

- A money which was used to purchase it was stolen money did not make that property unlawfully acquired in terms of the subsection. No contravention of the subsection takes place if the subject matter of the charge was not property "feloniously stolen, taken, extorted, obtained or disposed of."

In the eye of the law there was no charge preferred against the appellant in this case. That being so, when the purported charge was presented, the learned trial District Magistrate should have formed that opinion and proceeded to make an order in accordance with section 129 of the Criminal Procedure Act, 1985, which reads:

129. Where the magistrate is of opinion that any complaint or formal charge made or presented under section 128 does not disclose any offence, the magistrate shall make an order refusing to admit such complaint or formal charge and shall record his reasons for such order.

We wish to remind the magistracy that it is a salutary rule that no charge should be put to an accused person before the magistrate is satisfied, *inter alia*, that it discloses an offence known in law. It is intolerable that a person should be subjected to the rigours of a trial based on a charge which in law is no charge. It should always be remembered that the provisions of section 129 of the Criminal Procedure Code are mandatory.

The charge laid at the appellant's door having disclosed no offence known to law, all the proceedings conducted in the District Court on the basis thereof were a nullity. Since you cannot put something on nothing, the learned judge of the High Court should have so held and proceeded accordingly. Since he did not do so, it falls upon us to do it. Exercising the Revisional Jurisdiction conferred upon this court by section 4(2) of the Act, we declare the purported proceedings conducted in the District Court a nullity.

Having so declared the purported proceedings in the District Court, we are constrained to allow the appeal. Accordingly, for reasons we have given, though they are very different from those relied upon

by the appellant, we quash the order for restitution made by the High Court, which, very fairly, Mr Mbago, at the close of his submission, declined to support. We order that the items of property listed in the purported charge, namely, 160 corrugated iron sheets, 40 bags of cement, 81 timbers and 20 kgs of roofing nails be returned to the appellant. Since the articles tendered before the trial court on 24 May 1990, should not have been tendered and when they were tendered should not have been admitted in evidence, as they had absolutely nothing to do with the "charge", we say no more about them.

TWAHA ELIAS MWANDUNGU v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT MBEYA

(Ramadhani, Samatta and Lugakingira, JJ.A.)

CRIMINAL APPEAL No. 80 OF 1995

(From the Judgment of the High Court of Tanzania at Mbeya, Mwaikasu, J., dated 31 August 1993, in Criminal Sessions Case No. 50 of 1993)

Evidence – Presumption of existence of fact – Whether person found in possession of property of murdered person at the time of the murder may be presumed to have taken part in his murder – Section 122 of the Evidence Act 1967.

Evidence – Lies – When lies by an accused person can be considered in determining his guilt.

The appellant was convicted of murder in the High Court. During the fateful night the appellant asked the deceased to accompany him for a drink. The following day the naked body of the deceased was discovered within the same village. It had several injuries on it. A day later the clothes the deceased was wearing were found in the appellant's room and a pair of black rubber shoes among other articles. In his appeal

A against conviction the appellant challenged the credibility of witnesses including the post-mortem report.

B **Held:** The Court was entitled to draw an inference that the appellant committed the murder or took part in its commission from the fact that he was found in possession of property to have been in possession of the murdered person at the time of the murder and failed to give an explanation which could reasonably be accepted.

Appeal dismissed

C Cases referred to:

(1) *R v. Bakari Abdallah* (1949) 16 E.A.C.A 84

(2) *Andrea Obonyo and Others v. R.* [1962] EA 542

D (3) *Ngunjiri s/o Mugi v. R.* [1962] EA 542

(4) *Rex v. Yego* (1937) 4 E.A.C.A 25

(5) *John Albert Mgumba v. R* Criminal Appeal Number 153 of 1987 (unreported)

E Statutory provisions referred to:

(i) Evidence Act 1967, section 122

Mr Mkumbe, for the Appellant

F *Mr Mbago*, for the Republic

JUDGMENT

(Dated 10 June 1999)

G

SAMATTA, J.A.: The principal issues raised in this appeal are: (1) whether it was proved beyond reasonable doubt that Yusufu Abdi Zakaria (the deceased) lost his life at the hands of another person, and (2) if the answer to the first issue is in the affirmative, whether the appellant was the author of the death. The appeal is from a decision of the High Court (Mwaikasu, J) convicting the appellant of the murder of the deceased and sentencing him to death.

I

A It was not in dispute at the trial that the deceased is dead. Both A
the appellant and the deceased were residents of Ikombwe village
in the sub-district of Mbarali. It was the evidence of the deceased's
mother, Nosensia William (PW1), that on the evening of 11 July
1992, the appellant, whom she had known for many years, visited B
her home at Mkombwe and asked the deceased to accompany him
to go and have a drink. The deceased declined the invitation, giving
the excuse that he had no money, but following the appellant's insistence, C
he agreed. At his request, his mother gave him TZS. 100. The two
young men then left. That was the last time PW1 saw the deceased
alive. When until the following morning he had not returned, the
witness reported the matter to the local authorities. At about 3:00pm
that day information reached her that there was a dead body lying at D
a place called Majiweni in the village. When she reached there she
found a naked dead body which she recognized as that of her son,
the deceased. The body was lying in a farm irrigation canal, fairly
close to the appellant's residence. There were several injuries on E
it, and the abdomen, she observed, was distended. The body was conveyed
to her home where on the same day one Mr Mahungururo performed
a postmortem on it. PW1 told the trial court that about a month
before his death the deceased had been given by one Jason Chapile F
(PW6), as his remuneration for the work of harvesting paddy in the
latter's farm, a shirt with black and white spots, a pair of long trousers
in whitish and purple colours and a pair of black rubber shoes. Following
the request made by PW1, on 13 July 1992, the house of one Address G
Mbagaye (PW3), in which the appellant used to rent a room, was
placed under guard by Sungusungu. A day later, the appellant's padlocked
room was opened by the appellant himself and searched, in the presence
of PW1 and some of the local leaders, by PC. Joseph (PW8). A
shirt with black and white spots, a whitish and purple pair of long H
trousers and a pair of black rubber shoes, among other articles, were
found in the room. The clothes, according to PW8, were "wettish".
PW1 identified the three articles as the very articles which PW6
had given the deceased about a month before and which the deceased I
had worn on 11 July 1992. She claimed to have identified the shirt

A by a black thread which had been sewn on its lapel, and the pair of
 long trousers by a similar mark inside part of the waist. The witness
 asserted that the black thread marks on the clothes had been put in
 her presence by one of her daughters, Sikitu, at the deceased's request.
 B PW6 corroborated PW1's evidence regarding his giving three items
 of property to the deceased. Testifying specifically on the shirt, he
 said: "I cut a cloth and tailored it for him". The witness, surprisingly,
 was not recalled to identify the three articles, which were tendered
 C before the court after he had testified.

In the house of PW3 used to live another tenant, one Julius Alimasi
 (PW4). He had his own room. Testifying on the events which he
 said took place at the premises on the night of 11 July 1992, the
 D witness said:

... while I was inside in my room, the accused came and knocked [at] my
 door. I was then asleep, but I cannot tell the time only that by then it was
 time for Sungusungu guard duty which normally started at about 10:00pm.
 E When the accused knocked [at] the door I opened it for him. He then
 asked me for plastic basin which we use for washing clothes. I saw him
 carrying clothes. When I asked him what was [the] plastic basin was for
 he told me that he wanted to wash clothes as he was to travel with them
 F but he did not tell me where. He told me that he had obtained such clothes
 from his elder brother but he did not mention the name of his elder brother.
 When I was giving him [the] plastic basin I had lit my torch downwards.
 I was able to see properly the shirt and a pair of black chines rubber
 G shoes. The shirt was a draft type. I gave the accused the plastic basin. I
 noted such clothes to have been stained with blood. I therefore reported
 the matter to the ten cell leader the following day, following the accused's
 accusation before the ten cell leader that I had stolen his three bedsheets
 H and cash TZS. 12 000.

Giving his testimony, Cpl. Mathias (PW7) said, *inter alia*: "The accused
 claimed that such clothes found with him and claimed to have belonged
 to the deceased were his, alleging that he had bought [them] from
 I different persons but he could not show such persons or shops".

