeeds.

Finally, and by way of conclusion, this appeal is hereby allowed. We thus reverse the decision of the High Court by quashing the appellant's conviction and by setting aside his sentence of death. We further order that he be released from prison and set to liberty, unless he continues to be held in custody for other lawful cause.

DATED at **ARUSHA** this 22nd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Fridolin Bwemelo, learned counsel for the Appellant and Ms. Neema Mbwana, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL