

**IN THE COURT OF APPEAL OF TANZANIA  
AT MBEYA**

**(CORAM) LUBUVA, J.A., MBAROUK, J.A. And OTHMAN, J.A.)**

**CRIMINAL APPEAL NO.139 OF 2006**

|                                                                                           |   |                         |
|-------------------------------------------------------------------------------------------|---|-------------------------|
| <b>1. EVARIST MARO @ MANGI<br/>2. ABAS ABAS @ MATENGA<br/>3. MOHAMED SOKO @ MUDI SOKO</b> | } | <b>..... APPELLANTS</b> |
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**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High  
Court of Tanzania at Songea )**

**(Kaganda, J.)**

**dated the 2<sup>nd</sup> day of December, 2005  
in  
Criminal Sessions Case No. 8 of 2002**

**JUDGMENT OF THE COURT**

**9 & 14 July 2008**

**OTHMAN, J.A.:**

Before the High Court at Songea (Kaganda, J.) the appellants, Evarist Maro @ Mangi (1<sup>st</sup> appellant), Abas Abas @ Mtenga (2<sup>nd</sup> appellant), and Mohamedi Soko @ Mudi Soko (3<sup>rd</sup> appellant) were jointly charged with, tried and convicted of the murder of Vicent Barthazar Mapunda and Joseph Ngonyani that took place on 6.01.2000. Dissatisfied with the decision they have preferred this appeal.

At the trial court they were respectively the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> accused. The 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused were acquitted .

In this appeal, learned Counsel Mr. Mkumbe advocates for the 1<sup>st</sup> and 2<sup>nd</sup> appellants and Mr. Mushokorwa for the 3<sup>rd</sup> appellant. The respondent Republic, which did not support the appellants conviction was represented by Mr. Luoga, learned State Attorney.

The facts giving rise to the case were that on 6.1.2000 at 4 a.m. assailants murdered the deceased at PW4's (Flavin Haule) house and stole his properties. Following a search immediately mounted by the police, 114 towels (Exh. P7), 20 pillow cases (Exh.8) and 2 mattresses (Exh.11), all brand new, were recovered at the 1<sup>st</sup> appellant's room at Bombambili. He was not present. The 2<sup>nd</sup> appellant was inside the room dead drunk. PW5 (Aziz Kibwana) a taxi driver testified that on 6.01.2000, at 4 a.m. he was hired by the 1<sup>st</sup> appellant to transport goods from Matalawe to his house. That as they drove, at Mjimwema, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants appeared and the 1<sup>st</sup> appellant asked him to stop. He identified them by the car lights. They were not strangers. At Matalawe, he remained with the 3<sup>rd</sup> appellant who stammered when he spoke. The 1<sup>st</sup> and 2<sup>nd</sup>

appellants got out and returned carrying two boxes and two mattresses, which they carried to the 1<sup>st</sup> appellant's house.

In an identification parade conducted by PW6 (Insp. Masheli) on 13.01.2000, PW5 identified the 3<sup>rd</sup> appellant by face and the way he stammered when uttering the words "sisi sote twende shule". The 3<sup>rd</sup> appellant's extra judicial statement (Exh. P16) was received in evidence.

The 1<sup>st</sup> and 2<sup>nd</sup> appellants were arrested on 6.1.2000 and the 3<sup>rd</sup> appellant on 12.01.2000. Each denied involvement. The 1<sup>st</sup> appellant claimed that the properties, bought in Dar es Salaam were his. He explained that the 2<sup>nd</sup> appellant had come to him on 6.1.2000 to demand repayment of a Tshs. 40,000/= loan. That he left him there as he was sick and went to Mao Village to find the money. He denied having hired PW5. The 2<sup>nd</sup> appellant testified that he knew the other appellants. He gave the same account as the 1<sup>st</sup> appellant for being in his room. He admitted that he knew PW5 before. The 3<sup>rd</sup> appellant denied having been in the 1<sup>st</sup> and 2<sup>nd</sup> appellants company with PW5. He retracted the extra judicial

statement (Exh. P.16). He disputed his identification by PW5 at the identification parade.

The two assessors were unanimous that the prosecution had failed to prove who among the seven accused killed the deceased and stole the properties. Furthermore, the first assessor opined that PW4 had not provided sufficient evidence to identify the properties.

The learned trial judge, in the judgment delivered on 2.12.2005 considered that the whole case depended on circumstantial evidence and the doctrine of recent possession. She held that the identification of the stolen properties by PW4 was satisfactory; PW5's identification of the 3<sup>rd</sup> appellant correct, and that reliance could be placed on his extra judicial statement (Exh. P.16). She also invoked section 23 of the Penal Code, Cap 16 RE 2002 to convict the appellants.

We now deal with the appeal.

Three grounds of appeal, which in our considered view are decisive, emerge out of the appellants memorandum of appeals.

That is:

- (1) The learned judge erred to admit and rely on the 3<sup>rd</sup> appellant's extra judicial statement (Exh. P16).
- (2) The learned judge erred in law and fact in basing the appellants conviction on the alleged stolen properties (Exh. P7, P8 and P11 on which there was insufficient evidence that they were PW4's or had been stolen at his house.
- (3) The learned judge erred in relying on PW5's identification of the 3<sup>rd</sup> appellant.

On ground one, Mr. Mkumbe submitted that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were wrongly convicted on the 3<sup>rd</sup> appellant's retracted confessional extra judicial statement (Exh. P16) and that of a co-accused which needed corroboration as required under section 33 (2) of the Evidence Act, Cap 6 RE 2002. It could not, he urged, be used against them.

On his part, Mr. Mushokorwa submitted that the learned judge had erred in not holding a trial within a trial when the defence objected to admission of the statement. That in the absence of a trial within a trial, the statement did not stand the test of voluntariness. The learned trial judge should have considered the defence objection. Namely, non compliance by PW13, a justice of the peace, with the Chief Justice's Instructions to Justices of the Peace in the statement's recording and the torture the 3<sup>rd</sup> appellant claimed to have been inflicted on him by the police.

In reply, Mr. Luoga submitted that by not conducting a trial within a trial, which it was supposed to, the trial court was left in the dark whether the extra judicial statement was voluntary. That in the circumstances the benefit of doubt should be accorded to the 3<sup>rd</sup> appellant who claimed torture.

This ground centers on the admission and reliance on the 3<sup>rd</sup> appellant's extra judicial statement (Exh. P16). It is on record that in the presence of the assessors, PW13 (F.A. Fussi) sought to tender that statement. Learned counsel objected principally for procedural non-compliance with the Chief Justice's Instructions, which *inter alia*

includes 'A Guide for Justices of the Peace'. They suggested that a trial within a trial be conducted to determine whether or not the confession therein by the 3<sup>rd</sup> appellant was made voluntarily or not. The Republic submitted that the confession was admissible as there was no torture, threats nor promises made as the 3<sup>rd</sup> appellant was aware that he was before a justice of the peace which made him free to offer it voluntarily. As an alternative to its immediate admission it also proposed to prove its voluntariness in a trial within a trial.

The High Court in its ruling stated:

"The learned Attorney General suggested that a trial within a trial be conducted with a purpose of clearing a doubt whether the confession was voluntary made. In reply, the learned counsel Mr. Mushokorwa upheld the suggestion. I am not convinced with that suggestion because the defence counsel's objection was the legality of the document due to failure by PW13 to follow the laid down procedures.

.....

.....

Objection and alternative suggestions are overruled. The confession statement admitted and marked Exhibit P.16."

In its judgment, after considering whether or not PW13 complied with the Chief Justices guidelines and the torture the 3<sup>rd</sup> appellant claimed to have suffered in the hands of the police, the trial court concluded that he was a free person at the time of his confession. It relied on it.

Having closely considered the record, we are of the considered view, with respect, that the learned trial judge seriously misdirected herself on the matter. **One**, on the objection taken, which went to the voluntariness of the extra judicial statement, the grounds of attack being procedural irregularities, the High Court should have conducted a trial within a trial. It is well established that the practice applicable at the High Court in matters of voluntariness of a confession are determined in a trial within a trial and it is at that stage that the application of section 29 of the Evidence Act, Cap 6 R.E. 2002 is considered (See, **Richard Lubilo and Mohamed Seleman v. R**, Criminal Appeal No. 10 of 1995 (CAT) (unreported);

**Emmanuel Joseph @ Gigi Marwa Mwita v. R**, Criminal Appeal No. 57 of 2002 (CAT) (unreported).

In **Shija Luyeko v.R**, Criminal Appeal No. 43 of 1999 (CAT) (unreported) the Court in dealing with a cautioned statement stated:

