IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MAKAME, J.A., MUNUO, J.A. AND KAJI, J.A.)

CRIMINAL APPEAL NO. 74 OF 2005

ASHA HARUNA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Shangali, J.)

dated the 5th day of November, 2004

in

Criminal Session Case No. 44 of 2002

J UDGMENT O F T H E COURT
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28 June & 6 July, 2006

MUNUO, J. A.:

In Criminal Session Case No. 44 of 2002 in the High Court of Tanzania at Tanga, the appellant, Asha Haruna, was convicted of

murdering one Mohamed s/o Mussa alias Kacheche, on the 18th day of April, 2002 at about 13.00 hours at Mbwei Village in Lushoto District within Tanga Region. Having convicted the appellant, Shangali, J. sentenced her to death by hanging. The appellant then lodged this appeal to challenge the conviction and sentence.

It is not in dispute that the small boy, then aged 4, Mohamed Mussa, died violently on the material day from severe burns on the head, face, arms and stab wound on the left chest as shown on the postmortem report, Exhibit P. 1.

On the fateful day, the mother of the deceased, one Sikudhani Seif, went to farm. She left the deceased at home, playing with other children. When Sikudhani returned home she cooked and after the food was ready, she called out for her son, Mohamed in vain. She went round looking for the deceased's play mates and inquired from them the whereabouts of her son but she could not trace him. P.W. 3 Hadija George who had gone farming with Sikudhani also participated in the search for Mohamed Mussa. P.W. 3 learnt from

P.W. 4 Seif Mohamed that the accused had called the deceased into her house for food. P.W. 3 went to the accused's house to find out the whereabouts of the deceased. The appellant responded negatively and furiously.

As to how she saw the appellant call the deceased into her house for food, P.W. 2 Dawia Haruna, the daughter of the appellant stated, not on oath, because then aged 10, she did not know the meaning of an oath, but she had sufficient intelligence and knew the duty to tell the truth. P.W. 2 stated:

> ... I used to play with the deceased. We used to call him Kacheche. On the material date my mother called us inside the house to eat food. Then my mother told me to get out. She remained inside with Kacheche. As I was out I heard Kacheche cry once. Then I went to the door and peeped inside to see what my

> mother was doing to Kacheche. I saw her holding him by his legs upside – down and putting his head in the boiling water. Then Kacheche was still alive throwing his hands but my mother put him down on the floor and trodded on his body by her legs.

P.W. 2 continued to state:

> Then she put him in a big plastic bag and took him out. She warned me not to tell anybody what I saw or else she would chop off my legs. My mother threw the body of Kacheche under the mpera (guava tree).

The above evidence was corroborated by P.W. 4 Seif Mohamed. He stated that on his way back to school, he saw the appellant, Asha, carrying –

> ... a child because I was able to see the legs which were hanging --- I was very close to her about 12 paces. The child was in the plastic bag 'sulfate' and covered by a khanga. She was going towards behind the house. ...

Upon P.W. 2 and P.W. 4 identifying the appellant as the killer of the deceased, she was arrested and charged with murder.

The appellant denied killing the late Mohamed Mussa. She said that deceased's mother is her own husband's sister. She claimed that the police threatened to kill P.W. 2 if she did not implicate her mother. The appellant said that the deceased could have died from epilepsy. She said that she would not know who killed the deceased.

Mr. Akaro, learned advocate, represented the appellant. The respondent Republic was represented by Ms. Maganga, learned State Attorney. Counsel for the appellant filed three grounds of appeal, namely that –

1. P.W. 3 Hadija George and P.W. 4 Seif Mohamed, both Moslems by religion were sworn instead of being affirmed as is required under the provisions of Section 198(1) of the Criminal Procedure Act, 1985, Cap. 20 which state, inter-alia:

> 198(1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act.

Counsel for the appellant insisted that being Moslems, P.W. 3 and P.W. 4 ought to have been affirmed as is mandatory under Section 198(1) of Cap 20. Non – compliance with the material section, counsel for the respondent contended, rendered their evidence null and void.

With regard to ground 2 and 3 of the appeal, counsel for the appellant submitted that there were material contradictions and inconsistencies in the evidence of P.W. 3 and P.W. 4 so the learned trial judge should have found the evidence of these two witnesses incredible. He contended that P.W. 4 lied because he said that he went back to school when he in fact did not return to school on the material afternoon. He faulted P.W. 2 and P.W. 4 for saying that they saw the appellant carrying the body of the deceased to the back of the house whereas P.W. 1 and P.W. 3 stated that there were dragging marks from the house of the appellant to the guava tree under which the body was dumped. It was the contention of counsel for the appellant that a third party could have killed and dumped the body of the deceased under the guava tree. Furthermore, counsel

for the appellant contended, the evidence of P.W. 2 Dawia Haruna should not be believed because she gave evidence upon her father's promise to buy her a new uniform which means she was not a free agent, and could have lied, therefore. In view of such contradictions and inconsistencies, counsel for the appellant maintained, the guilt of the appellant was not proved beyond all reasonable doubt so the appellant should be accorded the benefit of doubt and the appeal should, therefore, be allowed, the conviction be quashed and the sentence set aside.

Ms. Maganga, learned State Attorney, supported the conviction and sentence. She conceded that P.W. 3 and P.W. 4 were sworn instead of being affirmed but the irregularity, she contended, was minor and thence curable because the meaning of swearing and, or, affirming is the same because in either case, the witness is essentially required to speak the truth.

As for minor discrepancies, and inconsistencies, the learned State Attorney argued that because the evidence of P.W. 3 and P.W.

4 was not rehearsed, it had to have minor discrepancies. P.W. 2 and P.W. 4, the learned State Attorney pointed out, stated that they saw the accused carrying the body in a 'sulfate' bag but the legs of the deceased were dangling. The appellant carried the body from her house to the back of the house, she observed. The dragging marks, the learned State Attorney further observed, were traced by P.W. 1 and P.W. 3 from the back of the house to the guava tree where the appellant dumped the said body. The learned State Attorney contended that the evidence of P.W. 2, P.W. 3 and P.W. 4, proved beyond all reasonable doubt that the appellant killed the late Mohamed Mussa Kacheche with malice aforethought by dipping him into boiling water upside down causing the severe burns which caused his death. She urged us to dismiss the appeal for lack of merit.

The issue is whether the appellant murdered the late Mohamed Mussa alias Kacheche.

We wish to start with the complaint in ground one of the appeal, that is, that the evidence of P.W. 3 and P.W. 4 is a nullity because although these two witnesses are Moslems as reflected in the record of appeal, they were sworn instead of being affirmed so their evidence should be nullified. Like the learned State Attorney, we checked the definitions of the words "sworn" and "affirm" to see whether they substantially differ.

At page 1210 of the Oxford Advanced Learner's Dictionary, 6th Edition, Oxford, the phrase –

> Swear to God means make a public or official promise especially in a court of law to speak the *truth.*

At page 19 of the same dictionary, the word –

> Affirm means state firmly or publicly that something is *true.*

We are of the settled opinion that the words 'sworn' and 'affirmed' mean that the witness be he Christian or Moslem will testify truthfully. In that situation, using the word 'sworn' instead of 'affirmed' in respect of P.W. 3 and P.W. 4 who undertook to testify truthfully, occasioned no injustice to the said witnesses or to the appellant. The error, we hasten to hold, is curable under Section 388 of the Criminal Procedure Act, Cap 20 for the said error did not prevent P.W. 3 and P.W. 4 from deposing truthfully. It appears to us that swearing or affirming a witness is more a question of semantics because at the end of the day, the goal is to cause the witness to solemnly promise to tell the truth and the truth only. Hence ground one of the appeal is lacking in merit.

On the alleged inconsistencies and contradictions in the evidence of P.W. 2, P.W. 3 and P.W. 4, the learned trial judge observed at page 54 of the record of appeal:

> I have carefully considered the contradictions and inconsistencies in this case, and just like

> the three wise assessors, I am satisfied that the available inconsistencies and contradictions do not affect the central and crucial issues in connection with how the accused lured the little boy to her house and brutally murdered him.

It will be recalled that P.W. 4 had been sent home to collect his mother, Sikudhani and take her to his school for some official school matter. P.W. 4 did not find his mother at home. As he was returning to school, he passed by the appellant's home and upon seeing her carrying a sulfate bag with the legs of a child dangling, got distracted and observed where and what she was up to so he did not return to school. Both P.W. 2 and P.W. 4 stated that they saw the appellant take the sulfate bag with the body from her house to back of her house. P.W. 1 and P.W. 3 observed dragging marks from the back of the house to the guava tree under which the body was dumped by the appellant.

The learned judge further held that –

> Apart from the evidence of P.W. 2 and P.W. 4 who witnessed the accused killing the deceased and throwing his body under the guava tree, there is circumstantial evidence that the accused was the last person to be seen with the deceased when he called him in her house. In the case of **Richard Matangule and Elia Richard versus Republic** (1992) TLR the appellants were seen calling a child of 12 years into their house. The child was never seen alive again. The Court held that the circumstances and evidence indicated that it was the appellants who killed the child.

In this case P.W. 2 Dawia Haruna saw the appel..., ... natural mother immerse the deceased child upside down into a large

pot of boiling water, and the cause of the death of the deceased was severe burns on the head, face and arms. More importantly both P.W. 2 and P.W. 4 saw the appellant carrying the body in a sulfate bag – the legs dangling – indicating that the little boy was by then already dead. The appellant carried the body in a sulfate bag to the back of her house. Like the learned trial judge we are satisfied beyond all reasonable doubt that the evidence of P.W. 2 and P.W. 4 and the fact that the appellant lured the little boy into her house pretending to give him food but later brought him out dead, his legs dangling from the sulfate bag she carried out of her house on the noon of the material day, established her guilt for murdering the little boy beyond all reasonable doubt.

In view of the above the appeal is devoid of merit. We accordingly dismiss the appeal.

DATED at TANGA this 6th day of July, 2006.

L. M. MAKAME
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR