IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MUNUO, J.A., And NSEKELA, J.A.)

CRIMINAL APPEAL NO. 99 OF 2000

BETWEEN

ABDUL ATHUMAN @ ANTHONY..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Mtwara)

(Kaji, J.)

dated the 6th day of November, 2000
in
Criminal Sessions Case No. 17 of 1996

JUDGMENT OF THE COURT

MROSO, J.A.:

The appellant Abdu Athuman @ Anthony was initially charged jointly with one Nyenye s/o Kassiano with the murder of one Seleman s/o Twalibu Chuma on 3rd January, 1996. Before the trial commenced Nyenye s/o Kassiano died and the charge against him abated. The appellant alone stood the trial for murder contrary to section 196 of the Penal Code. Eventually he was convicted as charged and was sentenced to the usual punishment to suffer death by hanging. But he believes he is innocent and has sought to challenge the conviction and the sentence, hence the appeal to this Court.

The appellant lodged his own memorandum of appeal but counsel who was assigned to prosecute his appeal, Mr. M.A. Mlanzi, filed a

substitute memorandum of appeal containing two grounds of appeal. Mr. Mulokozi, learned Senior State Attorney, appeared for the Republic during the hearing of the appeal.

The brief facts of the case which was before the trial High Court were as follows. During the night of 3rd January, 1996 in Namtunu Village, Masasi District, bandits, believed to be two, went to the home of the deceased and shot and killed him with a gun outside his house. The first of his two wives, Sharifa Mbaruku – PW1, attempted to go out to where her husband had been shot dead. She however found herself confronted by one of the bandits who was armed with a gun and a knife. She was kicked and ordered to return to the house. She was followed into the house and was ordered to give the bandit money and a radio cassette. She told him she had no money and that a radio was with the second wife, Rosemary Mathias – PW2. The bandit went with PW1 to Rosemary whom he raped. Later, the bandits stole a variety of things from the home which included clothes, a bicycle, a radio, a watch and cash and then disappeared. The following day, the murder and theft were reported to the police. About two days later the appellant and Nyenye Kassiano were arrested by the police and they were found with things suspected to have been stolen during the murder. They were then charged with the murder of the deceased Selemani Twalibu Chuma.

The grounds of appeal as filed by Mr. Mlanzi, learned advocate, read as follows:-

> 1. The articles found in the appellant's house had not been properly and sufficiently identified as the same articles which had been stolen during the commission of the killing incident. It was, therefore, not quite safe and reliable in founding the conviction of the Appellant basing on the doctrine of recent possession.

2. The appellant's conviction on (sic) the offence in question has been founded upon the weakness of the defence case rather than based upon the strength of the prosecution case as the law provides.

Mr. Mlanzi preferred to argue the appeal generally rather than arguing one ground after another. According to the evidence, an assortment of clothes in a bag as well as two bicycle tyres with their rims, a National Radio and Shs. 5,470/= in cash were found in the house of the appellant. When those things were shown to PW1 – Sharifa d/o Mbaruku, by the police she said some of the clothes were her own and the rest belonged to her deceased husband. She also said the radio and the tyres belonged to her and had been stolen on the night of the murder of her husband.

PW3 – Detective Corporal Teth who took part in seizing the bag containing clothes and the radio as well as the bicycle tyres from the house of the appellant said in court when those items were shown to him:-

> These clothes are also the very ones which we

> found with the accused in his house which were later identified by the deceased's wives.

The witness did not elaborate how the wives were able to identify them as their property. The two wives of the deceased on their part did not explain how they were able to identify the items as belonging to them at the time they were shown to them by the police. In Court when giving evidence PW1 said of those items as follows:-

> Later the police showed us many things and I identified several which had been taken by the robber. No body (sic) else claimed the same to be his. The police took them. If I see them I can identify them.

Then she spoke of the individual items in the following manner:-

> The hut (sic) belonged to the deceased. This is my kitenge and this is my gown. This is my bukta and this is my night dress. This is my gown and this is the deceased's kanzu and shirt and shuka -----. This bag belonged to my husband. This radio was ours and these two tyres and rims were of our bicycle. He took a complete bicycle ---.

The second wife of the deceased, PW2 – Rosemary, said of the items found with the appellant:-

> Later the Police brought several clothes which my co-wife identified to be hers and those of our deceased husband ---. I have never heard anybody claiming those properties to be his other than my co-wife.

The appellant did not dispute that those things were found in his house when the police searched it. His explanation however was that the erstwhile second accused in the case, Nyenye Kassiano, who was his close friend and at times lived with him in the house so that the said Nyenye even knew where he kept the key to the house when not at home, had brought the bag, radio, bicycle tyres and rims to his house while he was away and Nyenye did not come back before the police arrived.

The learned trial judge was of the view that since the appellant had been found with those items soon after the theft and murder were committed, he must have been one of the people who committed the murder. The High Court said in that connection:–

> He (the appellant) said he found those properties at his home when he returned with his wife from their shamba ---.
>
> (T)he accused has failed to give a reasonable explanation as to how he had come by the same. He was the one who committed this offence although he was not properly identified at the scene due to unfavourable conditions.

Mr. Mlanzi has argued that the learned judge erred in his finding first, that the items which were found in the appellant's house had been stolen from the deceased's house and, second, that he had failed to give a reasonable explanation of how those things got into his house. Mr. Mlanzi thinks that there had not been reliable identification by PW1 and PW2, the two wives of the deceased, because it did not meet the requirements of identification as prescribed in the case of **Nassoro s/o Mohamedi v. R.** [1967] HCD n. 446. That case laid down that:-

The proper procedure of identification of property in court is that the claimant should describe the item before it is shown to him, so that it can be clear to the court when the item is eventually tendered whether or not he was able to identify it.

Mr. Mlanzi also cited the case of **Bawari s/o Abedi v. R.** [1967] HCD n. 11 where the High Court held that:-

> Exhibition of a pair of khanga not distinguishable from such other items by special marks or features will not support a finding that they are the same as those stolen.

Mr. Mulokozi on the other hand thought that there was proper and adequate identification by PW1 of the items before the trial court as the very ones which had been stolen from the home of the deceased. He argued that PW1 and PW2 were simple village peasants who had

been with those items for a long time before they were stolen and, therefore, were familiar with them to the extent that they would reliably identify them without having to describe or mention special features on them. Besides, he said, a large number of items had been stolen so that it would not have been easy to describe them in the process of identification.

We think Mr. Mlanzi has a valid argument. Certainly the evidence of identification of the things which were seized from the appellant's house was wholly inadequate. PW1 made no indication at all how she was able to identify any of the seized items as one of the things which were stolen from her house. Those items may have been many and PW1 and PW2 may have been simple village women but it cannot be that they, and especially PW1, could not have explained to the court how they were able to know at least what was it about the radio that made them be sure it was the one which was stolen from her house on the night of the murder? It must be remembered that the appellant was facing one of the most grave crimes in the Penal Code and any evidence which was being relied upon for his conviction of the offence must be cogent. A murder suspect most of all must not be convicted of murder on the basis of mere presumption, which was what the evidence of identification of the items was. It was being presumed that the bare claim by PW1 that the clothes belonged to her and her late husband and that there had not been a rival claim of ownership of them were sufficient proof that they must have been stolen from her soon after the murder of her husband. That cannot be correct. We allow the first ground of appeal.

The trial judge had found that the evidence of identification of the people who committed the murder was weak because of unfavourable conditions that prevailed. But he remarked that the appellant had failed to call his wife and his children as his witnesses, presumably to confirm the appellant's claim that the bag containing clothes, the radio and bicycle parts were brought into his house in his absence. One may indeed criticize the appellant for failing to call his wife or his children to bear him out on his claim that some one who he believed was Nyenye s/o Kassiano had brought the things into his house in his absence. But it does not follow that he was necessarily lying in saying so. Most importantly, the court was not entitled to use that weakness in the defence case as a basis for finding the appellant guilty of the offence charged. We are therefore of the opinion, with respect, that the trial court erred in taking that aspect as one of the reasons for convicting the appellant.

It was said by the prosecution that the appellant showed the police where a rifle believed to have been used to kill the deceased was found in one of the appellant's house. The evidence about the alleged rifle was controversial. That evidence surfaced for the first time during the preliminary hearing and there was no mention of it, and it was not produced, during the preliminary inquiry in the District Court. The appellant denied that he showed the police where the rifle was retrieved. The trial court at any rate appears to have discredited that evidence.

We are of the considered opinion that the evidence from the prosecution did not sufficiently demonstrate that the appellant was party to the murder of the deceased. Too many loose ends were left untied and we must allow the appeal, as we hereby do.

The conviction of the appellant of the murder of Selemani s/o Twalibu Chuma is quashed and the sentence of death set aside. The appellant should be set free forthwith unless he is held for some other lawful cause.

DATED at DAR ES SALAAM this 14th day of June, 2005.

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR

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(Appeal from the Conviction of the High Court of Tanzania at Mtwara)

(Kaji, J.)

dated the 6th day of November, 2000
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Criminal Sessions Case No. 17 of 1996

The Republic …….
Prosecutor
Versus
Abdul Athumani @ Anthony …….
Accused

In Court this 14th day of June, 2005

Before: The Honourable Mr. Justice J. A. Mroso, Justice of Appeal
The Honourable Madame Justice E.N. Munuo, Justice of Appeal
And The Honourable Mr. Justice H. R. Nsekela, Justice of Appeal

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THIS APPEAL coming for hearing on the 6th day of April, 2005 in the presence of the Appellant AND UPON HEARING the Appellant and Mr. Mulokozi, Senior State Attorney, for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day;

IT IS ORDERED that the appeal against conviction and sentence is hereby allowed, the conviction of murder is quashed and the

sentence of death set aside. The appellant should be set free forthwith unless he is held for some other lawful, cause.

Dated this 14th day of June, 2005.

Extracted on the 14th day of June, 2005.

S. M. RUMANYIKA
DEPUTY REGISTRAR