CRIMINAL APPEAL NO. 19 OF 2007- COURT OF APPEAL OF TANZANIA AT ARUSHA -MROSO, J.A., KAJI, J.A. and RUTAKANGWA J.A.	**MATHEW STEPHEN @ LAWRENCE Vs. REPUBLIC- (Appeal from the Conviction of the High Court of Tanzania at Arusha)- HC. Criminal Sessions Case No. 25 of 2001-Mchome, J.**	Offence of murder contrary to section 196 of the Penal Code, Cap.16. **Doctrine of recent possession-** conviction was based mainly on the doctrine of recent possession that the appellant was found in possession of the 4 cheques, alleged to have been stolen in the course of the robbery which led to the death of the deceased, and could not give a satisfactory explanation as to how he had come by the same- Under the circumstances the possibility of those exhibits to have been planted there by the police to fix the appellant cannot be ruled out. **Proof of death-** it is necessary in the cases of murder for the prosecution to adduce evidence to prove the death- **See Court of Appeal of**

		Tanzania in MT 7479 Sgt Benjamin Holela v R (1992) TLR 121; Efraim Lutambi VR, CAT Criminal Appeal No. 30 of 1996 (Unreported); and Libert s/o Hubert v R, CAT Criminal Appeal No. 28 of 1999.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MROSO, J.A., KAJI, J.A. And RUTAKANGWA J.A.)

CRIMINAL APPEAL NO. 19 OF 2007

MATHEW STEPHEN @ LAWRENCE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Mchome, J.)

dated the 31st day of October, 2005
in
HC. Criminal Sessions Case No. 25 of 2001

REASONS FOR JUDGMENT

KAJI, J.A.:

The appellant, Mathew Stephen @ Lawrence, was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap.16, in the High Court at Arusha (Mchome, J.) in Criminal Sessions Case No. 25 of 2001. He was sentence to death by hanging. He was aggrieved.

On 16.10.07, after hearing submissions by Mr. Lundu, learned counsel for the appellant, and Mr. Boniface, learned Senior State Attorney who represented the respondent Republic, we allowed the appeal, quashed the conviction set aside the sentence and ordered the appellant to be released forthwith unless lawfully held. We reserved our reasons for the decision which we now give.

On 9.7.1998, International Forex Bureau De Change was invaded by bandits who shot and fatally wounded the deceased Gidion s/o Moses @ Mollel who was a security guard of the said Bureau De Change. The deceased died later at Mount Meru Hospital. Neither the cashier Scola Constantine Mroso (PW2) nor the manager

Robert Nyambe Kimaryo (PW3) identified any of the bandits. An identity card of the appellant was alleged to have been found in a taxi with Registration No. TZE 2369 which was alleged to have been involved in the robbery.

On either 10.7.1998 or 14.7.1998 at dawn, the appellant's room was searched and some money and some cheques alleged to have been stolen in the course of the robbery were alleged to have been found therein. The appellant was arrested and arraigned as above. He denied the information. He was convicted basically on the doctrine of recent possession. He was aggrieved. Before us the appellant was represented by Mr. Lundu, learned counsel who had preferred two grounds of appeal namely: -

1. That the trial court erred in law and in fact in not finding that the search of the appellant's room was illegal in that the police who searched the appellant's room were not searched before searching the appellant's room.

2. That the trial court erred in law and in fact for basing its finding on the contradictory evidence of the prosecution case.

The respondent Republic was represented by Mr. Boniface, learned Senior State Attorney.

In elaboration on the grounds of appeal Mr. Lundu pointed out that the police who searched the appellant's room were not searched before searching the room. In that respect the possibility of placing there the money and cheques could not be ruled out. The learned counsel conceded that he was not aware of a law requiring a police on search to be searched before the search. However he was of the view that, as a matter of prudence, in such a serious information of murder, he should be searched. The learned counsel contended further that, until the search was made and the said money and cheques alleged to have been found, PW2 and PW3 had not mentioned what was stolen in the course of the robbery. He was of the view that they mentioned them (Exh. P4) after they were allegedly found in the appellant's room to incriminate the appellant. The learned counsel asserted that, according to the evidence on record the searching party was big and the appellant's room was small with insufficient light. In that respect the learned counsel

insisted that there was a great possibility for the police to plant the exhibits there unnoticed by the appellant.

On the issue of contradictory evidence, the learned counsel contended that, there were a lot of contradictions in the prosecution evidence. He cited as an example where Ex No. E 8094 D/Sgt Kassim at first said he found the appellant's identity card in a taxi which was involved in another robbery. But when he was cross examined he said it was found by other policemen and not by him. Another example is where PW1 at first said the police who entered the appellant's room during the search were three. But when cross examined he said they were two. Another example is where PW1 said the money and cheques were found in a newspaper and whereas the Ten Cell Leader Godfrey Andrew (PW4) said they were found in an envelope. The learned counsel also expressed his doubt on whether PW1 was really the leader of the searching team in view of the search certificate Exh P5 having been signed by Assistant Inspector Hitt who did not testify. The learned counsel wondered

why the appellant's identity card which led to his arrest was not tendered as exhibit.

On his part, Mr. Boniface did not oppose the appeal mainly on the grounds submitted by the appellant's counsel. The learned Senior State Attorney wondered why the search was made at night without a search warrant and moreover the police had ample time to prepare a search warrant. He said the police had gone to the appellant's home during day time where they found the appellant missing. They returned there at dawn. In that regard it was the learned Senior State Attorney's view that they should have prepared a search warrant since it was not an ambush operation. Mr. Boniface also pointed out that the disclosure of the appellant's bad character as a habitual criminal prejudiced the appellant. The learned Senior State Attorney expressed his doubt on the authenticity of the cheques in view of the anomalies appearing thereat. He pointed out the anomalies. The learned Senior State Attorney also observed that no proper preliminary hearing was conducted, and there was no

evidence to prove the death and the cause of the death of the deceased.

We have carefully considered Mr. Lundu's submission and the reply thereat by the learned Senior State Attorney. We have noted with some concern the purported preliminary hearing. The learned judge who conducted the purported preliminary hearing recorded as follows: -

> *Charge read over to the accused who pleads:*
> *Accused: Not guilty*
> *Entered as a plea of not guilty to the charge*
> *Agree undisputed facts: -*
> 1. *It is accepted that Gideon Moses @ Mollel is dead.*
> 2. *The deceased's death was unlawfully caused.*
> 3. *Cause of death is as per post mortem examination report which is received and marked as exhibit P.1*
> 4. *The accused was found with Tshs. 150,000/= when searched.*
>
> *Sgn*
> *JUDGE*

4.2.2002

This was not a preliminary hearing envisaged by section 192 of the Criminal Procedure Act and the Accelerated Trial and Disposal of Cases Rules, 1988. It was not indicated anywhere whether the contents of the post mortem examination report Exh P.1 were read over and explained to the appellant in the language he understood as required by subsection 3 of Section 192. In that respect it was necessary for the prosecution to adduce evidence to prove the death of the appellant. See for example, the cases of **MT 7479 Sgt Benjamin Holela v R** (1992) TLR 121; **Efraim Lutambi VR, CAT** Criminal Appeal No. 30 of 1996 (Unreported); and **Libert s/o Hubert v R,** CAT Criminal Appeal No. 28 of 1999, just to mention a few. This was not done and none of the prosecution witnesses testified that he saw the deceased.

Second, PW2 and PW3 who were at the scene of crime said clearly that they did not identify any of the robbers. Thus the appellant's conviction was based mainly on the doctrine of recent possession that the appellant was found in possession of the 4

cheques, 150,000/=, 600 U.S. Dollars and £ 120 alleged to have been stolen in the course of the robbery which led to the death of the deceased, and could not give a satisfactory explanation as to how he had come by the same. The appellant had denied the allegation and had suspected the police to have planted the same during the search. We have carefully considered the circumstances under which the money and cheques were alleged to have been found in the appellant's room. There was ample evidence by PW4 and the appellant and to some extent by PW1 that the room was very small and was crowded by the searching party and the appellant with his wife and was with little light. The police had put on coats probably it was cold. Under the circumstances the possibility of those exhibits to have been planted there by the police to fix the appellant cannot be ruled out, especially bearing in mind that the police, according to PW1, were trailing him on suspicion that he was a habitual criminal.

Another point of some concern is where those exhibits were found. According to PW1 they were in a newspaper. But according

to the Ten Cell Leader PW4 they were in an envelope. This discrepancy casts more doubt on the whole aspect of the search.

We have also noted with some concern the contradictions in the prosecution evidence as elaborated by the appellant's learned counsel and accepted by the learned Senior State Attorney. We are mindful of the learned trial judge's remark on some of the discrepancies that some of them might have been caused by lapse of time. But if that were the case we would have expected the learned judge to give similar consideration to the appellant's contradiction on whether his money was Shs. 150,000/= or 400,000/=. But to the contrary he found this to have been fatal. This was a double standard approach which denied the appellant a fair assessment/evaluation of his defence.

These are the reasons why we allowed the appeal, quashed the conviction and set aside the sentence and ordered the appellant to be released forthwith unless lawfully held.

DATED at ARUSHA this 26th day of October, 2007.

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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

(I. P. KITUSI)
DEPUTY REGISTRAR