IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 125 OF 2015

1. **SIA MGUSI @ WAMBURA**
2. **JUMA MUHENDE NYAHITA @ MUGENDI MOMBASA** **.....APPELLANTS**
3. **ROBERT JONES KIGOSI @ NYAMACHO**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

Dated the 15th day of December, 2014
In
Criminal Sessions No. 77 of 2011

JUDGMENT OF THE COURT

20th & 27th May, 2016

MBAROUK, J.A.:

The appellants and another who is not subject to this appeal were arraigned before the High Court of Tanzania at Mwanza and charged with murder contrary to sections 196 and 197 of the Penal Code Cap. 16 Vol. 1 of

the Laws Revised Edition 2002. The appellants in this appeal were convicted and sentenced to suffer death by hanging. On his part the 4th accused, Mwita s/o Chacha @ Kibibi was acquitted. Dissatisfied, the appellants have preferred this appeal.

The facts of the case were as follows: The first appellant, SIA s/o MGOSI alias WAMBURA, the second appellant, JUMA s/o MUHENDE NYAHITA alias MUGENDI MOMBASA, and ROBERT s/o JONES KIGOSI alias NYAMACHO were the first, third and second accused at the trial respectively. Together with one MWITA s/o CHACHA alias KIBITI, they were in the High Court of Tanzania sitting at Tarime jointly charged with the offence of murder contrary to sections 196 and 197 of the Penal Code; CAP 16 R.E. 2002.

The charge particularized that on 11th May, 2008 at 10.00 at Nyarero village, of Tarime District in Mara Region, they murdered Maguriati Ntaruke Marandu. The appellants were on 15th December, 2014 convicted by Sumari, J. and each was sentenced to suffer death by hanging. This appeal is against that conviction and sentence.

At the trial, the prosecution built its case against the appellants on the basis of the evidence of thirteen (13) witnesses, namely, SP Constantino Bandola (PW1); Issa Abas Arabi (PW2); Robert Mayala (PW3); SP Shadrack Masija (PW4); Fatuma Mushi Shilinde (PW5); ASP Mohamed H. Banda (PW6); Godliver Simon (PW7); Augustino Nyambita (PW8); Juma Kijungu (PW9); Johanes Odera (PW10); A/Inspector Makole (PW11);

Leonard Mayala Korosso (PW12); and A/Inspector John (PW13).

The prosecution case was briefly that on 11th May 2008 seven people including the deceased were travelling from Dar es Salaam to Tarime in a Toyota Land Cruiser vehicle belonging to Rorya District Council. The deceased Maguriati Ntaruke Marandu, who was the District Security Officer of Tarime, was seated beside Tuoro Samson the driver of the vehicle. PW7 testified that their vehicle passed through the Serengeti National Park and around 11 p.m. they were in Tarime district. As they were cruising between Kimakolele and Nyarero villages, he saw four people dressed in military fatigue astride the road ahead. The four people had erected a makeshift road block made up of stones and boulders.

PW7 shouted to the driver to stop and turn back. But, it was too late for the driver to turn around. Shots rang out, as the deceased cried out in agony before he fell silent. The vehicle skidded into a trench forcing coming to a stop. The bandits surrounded the vehicle, and all the passengers were ordered to disembark, whereupon they were searched and all their possessions including their mobile phones, laptop, PW5's handbag and their suitcases were stolen. The bandits disappeared into the darkness of the night.

Two police officers, Issa Abas Arabi (PW2) and ACP Robert Mayala (PW3) testified on an informer's tip which the police received, leading to the arrest of the appellants. PW2 and PW3 were members of the police task force from the Police Headquarters in Dar es Salaam sent to Tarime to help in the investigations. Soon after their arrival at

Tarime, they learnt that their suspects were still at large and that the second appellant (who we shall henceforth identify in his alias, MOMBASA) was in Dar es Salaam at Kinondoni Mkwajuni.

The task force members returned back to Dar es Salaam where they accosted MOMBASA and arrested him on 23rd June, 2008. Mombasa mentioned the name of the third appellant (NYAMACHO) and one Mkami, to have been a member of the bandits. The information PW2 and PW3 received from MOMBASA also disclosed that NYAMACHO and MKAMI were at Buhemba gold mines in Musoma.

PW2 and PW3 left Dar es Salaam for Buhemba together with MOMBASA. Along the way, further updates came informing them that the suspects they were after had been seen drinking at a local bar in Buhemba. They

left MOMBASA at police custody in Musoma and travelled to Itembe bar where they spotted their suspects seated enjoying their drinks. NYAMACHO tried to escape. He did not get far because he was chased down by the members of the public and brought back where he was arrested. But PW2 and PW3 were not so lucky with the first appellant (WAMBURA) who managed to escape from their dragnet. According to PW2, NYAMACHO upon interrogation whilst still at Buhemba Police Station, informed the police about a gun which was hidden in a maize farm. The police followed up on this information and a gun, exhibit P1 was dug out from the farm. According to PW2, it was NYAMACHO and MOMBASA who disclosed that WAMBURA was in fact living at Nyamongo. It was this information which led the police at Nyamongo village to trace down WAMBURA and arrested him.

During the trial, and after a trial within trial, the cautioned statement of MOMBASA dated 4/7/2008 which had earlier been taken down by PW11, was admitted as exhibit P5.

The first appellant (WAMBURA) testified at the trial as DW1. He gave an account on how he spent the whole of 11/5/2008 from morning when he woke up and had his breakfast with his children before going out for his business. He returned back home around 8 p.m. when he ate his dinner right up to 9 pm when he sat down to watch TV with members of his family. He finally retired to bed till the following morning on 12/5/2008. He denied any role in the death of the deceased. He blamed his business rivals and neighbours for putting his name in the list of people suspected to be engaged in criminal activities.

The second appellant (MOMBASA) who testified as DW3 claimed that he was far away from the scene of crime at Tarime. He had travelled to Dar es Salaam from Tarime on 5/5/2008 and only learnt about the murder of the deceased on 23/6/2008 when a police officer (Robert Mayala, PW3), called him by mobile phone and informed about the crime. He tendered a bus ticket (Exhibit D2) to prove his claim that he travelled to Dar es Salaam several days before the deceased met his violent death.

The third appellant (NYAMACHO) on his part testified as DW2 that on the material day he was at home in Magoma Village of Binagi Tarime. This is where he was born and continued to live after completing his primary school education. On 26/6/2008 he rushed to Buhemba because one Mwita Siki had phoned to inform him about the discovery of gold and everybody else was rushing to

prospect for gold. He also recalled the day of his arrest on 30/6/2008 while still at Buhemba. He was at Itembe bar drinking with his friends when the police arrived and began to ask him questions about the incident that led to the death of the deceased. He blamed the way the identification parade was conducted because he wore a bandage on his head marking him out from others and facilitated his identification.

After evaluating the evidence of the prosecution and defence witnesses, the trial Judge concluded that the prosecution had proved its case beyond reasonable doubt. To reach this conclusion, the trial Judge depended on evidence of recent possession, discovery of the murder weapon (a shotgun hidden in a farm on instruction of the second appellant) and confessional statement of the

second appellant (exhibit P5) which implicated his co-accused.

In this appeal, Mr. Salum Magongo, learned advocate represented the 1st appellant, whereas Mr. Sylveri Chikwizile Byabusha and Mr. Stephen Magoiga, learned advocates represented the 2nd appellant and Mr. Constantine Mutalemwa, learned advocate represented the 3rd appellant. On the other hand, Mr. Victor Karumuna and Ms. Ajuaye Bilishanga, learned Senior State Attorneys represented the respondent/Republic.

The 1st appellant through his learned advocate Mr. Magongo preferred a memorandum of appeal which, contained four grounds of complaint which read as follows: -

> *"1. That, as the trial court failed to extend to the 1st appellant*

opportunity to participate in the trial within trial and cross-examine the witnesses therein it was against the law to take the confession (Exh. P5) as evidence against 1st appellant.

2. *That, in the absence of other independent evidence against the 1st appellant, the trial court erred in law in taking into consideration the confession (Exh.P5) against the 1st appellant.*

3. *That, in the alternative but without prejudice to ground 2, the trial court erred in law in convicting the 1st appellant basing on the retracted co-accused confession without any corroborative evidence relevant to the 1st appellant.*

4. *That, as a whole there is no evidence on record to support conviction against the 1st appellant."*

The 2nd appellant through his learned advocates Mr. Byabusha and Mr. Magoiga preferred a memorandum of appeal which contained eight grounds of complaint which read as follows: -

"1. *That the cautioned statement of the 2nd appellant was taken outside statutory time and the learned trial Judge erred in receiving it into evidence, the additional statement was taken without caution.*

2. *That the learned trial Judge grossly misdirected herself in relying on the 2nd appellant's caution statement recorded at*

Musoma without drawing an adverse inference for withholding the one made in Dar es Salaam; the second was extracted through torture of 2nd appellant.

3. *That the learned trial Judge erred in invoking the doctrine of recent possession in respect of common items allegedly recovered from the 2nd appellant's wife which were not sufficiently described.*

4. *That since the 4th accused at the trial did not confess to have committed the murder, it was a misdirection on the part of the learned trial Judge to impute discovery of the gun, shoes and belt* ***exhibit***

P.4 *on the 2nd appellant and to take that evidence as corroborative of the 2nd appellant's caution statement.*

5. *That circumstantial evidence did not irresistibly point to the guilt of the 2nd appellant.*

6. *That the learned trial Judge failed to direct assessors on legal requirements in regard to the caution statement and the defence of* ***alibi*** *by the 2nd appellant.*

7. *That coupled with a weak prosecution case, the learned trial Judge erred in not according any weight to the defence of* ***alibi*** *raised by the 2nd appellant.*

8. *That it was a gross misdirection to invite assessors to cross-examine prosecution and defence witnesses."*

Whereas the 3rd appellant through his learned advocate Mr. Mutalemwa preferred a memorandum of appeal which contained two grounds of complaint which read as follows: -

"1. *That the learned trial Judge erred in law in conducting the trial without the aid of the assessors as they were not given adequate opportunity to put across questions to the prosecution and defence witnesses.*

2. *That the learned trial Judge erred in law in convicting the*

3rd Appellant based on visual identification and recognition as testified by PW5 whose evidence was not watertight, credible and reliable."

Arguing the 1st ground of appeal, Mr. Magongo submitted that the 1st appellant's right to cross examine witnesses which was disregarded by the trial Judge during the trial within trial is recognized under sections 290 of Criminal Procedure Act (the CPA) and section 147(1) of the Evidence Act, Cap. 6 R.E. 2002. He further submitted that it was important for the 1st appellant to be given a chance to cross examine because he was adversely mentioned in the confessional statements. To support his position that failure to give the 1st appellant his right to cross examine witnesses amounted to his denial of a fundamental right, Mr. Magongo referred us to a statement made by the Court of Appeal for Eastern Africa

in **Edward Msenga Vs. R** (1956) E.A.C.A. 553 at page 554 –

> *"...there is no doubt that the appellant was entitled to cross-examine the second accused and that the trial Magistrate was wrong in refusing to allow him to do so. For this purpose, the appellant was undoubtedly an adverse party' within the meaning of section 138 of the Indian Evidence Act, as applied to Tanganyika..."*

Submitting on the 1st appellant's second ground of appeal, Mr. Magongo submitted that having denied this appellant his right to cross examine witnesses during the trial within trial, the trial Judge erred in law when she went ahead to take into account the cautioned statement as against the 1st appellant. Mr. Magongo refers to page 269 line 20 where the trial judge uses the confession to

link the 1st appellant to the crime. He argued further, as a confession of a co-accused, the cautioned statement of the 2nd appellant cannot stand alone to convict the 1st appellant without independent corroboration. This is the spirit of section 33 (2) of the Evidence Act, Cap 6. R.E. 2002.