**"It is trite law that for a cautioned statement to be admitted in evidence, it must be proved affirmatively by the prosecution that it was voluntarily made. If the Court is satisfied that the statement was made voluntarily and was recorded correctly then it should proceed to admit it in evidence, but if it is not so satisfied, then it should accordingly hold it inadmissible".**

(Emphasis added)

In our considered opinion the same position of the law is applicable to a controverted extra judicial statement such as Exh. P.16. In the circumstances appearing, the admissibility test should have been determined in a trial within a trial, and neither at the plenary during the trial or in the judgment as was done. We agree with both Mr. Mushokorwa and Mr. Luoga that with the omission to conduct a trial

within a trial the statement did not stand the required test of voluntariness and that the benefit of doubt arising should be accorded to the 3<sup>rd</sup> appellant who claimed to have been tortured into offering it involuntarily.

**Two**, in examining the record, with respect, we noticed another misdirection that was not mentioned by learned counsel. The existence of the controverted extra judicial statement and the defence objection to it were made known to the assessors. They were present. The established practice is that the existence of a controverted extra judicial statement should not be known to the assessors until it has been ruled admissible (**Ezara Kyabanamazi and Others v R** [1962] E.A. 309 at 312; **Kinyori s/o Kirudito v R** [1956] 23 E.A.C.A. 480; **George Michael Rajabu and Another v R**, Criminal Appeal No. 120 of 1994 (CAT) (unreported)).

In **Saidi Mohamed Mrimi v R**, Criminal Appeal No. 12 of 1991 (CAT) (unreported) the Court adopted the settled procedure in **Karuditu and Kyabanamazi** cases (*supra*) and had this to state:

**"the assessors should not have even an inkling that the accused person had made a statement until it has been ruled admissible. To that end, there should be prior understanding between the defence and the prosecution so that when the point is reached for a trial within a trial "the defence should mention to the court that a point of law arises and submit that the assessors be asked to retire." (Emphasis added)**

In this case, objection was taken by the defence on the admission of the extra judicial statement at the preliminary hearing on 11.02.2003. With respect, the basis was already laid for the trial court to proceed as was required by established procedure.

Another point, Mr. Mushokorwa firmly submitted that as the Chief Justice's Instructions as contained in the 'Guidelines for Justices of the Peace' was issued under the Magistrates' Courts Act and had the force of law, procedural non-compliance in the recording of the extra judicial statement rendered it fatal.

In **Hatibu Ghandi v R** (1996) TLR 12 the Court which had occasion to consider the matter in detail held:

"In deciding whether a magistrate's failure to comply fully with the Chief justice's Instructions renders extra judicial statements inadmissible, **the question is whether apart from any such non-compliances, other circumstances suggest that the statement were made involuntarily.**"

(Emphasis added)

In other words as stated by the court in **Shija Luyeko's** case, (*supra*) the correct recording of the statement **and** other attending circumstances ought to be taken into account in determining its voluntariness or otherwise. All the above considered, the extra judicial statement (Exh. P16) was erroneously admitted, and acted upon without testing its voluntariness. Ground 1 has merit.

On ground two, both Mr. Mkumbe and Mr. Mushokorwa submitted that there was no conclusive proof that the seized properties (Exhibits P7, P8 and P11) were PW4's or had been stolen from his house. The property identification, they urged, was not

free from deficiency. Relying on **Ally Bakari and Pili Bakari v R** (1992) T.L.R. 10 they submitted that in order to rely on the doctrine of recent possession PW4 must have established with certainty that those properties were his. He did not. That he even admitted that there were no specific marks on them, that they were common items available in the streets, and that he was not the only person who had them. Learned counsel pointed out that PW4 had produced no receipt. Furthermore, that PW5's evidence had not established that the properties he carried came from PW4's house. Mr. Mkumbe made an additional complaint that the trial court erroneously rejected the admission of the 1<sup>st</sup> appellant's receipt for those properties. That in the circumstances the true owner could not be established.

In response, Mr. Luoga readily agreed that the identification of the properties as those of PW4 was deficient. The 3<sup>rd</sup> appellant, he asserted, was not found with any.

This ground is a challenge on the identification of the seized properties as those of PW4. The learned judge after holding that PW4 had satisfactorily identified them as his, invoked, *inter alia*, the doctrine of recent possession in convicting the appellants.

