IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 474 OF 2007

CHRISTIAN MALIANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania (Dodoma Registry) at Kongwa)

(Masanche, J.)

dated the 19th day of September, 2007
in
Criminal Sessions Case No. 61 of 2005

JUDGMENT OF THE COURT

23 & 26. October, 2009

MSOFFE, J.A.:

The High Court sitting at Kongwa, Dodoma (Masanche, J.) found the appellant CHRISTIAN MALIAMBA guilty of murdering his wife JANETH MALIAMBA contrary to section 196 of the Penal Code on or about the 17th day of October 2003 at Mnozi-Lumuma village within Mpwapwa District in Dodoma Region and accordingly sentenced him to death. The appellant has come to this Court still protesting his innocence and he is represented before us by Mr. Paul Nyangarika,

learned advocate, who also advocated for him at the trial. Mr. Nyangarika filed and argued three grounds of appeal which essentially centre on one major ground of complaint that the prosecution circumstantial evidence adduced at the trial did not conclusively establish the appellant's guilt. In his response, Mr. Justus Mulokozi, learned Principal State Attorney for the respondent Republic, was of the affirmative view that the prosecution case against the appellant was proved beyond reasonable doubt.

In view of the position we have taken on the appeal as a whole we will not address the respective submissions made before us by learned counsel on the merits or otherwise of the appeal. In similar vein, we will not state the facts in much detail. It will suffice to say that, as already alluded to, the appellant and the deceased were husband and wife, respectively. On 17/10/2003 PW1 HAGURWA MNONGOLE MKASANGA and PW3 PAULINA ZAKARIA received information of the death of the deceased. They quickly went to the appellant's home where they saw the dead body. The appellant was also present. They observed the body and saw a black line around the neck. The neck was swollen. The body was eventually taken to

hospital for post mortem examination and the matter was reported to the police. On 19/10/2003 PW5 Dr. GODFREY DANIEL ITAJA examined the body. According to the post mortem examination report which he later produced, and was admitted in evidence at the trial without objection, the cause of death was due to

> *"strangulation of the neck caused obstruction of air way (Asphyxia death)".*

In the summary of the report he observed:-

> *"Examined a female dead body and found that the cause of death was due to strangulation of the neck-caused obstruction of air way (Asphyxia death)".*

In his testimony in Court PW5 ruled out suicide as the probable cause of the death.

We wish to observe here that from the above facts the prosecution case was premised on one major point. That it was the appellant, and he alone, who strangled his wife to death. This view was strengthened by the alleged fact that, according to PW3, on

15/10/2003 the deceased told her that the appellant had vowed to kill her (the deceased) one day as they usually quarrelled in their marriage. Apparently their marriage was not a happy one.

On the other hand the defence version on the cause of death was completely different from the one given by the prosecution. The appellant, testifying as DW1, said that in the morning of 17/10/2003 the deceased started complaining that she had stomach and back pains. He quickly informed his neighbours, notably DW2 FELIX CHIDUO, DW3 MDACHI HONOLI and one BIBI KIDUDE (a reputed local medicine woman or native **"midwife"**), about the deceased's deteriorating health condition. The neighbours came in and witnessed the deceased's condition. In the meantime, he (DW1) also went to a nearby shop and bought Flagyl tablets with a view to treating the deceased who was at that time vomiting heavily. As her condition deteriorated, BIBI KIDUDE suggested that the deceased should be taken to hospital for further clinical management and treatment. Before that could be done she died. Both DW2 and DW3 supported the appellant that much.

So, from the defence version, it will be observed that the cause of death was due to natural causes.

As our law provides, specifically under **Section 265** of the **Criminal Procedure Act** (CAP 20 R.E. 2002), a trial in the High Court is with the aid of two or more assessors as the court thinks fit. In this case, the judge sat with three assessors, JACKSON CHITUNGU, NAOMI BOMA and CLEMENT MAGEJA. After the judge's summing up, the three assessors returned verdicts of guilty. In convicting the appellant the judge agreed with the assessors thus:-

> *"The three assessors who have sat with me are unanimous in their verdict that it was the accused who assaulted the deceased by strangulating her to death – a mission he was accomplishing after he had remarked that he would kill her, for reasons best known to him. I agree with them in toto".*

In a case of this nature it is expected that a judge will always sum up to the assessors **properly** on the evidence and the law before inviting them to express their opinions. This is important so that at the

end of the day the assessors are put in a position of giving informed and objective opinions. The question here is whether the assessors were **properly** directed on both the prosecution and the defence evidence. In our respectful opinion, they were not.

To start with, in his summing up the judge said somewhere as follows:-

> *"As I said before we all were here when these witnesses were testifying. Some were long witnesses and some were short. I particularly draw your attention to two witnesses here. Paulina and Dr. Godfrey. You saw how these got a barrage of questions from counsels, particularly the defence counsel. This should not surprise you. It does not surprise me either. This is because these two witnesses* ***are crucial in the case****. Paulina is crucial in the sense that the proof of motive for the killing lies on her. Equally, the doctor is crucial on (sic) the sense that the prosecution rely on him in proving the cause of death."*
>
> (Emphasis supplied.)

It occurs to us that, as opined by the judge, it might as well be true that the above two witnesses were crucial in the case. Fine. But the judge should not have ended there. Equally crucial were the defence witnesses, notably DW2 and DW3, who alleged to have been present at the time of the death. It will be recalled that, as opposed to the prosecution witnesses, these were the only witnesses who claimed to have been present at the time of the death of the deceased. Therefore, in his summing up the judge ought to have directed the assessors on the significance, if any, of the evidence of these defence witnesses. By doing so, he would have put them in a position or opportunity of giving a balanced opinion on the case as a whole. As it is, the assessors were "**fed**" with the prosecution version only without being told anything about the defence case. We are of the considered view that this was improper.

As if the above was not enough, there were other features in the summing up which, we think, were not pleasant. For instance, the judge said as follows about the doctor:-

"As for the cause of death, you saw how the doctor was gruel (sic) in the witness dock. All that the defence are saying, actually is that Dr. Godfrey is not competent enough to do post mortem and give an opinion. You heard the questions leveled at him by the defence – some very derogatory indeed. ***The questions, actually, were suggesting that Dr. Godfrey is a bogus doctor and therefore, his opinion should be thrown overboard.***

Let me tell you what I have learnt for the barrage of questions from Mr. Nyangarika on Dr. Godfrey.

The scarring remarks on Dr. Godfrey were, indeed, uncalled for. ***We should be satisfied that he has sufficient training and licence to perform post mortems examination in hospital and give his opinion to the courts of law****. But, may I add to tell you the law – Doctors opinion is respected by courts of law, although they are not binding. A court of law is not obliged to accept doctor's opinion".* (Emphasis supplied.)

In our view, much as we are in agreement with the judge that courts are not bound by expert opinions by doctors, by the above passage he was, in a sense, inviting the assessors to accept his perception of the cross-examination made by Mr. Nyangarika on the evidence of the doctor. He was also, in effect, asking them to accept his opinion about the qualifications of the doctor. With respect again, we think this was not proper. The judge ought only to have given or guided the assessors on the **hard** facts and then leave them to make their own objective and informed opinions about the case.

There were two other unpleasant features in the case which show that the judge misled the assessors on the evidence. At some stage he told them that when PW1 and PW3 arrived at the appellant's home they saw "some **scratches** around the neck". With respect, this was not borne out by the evidence of these two witnesses because in their respective testimonies they said that they saw a **black line** around the neck. The judge also told the assessors that the deceased's brother, PW2 MESHACK MAFTAHA, went to the appellant's home at **Mnozi-Lumuma**, alongside PW1 and PW3, and viewed the body of the deceased. With respect, this was not true. PW2 was

positive that he did not go to the appellant's home at **Mnozi-Lumuma**. His evidence was that the body was brought to him at **Ipwaga** where he viewed it.

In view of the shortcomings in the summing up to the assessors we are of the view that the judge denied the assessors the opportunity to "**aid**" him properly. Indeed, it is apparent that they were heavily influenced by the "**one sided**" sort of summing up. In this regard it is no wonder, therefore, that in their respective opinions the assessors believed PW3 and PW5 in *toto* without assigning any reasons as to **why** the defence case should not be believed.

Having said so, it is also our opinion that the judgment is also not free from error. Apparently in the said judgment the judge adopted the same approach as the one he had taken in the summing up to the assessors. For example, in our reading and understanding of the said judgment one thing becomes evident. That the judge did not discuss the defence case. He merely mentioned or narrated it, without more. With respect, in doing so he was in error. **Section 312 (1)** of the **Criminal Procedure Act** (CAP 20 R.E. 2002) provides, *inter alia*,

that a judgment must contain the **point** or **points** for determination and the **reasons** for the decision. In this case, the defence case had a point, or rather points, which the judge ought to have considered and thereby make a definitive and reasoned finding on whether or not to believe it. As it is, the judge believed the prosecution case wholesale without testing its veracity against the defence case. Yet again, with respect, this was not proper.

In our considered opinion, the cumulative effect of the foregoing is that there was no fair, impartial and conclusive trial. For this reason, we are compelled, or rather constrained, to take the unusual step of invoking our revisional jurisdiction under **Section 4 (2)** of the **Appellate Jurisdiction Act, 1979** as amended by **Act No. 17** of **1993**, and accordingly nullify the proceedings and judgment of the High Court. There will be a trial *de novo* before another judge. We appreciate that the appellant has been in custody since 2003 which is, no doubt, a fairly long period of time. In the interests of justice therefore, the retrial should be conducted as soon as possible. We so order accordingly.

DATED at DODOMA this 26th day of October 2009.

J. H. MSOFFE
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(Z. A. MARUMA)
DEPUTY REGISTRAR