LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT DODOMA. CRIMINAL APPEAL NO. 173 OF 2008.KILEO, J.A, MASSATI J.A AND ORIYO J.A. (DISSENTING ON SENTENCE, KILEO J.A)	**KOBELO MWAHA VS THE REPUBLIC** (Appeal from the Decision of the High Court of Tanzania at Dodoma, Kwariko J.)	1. Death penalty is inherently an inhuman, and degrading punishment and it is also so in its execution and it offends Article 13 (c) (d) and (c) of the Constitution of the United Republic of Tanzania.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MASSATI, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 173 OF 2008

KOBELO MWAHA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Kwariko, J.)

dated the 6th day of March, 2008
in
Criminal Sessions Case No. 6 of 2004

JUDGMENT OF THE COURT

15 & 22 March 2010

MASSATI, J.A.:

Before the High Court of Tanzania sitting at Dodoma, the Appellant was charged with the offence of murder contrary to section 196 of the Penal Code, (Cap 16 – RE 2002). It was alleged that on the 12th day of June, 2003 at unknown time at Kawawa Village in Dodoma district and region he murdered one Tano s/o Sajilo. He was convicted as charged and sentenced to death by hanging as provided by law. He has now come to this Court on appeal.

The undisputed facts were that, the deceased was last seen by his wife (PW7) on Wednesday of 11th June, 2003 when he told her he was heading to Msisi to see the Appellant to look for groundnuts. However on the following afternoon, she passed through one Mwendwa's house where the latter gave him a shirt which she said was given to her by the deceased to take home. The next time she saw him was on the following Sunday, but a dead body. That body was found in the Appellant's home and it was decapitated and decomposed. It was not also disputed that the Appellant had borrowed Shs. 18,000/= from the deceased sometime earlier that month. It was also not disputed that the Appellant used to live partly at his father's compound, where he had his own apartment and partly at his mother in law's house with his wife Lucy. It was also not disputed that the Appellant left his house locked on Thursday, never to return until after the discovery of the dead body from his room. Lastly, it was not disputed that a bicycle alleged to have belonged to the deceased was retrieved from the Appellant's mother in law's home, where the Appellant was also found, after the deceased's body was found.

On the basis of those facts, and other findings that have been challenged in this appeal, the Appellant was convicted as indicated above. Before us, the Appellant was represented by Mr. Paul Nyangarika, learned counsel while the Republic/Respondent was represented by Mr. Faraja Nchimbi, learned State Attorney.

The Appellant filed and argued two grounds of appeal.

In the first ground of appeal Mr. Nyangarika essentially attacked the trial court's finding that the prosecution had proved its case beyond reasonable doubt, it being based on circumstantial evidence which did not compellingly point to the Appellant's guilt. The learned counsel submitted at length on the weaknesses of each of the three pieces of evidence, whose cumulative effect ended in the Appellant's conviction; which were:- first, that the Appellant was the last person to be seen with the deceased; second, that the deceased's body was found in the Appellant's room; and thirdly, that the Appellant was found in possession of the deceased's bicycle.

On the first finding, Mr. Nyangarika submitted that it was wrong for the trial court to have believed PW1, who was of doubtful mental state that he left the deceased with and at the Appellant's home when the latter sent him to get local brew for them. Besides, PW1 did not inform his father PW3 of the deceased's presence at home when he met him at the local pombe shop. He also submitted that if PW6 received a shirt from the deceased to take to his (deceased's) home, this must have been well in the noon and not in the morning as the prosecution alleged.

On the second finding that the deceased's body was found in his room, the learned counsel forcefully submitted that since the door to his room was broken open in his absence and since the Appellant's house was in his father's compound, it was quite possible that some other people, particularly his father PW2 and his step mother PW3, could have killed and deposited the deceased's corpse in his house.

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On the second finding that the deceased's body was found in his room, the learned counsel forcefully submitted that since the door to his room was broken open in his absence and since the Appellant's house was in his father's compound, it was quite possible that some other people, particularly his father PW2 and his step mother PW3, could have killed and deposited the deceased's corpse in his house.

As to the bicycle being in his possession, it was the Appellant's case that the bicycle was not found in his physical possession, but in the compound of his mother in law, PW5. He went on to argue that in any case, the description of the bicycle by PW4 and PW7 was so poor, as not to have proved beyond reasonable doubt that it belonged to the deceased.

In his second ground of appeal, Mr. Nyangarika, strenuously submitted that the trial judge misdirected the assessors on several instances, and those misdirections influenced the gentlemen and lady assessors in their opinions. He pointed out several passages from the summing up notes that featured those misdirections. For instance, when the learned trial judge referred to PW7's hearsay evidence as corroborative of PW1's evidence or where the learned judge is recorded to have directed that PW1 informed PW3 that the deceased was with the Appellant which was not supported by the evidence on record; or where the learned judge refers to a statement that the Appellant admitted to have been drinking with a person he did not know. The learned counsel was of the view that had the

assessors been properly directed, they may not have come out with the opinions they had dispensed. To wind up his submissions, Mr. Nyangarika referred us to several decisions of this Court and the High Court. There are: **HASSAN FADHILI v R** (1994) TLR 89, **ALLY BAKARI & PILI BAKARI v R** (1992) TLR 10, **MOHAMED MSOMA v R** (1989, TLR 227, **AZIZ ABDALLAH v R** (1991) TLR 71, **ALLY JUMA MAWEPA v R** (1993) TLR 231, **GEORGE MINGWE v R** (1989) TLR 10. We shall revert to those cases in due course. With those, Mr. Nyangarika urged us to allow the appeal.

On his part, Mr. Nchimbi threw his whole weight behind the conviction and sentence passed by the trial court. He attacked the grounds of appeal also **seriatim,** as the Appellant's counsel had presented.

In the first ground of appeal, Mr. Nchimbi, first agreed with the principles set out by Mr. Nyangarika with regard to the law on circumstantial evidence, the major premise being that circumstantial

evidence can only found a conviction if it affords no explanation other than the guilt of an accused person.

With regard to the finding that the Appellant was the last person to be with the deceased, Mr. Nchimbi submitted that the finding was supported by the evidence of PW1, and PW6 who saw them last before the deceased's body was found in the Appellant's house. PW1 was a credible witness as the trial court had found. There were no contradictions between the evidence of PW1, and PW3, he submitted. As to the time spent within which to commit the crime, Mr. Nchimbi submitted that the time given by PW1, as the time it took to the local brew shop, was only an estimation. But this was not impossible. He referred us to the case of **CHANDRAKANT JOSHUBHAI PATEL v R** Criminal Appeal No. 13 of 1998 (Unreported) (Dar es Salaam). He further submitted that the trial court properly analysed the evidence, and concluded that PW1 was of sound mental state and lucidly described what he saw.

On the holding that the body was found in the Appellant's home; Mr. Nchimbi submitted that there was no doubt that the room was that of the Appellant; and the inference that his own members of the family could have fabricated it was far fetched. He submitted that from the chain of events narrated by PW1, PW2, PW3, PW5, PW6 and PW7, the finding that it was the Appellant who committed the murder was inescapable. He said that there could be no suspicion cast on PW2 and PW3, or PW6 and PW7 the deceased's wife.

On the finding about the bicycle Mr. Nchimbi, submitted that on the evidence of PW5, PW4 and PW7 there was no doubt that Exh. P3 was the deceased's bicycle. The fact that PW5's place was also home to the Appellant who was in fact found there, goes to prove that the Appellant was in control of the bicycle. Nothing had been suggested to show why the Appellant's mother in law would have said what she said about the Appellant having brought the bicycle. He further submitted that although PW7 described the bicycle, her description did not materially differ from that of PW4 who took the bicycle to the

police. He PW4 thus explained the unbroken chain of custody. He distinguished **MINGWE's** case because in that case the only description was that of colour, but here special marks were picked up, and described for the trial court to see. Besides, there was no other claim on the bicycle. In such cases an appellate court should be slow to disturb the finding. He referred us to the decision of **MATHAYO MWALIMU & ANOTHER** Criminal Appeal No. 147 of 2008 (Unreported) (Dodoma).

As to the second ground of appeal, Mr. Nchimbi, submitted, with reference to the passages cited by Mr. Nyangarika from the judge's summing up to the assessors, that if there were any misdirections they did not influence the assessors or affect the legality of the judgment or occasion a failure of justice. He referred us to the decision of **MICHAEL LUHIYE v R** (1994) TLR 181. He then prayed that the appeal be dismissed.

In his rebuttal submission Mr. Nyangarika reiterated that since the cause of death was not proved (the appellant having only admitted during the preliminary hearing that the deceased had died) and since there was no evidence as to the condition of the door, who broke it, or which part was broken; the trial court should have drawn adverse inference for not calling the police and the doctor who prepared the post mortem examination. He also recaptured his earlier point that considering the mental health history of PW1, and his evidence that was inconsistent it was wrong to have found that PW1 was a credible witness; and that his evidence required corroboration, and there was none. Again he argued that the description of the bicycle was not satisfactory in view of the inconsistences on that point between PW4 and PW7. Lastly he recited the decision of **ALLY JUMA MAWEPA** on the effect of misdirections to assessors. He then prayed that this Court find that the prosecution has failed to prove its case beyond reasonable doubt, and so allow the appeal, quash the conviction and set aside the sentence.

We first wish to restate that this is a first appeal. It has been held that such an appeal is by way of a retrial and therefore the court is empowered to reconsider the evidence adduced at the trial without being bound to follow a trial judge's finding of fact, except, in circumscribed instances where such finding is based on credibility (See **SELLE v ASSOCIATED MOTOR BOAT CO.** (1968) EA 123. As Lord Simonds said in **BENMAK v AUSTIN MOTOR CO. LTD.** (1955) 1 AII ER 326 (HL).

> "An appellate court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial judge on a question of fact but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge."

A similar remark had been made earlier on in **ANTONIO DIAS CALDEIRA v FREDRICK AU OUFUS** (1936) AII ER 540 that:-

> "Where the trial judge has come to a conclusion upon a pure question of fact the appellate tribunal cannot, merely because the question is one of fact, and because it has been decided in one way by the trial judge, abdicate their duty to review his decision and to reverse it, if they deem it to be wrong; but the function of the appellate tribunal when dealing with a pure question of fact on which questions of credibility are involved are limited in their character and scope."

So in the present case our duty is to reevaluate the evidence and if need be come to our own conclusions, if the trial court's findings are based on improper inferences to be drawn from specific facts.

The first ground of appeal is on circumstantial evidence, and the applicable principles. We agree with both learned counsel on their statements as to the principles applicable to circumstantial evidence. That principle was set by the predecessor of this Court, in **SIMON MUSOKE v R** (1958) EA 715 at page 718; and it is this:-

> " --- In a case depending conclusively upon circumstantial evidence, the court must before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty."

That decision was followed by this Court in several cases including **HASSAN FADHILI v R** (1994 TLR 89, and **ELISHA NDATANYE v R** (Criminal Appeal No. 51 of 1999 (Mwanza) (Unreported). It is further certainly the law that:-

> "Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred."

(See **ALLY BAKARI & PILI BAKARI v R** (1992) TLR 10.

The trial court held that the case was proved wholly by circumstantial evidence comprised of three strands of evidence. The first is that the Appellant was the last person to be seen with the deceased alive; the second is that the deceased's body was found in the Appellant's room; and lastly the deceased's bicycle was found in possession of the appellant. We have exposed above, the arguments put forward by the learned counsel in support or opposition of the trial court's findings.

We think that the most crucial witness in the first strand is PW1, whom the trial court found as credible, and that finding was heavily criticized by Mr. Nyangarika, learned counsel. Mr. Nyangarika premised his criticism on the fact that PW1 had a history of mental illness, and so it was doubtful if he was lucid enough to be able to recollect what happened on that day. According to this witness:-

> "On 12/6/2003 during morning hours, I was home together with Shida and Grace. Whilst we were at home the accused and Tano who is deceased now came. The two sat in the sitting room of the accused's house. Thereafter the accused sent us to buy local brew. He gave us Shs. 100. We all three left. We went to buy the brew at one Chato's residence. At the pombe shop our father was there. He asked us where we were taking the alcohol. We informed him that we were taking it to Kobelo who was at home with the deceased.

> When we got home we found the accused sitting outside and had locked his door. He was alone. The door was locked by a padlock.
>
> We found a bicycle parked outside there. The bicycle belonged to Tano as the two came with it in the first place."

That PW1 went to Chato's place to buy alcohol for the Appellant on 12/6/2003, is amply supported by PW3. Although he gives a different date (13/6/2003) the Appellant, admitted in cross examination that he had sent PW1 to buy local brew. Furthermore he also admitted that on that particular day, he had gone home with a person "whom he did not know his name and place of domicile", who was asking for groundnuts; and that they shared the brew before they parted company. In the course of cross examination he had also admitted that PW1 knew the deceased because they were village mates. In a surprising turn, the Appellant says PW1 may have mistaken the "stranger" he was sharing the brew, with for the deceased. Mr. Nyangarika has tried to persuade us to find PW1 as

an unreliable witness because of his history of mental illness; but only in one aspect; that the person that the Appellant was taking the brew was not the deceased, but someone else. He has not shown us why PW1 should be believed on some matters, and not on some, but suggested that this should be so because his evidence was not consistent with that of PW3. We think that the credibility of PW1 could not have been assessed by looking at only part of his evidence, but against the whole of his evidence. We are also of the settled opinion that the mental capacity of a witnesses to perceive what he says he did, cannot be shaken by mere conjecture and speculation from the bar, but must be supported by cogent physical or expert evidence. The evidence of PW1's mental history, scanty as it is from PW3 and the Appellant, does not anywhere prove or even suggest that at the material time, PW1's mental capacity to perceive had deteriorated so much. We are therefore, like the learned trial judge, satisfied that, PW1 gave a lucid and credible account and his evidence needed no corroboration. The conclusion that the Appellant was the last person to be seen with the deceased alive cannot in our view, be assailed. But as this Court said in **RICHARD MATANGULE**

AND ANOTHER v R (1992) TLR 6 at page 9, this fact casts a very good suspicion on the Appellant but it is not in itself conclusive proof that the appellant killed the deceased.

But the prosecution did not rely only on that piece of evidence. This brings us to the second strand of circumstantial evidence. The trial court found as a fact that the deceased' body was found in the Appellant's room. Mr. Nyangarika has argued that since the circumstances in which the Appellant's room was broken were suspect, the cause and time of death unknown, considerable time had lapsed up to the time the deceased's body was discovered; that no police were involved and no doctor was called to testify on the cause of death or time thereof; and the chairman who supervised the breaking of the room was not called, an adverse inference should be drawn against the prosecution case.

We shall first deal with two aspects; on the question of adverse inference and on that of the evidence of cause and time of death of the deceased. On the question of adverse inference Mr. Nyangarika

had sought to rely on the decision of **AZIZ ABDALLAH v R** (supra) whereas Mr. Nchimbi refuted by saying that no adverse inference could justifiably be drawn against the prosecution case, because the non calling of the doctor was filled in by Exh. P1 (the post mortem examination report) which was tendered without objection during the hearing, whereas the evidence of the chairman who witnessed the breaking in was the same as that of PW3, the Appellant's father.

It is doubtless valid to say that adverse inference may be made where the persons omitted are within reach and not called without sufficient reason being shown by the prosecution side **(AZIZ ABDALLAH v R)** but this depends on the circumstances of each case. In **MT 7479 SGT. BENJAMIN HOLELA v R** (1992) TLR 121 (CA) this Court refused to draw adverse inference against the prosecution for not calling a certain witness where it was not suggested that he was in a better position than another witness regarding the shooting incident. In the present case with regard to the breaking of the door to the Appellant's house the chairman and PW3 witnessed it. There is no suggestion in the record that the

chairman was in a better position than PW3 regarding the breaking and the condition of the door. The prosecution therefore had sufficient cause for not calling the chairman and no adverse inference can justifiably be drawn against that omission.

But the situation is different with regards to the cause and time of death of the deceased. Here, the prosecution had relied heavily on its post mortem examination report (Exh. P1) which was tendered at the preliminary hearing Mr. Nchimbi, admitted that the record did not reflect that the contents of the intended evidence were brought to the Appellant's attention and explained as the law required, but submitted that as the Appellant was defended, he was not prejudiced, and therefore the irregularity was innocuous. But, with respect, that is not the law. In **MT 7479 SGT BENJAMIN HOLELA v R** (supra) this Court was of the view that under Rules 4 and 6 of the Accelerated Trial and Disposal of Cases Rules, 1988 GN 192/88, the facts of the case must be read and explained to the accused himself, and the magistrate or judge must record the same. So, a statement by counsel or advocate for the accused to the effect that

the matters raised are admitted is not sufficient under the law. It must be the accused himself who must indicate what matters he or she admits. The Court went on to state that failure to comply with those rules disapplies section 192 (4) of the Criminal Procedure Act, 1985 and so any "admitted fact or document" cannot be deemed proved; and so they must be proved by other means.

In the present case, the record shows that after the facts were read and a statement thereof filed in Court Mr. Magoma the State Attorney who represented the Republic said:-

> **Mr. Magoma**
>
> The Republic is applying to tender the Post mortem Report as exhibit in court
>
> **Mr. Nyabiri**
>
> I (have) no objection
>
> **Court** Post mortem report admitted in court as Exh. P1.

That is how the post mortem report was admitted. There is no record that the accused (now appellant) was asked if he had any objection. It is even more interesting that when the memorandum of matters not in dispute, were drawn, which the appellant signed; the only point admitted as Mr. Nyangarika submitted was that

" --- the deceased is dead"

Indeed he did not admit the cause of death, or the time of death which form the other content of the post mortem examination report. And there was no other evidence from the doctor who prepared the report as to the cause and time of death, as Exh. P1 had no probative value in view of section 192 (4) of the Criminal Procedure Act. We agree with Mr. Nyangarika that the prosecution should have called the doctor to testify on that.

The above, notwithstanding however, we do not think that the non calling of the doctor, necessarily drew adverse inference on the prosecution case. This is so because medical evidence is not the only evidence that can prove cause of death; and in certain cases, the

court may reject medical testimony if there is good cause for doing so. (See **AGNES LIUNDI v R** (1980) TLR 46. In **JOSEPH HAMIS AND ANOTHER v R** (Criminal Appeal No. 13 of 1990 (Unreported) (Mwanza) the Court said:-

> "---- Where cause of death is not medically established, that is not necessarily fatal to the charge. This is so if there is other cogent evidence, direct or circumstantial from which to arrive at a conclusion as to the cause of death."

So, although Exh. P1 was wrongly taken into consideration by the trial court as proving the cause and time of death that is not necessarily fatal, and does not invite the drawing of adverse inferences against the prosecution case. This is so, because PW2, PW3 and PW7 who saw the deceased's body described it as slaughtered/decapitated. In the circumstances even without the post mortem examination report there was strong cogent and circumstantial evidence to prove that the deceased was decapitated and that led to his death. For those reasons, we do not agree with

Mr. Nyangarika that cause and time had not been established. We are settled that it has. Considering the other pieces of evidence that the deceased was last seen alive on 12/6/2003, and his body discovered on 15/6/2003 it was a compelling inference that his death must have occurred 4 days prior to the discovery. Time of death, we think, has also been proved by circumstantial evidence.

Mr. Nyangarika, learned counsel, has also strenuously argued that given the approximate time that PW1 could have taken between the Appellant's house and the pombe shop at Chato's home (22 minutes to and from) the killing could not have taken place so quickly. This argument may be attractive, but we think, not realistic. First, the time given by PW1 was only an estimation. PW1 came back only to find the deceased missing, but that does not mean that by that time he was already dead. Thirdly it is in evidence that soon thereafter PW1 and his siblings were sent away to their grandmother. Although PW1 says they did not stay long at their grandmother's place, he did not say how short the time was. It is therefore all too reasonable to infer that the killing must have taken place between

the time PW1 and his siblings were absent, and before the Appellant disappeared.

When all those misgivings are explained away, the evidence that the body of the deceased was found in the Appellant's room remains unshaken. That the Appellant had something to hide is exhibited by the fact that on that Thursday when he last came to his home and locked his room he never came back again. According to his defence he left the key with a young cousin to give it to PW2, his stepmother. But PW2 denied the existence of such habit. It was her evidence that he had always gone with his key. The trial court had no reason not to believe her. Indeed, if PW2 had the key, they would not have broken the door.

We also agree that the suggestion that PW2 and PW3 were suspects of the killing was far fetched. We cannot see why, if they were he ones who killed the deceased, they decided to keep the body in the Appellant's house. They could easily have thrown it into a bush, and not in a place that would easily implicate them.

With respect therefore, we find that this strand of circumstantial evidence that the deceased's body was found in the Appellant's house was proved beyond reasonable doubt.

The last strand of circumstantial evidence that the trial court found that linked the Appellant with the commission of the offence was the **bicycle.** Mr. Nyangarika's criticism was that the bicycle was not identified to be that of the deceased, and/or that he was found in its possession. Mr. Nchimbi referred us to the evidence of PW4, PW5 and PW7 to establish the two contentious elements.

In our re-evaluation of the evidence on record we think both Mr. Nchimbi and the trial court came to the correct conclusion.

That the deceased owned a bicycle and the Appellant had none up to the date of the deceased's disappearance is proved by PW5 and PW7. PW5 is the Appellant's mother in law. She is the one in whose compound the bicycle was found. She told the trial court that

it was the Appellant who brought the bicycle. This is the bicycle that was later taken by PW4 from PW5's home to the police. This is the bicycle that the deceased's wife, PW7 identified from its special marks that it belonged to the deceased. The argument that the Appellant was not found in physical possession is neither here nor there. Once PW5 is believed as the trial court was entitled to, the possession could be implied to him as he used to live there and that was where he was found and arrested. Under section 5 of the Penal Code, the term "possession" has a wide definition, including not only having in one's possession, but also knowingly having anything in the actual possession or control of any other person. From the testimony of PW5 we are satisfied that the Appellant sent the bicycle there, and was in actual or constructive possession of it. That the Appellant had coveted the bicycle is evidenced by the testimony of PW6 who also saw both the deceased and the Appellant on the way to the auction; and testified that it was the Appellant who had the bicycle which she categorically stated belonged to the deceased. In his testimony, the Appellant said he had borrowed money from the deceased so that he could buy a bicycle.

As to the description and identification, we are aware that it is a principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainants conclusively and that in a criminal charge, it is not enough to give generalized description of property (See **DAVID CHACHA AND 8 OTHERS v R** (Mwanza) Criminal Appeal No. 12 of 1997 (Unreported). In this case PW7 claimed that she knew the bicycle as she had been using it. She had identified it at the police and also in court before it was tendered in evidence. Her description of the bicycle was:-

> "The bicycle had a chain around the junction
> and it was welded in the rear and front."

Mr. Nyangarika has severely criticized this kind of description saying it was too general. With respect, we cannot agree. While it may be common for a bicycle to have a chain and a rubber band stripped in it, we cannot accept that it is common for bicycles to be welded in the rear and front. The welding must have been for a purpose,

which only the owner could explain. We find it as a special mark. When cross examined on this mark, PW7 said:-

> "Any body can weld his bicycle but exhibit P3 is our own property. The marks I mentioned on the bicycle were put in June, 2003. I have forgotten the date."

But what is more, neither the Appellant nor any other person came forward to claim ownership of the bicycle. Like the trial court we are satisfied that the Appellant was found in possession of a bicycle belonging to the deceased, soon after the death of the owner.

The position of the law is that recent possession of property that had belonged to a murdered person raises the presumption that the accused was the murderer, and unless he can give a reasonable account of how he became possessed of the property he could be convicted of the offence. (See **MWITA WAMBURA v R** (Mwanza) Criminal Appeal No. 56 of 1992 (Unreported).

In the present case we are satisfied beyond reasonable doubt that the Appellant was found in possession of a bicycle; that bicycle belonged to the deceased; immediately after his death, and the Appellant has failed to explain how he became possessed of the bicycle. He is thus netted by the doctrine of recent possession.

From the foregoing discussion we are satisfied that the circumstantial evidence against the Appellant, irresistibly points to his guilt and incapable of any other explanation. So, the first ground of appeal fails and is dismissed.

The second ground of appeal is that the trial judge misdirected the assessors and thereby influenced their opinions. Mr. Nyangarika referred us to the decision of **ALLY JUMA MAWEPA v R** (supra) that it is wrong for a trial judge to make known his own views to the assessors. But to refute it Mr. Nchimbi, referred us to the decision of **MICHAEL LUHIYE v R** (supra).

Trial with the aid of assessors is procedural law. Section 265 of the Criminal Procedure Act (Cap 20 – RE 2002) stipulates that all trials in the High Court should be held with the aid of assessors. To gauge the effect of non compliance or miscompliance with any rule of procedure, the test is always whether the breach of that rule has in any way prejudiced the accused and thus led to a miscarriage of justice. The decision in **MICHAEL LUHIYE v R;** case, carries that message. There, it was held:-

> "For a trial in a criminal case to be a nullity it must be shown that the irregularity was such that it prejudiced the accused and therefore occasioned a failure of justice."

Not every irregularity therefore carries with it the same effect. In **LUHIYE's** case, the assessors were not allowed to cross examine witnesses individually and separately and recorded. The court held that it was a curable irregularity. In **MAWEPA's** case, the judge has expressed his own views before the assessors gave their opinions. It was held that even though the judge did so, by commenting on the

credibility of the appellant, the error did not affect the opinion of the assessors. Otherwise the trial would have been a nullity. In **ALPHONCE PHILBERT v R** (Mwanza) (Criminal Appeal No. 27 of 1999 (Unreported) it was held that if a judge misdirects the assessors on such vital point as provocation, the trial judge cannot be said to have been aided by assessors; and so the trial would be a nullity.

Mr. Nyangarika's complaint in the present appeal is that the judge made known her own views before the assessors gave their opinions and that this influenced their opinions. Mr. Nchimbi thinks not. Mr. Nyangarika picked several passages from the summing up notes to demonstrate his point. From page 98 of the record the learned counsel picked the following sentence:-

> "This piece of circumstantial evidence --- was corroborated by a hearsay evidence of PW3, Malogo s/o Chisomi ---"

and then later below:-

> "This witness when she was coming from the auction on 12/6/2003 she met the accused in the company of the deceased."

Then, on page 100, the following passages were pointed out:-

> "--- PW1 was not mentally stable as he used to suffer from headaches."

Counsel quickly pointed that this finding was not supported by the evidence on record. Then he picked the following paragraph:-

> "If you find PW1's evidence weak and needs corroboration you may advise that it be corroborated by PW6's evidence."

Learned counsel cited several other passages from pages 101 to 104 of the record with a similar tone. To these, Mr. Nchimbi's reaction was that they did not influence the assessors.

We have looked at the opinions of the lady and gentlemen assessors who sat with the trial judge. We cannot see how the assessors were influenced. The first assessor's opinion was based on the fact that the Appellant was last seen with the deceased, cemented by his own testimony. The second assessor's opinion was based on the testimony of PW1 and PW5 whom he found credible. The third assessor's opinion was based on his assessment of the evidence of PW1 and PW2.

With respect, therefore much as it is true that the trial judge slipped in her own opinions in the summing up to the assessors as demonstrated by the various passages picked by Mr. Nyangarika which was wrong we are far from being satisfied that such opinions colored the opinions of the assessors. As in **MAWEPA's** case we think that the irregularity did not occasion a miscarriage of justice to the appellant. We therefore find no merit in the second ground of appeal too.