On the evidence, 114 towels (Exh. P7), 20 pillow cases (Exh. P8) and 2 mattresses (Exh. P11), all brand new, were seized by the police in the 1<sup>st</sup> appellant's room (PW1, PW9, PW10). They had no special marks and were the kind ordinarily sold at shops (PW1, PW3). The 1<sup>st</sup> appellant claimed that that those were his properties. He had bought them in Dar es Salaam for business. PW4 too claimed they were his.

The question for determination is whether or not it was established with certainty that the properties were PW4's for the doctrine of recent possession encapsulated in section 122 of the Evidence Act, Cap 6 R.E. 2002 to be invoked?

Upon a close examination of the whole evidence, we are of the considered view that it could not have been conclusively established that the properties were PW4's. According to PW3 (Sgt. Mzava) a rival ownership claim was made on those properties on the 1<sup>st</sup> appellant's arrest. PW4 testified that the towels and pillow cases were respectively, made in Iran and China. That he identified them by comparison with the items left behind at the scene of crime. He

also identified the towels by their sizes and the mattresses by the red colour and stripes of their covering cloth. He acknowledged that none had any special marks. The boxes had no labels. When cross examined, PW1, (Akili Mwapwa) the officer-incharge of District Criminal Investigations responded:

"The mattresses and pillow cases plus towels are ordinary clothes which can be found in the streets".

When cross examined PW3 (Sgt. Mzava) replied:

"The goods are also being sold in the shops".

With regard to the production of a receipt by PW4, cross-examined,

**PW3** stated:

**"The owner showed receipts for the mattresses".** (Emphasis added)

However, this is what **PW4** testified:

**"I did not give the police any receipts".**

(Emphasis added)

His evidence was that the inventory of all the goods was stolen together with the properties.

Taking into account that rival claims over the properties between PW4 and the 1<sup>st</sup> appellant were immediately brought to the attention of the police on 6.1.2000; the types of goods being those ordinarily available at shops; that they did not bear any special marks or labels as being those of PW4 and the contradiction between PW3 and PW4 as to whether the later had a receipt for them, which goes to the root of the matter, with respect, we are of the considered view that it could not have been established with certainty as required by **Ally Bakari's** case (*supra*) that the properties were PW4's. In the circumstances, the doctrine of recent possession could not have been validly invoked. By a comparison between those goods (Exh. P7, P8, P11) with those found at the crime scene, which were not tendered in evidence, and the manner PW4 said he identified them certainly could not be assured. That identification had doubts. Ground 2 is also upheld.

Ground three concerns PW5's identification of the 3<sup>rd</sup> appellant. Mr. Mushokorwa faulted the trial judge in just believing PW5's weak identification, susceptible to mistaken identity. The court, he said, did not direct itself on the dangers of convicting on visual identification evidence. He submitted that it was night time; PW5 gave no description of the intensity of the car lights; whether they were continuously on or not and for how long; the distance between the persons he claimed to have identified and himself; whether those he saw appeared in front of the car or on the sides and whether or not he spoke to the 3<sup>rd</sup> appellant while both were in or outside the car.

Mr. Mushokorwa also submitted that the identification parade held on 13.01.2000 had irregularities and should not have been relied upon. He emphasized that PW5's alleged identification of the 3<sup>rd</sup> appellant by the way he stammered when uttering the words "sisi sote twende shule" was unreliable as he did not record the same in his statement to the police. That as the 3<sup>rd</sup> appellant actually stammers, there ought to have been paraded other persons who also stammered. There was, he added, no age or dress similarity between the persons who were on the parade.

Mr. Luoga agreed that the surrounding circumstances did not show that the identification conditions were favourable to the 3<sup>rd</sup> appellant's correct identification.

Having closely examined the evidence and account taken of the submissions, with respect, we are of the considered view that PW5's identification of the 3<sup>rd</sup> appellant by the car lights and his manner of speech at Mji Mwema and Matalawe cannot be said to have been watertight. It was around 4 a.m., night time. In court, PW5 was unable to describe the type of dress any of the persons he carried in his car wore. There were a lot of unknown identification factors to lend credence to correct and unmistakable identification. PW5 made no mention whether or not the persons he saw emerged from in front of the car or on the sides; the proximity or distance involved between them; whether or not the car lights beamed continuously or not, and whether or not he spoke to the 3<sup>rd</sup> appellant inside or outside the car and if at all the lights inside were lit.

With these as unfavourable conditions, the requirement for reliance on visual identification set in **Waziri Amani v R** (1980) TLR

250, **R.v. Eria Sebwato** (1960) EA 174, **Abdalla Bin Wendo and Another v R** (1953) 20 EA 166, **Igola Igona and Noni @ Dindai Mabina v R**, Criminal Appeal No. 34 of 2001 (CAT) (unreported) can hardly be said to have been met. Serious doubt is raised on PW5's alleged identification at Matalawe.

Next is the identification parade whose register was admitted as (Exh.P16). The question is whether or not it was properly conducted as *per* the required procedure and the 3<sup>rd</sup> appellant was correctly identified (For the procedure, see **R v. Mwango s/o Manaa** (1936) E.A.C.A. 29). Conducted on 13.01.2000 it was PW4, PW6 and PW7's evidence that the former identified the 3<sup>rd</sup> appellant when asked to repeat the phrase "sisi sote twende shuleni".

Voice identification is inherently unreliable (**James Chilonji v R**, Criminal No. 101 of 2003 (CAT) (unreported)). The question we have anxiously asked ourselves is whether PW5 would have been able to correctly identify the 3<sup>rd</sup> appellant if all the nine people who lined up in the parade also stammered as he could not have correctly and unmistakably have identified him earlier by the car lights at Matalawe. In our considered previous failure by PW5 to have

positive visual identification of the 3<sup>rd</sup> appellant would make it difficult for PW5 to identify the 3<sup>rd</sup> appellant only by the stammering of his voice. PW5 never said he was familiar with it. With respect, all considered we agree with the learned counsel that PW5's identification was deficient in many respects and was one susceptible to mistaken identification. Ground three also succeeds.

Another point. On an examination of the record we noticed a misdirection in the manner the Chief Government Chemist's report was acted upon by the learned trial judge. At the preliminary hearing, the respondent Republic sought to tender it as it contained the results of blood tests conducted on the deceased blood stained clothes and blood samples, the 1<sup>st</sup> appellant's blood stained T-shirt and the 2<sup>nd</sup> appellant's Jacket and trousers (PW1, PW2, PW12). The defence objected.

It is not on record that the Chief Government Chemist's report was tendered as evidence. It is not listed in the exhibits list in the record of appeal. The trial proceedings (p.107) reveal that the learned trial judge gave a detailed account of its contents to the assessors while summing up the case for their opinion. Both

assessors opined that the Government Chemist failed to relate and show whether the blood stains found on the appellants clothes were of the same group with the deceased's blood group. Reference to the report was also made in the judgment. With respect, without the Chief Government Chemist's report having been properly admitted into evidence it was a misdirection for the trial court to have acted on it in any way and to have regard to its contents. That evidence was simply was not before the court. However, it would appear that it did not serve the prosecution's case and no prejudice was occasioned to the appellants.

On the whole case, there is no doubt that the circumstances are such to raise grave suspicion against the appellants. However, it is trite law that suspicion alone however strong it may be is not sufficient to sustain conviction in a criminal case where the standard of proof is that beyond all reasonable doubt. As a matter of fact, immediately PW1 learned of the crime on 6.1.2000 he ordered policemen to arrest the appellants who were among a list of common and hard core criminals he had prepared.

Accordingly, for the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentences. The appellants are to be released forthwith from custody unless otherwise lawfully held.

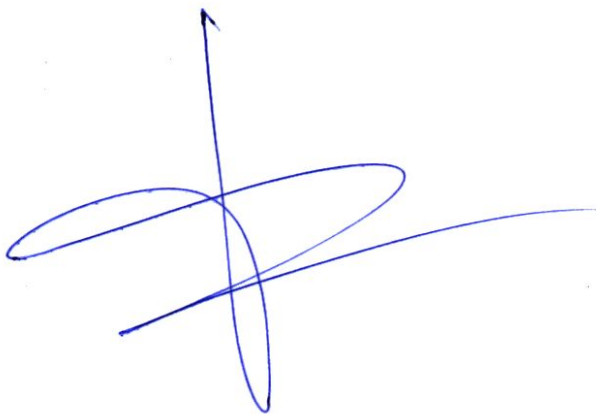
DATED at MBEYA this 14<sup>th</sup> day of July, 2008.

D.Z. LUBUVA  
**JUSTICE OF APPEAL**

M.S. MBAROUK  
**JUSTICE OF APPEAL**

M.C. OTHMAN  
**JUSTICE OF APPEAL**

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



**DEPUTY REGISTRAR**