Mr. Magongo argued ground number three as an alternative ground to the 2nd ground. He contended that without independent corroborating evidence, the trial court erred in law when it used a retracted confession of a co-accused against the 1st appellant. Furthermore, he added that the trial court even failed to warn itself of the dangers of convicting on the retracted confession of a co-accused.

Arguing on the fourth ground of appeal which he described as a general overall ground of appeal, Mr.

Magongo submitted that from the totality of the evidence that is on record, there is no valid evidence that can link the 1st appellant to the offence of murder. He submitted that after disregarding the cautioned statement, there is no other evidence which remains on record that links the 1st appellant to the offence of murder.

In response to the questions put forward by the Court, Mr. Magongo submitted on another reason why the cautioned statement of the 2nd appellant (exhibit P5) which the A/Inspector Makole (PW11) recorded, should be discarded. This is because PW11's statement was not read out during the committal proceedings to give notice to the parties about the content of evidence which PW11 was going to testify on during the trial.

On his part, Mr. Magoiga for the 2nd appellant, submitting on the first and second grounds of the 2nd

appellant's appeal, expressed his grievance with the way the cautioned statement of the 2nd appellant was taken outside the timeframe prescribed by the law. Secondly, he submitted that the cautioned statement was taken after subjecting the 2nd appellant to torture.

Submitting on the cautioned statement being recorded out of the prescribed time, he referred to the evidence of PW2 and PW3, on how the 2nd appellant was arrested on 23/6/2008 whilst in Dar es Salaam. The evidence of these prosecution witnesses show that after his arrest in Dar es Salaam, they travelled with the 2nd appellant and slept in Dodoma on 21/6/2008, arrived in Mwanza on 26/6/2008. They arrived in Musoma on 27/6/2008. Mr. Magoiga also submitted that PW2 and PW3 left the accused at Musoma as they travelled to Rorya and then to Buhemba. Since by 30/6/2008 arrests

of all the accused persons were completed, the learned counsel expressed surprise why it took the police four days up to 4/7/2008 to record the cautioned statement of the 2nd appellant since 30/6/2008 when the last arrest was carried out. Mr. Magoiga submitted that the unexplained delay to record the 2nd appellant's cautioned statement suggests there was torture. The delay was also in violation of the minimum four hours after arrest within which the police can interview suspects under section 50 of the CPA. There was nothing on record to show any extension of time was requested and obtained, he submitted.

Mr. Magoiga submitted on his concern that torture must have been used, otherwise, why should the cautioned statement of the 2nd appellant be recorded first in Dar es Salaam and secondly in Musoma. He referred

us to the evidence of PW2 who on pages 31 – 37 suggests that cautioned statement was taken twice, suggesting that there was torture.

He further blamed the trial judge for failing to see the conflicting evidence of prosecution witnesses, with one saying that cautioned statement was recorded in Dar es Salaam and Musoma but another suggesting that no such statement was recorded in Dar es Salaam. Still contesting the validity of the cautioned statement, Mr. Magoiga faulted the trial Judge for failing to make a decision on the objection raised under section 169 of the CPA contending that the cautioned statement violated the four-hour period. He argued that had the trial Judge considered this objection, she would have expunged the cautioned statement. He cited **Lamuda Mahushi Vs. R** Criminal Appeal No. 239 of 2011 (unreported) page 6 in

support of his submission that we should expunge exhibit P5 for having been taken out of the period prescribed by section 50 of the CPA. He faults the trial Judge for justifying the delay when on page 269, the trial Judge claims that "there is an explanation of that delay" – which is not backed by any evidence on record. He therefore urged us to expunge Exhibit P5.

On the 2nd appellant's grounds number 6 and 7, Mr. Magoiga faulted the trial Judge over two matters. First, that the trial judge failed to direct assessors on importance of the weight of evidence of alibi but only dealt with defence in a fleeting way. Secondly, the dismissive way the trial judge dealt with the defence of alibi. He submitted that the 2nd appellant having tendered his PF3 and bus ticket, the trial judge should not have dismissed the defence of alibi so easily where even the

trial court's own witness, CW1, Stephen Jeremiah Tungu acknowledged the genuineness of the bus ticket.

