IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 80 OF 1995

BETWEEN

TWAHA ELIAS MWANDUNGU. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the judgment of the
High Court of Tanzania at Mbeya)

(Mwaikasu, J.)

dated the 31st day of August, 1993

in

Criminal Sessions Case No. 50 of 1993

JUDGMENT OF THE COURT

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.

It was not in dispute at the trial that the deceased is dead. Both the appellant and the deceased were residents of Mkombwe village in the sub-district of Mbarali. It was the evidence of the deceased's mother, Nosensia William (PW.1), that on the evening of July 11, 1992, the appellant, whom she had known for many years, visited her home at Mkombwe and asked the deceased to accompany him to go and have a drink. The deceased declined

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the invitation, giving the excuse that he had no money, but following the appellant's insistence, he agreed. At his request, his mother gave him Shs. 100/=. The two young men then left. That was the last time PW.1 saw the deceased alive. When until the following morning he had not returned, the witness reported the matter to the local authorities. At about 3.00 p.m. that day information reached her that there was a dead body lying at a place called Majiweni in the village. When she reached there she found a naked dead body which she recognised 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 it, and the abdomen, she observed, was distended. The body was conveyed to her home where on the same day one Dr. Mahungururo performed a postmortem on it. PW.1 told the trial court that about a month before his death the deceased had been given by one Jason Chapile (PW.6), 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 PW.1, on July 13, 1992, the house of one Andreas Mbagaye (PW.3), 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 PW.1 and some of the local leaders, by P.C. Joseph (PW.8). A shirt with black and white spots, a whitish and purple pair of long trousers and a pair of black rubber shoes, among other articles,

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were found in the room. The clothes, according to PW.8, were 'wettish'. PW.1 identified the three articles as the very articles which PW.6 had given the deceased about a month before and which the deceased had worn on July 11, 1992. She claimed to have identified the shirt 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. PW.6 corroborated PW.1'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 before the court after he had testified.

In the house of PW.3 used to live another tenant, one Julius Alimasi (PW.4). He had his own room. Testifying on the events which he said took place at the premises on the night of July 11,1992, the 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 10.00 p.m. When the accused knocked /at/ the door I opened it for him. He then asked me a plastic basin which we use for washing clothes. I saw him carrying clothes. When I asked him what was /the/ plastic basin for he

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> told me that he wanted to wash clothes as he was to travel with them 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 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 and cash TShs. 12,000/=".

Giving his testimony, Cpl. Mathias (PW.7) 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 different persons but he could not show such persons or shops."

Dr. 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 extenso. 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

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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 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 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 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 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:

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and PW.4, according to the appellant, had lied against him in the witness-box - PW.1 because, in his capacity as a militiaman, one day in the past he had arrested her in connection with local liquor, and PW.4 because he (the appellant) had accused him to a leader of ten cells of stealing his Shs. 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:

> "The clothes ... were not sent to our (sic) room on 11/12th July, 1992. They had been inside /the/ room. I had /the/ clothes inside /the/ room from 6/7/92. 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 PW.7 as from whom I had bought /the/ clothes".

Gervas, according to the appellant, had since passes away. As regards the pair of black rubber shoes, he said he bought it on July 2, 1992. He denied that when the clothes were seized by PW.8 they were wet or wettish.

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 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.

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On behalf of the appellant, Mr. Mkumbe, learned advocate, strenuously urged us 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) Dr. 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) Dr. 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 Dr. 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.

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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 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 great care and skill.

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 PW.1 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 July 11, 1992, the appellant visited her

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home was false because, as he 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 PW.7, 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 PW.1 said could not possibly be said to be in conflict with PW.7's evidence. This is what PW.1 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 shop. 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 shop. Secondly, the learned advocate submitted that the identification of the shirt, pair of long trousers and pair of shoes by PW.1 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

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be attached to the evidence. In re-evaluating the evidence of PW.1 it is important, in our opinion, to have regard to the evidence of PW.4, 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 July 11, 1992, the day the deceased was robbed of his natural life, PW.4 saw the appellant in possession of three articles identical with those the deceased had in possession on the day and which PW.1 identified as the deceased's property. It is perfectly true that the appellant had lodged a complaint of theft against the witness (PW.4) 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 PW.1 who told the trial court that the clothes were wet when seized by the police, and also in the evidence of PW.8, who testified to the effect that the clothes "appeared wettish". Like the learned trial judge, we accept the evidence of PW.4, including his assertion that the appellant told him on the night of July 11, 1992, that he had been given the shirt and pairs of long trousers and shoes by his (the appellant's) brother.

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The learned trial judge was highly impressed by PW.1. 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 be recalled that in the course of his testimony the appellant asserted that PW.1 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 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 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 PW.1'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 recognise 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.

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 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

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wearing at the time of the murder. In our opinion, this is a proper case in which to invoke the presumption created by s.122 of the Evidence Act, 1967 (the Act), which reads:

> "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."

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 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 (1949) 16 E.A.C.A. 84. But in case of murder (or manslaughter) receiving must be out of question before conviction can be based on the presumption: See Andrea Obonyo and Others v R [1962] E.A. 542. 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 in its commission from the fact that he is found in possession of property to have been 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 (1939) 6 E.A.C.A. 90; Rex v Yego 4 E.A.C.A. 25; John Albert Mgumba v The Republic,

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Criminal Appeal No. 153/87 (C.A.) (unreported). The appellant in the instant case having 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 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 s.122 of the Act and hold, as did the learned trial judge, that the appellant 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 dismiss.

DATED at MBEYA this 10th day of June, 1999.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR