IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 267 OF 2020

ABEL MATHIAS @GUNZA @ BAHATI MAYANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mambi, J.)

dated the 26th day of September, 2019
in
Criminal Sessions No. 25 of 2016

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JUDGMENT OF THE COURT

8th & 20th February, 2023.

KITUSI, J.A.:

This is a case of murder under sections 196 and 197 of the Penal Code. One Lilangi Mlavege @ Mtafya, a motorcyclist commonly known as *bodaboda* at Itaka area in Mbozi District within Mbeya Region, allegedly died an unnatural death in the hands of the appellant. It was alleged that the appellant executed the murder by hiring the deceased's motorcycle to drive him to a point away from Itaka. The appellant was convicted by the trial court on two grounds, namely that he was found in possession of some items which the deceased allegedly had with him before he met his death. Considering that fact, the trial court invoked the doctrine of recent

possession. Secondly, the trial court was satisfied that the appellant was the last person to be seen with the deceased alive but he was never seen alive again. It therefore invoked the principle of, "last person to be seen with the deceased".

By way of background, there was evidence that the appellant had initially approached Wenslaus Msafiri (PW1) also operating as a *bodaboda,* to take him to Mporo village, but the two could not strike a deal because the appellant failed to afford the fare charged by him. Instead, PW1 who had rode his motorcycle for some distance to get to where the appellant was, demanded that the appellant should pay him Shs. 5,000/= to compensate for the fuel he had used. This caused a disagreement resulting into the two reporting the matter to police station before DC Simon (PW4). Through that complaint, PW4 got to know that the appellant was from Mporo village and this fact will become relevant later. As the appellant was unable to pay that amount at the moment, PW4 retained his mobile phone to act as security for payment later.

It seems that thereafter the appellant sought the same service of transport from Athuman Joseph (PW2). PW2 was not only an operator of *bodaboda* like PW1, but was a leader of the association or group of *bodaboda* riders at Itaka centre. The appellant and PW2 did not reach an agreement

too because he also charged too high a fare for the appellant to afford. That is when, it is alleged, the appellant approached the deceased, with whom a deal was struck. It is in PW2's testimony that he saw the appellant, whom he knew before, leave with the deceased on the latter's motorcycle. That was on 27/6/2014.

PW2 never saw the deceased alive again because, in the night of the same date he received a call from the Ward Executive Officer (WEO) of Bara Ward, informing him that Lilangi had been found dead. PW2 and members of the deceased's family set out in search of his body and confirmed the fact when they found it.

It was PW2 who reported the death to PW4 and told him that the deceased had last left the *bodaboda* center carrying a passenger of Mporo village whom he described as tall, lean and dark. At the mention of Mporo village, PW4 recalled that the appellant and PW1 had earlier been to his office on account of a complaint of the former failing to pay for a ride to Mporo Village. This made PW4's instincts suspect the appellant so he went to the brother of the appellant one Raphael Mayani (PW3) to enlist his assistance in tracing him.

Connected to the above, PW3 testified that he received a call from PW4 demanding to see Abel, the appellant. While PW3 was with the police, the appellant allegedly called him through a mobile phone whose number was not registered in his name. According to PW3, the appellant informed him that he had a motorcycle which he was offering for sale and it was agreed that PW3 would find a buyer and meet the appellant at the residence of one Gilbert Mwanso in Chunya District. As agreed, PW3 turned up at Gilbert Mwanso's place but, unknown to the appellant, he was accompanied by police officers who arrested him.

The prosecution case is that the appellant was found in possession of two items belonging to the deceased, that is, the motorcycle and mobile phone, and these were relied upon by the learned trial Judge to invoke the doctrine of recent possession. However, before us, it has been argued by the appellant's counsel and conceded by the respondent's State Attorney, that the doctrine was wrongly applied so we shall not consider it.

In his brief defence, the appellant who was represented by learned Counsel denied killing the deceased. He confirmed the prosecution's account that he was arrested at Gilbert's house who happens to be a brother to him and to PW3. About the motorcycle, the appellant stated that the police are the ones who led him to a place where the same had been hidden,

presumably by somebody else. He cried foul play by PW1 and PW3, his own brother, alleging that their ill inclination was prompted by a pending land dispute between him and PW3.

To begin with, we have no doubt that the deceased met an unnatural death because the report of Post-Mortem Examination which was introduced into evidence without any objection, cites the cause of death as *"severe hemorrhage secondary to multiple deep cut wounds".* The learned trial Judge was satisfied that the evidence presented by the prosecution proved that the appellant was the perpetrator of the murder based on, as we hinted earlier, the doctrine of recent possession and that of the last person to be seen with the deceased. Incidentally, those were also the unanimous views of the gentlemen and lady assessors who sat with the learned Judge. The appellant was consequently convicted with the murder and sentenced to the mandatory death sentence.

He has preferred this appeal. Mr. Pacience Yonatas Maumba, learned advocate who had represented the appellant during the trial, has continued to act for him before us. He abandoned the grounds of appeal which the appellant had drawn from prison and argued two substantive grounds drawn by him and one additional ground also raised by him during the hearing. Ms. Mwajabu Tengeneza, learned Senior State Attorney and Ms. Prosista Paul,

learned State Attorney represented the respondent Republic and supported the conviction and sentence.

The grounds of appeal are:

1. *That the High court Judge erred both in law and in fact for holding that the Appellant is guilty and convicted him of murder while the evidence adduced in court by the prosecution was not strong enough to justify the conviction and sentence imposed on the appellant.*
2. *That the trial Judge's finding that circumstantial evidence has proved that, the appellant was the last person seen with the deceased was erroneous because it is not supported by any evidence on record.*

Additional ground:

The learned High Court Judge erred in relying on the motorcycle, mobile phone and knife which were tendered in exhibit in contravention of the law because they had not been listed during the committal proceedings.

Mr. Maumba had earlier presented written submissions in support of the first two grounds, and he simply adopted them and proceeded to address us orally on the additional ground, that the requirement to list down exhibits

during committal proceedings is provided under section 246(2) of the Criminal Procedure Act (CPA). Ms. Paul who argued the appeal on behalf of the respondent conceded to this argument and cited our decision in the case of **Remina Omary Abdul v. Republic**, Criminal Appeal No. 189 of 2020 (unreported), in support. It is common ground that during committal proceedings, the prosecution has a duty to list down the exhibits which they intend to use during the trial. That procedure was not observed and since, in our view that is a settled rule and an aspect of fair trial, its violation is fatal.

For the above reason, both Ms. Paul and Mr. Maumba have moved the Court to expunge Exhibit P3 (the mobile phone), Exhibit P4 (the knife) and Exhibit P5 (the motorcycle), and we do expunge those exhibits because they were wrongly introduced into evidence. This means that the additional ground of appeal has merit and consequently the doctrine of recent possession which was mounted on those three exhibits has now no legs to stand on. It crumbles, as we had earlier intimated.

Mr. Maumba has submitted that with the three exhibits as well as the doctrine of recent possession gone, there is no other evidence on which a conviction of the appellant could be grounded. On the other hand, Ms. Paul has maintained that there is evidence to prove that the appellant was the

last person to be seen with the deceased, and in the absence of an explanation from the appellant, he is presumed to be the one who killed him.

In his written submissions, Mr. Maumba raised about four points to support his contention that after the collapse of the doctrine of recent possession, there is no evidence left to ground a conviction on.

The first argument is that PW3 and PW4 contradicted each other as to which one of them moved to meet the other for a discussion on the appellant's whereabouts pointing out that PW4 said they met at PW3's home but PW3 said they met at police station. Ms. Paul submitted in response, that the mode of communication between these witnesses and the alleged contradiction in that respect is not relevant and does not go to the root of the case.

We have pondered over the essence of this complaint but we have seen no contradiction warranting a finding that PW3 and PW4 are untruthful. For one, PW3 stated:-

> *"On 28/06/2014, I was phoned by Afande Simon. The police told me they wanted to see Abel Mathias (the accused)".*

On the other hand, PW4 stated:-

"I went to the brother of Abel known as Raphael Mayani at Iporoto village; to see if Abel was there".

From the two excerpts, we see no contradictions in the evidence of PW3 and PW4. But then, the evidence of PW3 and PW4 is, in our view, relevant only as regards tracing the appellant's whereabouts. While PW3 stated that the appellant told him to find him at Gilbert's place, the appellant's own evidence confirms that he was indeed found at that residence. Therefore, the venue where the discussion between PW3 and PW4 was held prior to going to Gilbert's residence becomes irrelevant, in our view. The law is settled that only contradictions going to the root of the case will be seriously considered as affecting the decision. [See **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported)]. This ground lacks merit and we dismiss it.

The second argument is the alleged bias on the part of the learned trial Judge which, it is argued, could be inferred from some of his remarks in the judgment. Mr. Maumba has cited an example of the Judge's remark that the appellant's failure to attend the burial of the deceased suggested his guilt. Ms. Paul dismissed this complaint as baseless because, she argued, the learned Judge made those observations in the course of evaluating evidence.

We agree that some of the remarks made by the learned Judge may have been unfortunate though made in the course of his evaluation of the evidence. We reiterate what we said previously, that Judges and magistrates should avoid making remarks that may tend to show their inclination in a case. See the case of **Alex John v. Republic**, Criminal Appeal No. 32 of 2003 and; **Kabula Luhende v. Republic,** Criminal Appeal No.281 of 2004 (both unreported). In the first case the Court said, and we emphasize: -

> *"...fair hearing according to the law envisages that both parties to a case be given opportunity of presenting their respective cases without let or hindrance from the beginning to the end...**a fair trial also envisages that the court or tribunal hearing the parties' case should be fair and impartial without it showing any degree of bias against any of the parties".*** (Emphasis ours).

However, since we are sitting on first appeal and doing a re-hearing, we will come up with our own findings. [**Oscar Lwela v. Republic,** Criminal Appeal No. 49 of 2013 (unreported)]. We shall, in the end, decide the appeal not on the basis of extraneous matters or bias, but on the evidence on record as we shall appreciate it.

The other point is a complaint on PW2's testimony which has two limbs. First it is argued that PW2 is not a credible witness so his testimony that he saw the appellant with the deceased, should not be believed. It is argued that if it is true that PW2 saw the appellant leave the *bodaboda* centre with the decease, why did he not immediately name him to PW4? The other argument is; why did the trial court rule out the possibility that after the appellant had reached his destination and parted with the deceased, the latter might have picked another passenger who may have caused his death subsequently?

Submitting on the first limb, Mr. Maumba has argued that PW2 was not a credible witness because had he been credible, the trial Judge would have made written notes to that effect as per section 212 of the CPA. He has also submitted that if PW2 saw the appellant and the deceased for the last time, why did he not mention the appellant's name to PW4?

Against those arguments, Ms. Paul responded that the trial Judge's finding on credibility of a witness is usually binding on an appeal court and she cited the case of **Bakari Said Bukuru v. Republic**, Criminal Appeal No. 107 of 2012 (unreported). She invited the Court to re-evaluate the evidence on the very principle that we have such powers. As regards the

naming of the appellant, Ms. Paul submitted that PW2 did not know his name, but described the appellant.

We agree that section 212 of the CPA requires, where necessary, a trial magistrate or judge to enter written notes of his observations on the demeanour of a witness. See **Michael Joseph v. Republic** Criminal Appeal No. 506 of 2016 (unreported). However, that is only in relation to demeanour, though credibility of a witness may be determined otherwise than by assessing his demenour. Upon our own re-evaluation, we agree with the learned trial Judge that PW2 was consistent, coherent and when assessed in relation to testimonies of other witnesses, he was a credible witness. With respect, we agree with Ms. Paul that PW2 was categorical that he did not know the appellant's name but he gave his description. In our considered view, the requirement for a witness to name a suspect at the earliest opportunity [**Marwa Wangiti Mwita & Another v. Republic**, [2000] TLR 4], does not carry a literal meaning so as to suggest that even if a witness does not know the name of the suspect, he should provide it. Often times description of a suspect that would lead to his arrest has been taken to be proof of the witness's credibility. The failure to name or describe a suspect may be validly raised where there is an unexplained delay in

arresting that particular suspect. In this case there is no such delay, therefore the complaint is misplaced and we dismiss it.

Having found PW2 credible, we conclude as did the learned trial Judge, that PW2 last saw the deceased alive riding off with the appellant.

Mr. Maumba has also suggested a possibility that the deceased might have met his death after he had left the appellant's destination. He submitted that in considering circumstantial evidence, as is the case here, we should be satisfied that the facts point to the appellant's guilt leaving no room for any other possibility. The learned counsel cited **Abdul Muganyizi v. Republic** [1980] TLR 263 and **Shaban Mpunzu @ Elisha Mpunzu v. Republic**, Criminal Appeal No. 12 of 2002 (unreported) to support his submissions. Ms. Paul submitted that under the principle of last person to be seen with the deceased, the appellant is the one to offer such explanation.

It is true that for a conviction on circumstantial evidence to stand, it should not be capable of an interpretation other than the accused's guilt. However, the specie of circumstantial evidence we are dealing with here, is that of the last person to be seen with the deceased, which as we stated in **Miraji Idd Waziri @ Simana & Another v. Republic** Criminal Appeal No. 14 of 2018 (unreported) :-

> *"simply means that, where there is evidence that an accused was the last person to be seen with the deceased alive then there is a presumption that he is the killer unless he offers a plausible explanation to the contrary".*

See also **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 cited by Ms. Paul and **Akili Chaniva v. Republic**, Criminal Appeal No. 156 of 2017 (both unreported), which was also relied upon by the learned trial Judge in finding the appellant guilty.

In our considered view, the plausible explanation envisaged in the above principle should be in the suspect's evidence so as to counter the evidence presented by the prosecution. With respect, that explanation cannot be in a form of submissions as raised by Mr. Maumba, because submissions are not evidence. [See **Republic Denatus Dominie @ Ishengoma & 6 others**, Criminal Appeal No. 262 of 2018 (unreported)].

In this case the appellant offered no explanation in his testimony, let alone a plausible one. He simply denied involvement and maintained that he was never at the *bodaboda* centre where PW1, PW2 and PW3 operated from, and further he accused PW1 and PW3 of framing up the case for their own ill motive. In his written arguments, Mr. Maumba invited us to be suspicious

of PW3's testimony arguing that, he being a brother to the appellant, he could not be expected to testify against him unless he had an ill motive. Ms. Paul submitted that no law prohibits a competent person to testify against his brother.

With respect, we hold views quite contrary to Mr. Maumba's submission on this point. PW3's testimony against his own brother is indeed rare as submitted by the learned counsel, but instead of that being a reason for suspecting him, it makes such evidence to be most probably truthful. We would have approached PW3's testimony more cautiously if it was calculated at exonerating the appellant because in such circumstances such witness is suspected to have an interest to serve. The Court faced such a scenario in the case of **Meshack Redson Mwasimba @ Mwazembe v. D.P.P,** Criminal Appeal No. 468 of 2017 (unreported) where there was an argument that evidence of two witnesses who had testified in favour of an accused should be discounted because being relatives, they had an interest to serve. Here the reverse is the case because PW3 is so candid as to testify against his own brother. But we also note that the alleged conflict over a parcel of land between the appellant and PW3 was not put to him when he testified, making this story an afterthought. It cannot be said that the appellant who was represented by counsel did not know that he had the duty to make the

theme of his defence known, an omission that made the Court dismiss such defence in the case of **John Madata v. Republic,** Criminal Appeal No. 453 of 2017 (unreported). Therefore, we take the alleged conflict over a piece of land to be an afterthought and reject it.

Considering the above, we dismiss the argument that PW3 was ill motivated, instead we pass him for a credible witness. Corollary to that, the finding of the appellant at Gilbert's residence does not appear to us to have been a sheer coincidence. PW3 said that through communication with the appellant he came to learn that he was at Gilbert's place, a fact the appellant did not dispute. This piece of evidence which the appellant himself admits as true was supplied by PW3, and confirms our view of him as a credible witness.

In the end, the evidence of the appellant purporting to explain away the principle of last person to be seen, is not actually an explanation but a lame attempt to cast stones at PW3. It is our conclusion that the appellant was the last person to be seen with the deceased and he has not made a plausible explanation exonerating him from the presumption that he is the one who killed him. In view of the position we have taken, the complaint that the trial Judge's decision was partly influenced by extraneous matters, cannot stand. We dismiss that complaint.

For the reasons discussed, we find no merit in any of the grounds of appeal. We therefore dismiss the entire appeal.

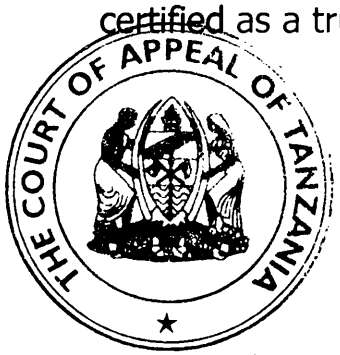
DATED at **MBEYA** this 17th day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2023 in the presence of Mr. Pacience Y. Maumba, learned counsel for the Appellant and Mr. Davice H. Msanga, 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