IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE,J.A., MBAROUK,J.A. And ORIYO,J.A.)

CRIMINAL APPEAL NO. 338 OF 2007

KULWA MALINGANYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Morogoro)

(Othman, J.)

Dated the 22nd day of June, 2007
in
Criminal Sessions Case No. 102 of 2003

JUDGMENT OF THE COURT

25th May & 8th June, 2009

MSOFFE, J. A.:

It is common ground that on or about the 22nd day of April 2000 MOHAMED ATHUMANI LYOKO died. He died a violent and an unnatural death. According to the post mortem examination report, the death was due to drowning. The body of the deceased was seen on 24th April, 2000 at around 7.30 p.m floating on a river. It had a

piece of rope applied tightly several times above the right knee joint. Except for an underwear, the body had no other clothes.

It is also common ground that in the information filed in the High Court on 27/10/2003 the appellant was charged with another person known as SAWA MAHINDUKA. On 9/5/2005 the case came up for preliminary hearing. On this day, there was information that the said SAWA MAHINDUKA was dead. The prosecuting State Attorney appeared to doubt the authenticity of the information. So, instead of praying for an order under **Section 284 A** of the **Criminal Procedure Act** (CAP 20 R.E. 2002) that the case against him be marked abated, he informed the court that the Director of Public Prosecutions was entering a *nolle prosequi* against him because "he was to be dealt with in another charge altogether". Accordingly, an order was made under **Section 91**(1) of the above **Act** discharging him from the case. Later, on 27/2/2007 the Prison Officer incharge of Morogoro Remand Prison wrote a letter Ref. No. 110/MOR/4/iv/223 to the "Mahakama Kuu (T) Morogoro" attaching a death certificate showing that SAWA MAHINDUKA died on

11/11/2004. As it is, therefore, there was no dispute at the trial that SAWA MAHINDUKA was dead. Henceforth, the trial proceeded against the appellant alone.

The crucial question before the trial High Court was this:- Who killed MOHAMED ATHUMANI LYOKO? The High Court received evidence from both the prosecution and the defence sides. In the end, in a very carefully written and well reasoned out judgment, the trial judge held that the death was caused by the appellant, KULWA MALINGANYA. It accordingly convicted and sentenced him to death. Aggrieved, the appellant is now appealing. Ms. Fatma Karume, learned counsel, advocated for him. The respondent Republic was represented by Ms. Angela Kileo, learned State Attorney.

Ms. Fatma Karume filed and argued one ground of appeal. That, in finding that the appellant caused the death of Mohamed Athumani Lyoko with malice aforethought the learned judge misdirected himself in law and in fact. In elaboration, she was of the view, *inter alia*, that the prosecution did not prove any or more of the

circumstances prescribed under Section 200 of the Penal Code in establishing malice aforethought. She cited the case of **Olenja v Republic** (1973) EA 546 at page 552 that... *it is not possible to lay down a general interpretation to be followed in all cases*...and then urged us to determine the appeal with that view in mind.

On the other hand, Ms. Angela Kileo was of the view that the case against the appellant was proved beyond reasonable doubt. She carried us through the circumstantial evidence in the case. In the process, she maintained that the appellant was the last person to be seen with the deceased. That the chain of events in the circumstantial evidence was unbroken. That the appellant's conduct, particularly after the murder, was not consistent with innocence. In conclusion, she submitted that the evidence established that it was the appellant alone, and not anyone else, who killed the deceased with malice aforethought.

It is not in dispute that the deceased and the appellant were father-in-law and son, respectively. They were good friends. Indeed, they used to socialize together.

The prosecution case, in so far as the events of 22/4/2000 and 23/4/2000 were concerned, is well stated in the judgment of the High Court as follows:-

> *...the accused, on 22/4/2000, the fateful day came to take the deceased from his house at Mlabani to go to the ferry (Kivukoni). (PW1 Kassim Lyoko, Exhibit P.5). That when they left at around 8 p.m they took with them the deceased's bicycle (Exhibit P.3). It was a green, Phoenix make bicycle bearing serial number 66776 (Exhibit P.3). The deceased had leprosy. However, he could ride a bicycle (PW.4). He did not return home that night. Or ever.*

The next morning, on 23/4/2000, the bicycle (Exhibit P.3) was offered for sale by three (3) youths to PW4 (Mambwambe). He is a bicycle repairer whose workshop is at his house. One, Sawa Mahinduka said the bicycle was given to them by the accused to sell (PW1 and PW4 (Mambwambe), PW5 (Mponda), PW7 (Cpl. Feedman). PW1 and PW4 knew him. Both of them recognized that it was the deceased's bicycle. This by having dealt with it before and by special marks. With its identification by PW.1 as that of the deceased the three youths fled (PW1, PW4, and PW5). Later that day, Sawa Mahinduka was arrested by PW1, PW4 and PW5 at the big market. He was taken to the police and locked up. The other youths were also arrested and locked up (PW.7).