Submitting on behalf of the 2nd appellant, Byabusha agreed with Mr. Magongo that the evidence of PW11 should be discarded because his statement was not read out during the committal proceedings in compliance with section 289 of the CPA.

On the 2nd appellant's third ground of appeal, Mr. Byabusha faulted the way the 2nd appellant's house was searched. He referred to the evidence of PW3 who stated that the 2nd appellant was left at home when they went to search. The police went to the house of PASKALIA JUMA and what they found were ordinary items. He wondered why the two people who witnessed the search, Paschalia w/o Juma and Christopher s/o Onditi were not called to confirm the search. He submitted that this

evidence cannot link the 2nd appellant to the crime. And the items like Mkoba are ordinary day to day items.

In support of the 4th and 5th grounds of appeal, Mr. Byabusha submitted that, since the 4th accused at the trial did not confess to have committed the murder and the trial court set him free, it was a misdirection on the part of the trial judge to impute the discovery of the gun, shoes and belt Exhibit P4 on the 2nd appellant and to take such evidence as corroborative to the 2nd appellant's cautioned statement. He also submitted that the circumstantial evidence did not irresistibly point to the guilt of the 2nd appellant.

Finally in support of the 8th ground of appeal Mr. Byabusha submitted that it was wrong and gross misdirection to invite the assessors to cross examine the prosecution and defence witnesses. He referred us to the

case of **Kaheme Manyemela @ Manoni v. Republic**, Criminal Appeal No. 212 of 2014 (unreported). For such misdirection and considering other grounds stated earlier on, Mr. Byabusha urged us to allow the 2nd appellant's appeal, quash the conviction and set aside the sentence imposed on him by the trial court and release him from prison as there is no evidence against him.

On his part, arguing in support of the 1st ground of appeal for the 3rd appellant, Mr. Mutalemwa submitted that, according to section 290 of the CPA the witnesses called for the prosecution shall be subject to cross-examination by the accused person or his advocate and to re-examination by the advocate for the prosecution. Whereas, he said, according to section 177 of the Evidence Act, in cases tried with assessors, the assessors may put any questions to the witness, through or by leave

of the court, which the court itself might put and which it considers proper.

However, Mr. Mutalemwa claimed that in the instant case, the record has shown that all the witnesses and accused persons except PW2 were cross-examined by the assessors which was wrong. In support of his argument he cited the case of **Tito Mang'ombe v. Republic**, Criminal Appeal No. 208 of 2014 (unreported) where such an irregularity led the entire proceedings to be nullified and a retrial ordered. But Mr. Mutalemwa urged us not to order retrial because the evidence in this case was weak and if retrial is to be allowed, the prosecution will go and fill-in the gaps.

In his response to this appeal, Mr. Karumuna, the learned Senior State Attorney from the outset indicated to support the appeal filed by the 1st and 3rd appellants.

However, he did not support the 2nd appellant's appeal for the reasons that, **firstly**, the cautioned statement was rightly admitted as per the requirements stated in section 50 of the CPA which was rightly complied with, as the investigation was still going on even after 30-6-2008, and that, the reasons for the delay was explained. He further stated that, taking into account the presence of section 169(2) of the CPA, the trial court rightly admitted the cautioned statement. On the issue of voluntariness Mr. Karumuna submitted that, when the 2nd appellant made his cautioned statement, the trial judge rightly warned herself on the admission of the retracted confession before the 2nd appellant was convicted.

Secondly, on the issue of the doctrine of recent possession relied upon to convict the 2nd appellant, the learned Senior State Attorney submitted that the chain of

custody of the gun was not broken, hence the doctrine of recent possession was rightly invoked.

In his reply to the claim concerning the act of the assessors to have cross examined the prosecution witnesses, the learned Senior State Attorney submitted that under section 177 of the Evidence Act, it was wrong for the assessors to cross examine the prosecution witnesses, as they are only allowed to put questions to the witnesses through or by the leave of the trial judge. He said as in this case, the record shows that the assessors cross examined the prosecution witnesses, the effect is that the entire proceedings are a nullity. For such an irregularity, Mr. Karumuna prayed for the proceeding to be nullified and order a retrial, because there is sufficient evidence to convict the appellant.

In his rejoinder submissions, Mr. Magongo who represented the 1st appellant had nothing much to submit after the learned Senior State Attorney conceded to the 1st appellant's appeal. However, he submitted that as PW11 who was the person who wrote the disputed cautioned statement, his statement was not read at the committal proceedings, that is a fatal irregularity as it has contravened the mandatory requirements of section 289(1) of the CPA. He then reiterated his earlier pray for the 1st appellant's appeal to be allowed, quash the conviction and set aside the sentence and set his client free from prison.

As for the 2nd appellant, Mr. Magoiga directed himself in his rejoinder submission and reiterated on the irregularities found in the admission of the cautioned statement and concluded that the prosecution side has

failed to give substantial reasons for being late to record the 2nd appellant's cautioned statement. He further submitted that, according to section 169(1) of the CPA the court is conferred with absolute discretion not to admit the evidence unless it is satisfied that the admission of such evidence would benefit the public interest without prejudicing the rights and freedom of any person.

All in all, he said that, having found that section 50 and 51 of the CPA were contravened and no cogent reasons advanced, the cautioned statement ought to be expunged. After expunging it, he said, there is no other evidence which connect the 2nd appellant with the offence charged against him. He therefore urged the Court not to order a retrial, because if retrial is to he ordered, the prosecution side will go and fill in the gaps. He also remarked that, this case was poorly investigated and

prosecuted. Finally, he prayed for the appeal to be allowed.

On his part, Mr. Byabusha in his rejoinder submission briefly submitted on the discrepancies found in the evidence of recent possession. He pointed out that, those who were mentioned in the Record of Search of Police Officer to have witnessed the search were not called to testify. He also said, even the village leaders who accompanied PW3 at the place where such items were found were not called to testify. He also remarked that the chain of custody of a gun sent to ballistic expert was broken as there is no sufficient evidence on how that exhibit was handled from the place where it was found, then kept in a police custody and whether it was sealed when it was sent at the ballistic expert's office and how the same was returned. For those reasons, he said, the

doctrine of recent possession cannot be safely invoked. He therefore urged us to allow the 2nd appellant's appeal and that we should not order retrial.

In his rejoinder submission, Mr. Mutalemwa reiterated his earlier submission and asked the Court to consider the basic rights and freedom of any person in reaching to its conclusion.

Having considered the submissions made by both parties in this appeal, we agree with both, the advocates for the 1st and 3rd appellants and the learned Senior State Attorney that the appeal in connection to these two appellants is meritorious and deserves to be allowed. For that reason, even at this juncture we find ourselves constrained to allow the appeal for the 1st and 3rd appellants and hence quash their conviction and set aside

their sentence and consequently order their immediate release from custody unless otherwise lawfully held.

As for the 2nd appellant to whom the learned Senior State Attorney urged us to order retrial against the 2nd appellant because of the defect arising from assessors who cross examined the witnesses. To start with, Section 177 of the Evidence Act provides as follows:

> *"In cases tried with assessors, the assessors may put any questions to the witnesses, through or by leave of the Court, which the Court itself might put and which it considers proper."*

Also, looking at section 146 of the Evidence Act the duty to cross examine a witness is conferred upon the

adverse party and not the assessors. Section 146 of the Evidence Act provides as follows: -

> *"146. (1) The examination of a witness by the party who calls him is called his examination-in-chief.*
>
> *(2) The examination of a witness by the adverse party is called his cross-examination.*
>
> *(3) The examination of a witness, subsequent to the cross-examination, by the party who called him is called his re-examination."*

According to the above cited provisions, we are of the view that the assessors are not expected to cross-examine prosecution witnesses, they are only expected to put questions to them. To bolster that stand, this Court in the case of **Mathayo Mwalimu & Another v.**

Republic, Criminal Appeal No. 179 of 2008 (unreported) stated that:

> *"...the function of cross examination is the exclusive domain of an adverse party to a proceeding."*

In addition to that, this Court in the case of **Abdallah Bazamiye and Others v. Republic**, [1990] TLR 47 this Court stated that:

> *"It is not the duty of assessors to cross-examine or re-examine witnesses or the accused. The assessor's duty is to aid the judge in accordance with section 265 and to do this they may put their questions as provided under section 177 of the Evidence Act. The assessors being part of the*

Court are supposed to be impartial. This renders the whole proceedings a nullity."

However, in essence after we took the trouble of going through the record of appeal, we have found that what has transpired is that even if the trial judge indicated **XXD** which should have meant cross examination made by the assessors, but in essence we have found that, it was mere questions asked by the assessors and not cross-examination. For that reason, we advise the trial courts when recording assessors' opinions, should desist from using such words as examination-in-chief (XD), cross-examination (XXD), re-examination (REXD).

Having established that the assessors in this case did not cross-examine the witnesses but put questions to the witnesses, we do not find any irregularity to that

effect. But looking at the other anomalies pointed out by the advocates for the 2nd appellant concerning the admission of cautioned statement (Exhibit P5) and the evidence concerning the doctrine of recent possession of items such as the gun used to kill the deceased and other items allegedly belonged to PW5, we have come to a conclusion that the case was not proved beyond reasonable doubt on the part of the 2nd appellant too.

To start with the anomalies found in the admission of the cautioned statement, we are in full agreement with Mr. Magongo and Mr. Magoiga that, **firstly**, PW11 as a person who wrote the said cautioned statement allegedly made by the 2nd appellant was not listed as a witness and his statement was not read at the time of committal proceedings, as shown in the record. We are of the view that, this was contrary to the mandatory requirement

under section 289(1) of the Criminal Procedure Act which provides that:

> *"289. (1). No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

Taking into account such an irregularity, that leads us to find PW11's evidence was taken contrary to the dictates of section 289(1) of the Criminal Procedure Act.

Secondly, we agree with Mr. Magoiga that no cogent reasons were adduced to substantiate the delay of recording the 2nd appellant's cautioned statement out of

the prescribed time. Even if the learned Senior State Attorney wanted us to believe that all the time after the 2nd appellant was arrested on 23-6-2008 in Dar es Salaam until he reached Musoma and the preceding days until his statement was recorded on 4-7-2008 was for investigation purposes. But, we are of the view that, the prosecution side ought to have considered the requirements under section 51(1) and (2) of the Criminal Procedure Act which provides as follows:

> *"51.-(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is*

necessary that the person be further interviewed, he may –

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

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

(2). A police officer shall not frivolously or vexatiously extend the basic period available for interviewing a person, but any person in respect of whose interview the basic period is extended pursuant to paragraph

(a) of subsection (1), may petition for damages or compensation against frivolous or vexatious extension of the basic period, the burden of proof of which shall lie upon him."

Time and again, this Court has emphasized the necessity of complying with the provisions of section 50 and 51 of the Criminal Procedure Act and has reached to a conclusion that non-compliance with those provisions of the law has the effect of expunging the cautioned statement recorded out of the prescribed time. For instance, see the decisions of this Court in the case of **Lumuda Mahushi** *(supra)*, **Junta Joseph Komba and Three Others v. Republic**, Criminal Appeal No. 95 of 2006, **Salim Petro Ngalawa v. Republic**, Criminal Appeal No. 85 of 2004 and **Roland Thomas @**

Mwangamba v. Republic, Criminal Appeal No. 308 of 2007 (all unreported) to name a few.

Having found that in the instant case the trial court failed to direct itself properly on the necessity of compliance with the mandatory requirements under section 50 and 51 of the Criminal Procedure Act, we find to have no other option but to expunge the said cautioned statement tendered and admitted as Exhibit P5.

As on the evidence concerning the doctrine of recent possession, we agree with Mr. Byabusha that some important witnesses were not called to testify, such as those who attended the place where important items tendered as exhibits such as the alleged gun used in killing the deceased. But also, the evidence on record does not show how the gun was handled to establish that the chain was not broken in handling such exhibit from the time it

was found, then when it was sent to the police station and therefore at the ballistic expert offices and sent back. The record is silent as to whether such exhibit was sealed before it was sent to the ballistic expert. The evidence is also silent as to how such exhibit was handled while in the hands of police custody. All such discrepancies create doubt as to whether that gun was properly handled by the police. Having established that there are doubts and discrepancies in handling that exhibit, we give such benefit of doubt to the 2nd appellant.

Apart from that, we have also found that, even the items such as the black handbag and an extension cable allegedly owned by PW5 no special marks were described before being tendered in court. This is because such items are very common to be owned by any person in the society, hence the need to prove that they belong to the

complainant who alleged to have own them, by giving a description of specific marks. Failure of that, it cannot be safely established that PW5 was a real owner. For those reasons, we find that the doctrine of recent possession was not correctly invoked by the trial court.

In addition to that, the record shows that the 2nd appellant raised a defence of *alibi* but the learned trial judge rejected it. In our perusal of the record of appeal, we have noted that the trial High Court Judge failed to adequately sum up to assessors in the instant case on the point of the defence of *alibi* raised by the 2nd appellant. We have noted that the requirement to give notice of *alibi* was earlier on complied with by the 2nd appellant. At the hearing, he tendered a bus ticket to establish that he was in Dar es Salaam since 5-5-2008 and has never been at Musoma when the offence of murder was committed on

11-5-2008. The trial court also called its witness CW1 Stephen Jeremiah Tungu who was an employee and General Manager of Mohamed Trans Ltd. as a company which owned buses travelling in different places. CW1 testified and confirmed that the ticket to which the 2nd appellant used to travel to Dar es Salaam was their ticket and confirmed that the 2nd appellant travelled from Sirari to Dar es Salaam. However, we have noted that the trial judge who sat with assessors did not adequately sum up the defence of alibi raised by the 2nd appellant. This Court in the case of **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported) stated as follows:

> *"... As provided under the law, a trial of murder before the High Court must be with the aid of*

assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. ***Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."***

(Emphasis added.).

For that failure on the part of the learned trial judge to direct the assessors properly on that vital point of law,

we are constrained to find that the trial was conducted without the aid of assessors and renders the trial a nullity.

In the light of all the above stated reasons, we hold that, even the 2nd appellant was wrongly convicted, and we therefore, allow his appeal. We therefore quash his conviction for murder, and set aside the sentence. Consequently, we order the 2nd appellant too to be released forthwith from prison unless he is otherwise lawfully held just like we have earlier on ordered for the 1st and 3rd appellant. We also agree with the learned advocates for the 2nd appellant that this is not a fit case to order retrial, because, we have found there is no evidence on record to implicate the 2nd appellant, and if retrial is ordered, we are afraid that, the prosecution side will go and fill in the gaps. (See **Fatehali Manji v. R** [1966] E.A. 343). In the event, in its totality we find this appeal to

have merit and order all the appellants to be released from prison, unless they are lawfully held. It is so ordered.

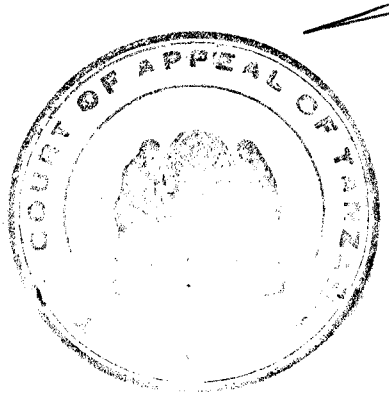
DATED at **MWANZA** this 26th day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



J.R. KAHYOZA
REGISTRAR
COURT OF APPEAL