IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: Nyalali, C.J., Mwakasendo, J.A. and Makame, J.A.)

CRIMINAL APPEAL NO. 20 OF 1979

B E T W E E N

DIDAS s/o SIRIA . . . . . APPELLANT

A N D

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction of
The High Court of Tanzania
at Moshi) (Mnzavas, J.)
date the 23rd day of September, 1978,

IN

Criminal Sessions Case No. 27 of 1978

JUDGMENT OF THE COURT

NYALALI, C.J.:

The appellant Didas s/o Siria was charged and convicted in the High Court sitting at Moshi for the offence of murder contrary to section 196 of the Penal Code and was sentenced to the only penalty allowed by law, that is, to suffer death by hanging. He was aggrieved by the conviction and is now appealing to this Court against conviction. Mr. Mirambo, learned advocate, was assigned to represent the appellant in this appeal and the Republic was represented by Mr. Ntabaye, learned Principal State Attorney.

According to the proceedings in the High Court and in this Court the following material facts appear not to be in dispute between the parties: That one Adelina wife of Wilfred Mnyesi (P.W.4), died violently on or about the 23rd October, 1977, at Marangu Rauya in Moshi District. Before she met her death on that day of the 23rd October, 1977, she had gone to P.W.1's home for a drink of pombe.

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P.W.1 is her mother-in-law. On the same day the appellant, P.W.2 and other people had also gone to have a drink of pombe at P.W.1's home.

Sometime later before 8 p.m. the deceased and the appellant left P.W.1's home for their own homes. The deceased was carrying a calabash of pombe. The appellant reached the deceased's home alone and delivered the calabssh of pombe to the children of the deceased. After delivering the calabash of pombe the appellant left for his own home. The deceased never reached her home but met her violent death on the way home.

The following day of the 24th October, 1977, P.W.3, who is the daughter of the deceased, went to P.W.1 to enquire about the deceased. Subsequently, P.W.1 and P.W.3 went to the home of the appellant to make enquiries about the deceased. The search for the deceased led to the discovery of her dead body together with other articles at a place about 120 paces from her home. An alarm was raised and a number of people including P.W.2 appeared at the scene in response to the alarm. Later, on a report being made to the police station, the police, including P.W.5 and P.W.6, arrived at the scene and took the dead body of the deceased together with the other items found at the scene. The appellant was arrested by the police that same day.

Also, according to the proceedings in the High Court and in this Court, the following material facts appear to be in dispute between the parties. According to the prosecution it is alleged that the deceased was killed by the appellant who then proceeded to fabricate evidence in his favour by delivering the calabash of pombe at the deceased's home and concocting the story that the deceased had asked him

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to deliver the calabash at her home while she went to answer a call of nature. Furthermore, it is said that the conduct of the appellant on the day when the deceased's body was discovered is consistent with the appellant being the killer of the deceased.

On the other hand, the appellant denies killing the deceased and maintains that it is true that the deceased requested him to deliver the calabash of pombe at her home whilst she went to answer a call of nature. Furthermore, it is said that there is a reasonable possibility that the deceased could have been killed by a person other than the appellant, and that the conduct of the appellant on the day of the discovery of the dead body of the deceased has an innocent explanation.

The first and crucial point of fact for consideration and decision is whether the appellant is the person who killed the deceased. The entire prosecution case depends on circumstantial evidence since no one claims to have seen the appellant killing the deceased. Evidence was given by P.W.1 and P.W.3 to the effect that the appellant was the last person who was with the deceased before she met her violent death. Furthermore, evidence was given by the same witnesses to the effect that in the morning of the 24th October, 1977, when they went to the appellant's home to enquire about the deceased, the appellant was reluctant to see them and that later the appellant led the witnesses to the place where the dead body of the deceased was discovered. The same witnesses testified to the effect that the appellant, after pointing out that place, returned to his home and did not come back when the alarm was raised until he was compelled to do so. Furthermore, there is

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the evidence of P.W.2 who responded to the alarm, to the effect that when he went to the appellant's home and enquired from the appellant about the cause of the alarm, the appellant informed him to the effect that the deceased had died.

The appellant in his testimony given in his defence, testified to the effect that he had not been reluctant to meet P.W.1 and P.W.2 when they went to his home to enquire about the deceased but they found him asleep and he had been feeling unwell for sometime. He further denied leading P.W.1 and P.W.2 to the place where the dead body of the deceased was discovered but claimed to have joined P.W.1 and P.W.2 in the search for the deceased in the area where the deceased had gone to answer a call of nature the previous night. He later went back home to return the blanket which he was covering himself. He denies being compelled to go back to the scene but claims to have voluntarily done so after the alarm was raised.

It is apparent from the record of the trial that P.W.5 (Corporal Mbega) testified to the effect that when he arrived at the scene of crime he found, among other things, two underpants, one being female wear and the other being male wear. The other witnesses who testified about this aspect, that is P.W.1, P.W.3 and P.W.6, claim to have found, among other things, only a female underpant at the scene. This apparent contradiction regarding the type and number of the underpant found at the scene of crime was not considered by the learned trial judge and does not appear to have been explained away in the course of the proceedings.

Mr. Mirambo, learned advocate for the appellant, has submitted in this appeal to the effect that there is a mere possibility that a male underpant was found at the scene of crime and that in the absence of evidence to link the appellant with that male underpant it cannot be said that no person other than the appellant killed the deceased as the male underpant could have belonged to another person who killed the deceased. These powerful arguments were not successfully countered by Mr. Ntabaye, learned Principal State Attorney.

The question therefore arises whether the evidence adduced at the trial is sufficient to support the conviction. As already noted, the prosecution case depends entirely on circumstantial evidence. The learned trial judge was aware of this position. This Court has pointed out in a recently decided case, that is the case of Fidelis s/o Selemani vs. The Republic - Criminal Appeal No. 2 of 1979, that:-

> "The law regarding circumstantial evidence has long been settled in East Africa, including this country, and is as stated by the Court of Appeal for Eastern Africa in the case originating from Kenya, that is, the case of Kipkering Arap Koske and Kimure Arap Matatu 16 E.A.C.A. page 136 where it is said that:
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> > 'in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.'.
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> Sometimes the same rule is stated in different ways as was done by the same Court in the case of Ngunjiri s/o Mugi vs. Rex page 93 where it was stated:-
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> > 'In a trial for murder where circumstantial evidence is relied on, that evidence must lead to the inevitable conclusion that the death was the act or contravance of the

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> ' accused and if there is an alternative which can with any reasonable probability account for the death this excludes the certainty which is required to justify a verdict of guilt.'".

The learned trial judge was aware of this rule of law and cited a number of cases in which the same rule was stated, such as the cases of R. v. George William Senkatuka (1946) E.A.C.A. 89 and R. vs. Tharacithio s/o Faragu (1946) E.A.C.A. 119. The learned trial judge was of the view that the circumstantial evidence in this case satisfied the requisite legal standard and therefore proceeded to convict the appellant. But as we have noted, the learned trial judge did not consider the evidence regarding the type and number of underpants found at the scene of crime. We are of the view that had he done so he might have come to a different conclusion regarding the guilt of the appellant. Since, as we have said, the contradiction in the evidence adduced by the prosecution regarding the type and number of underpants found at the scene of crime was not explained away at the trial and has not been explained away in this appeal, then in the absence of evidence to link the appellant with the male underpant which P.W.5 claims to have found at the scene of crime, the reasonable probability that the deceased was killed by a person other than the appellant cannot reasonably be excluded. In other words, it cannot be said that the circumstantial evidence in this case is such as to lead to the inevitable conclusion that the death of the deceased was the act or contravance of the appellant and that there is no alternative which can with reasonable probability account for the death of the deceased.

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It follows, therefore, that the conviction of the appellant cannot be left to stand and we allow the appeal and quash the conviction with direction that the appellant be released from jail forthwith unless detained therein for some other lawful cause.

Dated at Arusha this 22nd day of November, 1979.

F. L. NYALALI
CHIEF JUSTICE

Y.M.M. MWAKASENDO
JUSTICE OF APPEAL

L.M. MAKAME
JUSTICE OF APPEAL

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

DEPUTY REGISTRAR