

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MWANZA REGISTRY

AT MWANZA

CRIMINAL SESSIONS CASE NO. 131 OF 2019

THE REPUBLIC

VERSUS

NKANDA S/O JOSEPH SELEMANI SHING'OMBE @ SAID

JUDGMENT

3/6/2022 & 2/9/2022

ROBERT, J:

The accused person, Nkanda s/o Joseph Selemani Shing'ombe @ Said stands charged with the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16, R.E.2002. It was alleged that the accused person murdered one Juma s/o Rashidi on the 4th day of November, 2017 at Magurukenda village within the District of Sengerema in Mwanza region.

Briefly, the factual background of this matter reveals that on the 4th day of November, 2017, while on his way towards Nyehunge Village, Sengerema District, the accused person hired a motorcycle popularly known as

“bodaboda” from Juma s/o Rashid, the deceased, to take him to the village of Magurukenda. In the course of the journey, he was joined by his friend one Lutogola at the village of Mizolozolo. While on the way, the accused and his friend attacked the deceased, subdued him and struck him with an object on the head then pulled him by the road side and left him there. The accused and his friend robbed his motorcycle and went at large. On the 5th day of November, 2017 the dead body was found disserted by the roadside and later identified to be the deceased’s body. The accused person was allegedly found offering the said motorcycle for sale at Kahama District where he was arrested and later charged with murder.

When this case came up for hearing, the prosecution was represented by Maryasinta Lazaro, Luciana Shaban and Zena James, State Attorneys whereas the accused person enjoyed the legal services of Mr. Mashaka Tuguta, learned counsel.

In proving the offence charged, the prosecution called eight witnesses namely, Mpanduji Paulo (PW1), Kazimili Filipino Mashimba (PW2), Adam Marire Sanya (PW3), Aloyce Kamandu (PW4), Maneno Salama (PW5), H.2332 D/Constable Njile (PW6), PF 21339 A/Insp. Gaidon Jonathan Noah (PW7) and Salum Haruna Hussein (PW8).

PW1 recounted that on the 4th day of November, 2017 he saw the accused riding a motorcycle as he went to fuel it at the petrol station accompanied with another person whom he didn't know. The motorcycle had a green cover, red dash board sanlg make. On the 5th day of November, 2017 an alarm was raised at Katoma village centre and villagers were informed that a person was found lying dead near the centre. At the scene of crime he found a young man killed and one helmet was left at the scene of crime. On the 6th day of November, 2017, he went to the acting Village Executive Officer of Katoma Village and informed him that the accused had gone to his petrol station to fuel a motorcycle but he had no money therefore he left his mobile phone as security. The acting VEO informed the Ward Executive Officer of Kalembezo Ward who directed that the phone be surrendered to the police because the accused was found at kahama selling a motorcycle and arrested. On 7th November, 2017 he reported the matter at Nyehunge police station.

PW2 Kazimili Filipo Mashimba, who is the hamlet chairman of Logoni at Katoma Village, informed the Court that he visited the scene of crime together with the village security chairman one Baraka Paskali and the acting VEO of Katoma village one Julius Magabe on 5/11/2017. The deceased's

body was at the border with the village of Magurukenda. At the crime scene they found pieces of broken helmet glass and a red helmet. The deceased's neck was tied with a trousers' belt. Thereafter, he called the OCS of Nyehunge Police station who arrived later at the scene of crime with a doctor. On 6/11/2017 he was informed by the police that the deceased's body was identified by his relatives. On 7/11/2017 one person by the name of Mpanduji Paulo went to him with a letter from Katoro Village Executive office. He escorted him to police station where he told the police how the accused left his phone with him when he went to fuel the motorcycle.

PW3, Adam Marire Sanya, is the Doctor who conducted post-mortem examination on 5/11/2017. He saw the injuries on the deceased's body, the body was bleeding from mouth to nose. The deceased's body had a belt tied on his neck and he had an injury on the head and he was bleeding from the nose. He tendered the post-mortem report which indicated the cause of death to be Head injury and Asphyxia. The post-mortem examination report was admitted in evidence as exhibit P1.

PW4, Aloyce Kamandu, testified that in November, 2017 he was the Assistant OCCID at Kahama District. On 6/11/2017 two police officers went to him (Police Constable Albert and Police Constable Njile). They were together with two other men (the accused person and one Paulo Mbunge). They also had one red motorcycle with a green cover, sanlg make with registration No. MC937 BGS. The two police officers told him that they arrested the two men with the said motorcycle. They informed him that initially they thought it was a stolen motorcycle but they later came to learn that the person who was the owner of that motorcycle was killed. He decided to verify that information with the OCS of Nyehunge who assured him of that information and asked him to keep the arrested suspects in custody. After that, he seized the motorcycle, helmet and key and remote control. The said items were received and admitted by the Court as exhibit P2 Collectively. He then gave the exhibits to sergent Geoffrey who is the keeper of exhibits for the police.

PW5, Maneno Salama, the owner of the motorcycle, testified that on 3/11/2017 he gave the deceased Juma Rajabu his motorcycle, MC 937 BGS, Sunlg make in order to operate it by carrying passengers and pay him. On 6/11/2017 he received information regarding the deceased's death. He

reported the incident at Nyehunge Police station. On 7/11/2017 the deceased's body was identified. He showed the receipt given to him when he purchased the Motorcycle which was admitted in Court as exhibit P3. He informed the Court that the registration certificate of the said motorcycle was lost. He identified the motorcycle by its green cover, registration number and colour.

PW6, H2332 D/constable Njile, was the arresting officer, he testified that on 5/11/2017 while in patrol with his colleague Mr. Albert, he got information from his informer that there was a man who was selling a motorcycle at Nyihogo area but he was suspicious that the said motorcycle could have been stolen as the said seller had no registration certificate. He went to Nyihogo area with one Albert on 6/11/2017 and found the accused person together with two others in possession of a motorcycle. He became suspicious of the accused person because he had no registration certificate. He arrested the accused person and the two individuals who were with him and took them to police station. The accused person gave him a mobile number of one teacher at Nyehunge and asked him to communicate with the said teacher in order to verify if the accused person is the owner of the motorcycle. The said teacher told him that the accused person and his family

had never owned a motorcycle. He informed him further that, there was a person who was killed at Nyehunge and his motorcycle was stolen. He handed over the accused person and his colleagues together with the helmet, motorcycle key and remote to PW4, Aloyce Kamandu. He identified the motorcycle, helmet, key and remote in the Court as the items which he identified the accused person with and the ones he gave to PW6. He identified the motorcycle through its Registration No. MC 937 BGS, Sunlag make.

PW7, PF 21339 A/Inspector Gaidon Jonathan Noah, testified that on 6/11/2017 both him and Detective Constable Arnold were given movement order from Sengerema Police station to Kahama Police station to bring the accused person and exhibits from Kahama Police station. They met with Inspector Kamandu at Kahama Police station who asked them to take the accused person to Justice of Peace because he had confessed. They took the accused person to justice of peace at Kahama Primary Court to record his statement. On 8/11/2017, he took the accused person together with the exhibits from Sgt Geoffrey and filled the exhibit register and Occurrence Book (OB) and proceeded to Sengerema Police Station. At Sengerema Police station he handed the accused person together with the exhibits to exhibits

keeper, one Mr. Chikaka. On 26/6/2018 he was given the case file to conduct investigation. He continued with investigation and drew the sketch map which was admitted in Court as exhibit P4. In 2019 when the case was called up for prosecution he took the exhibits to Nyamagana Police station where he handed the exhibits to Sgt Rashid. He took them again on 16th May, 2022 and brought them to Court.

PW8, Salum Haruna Hussein, informed the Court that, on 7/12/2017 the accused person was brought to him by two police officers, Gaidon and Arnold. He recorded the extra-judicial statement of the accused person who confessed to have killed the deceased. The extra-judicial Statement was admitted in Court as Exhibit P5.

After examining the evidence tendered by the prosecution, the court ruled that the accused Nkanda Joseph had a case to answer upon which he was given a chance to tender evidence in his defence. The accused person testified on his own behalf as DW1 without calling any other witness. In his testimony, the accused person denied allegations made against him.

He informed the court that, on 3rd and 4th November, 2017, he was at Kazaroho area Kahama District where he was residing. He was arrested by

police officers who were dressed as civilians on 5/11/2017 at Kazaroho area. He met the said police officers on the road while going to the barber shop. They informed him that they were looking for a motorcycle to buy and he told them that he was not an agent of motorcycle sellers. After that, he was taken to police station with the said two police officers namely, Albert and Njile. At the police station, he was taken to a room where he was interrogated and then held at the police lock up where he stayed until 6/11/2017. On that day, he was taken again to another room by Mr. Njile and Albert who told him that he was accused of murder without telling him the name of the person he was accused of murdering. After that, he was beaten and compelled to confess.

At the end of the defence case, the prosecution requested to make final submissions which the court granted. Submitting on behalf of the Republic, Ms. Zena James, learned state attorney stated that, although the evidence adduced against the accused person is circumstantial as there is no witness who saw the accused person killing the deceased, in general the evidence adduced is sufficient to establish the offence of murder against the accused person.

She made reference to the Court of Appeal decision in the case of **Ndalahwa Shilanga and another vs Republic**, Criminal Appeal No. 247 of 2008, Mwanza (unreported) at page 8 where the Court gave three conditions to be considered in relying on circumstantial evidence as follows:

- (i) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and
- (iii) 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.

She submitted further that, in this case there is no doubt that the accused person died unnatural death as shown in exhibit P1 and the testimony of PW3 which indicates that cause of death was due to Head injury and asphyxia. The evidence is supported with the testimony of PW2. She argued that, the significant question to be asked is who caused the deceased's death. To prove this, she submitted that, the Republic relies on the doctrine of recent possession. She argued that, in the case of **Kashinje**

Julius vs Republic, Criminal Appeal No. 305 of 2015 at Tabora (unreported) at page 15 where the Court gave three conditions to be considered when relying on the doctrine of recent possession as follows:

- (i) The property to be found with the suspect;*
- (ii) The property is positively the property of the complainant;*
- (iii) The property was recently stolen from the complainant.*

She argued that, in the present case, PW4 informed the Court that he arrested the accused with motorcycle with registration number MC937 BGS. His testimony is supported with that of PW2.

She submitted further that, PW5's evidence shows that he identified the motorcycle to belong to him and said it is the motorcycle given to the deceased on 3/11/2017. PW6's testimony corroborates this testimony by saying that the accused person and the said motorcycle were handed to him after the alleged arrest. Hence, she maintained that the conditions set in the case of Kashinje Julius are properly complied with in this case.

She continued to submit that, in identification of stolen property the owner must show a special mark in order to prove that the said doctrine followed the requirement of the law (See Paul Maduka and others vs

Republic, Criminal Appeal No. 110 of 2007, CAT, Dodoma (unreported) at page 14 where the CAT followed the decision in the case of **Ally Bakari and Pili Bakari vs Republic (1992) TLR 10.**

She submitted that PW3 identified the said motorcycle by describing the registration number which can be used to distinguish the property in question from the other properties. This is established in the case of **Seleman Hassan vs Republic, Criminal Appeal No. 364 of 2008, CAT,** at page 7 and 8.

She submitted further that, the Republic's case is also based on the confession of the accused person. She argued that, in the case of **Seleman Hassan** (supra) at page 4 the Court of Appeal made reference to the case of Paulo Maduka (supra) and stated that the accused person's confession in admissible in Court as evidence. The Court explained that the best evidence in murder cases is the confession of the accused person who confesses his crime. She argued that, the evidence adduced by PW8 and exhibit P5 can be relied on to convict the accused person. This is because it considered all the requirements set in the case of Selemani Hassan. Therefore, she prayed for the Court to consider the confessional statement of the accused as truthful

and convict him accordingly. She maintained that the confessional statement was sufficient to convict the accused even without corroboration.

On the question of the chain of custody, she made reference to the principle set in the case of Paul Maduka that the chain of custody must be proved to the effect that nobody else could have access to it.

She argued that, in this case PW6 arrested the accused with the motorcycle and handed them to PW4 who was the acting police officer in-charge at the station. PW4 then handed the exhibit to exhibit keeper (Sgt Geoffrey) whom he said is deceased now. He filled the exhibit register and Occurrence Book. He then took the exhibit to Sengerema police station where he handed the exhibit to Mr Chikaka who was the exhibit keeper there. He filled the exhibit register and OB. The exhibit stayed there until 2019 when he took the said exhibit to Mwanza at Nyamagana Police station where he handed it to Sgt. Rashidi who was the exhibit keeper there. After that he filled both the exhibit register and the OB. On 16/5/2022, he took the exhibit to Court.

