

12

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 70 OF 2008

SHUKURU SIMON CHARLES APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania
at Tanga)

(Mushi, J.)

dated 6th October, 2007

in

Criminal Sessions No. 14 of 2005

JUDGMENT OF THE COURT

25 June & 6 July, 2009

MANDIA, J.A.:

The appellant SHUKURU SIMON CHARLES was charged with murder contrary section 195 of the Penal Code and was duly convicted and sentenced to death by the High Court of Tanzania sitting at Tanga. The alleged offence was committed on 26th August, 1996 at Kwediboma Village, Handeni District, Tanga Region. The

appellant was aggrieved by both the conviction and the sentence, hence the appeal to this court.

Five witnesses testified for the prosecution. The case for the prosecution shows that on 22/8/1996 PW4 Samson Abiazi Kalemi who was a Village Executive Officer for Majiwanga Village in Gairo, Kilosa District, was approached by one MADIHI FUNDI who wanted PW4 to issue a permit for the transportation of a cow, black/grey in colour, from Majawanga Village in Gairo to Sangani Village in Handeni District. On the day Madihi Fundi went to apply for the permit he was seen by PW4 wearing a white shirt, black trousers, rubber shoes and a red khanga (lubega). In the morning of 26/8/1996, the exact hour is not mentioned, PW5 Mwinjuma Bakari of Kwediboma Village was travelling on foot from Kwediboma Village going towards Sangasa Village where he was going to attend a funeral. Midway between the two villages, PW5 met two persons – one an old man and the second a young man – travelling from the direction of Sangasa Village and going towards Kwediboma Village. The two persons were driving along with them a cow. The older

person was dressed in black/grey shorts and red shoulder cloth, known locally as "lubega". In the evening of the same day 26/8/1996, PW4 learned of the death of a person in the vicinity of his village, Kwediboma. He went to the place where the body of the dead person lay and viewed the dead body. He identified the dead body as that of the person he had seen earlier on in the same morning driving one female cow towards Kwediboma Village. The dead person had a cut wound on the neck. The body was still clad in the same clothes worn by the old man PW5 had seen driving one she cow in the morning towards Kwediboma Village.

In the afternoon of 26/8/1996 at 2 p.m. PW1 Saidi s/o Ali, a resident of Kwediboma Village operating a butchery jointly with his brother-in-law PW2 Said s/o Kalungwana, met two persons. Of the two persons, PW1 knew only Salim Vuoza Said who lived in the same village, Kwediboma, with PW1. Salim Vuoza Said offered to sell a she cow, black/grey in colour, to PW1 at a price of shs.60,000/=. PW1 could not raise the sh.60,000/= so the sale deal fell through and Salim Vuoza and his colleague proceeded further with their journey.

Further on, Salim Vuoza Said and his colleague met PW2 the brother in law of PW1 and a partner in the butchery business they operated. The second person who was with Salim Vuoza Said was the appellant.

PW2 managed to lower the sale price to shs.55,000/=. After the deal was concluded, both PW1 and PW2 asked for a permit for the cow, and Salim Vuoza Said produced a permit in the name of MADIHI FUNDI. PW1 and PW2 took the cow and the permit, slaughtered the cow and sold the meat. On the following day 27/8/1996 PW1 and PW2 were queried about the sale of the cow to them on the previous day. They produced the permit given to them during the sale of the cow Exhibit P2. They were also shown an NCCR party card recovered from the body of the old man wearing the red "lubega" who was seen last by PW5 Mwinyijuma Bakari driving the she-cow towards Kwediboma Village. The NCCR party card was in the name of Madihi Fundi. During cross-examination, PW1 told the trial court that both accused persons told him they got the cow in Gairo, and that the second accused, now the appellant, put himself

forward as the owner of the permit which had the name Madihi Fundi, now deceased, on it.

On 18/10/1996 PW3 ASP Mary of Handeni Police Station conducted an identification parade at Handeni Police Station. In the parade the appellant was identified by PW1 and PW2 as the person who sold the cow to them on 26/8/1996 at 2 p.m. On 26/11/1996, three months after the death of MADIHI FUNDI, PW4 Samson Abiazi Kalemi identified the clothes which Madihi Fundi, the deceased, wore on 22/8/1996 when he applied for and was issued with the permit to transport the she cow from Majiwanga Village in Kilosa District to Sangeni Village in Handeni District.

The trial in the High Court involved Salim Vuoza Said as the first accused person and the present appellant Shukuru Simon Charles as the second accused person. The first accused gave his defence on affirmation. The first accused said he met the second accused by chance at his village Kwediboma. The second accused, now the appellant complained that he had been driving a cow from

Gairo on foot for four days and the cow was now weak so he was selling the cow for shs.80,000/=. The first accused said he could not raise the sale price. The sale was finally clinched with PW2 at shs.55,000/=. After the deal was concluded the second accused produced a permit for the cow as proof of ownership.

The second accused person was brief in his defence. He contended that he bought a cow at Tomota village for shs.45,000/= in August, 1996 from a person he did not know. This unknown person gave him a permit. The second accused person claims he is illiterate so he did not know the contents of the permit, but he gave the cow and the permit to the first accused as his agent in the sale.

The High Court, basing itself on the doctrine of recent possession, found it as a fact that the first accused person before it, that is, Salim Vuoza Said, was an innocent broker for the second accused, and consequently found the first accused not guilty and acquitted him. The same court, however, found that the second accused was found in possession of the cow after a recent murder of

the owner. The court also found that the second accused person did not give a reasonable and probable account of how he came into possession of the cow. The second accused was accordingly found guilty, convicted and sentenced to death. This resulted in the present appeal.

The appellant was represented in this appeal by Mr. Stephen Sangawe, learned advocate, and the respondent Republic was represented by Mr. Oswald Tibabyekomya, learned State Attorney.

At the start of hearing of the appeal this court posed the question on whether or not there was no conflict of interest between the first and the second accused. The court observed that from the beginning up to when the first accused person gave his own defence both accused persons were represented by Mr. Zuberi, learned counsel. It was after the first accused had defended himself that Mr. Zuberi learned counsel, raised the issue of conflict of interest on 3/1/2007. Thereafter, the court adjourned the matter to enable the District Registrar of the High Court at Tanga to assign counsel for the

second accused person. Defence hearing resumed on 3/12/2007 with a change of counsel for both accused persons. Mr. Akaro, learned advocate, represented the first accused person, and Mr. Msakamari, learned advocate, represented the second accused person. The record shows that on 3/12/2007 Mr. Msakamari opted for the trial to continue from where it left off, and did not wish to cross-examine the first accused person.

When addressing themselves to the Court on the question of conflict of interest, both counsel were of the opinion that there was no conflict of interest because the defence counsel who took over the defence for the second accused person declined to have the first accused recalled as a witness, and also because of the fact that the evidence of the first accused person in his own defence was not prejudicial to the second accused person, now the appellant. Both counsel also agreed that in his defence the second accused person exonerated the first accused person from any connection with the subject matter of the trial i.e. the cow. The Court decided to let the

appeal go on to hearing during which the issue of conflict of interest will be addressed.

Let us first start with the question of conflict of interest. After going through the record of proceedings, we agree with both counsel that there is no conflict of interest since the respective defences of the then first and second accused persons are not mutually antagonistic, and the testimony of the first accused person did not play any part in the conviction of the second accused person for the offence he was charged with. We now proceed to evaluate the appeal before us.

Mr. Sangawe filed a memorandum of appeal containing five grounds, namely:-

- 1. That the trial learned judge erred in law and facts when he convicted the appellant on circumstantial evidence without directing his mind and ensure that the inculpatory facts pertaining to the said case were incompatible with innocence of the accused and*

incapable of explanation upon any other reasonable hypothesis than that of the accused's guilt.

2. *That the trial learned judge erred in law and facts when he rejected the appellant's defence evidence in that he bought the cow from a person whom he did not know by doing so, the trial judge had shifted the burden of proof to the appellant, the duty which is always on the prosecution.*
3. *That the trial learned judge erred in law and facts by using double standard when assessing the appellant's defence Visa vis that of the first accused.*
4. *That the trial learned judge erred in law and facts in holding that the prosecution had proved their case beyond reasonable doubt whereas PW5's testimony was full of doubts which the appellant ought to be given benefit of doubt and the same be resolved in his favour.*
5. *That the trial learned judge erred in law and facts when he failed to observe that since the property (cow)*

could easily change hands from one person to another, then this was not a good case upon which the doctrine of recent possession could be invoked and convict the appellant of the offence of murder.

Mr. Sangawe, learned advocate, argued the appeal starting with the first ground of appeal, the thrust of which is that the trial court convicted on circumstantial evidence without ensuring that such evidence was not incompatible with the innocence of the appellant. In expounding the ground however, Mr. Sangawe touched on the other grounds and ended up arguing the appeal generally, rather than ground by separate ground. Similarly, the address of Mr. Tibabyekomya in reply was more of a generic nature rather than a ground by ground treatment of the appeal. This approach does not surprise us, since the memorandum as drafted is more based on a general evaluation of the evidence adduced at the trial court than argument on isolated points of law arising from the trial. We are of the opinion that the memorandum, as it appears, deserves a general approach in discussion along the lines both counsel argued the appeal.