Mr Muhungururo gave evidence at the trial. As that evidence is,
 in our opinion, particularly crucial to the determination of the first
 issue in this appeal, we propose, even at the risk of making this judgment
 unduly long, to quote the operative part of it *in extensor*. This is
 what the witness said in examination-in-chief:

... I carried out [the] postmortem examination at the home of the deceased.
 I found the body of the deceased with bruises on the back of his body and
 on the back of his neck. There was also a stab wound on the right side of
 the chest, on mid-axilla line which penetrated and pierced the middle lobe
 C of the deceased's lungs; there was another stab wound on the right side
 of the deceased's neck which cut the throat. The primary cause of death
 was *pneumothorax* (i.e. accumulation of air in the lungs) and also *haemothorax*
 which means accumulation of blood in the lungs; and asphyxia, meaning
 D want of air. The body of the deceased had been thrown into water. The
 accumulation of air into the deceased's lungs was due to injury to the
 lungs. Though the deceased was thrown into the water and I have also
 reported in my postmortem examination (*sic*) as "drowning" that however
 E did not contribute to the death of the deceased as he did not swallow any
 water, and therefore it means that he was thrown there while already
 dead. I therefore used the term "drowning" simply because the body of
 the deceased was found into the water. Had the deceased died while in
 F the water, he would have swallowed the water and the lungs would have
 been extended and contain some water, which condition I did not find. I
 pray to tender [the] postmortem examination report as an exhibit.

Cross-examined by the appellant's counsel, Mr Mkumbe, who has
 also represented the appellant in the appeal, the doctor said:

I entered the term "drowning" in my report as one of the possible causes
 of the death of the deceased. However, after full examination drowning
 came to be excluded after a full examination the causes "haemothorax
 H and asphyxia" had to be added by me in hand after noting that the same
 had been omitted by the typist. I came to provide [those] omitted causes
 after I had received the summons. I received the summons on or about 11
 August 1995. I did note [the] omission when I signed the report. I came
 I to discover such omission as I looked at a special document which I had

A to use when carrying out [the] postmortem examination. I keep [the] special document in the file relating to the postmortem examination report. I did not open the chest cavity. I was able to examine the condition of the lungs through the stab wound that pierced the lungs. That I did in the presence of Cpl. Mathias. The other persons simply help to identify the body of the deceased. It is not true that I did not carry out [the] postmortem examination.

C There was no re-examination of the witness and neither the learned trial judge nor the assessors asked him any questions.

D The appellant gave evidence but called no witness. He denied not only killing the deceased but also knowing him. He emphatically denied to have visited PW1's home on the fateful day or meeting the deceased. Both PW1 and PW4, according to the appellant, had lied against him in the witness-box – PW1 because, in his capacity as a militiaman, one day in the past he had arrested her in connection with local liquor, and PW4 because he (the appellant) had accused him to a leader of ten cells of stealing his TZS. 12 000. Testifying on the exhibited shirt and pair of long trousers, the appellant said he was the owner thereof. He went on to say:

F The clothes ... were not sent to our (*sic*) room on 11-12 July 1992. They had been inside [the] room. I had [the] clothes inside [the] room from 6 July 1992. I bought them from one Gervas who is a Kinga by tribe who owns a shop at Rujewa. It is not true that I did not tell PW7 as from whom I had bought [the] clothes.

G Gervas, according to the appellant, had since passed away. As regards the pair of black rubber shoes, he said he bought it on 2 July 1992. He denied that when the clothes were seized by PW8 they were wet or wettish.

H As indicated at the beginning of this judgment, the principal issues in this appeal, the deceased's death being not in dispute, are, first, whether it was proved beyond reasonable doubt that the deceased lost his life at the hands of another person, and, secondly, whether, if the answer to the first issue is in the affirmative, the appellant

A was that other person. There can be no dispute that if the deceased was killed, whoever did that evil act had malice aforethought. At this stage, therefore, we ask ourselves whether the learned trial judge was right to find, as he did, that the deceased was killed.

B On behalf of the appellant, Mr Mkumbe, learned advocate, strenuously urged to hold, contrary to what the learned trial judge held, that there was no sufficient evidence to prove that the deceased was killed. He contended that the following factors existed in this case and they had the effect of weakening the prosecution case, as far as the alleged killing was concerned: (1) Mr Mahungururo wrote down in report that the cause of the deceased's death was drowning; (2) the testimony of PW.1 to the effect that the deceased's abdomen was distended suggests that the deceased had drowned and not killed; (3) the fact that the deceased's body was found naked in the canal suggests that the deceased was taking a bath when he drowned; (4) Mr Mahungururo's evidence regarding the cause of death was unreliable because he changed his opinion on the crucial point; (5) the doctor did not open the chest cavity, thus denying himself the opportunity to detect the condition in which the lungs were. While not accepting that the learned trial judge erred in excluding drowning as the cause of death, Mr Mbago, Senior State Attorney, declined to support the appellant's conviction and conceded to the rest of Mr Mkumbe's arguments. There can be no rational controversy, in our opinion, over the fact that in preparing his postmortem report in this case Mr Mahungururo did not exercise that degree of care which is expected from a professional man, but we are unable to uphold Mr Mkumbe's contention that it is possible that the deceased was not killed. In our view, in determining what happened to the deceased on the fateful day it is necessary to have regard to the totality of the evidence laid before the trial court.

I When that is done, we think it is not possible to entertain reasonable doubt over the fact that the deceased lost his life at the hands of another person. It was common ground in this case that the deceased's body was found to have two severe stab wounds, one which penetrated

A up to the lungs, which were perforated, and the other which pierced
 the trachea. Plainly, such injuries could not have been a result of
 the deceased drowning. In our opinion, one need not be a medical
 expert to confidently express that opinion. Like the learned trial
 judge, we accept the doctor's explanation as to how he came to use
 the word "drowning" in the postmortem report and why drowning as
 a cause of the deceased's death had to be excluded. With due respect,
 we see no merit in Mr Mkumbe's criticism of the learned trial judge's
 finding that the deceased was killed. But before we part with this
 aspect of the case, we wish to observe, in the interests of justice,
 that it cannot be stressed too strongly that it is of earthshaking importance
 that those who carry out postmortems and prepare reports thereon
 do so with great care and skill.

D Was it proved beyond reasonable doubt at the trial that the appellant
 is the author of the deceased's death? To that question we now turn
 our attention. In a lucid submission Mr Mkumbe subjected the evidence
 of PW1 to two principal criticisms and invited us to hold that the
 learned trial judge strayed into an error in treating the evidence of
 the witness as reliable. First, the learned advocate contended that
 the evidence of the witness to the effect that on 11 July 1992, the
 appellant visited her home was false because, as to put it, the witness'
 testimony regarding where her son and the appellant reportedly went
 to have a drink flew in the face of the evidence of PW7, who told
 the trial court that he questioned one Tolo Mujovangwa, the owner
 of the pombe shop where the two young men were said to have been
 seen, but Tolo denied to have seen the men there. With respect, we
 find ourselves unpersuaded by the learned advocate's criticism. Even
 assuming that the evidence of the two witnesses on the point did
 not constitute hearsay, it must be correct to say, as we do, that what
 PW1 said could not possibly be said to be in conflict with PW7's
 evidence. This is what PW1 told the trial court on the point: "I was
 told by the late Kalinga alias Mama Stella that she had been together
 with the deceased while taking liquor at the home of the said Tolo
 Mujovangwa. They did not go to the pombe shop on that day because

it was a feast for our Branch Chairman" (the emphasis is supplied).
 Plainly, this passage does not lend any colour to Mr Mkumbe's submission.
 Going by the passage, the information was that the two young men
 did not visit Tolo's pombe shopage. We nevertheless agree with the
 learned advocate that there was no evidence before the trial court
 which could serve as a peg, so to speak, upon which to hang the
 finding that on the fateful day the appellant and the deceased visited
 a pombe shopage. Secondly, the learned advocate submitted that the
 identification of the shirt, pair of long trousers and pair of shoes by
 PW1 as the property of the deceased having not been preceded by
 the witness giving descriptions of special features on the articles,
 not much weight could be attached to the evidence. In re-evaluating
 the evidence of PW1 it is important, in our opinion, to have regard
 to the evidence of PW4, one of the witnesses whose demeanour
 highly impressed the learned trial judge. We find it very significant
 in this case that on the night of 11 July 1992, the day the deceased
 was robbed of his natural life, PW4 saw the appellant in possession
 of three articles identical with those the deceased had in possession
 on the day and which PW1 identified as the deceased's property. It
 is perfectly true that the appellant had lodged a complaint of theft
 against the witness (PW4) to a leader of ten cells before he reported
 the strange behaviour of the appellant on the fateful night. Mr Mkumbe
 submitted that the witness was not a reliable one. While we are prepared,
 bearing in mind the misunderstanding between the witness and the
 appellant, to accept that the evidence of the witness had to be approached
 with some caution, we are unable to accede to Mr Mkumbe's contention.
 The witness' assertion that the appellant told him that he wanted to
 wash the shirt and pair of long trousers finds support in the evidence
 of PW1 who told the trial court that the clothes were wet when seized
 by the police, and also in the evidence of PW8, who testified to the
 effect that the clothes "appeared wettish". Like the learned trial judge,
 we accept the evidence of PW4, including his assertion that the appellant
 told him on the night of 11 July 1992, that he had been given the
 shirt and pairs of long trousers and shoes by his (the appellant's)
 brother.

A The learned trial judge was highly impressed by PW1. This is what he said about her: "... this witness has already demonstrated as a truthful and intelligent witness who has been very consistent in her testimony". We find no warrant to fault that assessment. It will
 B be recalled that in the course of his testimony the appellant asserted that PW1 had given false evidence against him and that she had done so because he once arrested her for a crime connected with local liquor. It is not insignificant, in our opinion, that that reason was
 C not put to the witness although she was cross-examined at a great length. It seems more probable than not that the explanation is an afterthought. Like the learned trial judge, we find no credible explanation why the witness should have been so wicked as to implicate the appellant
 D in the murder of her son. Consequently, we can see no basis for faulting great reliance placed on the witness' testimony by the learned trial judge. If PW1's evidence is accepted, we must find, as did the learned trial judge that the appellant lied in denying to have visited the witness' home and leaving with the deceased. Of course, we recognize
 E that a conviction cannot be based on the accused person's lies, but if material, such lies may be taken into account in determining whether the alleged guilt of the accused has been proved.

F For the reasons we have endeavoured to give, we are of the settled opinion that the evidence laid in the scale against the appellant proved beyond reasonable doubt that the deceased was murdered and that
 G some hours after the crime had been committed the appellant was found in possession of the clothes and pair of shoes the deceased had been wearing at the time of the murder. In our opinion, this is a proper case in which to invoke the presumption created by section 122 of the Evidence Act 1967 (the Act), which reads:

H 122. The Court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

I

A The presumption under this section embodies, *inter alia*, the well known doctrine of recent possession which is to the effect that a man who is in possession of stolen goods soon after the theft is
 B either the thief or has received the goods knowing them to be stolen, unless he can account for his possession by at least giving an explanation which may reasonably be true. The presumption can extend to any charge however penal: See *R v. Bakari Abdallah* (1). But in case of murder (or manslaughter) receiving must be out of question before
 C conviction can be based on the presumption: See *Andrea Obonyo and others v. R.* (2). Under the section the court is entitled if it appears reasonable in all the circumstances of the case to draw an inference that an accused person committed a murder or took part
 D in its commission from the fact that he is found in possession of property that was in possession of the murdered person at the time of the murder and fails to give an explanation which can reasonably be accepted: See *Ngunjiri s/o Mugi* (3); *Rex v. Yego* (4); *John Albert Mgumba v. The Republic* (5). The appellant in the instant case having
 E failed to account for his possession of the property which was in possession of the deceased at the time he was murdered, and bearing in mind several factors, including the fact that the appellant was found in possession of the property a very short period after the
 F murder of the deceased, and also the fact that, as far as the evidence on record goes, the deceased was last seen alive in the company of the appellant, we feel entitled to invoke the presumption under section 122 of the Act and hold, as did the learned trial judge, that the appellant
 G was the person who murdered the deceased. We entertain no doubt that that inference can legitimately be drawn from the proved facts.

Mr Mkumbe has, in our opinion, ably said everything which could properly be said on behalf of the appellant in this case, but, for the foregoing reasons, we can see no merit in the appeal, which we accordingly
 H dismiss.

I