She argued that, although there is no documentary evidence to establish the said custody, the Court can rely on oral evidence to establish

the chain of custody if it finds the witnesses to be credible. To buttress her argument she made reference to the case of **Ally Mohamed Mwanga vs Republic**, Criminal Appeal No. 214 of 2011.

With respect to the defence raised by the accused person, she argued that, the accused person raised the defence of alibi without complying with the requirement of the law under section 194 of the Criminal Procedure Act. She maintained that while the accused person did not issue a notice of alibi as required in the cited provision, in his defence he alleged that from 3rd to 5th November, 2017 he was at Kahama District where he was arrested.

She faulted the accused person for alleging that he was beaten by PW6 and his colleague. However, when PW6 testified in Court the defence did not ask him anything regarding the alleged beating. She maintained that failure to cross-examine the witness on a particular issue alleged by a witness means the accused person was in agreement with the said issue. To support her argument, she cited the case of **George Maili Kemboge vs Republic, Criminal Appeal No. 327/2013 (unreported)**.

She also talked about the perceived contradiction on the alleged scene of crime as stated by PW7 who testified that the scene of crime was the

village of Katoma. She clarified that, the evidence adduced by PW2 indicates that the scene of crime was at the border between the two villages of Katoma and Magurukende. Hence, she maintained that this contradiction is curable because the charge sheet indicates that the scene of crime was Magurukende village. She submitted that there is sufficient evidence to establish the offence of murder against the accused person.

On his part, counsel for the accused person opted to make no final submissions.

In this case the court was assisted by three assessors namely Martha Makuru, Fatuma Abdallah, and Suzana Abdallah. However, on the date fixed for summing-up only two assessors entered appearance and gave their opinions namely, Martha Makuru and Suzana Charles. After my summing-up note, the two assessors were of the view that the accused person is not guilty of killing the deceased.

The first assessor (Martha Makuru), opined that, none of the prosecution witnesses testified to the effect that they saw the accused person beating the deceased. She opined further that, it is not clear why the other person who committed the alleged offence together with the deceased

was not charged. With regards to the motorcycle allegedly robbed from the deceased, she explained that it is not clear if the ownership of the said motorcycle was properly established in the absence of the registration certificate which was allegedly lost.

Similarly, the second assessor, Suzana Charles, opined that, none of the prosecution witnesses adduced evidence to show that they saw the accused person killing or beating the deceased. She submitted further that, the witness who said the stolen motorcycle belonged to him relied on the colour of the cover of the motorcycle which is not unique to the motorcycle and he didn't have the registration certificate of the said motorcycle. He relied on the purchase receipt which creates doubt on the alleged ownership.

It is basic that in a case of murder like this one, the prosecution is required to prove beyond reasonable doubt that the accused person caused death of the deceased by committing unlawful act or omission with intent to cause death.

The starting point in this case is the death of the deceased Juma s/o Rajabu. It is not disputed that death of the deceased was due to head injury and asphyxia as shown in the autopsy report (exhibit P1) and in the

testimony of the Doctor who examined the body of the deceased (PW3). The question for determination is whether the accused person committed an act which resulted to the said death.

Evidence adduced in this case is circumstantial as there is no eye witness to the alleged killing. However, it is the prosecution's allegation that the accused person is the one who murdered the deceased having been found in possession of the deceased's motorcycle only a few days after the deceased was brutally murdered. The Court is therefore invited to consider the doctrine of recent possession to convict the accused person.

In the case of **Juma Marwa vs Republic, Criminal Appeal No. 71 of 2001**, (unreported), the Court of Appeal of Tanzania stated that,

"the doctrine of recent possession provides that if a person is found in possession of property recently stolen and gives no reasonable explanation as to how he had come by the same, the Court may legitimately presume that he is a thief or a guilty receiver".

In the present case, the deceased was allegedly robbed of a motorcycle with registration number MC 937 BGS, sanlg make with a green cover and murdered on the 4th day of November, 2017. PW5 informed the Court that he is the owner of the motorcycle with registration no. MC 937 BGS, Sanlg

make which he gave to the deceased Juma s/o Rajabu on 3/11/2017 for business. PW1 recounted that on the 4th day of November, 2017 at 21:00 HRS he saw the accused riding a motorcycle with a green cover, sanlg make as he went to fuel it at his petrol station. PW6 informed the Court that he received information on the 5th day of November, 2017 about a suspicious man who was selling a motorcycle at Nyihogo area, Kahama district. He laid a trap and on 6/11/2017 he arrested the accused person with motorcycle with registration number MC937 BGS which he was offering for sale. He took the accused person together with the motorcycle, helmet and a key with remote control and handed the accused together with the said items to PW4, Aloyce Kamandu at the police station. His testimony is supported with that of PW4 who tendered the said items in Court (exhibit P2). PW5, identified the said items as his property given to the deceased on 3/11/2017. He also tendered the purchase receipt of the said motorcycle (exhibit P3). On his part, the accused person simply denied to have owned a motorcycle or being arrested with a motorcycle. His defence of alibi that on the date of the alleged murder he was at Kazaroho, Kahama and not at the scene of crime is an afterthought having been made without notice in contravention of the mandatory requirements of section 194(4) of the Criminal Procedure.

From the evidence adduced, this Court is satisfied that the accused was found in possession of the said motorcycle and the ownership of the motorcycle was well established by the testimony of PW5 and exhibit P3. The question for determination is whether the possession of a motorcycle by the accused person which was in the possession of the deceased at the time of his death is sufficient to conclude that the accused person stole the deceased's motorcycle and caused his death.

In the case of **Rex vs Bakari Abdulla (1949)16 EACA 84**, speaking on the doctrine of recent possession, the Court said that;

"cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any other charge however penal".

Considering that the accused person was seen with the motorcycle alleged to have been robbed from the deceased on the night of the alleged murder (see evidence of PW1) and arrested with said motorcycle two days after the said murder (see evidence of PW6 and PW4), in the absence of reasonable explanation from the accused person on how he came into

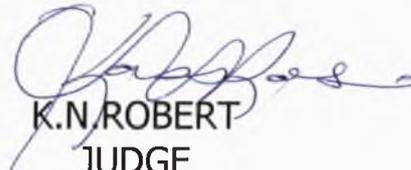
possession of the said motorcycle, as it is in this case, this Court finds that this is a fit case for invoking the doctrine of recent possession to support not only the stealing of the motorcycle but also murder of the deceased. The Court is satisfied that the killing was done to effect the stealing and therefore it is proper to infer malice aforethought.

Considering the evidence adduced by the prosecution on how the motorcycle allegedly found in possession of the accused person was handled to the time of being tendered and admitted in evidence, the Court is satisfied that the chain of custody did not provide a room for any unlawful access to the said exhibit and there was no evidence to that effect.

The other piece of evidence is the extrajudicial statement of the accused person (exhibit P5) in which he confessed to have murdered the deceased and stole his motorcycle with the assistance of his friend, one Lutogela who is still at large. Although the statement was retracted by the accused person on grounds that it was not voluntarily made because at the time of recording the statement there were more than two people in the room and therefore he was not free and further repudiated that the accused person did not record the statement at all, this Court was satisfied during trial within trial that the confessional statement was voluntarily made. Since the confessional

statement was made freely and voluntarily by the accused in the immediate presence of a justice of the peace, this Court finds that it was properly proved by the prosecution against the accused person under section 28 of the Evidence Act, R.E. 2019.

In the circumstances of this case, the court is satisfied that both elements of murder have been proved beyond reasonable doubt. As a result, I convict the accused person of the offence of murder contrary to section 196 and 197 of the Penal Code, Cap. 16 Revised Edition 2002.


K.N.ROBERT
JUDGE
2/9/2020

SENTENCE

Pursuant to section 197 of the Penal Code, Cap. 16 R.E 2002 read together with section 322 of the Criminal Procedure Act, Cap.20 Revised Edition, 2002 the accused person is hereby sentenced to death and shall suffer death by hanging.




K.N.ROBERT
JUDGE
2/9/2020