We are in agreement with both counsel that the central plank in the trial was the doctrine of recent possession, and that both counsel for the appellant and counsel for the respondent agree to this. Both counsel agree that the appellant was found with property, to wit, a cow, which was recently in the possession of an owner who was killed and then the property taken from him. The point of divergence between the two counsel is whereas Mr. Sangawe argues that the appellant gave a reasonable and probable account of the property, Mr. Tibabyekomya argues that the appellant has not. Both counsel agree that the doctrine of recent possession takes hold only where there is proof that theft has taken place, and that soon thereafter an accused person is found with the said stolen property. The authorities of **Rex vs Bakari Abdalla** (1949) 16 EACA 84, **Ali Bakari vR** (1992) TLR 10 and **Alex Thomas v R** Criminal Appeal No 230 of 2008 (unreported) are cases in point. The argument of Mr. Sangawe is that the bench mark put by the above-quoted authorities has not been met because the permit was issued on 22/8/1996 and the

deceased was found dead on 26/8/1996 so the deceased could have been killed by anybody else other than the appellant between these dates. Mr. Sangawe also argues that the record shows that in the morning of 26/8/1996 PW5 saw the deceased in the company of another person who was not called to testify and was neither the appellant nor the first accused Salim Vuoza Said, and since the appellant testified in his defence that he bought the cow from an unknown person, it was possible this unknown person or persons killed the deceased and then sold the cow to the appellant who in turn sold it to PW1 Said Ali and PW2 Said Kalungwana. Mr. Sangawe admitted that the appellant was in possession of the permit for the transportation of the cow, but the evidence of PW5 on the existence of other unknown persons broke the chain between the appellant and the killing of the deceased. The case is therefore based on circumstantial evidence, but the evidence is capable of more than one explanation so as to afford doubt whose benefit should be given to the appellant. Mr. Sangawe added further that a cow is an item which can pass

hands easily so possession of the cow cannot be used as a ground for finding the appellant liable for the death of the deceased.

On the opposite side of the spectrum, Mr. Tibabyekomya argued in support of both the conviction and the sentence meted. According to him, the prosecution evidence showed that in the morning of 26/8/1996 the deceased was seen alive by PW5. The deceased was in the company of another unknown youth. At 2 p.m. in the afternoon of the same day the deceased's cow was sold to PW1 and PW2 by the appellant who posed as the owner of the permit to transport the cow, and that the appellant had told the first accused Salim Vuoza Said that he had travelled with the cow for four days. Mr. Tibabyekomya also argued that the appellant himself at page 33 of the record exonerated the first accused when he said he just gave the first accused the cow to sell, a cow which in the morning of the date of the sale was in the hands of the deceased.

Mr. Sangawe also faulted the trial judge for shifting the burden of proof onto the appellant when he was discussing the duty of an accused person in giving a reasonable and probable explanation on property in possession of an accused person which is found to have been stolen. We have examined the record. We agree that the use of the words "simple," "shallow," "naive" when discussing the appellant's explanation was unfortunate and impolitic, but we are far from persuaded that the use of these words shifted the burden to the appellant. Earlier on, the trial court had correctly surmised that the appellant's burden was simply to give a reasonable explanation, and since the court had already explained the position of the law, the use of the unfortunate language did not, in our view, shift the burden.

After all is said and done, we are in agreement with the facts as established in the trial court which show that **firstly**, the deceased MADIHI FUNDI is dead. **Secondly**, the deceased was issued with a permit to transport one cow at Majawanga Village in Gairo, Kilosa District on 22/8/1996. **Thirdly**, the deceased was seen in

the morning of 26/8/1996 at an undetermined hour with his cow near Kwediboma Village in Handeni District. The person who saw the deceased was PW5 Mwinyijuma Bakari. **Fourthly**, at 2 p.m. on the same day 26/8/1996 the appellant sold the same cow which earlier in the morning was in the possession of Madihi Fundi. **Fifthly**, when offering the cow for sale, the appellant had told DW1 Salum Vuoza Said he had been walking with the cow for four days and that the cow was weak. **Sixthly**, when the sale deal with DW1 Salum Vuoza Said fell through because PW1 had no money to purchase the cow, the appellant instructed DW1 to find a buyer for him. **Seventhly**, when the final buyers came the appellant gave the buyers the permit in the name of the deceased. By saying that he had been walking with the cow for four days, and by giving out a permit in the name of the deceased, the appellant was putting himself forth as the deceased at 2 p.m. on 26/8/1996 while the deceased was already dead. In the circumstances of this case, the trial High Court was right to invoke the doctrine of recent possession. There was no other possible explanation to explain the possession of the cow except that it

was taken from the deceased within the first half of the day
26/8/1996. For the foregoing reasons, the appeal therefore fails
and is dismissed in its entirety.

DATED at TANGA this 6th day of July, 2009.

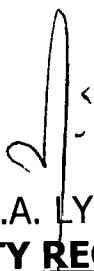
J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL



W.S. MANDIA
JUSTICE OF APPEAL

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


P.A. LYIMO
DEPUTY REGISTRAR