At around 9.10 a.m, on 23/4/2000, the accused came to PW3's house at Mlabani (PW1, PW3, (Robo). He was offered tea (PW2 Ngoka). He said the

deceased had asked him to collect two cigarettes (sigara kali) which he (i.e. the deceased) had left at his house (PW2,PW3). PW2 fetched them and they were given to the accused. PW1 arrived with the deceased's bicycle he had seized at PW3's house. The accused was informed that the deceased had not returned home since the previous night and that the bicycle had been recovered being sold. He expressed surprise. The accused told PW.1 to go with him so as to be shown where he had left him. He took him to Chatu Bar (PW.1). They did not find him. PW.1 was told by the accused to return in the afternoon. When he did, he neither found him nor the deceased.

Meanwhile, sometime late afternoon, PW.3 and PW.6 (Halima Ngwembe) went to the accused's house at Viwanja Sitini (60). They asked him to show them where he had left the deceased. He took them to Jaribu Club. Then the accused led them to a route that

had banana plantation at Kionjo or Matongo (PW3, PW6). It was around 7-8 p.m and getting dark (PW3, PW6). PW3 told the accused that they should return to collect the deceased's sons to assist in the further search for the deceased. As PW3 held the accused's sweater from behind, the accused drew a knife (Exhibit P.4) and stabbed PW.3 on top of the head. PW6 and one Hadija Lyoko screamed 'thief,thief'. They held the accused by the legs. Some 30 people, including PW4 came to the scene. The accused was apprehended and taken to the Ten Cell Leaders house, Mzee Waziri. The police came. The accused was taken and locked up at the police station.

The appellant's version of the events of 22/4/2000 and 23/4/2000 was to a large extent not in conflict with the version given by the prosecution. He testified that on 22/4/2000 he and the deceased went to the ferry to buy fish. The deceased rode the bicycle and he sat on the rear seat. They arrived safely at the ferry

after leaving Chatu Bar at 10.00 p.m. They waited for fishermen at the ferry until midnight. On their way back they encountered three youths, one of them being SAWA MAHINDUKA. The said SAWA MAHINDUKA hit a stick on the road. He and the deceased fell off the bicycle. They ran in opposite directions. He ran a bit far, stopped somewhere and overslept. He returned to his house between 3.15 to 4.00 a.m. In the morning of 23/4/2000 he went to the deceased's house with a view to checking whether or not he had returned home. He met PW2 and PW3. He was informed that the deceased had not returned. He went with PW1 to the ferry. The deceased was no where to be seen. Since PW1 was already late in collecting firewood the search was postponed till 4.00 p.m. At that time he met with PW1, PW3 and PW6 and together went out again for the search. They passed through Chatu, Seratini and Jaribu bars. They did not find the deceased. Eventually, he was surprised to be grabbed by PW3 from behind as if he was a thief. In the ensuing struggle PW3 was accidentally injured on the head.

On the issue of cigarettes, the appellant stated that he went to the house of PW3 to ask for the two cigarettes he had left on 22/4/2000. PW2 fetched them for him. He smoked one and gave the other to PW3 who smoked it.

In brief, the learned trial judge was satisfied that the circumstantial evidence in the case established that the appellant killed the deceased with the requisite malice aforethought. In finding so, the judge took into account the fact that the appellant was the last person to be seen with the deceased while still alive. He also addressed his mind to the appellant's conduct in the matter, particularly after he parted with the deceased, and ultimately concluded that it was the appellant, and he alone, who killed the deceased on the fateful day.

The crucial question in the appeal is whether or not the circumstantial evidence as produced by the prosecution proved the case against the appellant beyond reasonable doubt that he, and not anybody else, killed the deceased.

The first piece of circumstantial evidence found by the High Court was the undisputed fact that the appellant was the last person to be seen with the deceased while still alive. With respect, this fact alone was not enough to establish that the appellant caused the death of the deceased. In the case of **Sylvester Fulgence v Republic** (1980) TLR 208 it was in evidence that the accused person was walking with the deceased shortly before his death. On appeal to this court it was held that in the absence of proof of a motive or of the appellant having caused the death, a **conviction** for murder could not be upheld. It occurs to us that the principle in **Fulgence** applies here too. It was nowhere established that the appellant had a motive to kill the deceased. Indeed, the appellant and the deceased were friends. In the circumstances, it was unlikely that there would be a motive for the murder. At best, there was a suggestion by PW6 that when the appellant returned after having suddenly left her, he allegedly claimed that the deceased had bewitched him into impotence. The judge considered the suggestion; taking into account that the deceased and the appellant were good friends who

socialized together and that there was no evidence of any previous dispute or quarrel between them; and then in the end he dismissed the suggestion as "conjecture, if not a wild guess". With respect, we have no reasons to differ with the judge in his finding of fact on the point. Again, applying the principle in **Fulgence,** there was no positive evidence in this case that the appellant caused the death of the deceased. No one testified to have seen the appellant killing the deceased.

This brings us to the other piece of circumstantial evidence. The prosecution case here was that on 22/4/2000 at around 8.00 p.m.the appellant and the deceased left together for the ferry taking the deceased's bicycle with them. It was *Phoenix* make with serial number 66776. The bicycle was seized and recovered from SAWA MAHINDUKA on 23/4/2000 while attempting to sell it to PW4. When he and two other youths who were with him realized that PW1 had identified that the bicycle belonged to the deceased, they fled. In the light of the above evidence, the prosecution owned that it was fully proved that the appellant gave the deceased's bicycle to SAWA

MAHINDUKA to sell. The learned judge dealt with this point by first of all underlining the submission of Mr. Mbezi, learned advocate for the appellant at the trial, thus:-

> *...Opposed, Mr. Mbezi submitted that it is a rule of law that the receiver of property suspected to have been stolen is presumed to be the one who killed. That as the three youths were found in its actual possession then it is them who should be presumed to be the deceased's killers. Not the accused who was never found in its possession nor had he given it to them to sell or otherwise. He questioned if the prosecution knew of the three youths, why did it not charge them?* ***He urged that the question how the three youths got the bicycle from the accused still remained unresolved and open.***
>
> *(Emphasis supplied.)*

The judge appreciated the force of argument in the above submission. Indeed, he opined that the arguments sounded "attractive". In the end, however, he disagreed with Mr. Mbezi. The judge reasoned, *inter alia,* as follows:-

> *On a cross-examination of the whole evidence, I find it fully established that the accused had given that bicycle to Sawa Mahinduka to sell.* ***One,*** *this on the cogent and credible evidence of PW1, PW4 and PW5 to what he told them when trying to sell it to PW4 on 23/4/2000.* ***Two,*** *PW7 (D/Cpl.Feedman) the policeman in charge of the investigation of the deceased's murder was told the same by Sawa Mahinduka. Unrelated to either the deceased or the accused, on the whole material, the evidence of PW4,PW5 and PW7 can be relied upon...*

With respect, we have the following to say on the above findings of the trial judge. **First** and foremost, Mr. Mbezi was correct in the sense that, in law, a receiver of property suspected to have been stolen is presumed to be the actual thief or a guilty receiver. In **Marwa bin Siongo v R, 1** TLR (R) 201 it was held that:-

> *If a person is in possession of stolen property recently after the stealing it lies on him to account for his possession and if he fails to account for it satisfactorily he is reasonably presumed to have come by it dishonestly. It depends on the surrounding circumstances whether he is guilty of receiving or stealing.*

In this respect, also see **Idi Waziri v R** (1961) E.A. 146 to the effect that the circumstances under which an accused received or possessed the goods may be sufficient to prove that the accused knew that they were stolen and knew it when he received them.

In similar vein, by the doctrine of recent possession a person found with stolen property immediately after the murder, will be taken or presumed to be the murderer- See **Hamisi Meure v Republic** (1993) TLR 213.

Second, there is no dispute that SAWA MAHINDUKA was mentioned by both the prosecution and the defence. Very unfortunately, SAWA MAHINDUKA died and therefore did not testify. In the absence of his testimony, it was not fair for the judge to say that he found it established that the appellant gave him the bicycle to sell. If he had testified perhaps he would have said that the appellant did not give him the bicycle to sell. Who knows? In similar vein, in the absence of his evidence it was still possible that he did not tell PW7 anything about the bicycle.

Third, the appellant's version was that on the way back from the ferry he and the deceased were attacked by three youths, including SAWA MAHINDUKA. Seriously speaking, this evidence was not contradicted by the prosecution. If so; it is not clear to us as to

why the judge believed the prosecution version that the appellant gave the bicycle to SAWA MAHINDUKA to sell, in the absence of the latter's evidence to that effect; and disbelieved the appellant that they were attacked by the three youths who included the said SAWA MAHINDUKA!

In our evaluation of the evidence relating to the bicycle incident we are constrained to say that there were questions which remained unanswered in the case. These are the questions. Wasn't it possible that SAWA MAHINDUKA and the two other youths were responsible for the death of the deceased? If not, why did they run away once it was discovered that the bicycle they wanted to sell belonged to the deceased? Wasn't it possible that the youths got the bicycle from the deceased; and if so under what circumstances? Having arrested and locked up the youths who were with SAWA MAHINDUKA why did the prosecution decide not to prefer charge(s) against them! Or if it was not possible to charge them why didn't the prosecution call them as witnesses in order to explain how they got the bicycle? Wasn't it possible that the deceased died at the hands of SAWA MAHINDUKA

alone? Though no motive was established in respect of the appellant, as already stated, wasn't it possible that the appellant and SAWA MAHINDUKA killed the deceased? Wasn't it also possible that the deceased was killed by other person(s) other than the appellant, SAWA MAHINDUKA or the youths? In the absence of answers to these questions we are, with respect, in agreement with the submission made by Mr. Mbezi at the trial that it was not safe to ground a conviction on the available circumstantial evidence. As it is, it was quite possible that someone else, and not necessarily the appellant, was responsible for the death in question. In fact, we may respectfully say that the ***SAWA MAHINDUKA factor*** in the case, if we may call it so, broke the chain of events in the prosecution case.

Having said so, we see no compelling need of addressing **all** the other pieces of circumstantial evidence relating to the appellant's conduct. We will address only **one.** It will be recalled that the appellant was blamed for, among other things, that in the course of the search for the deceased on 23/4/2000 he led:-

> *...PW1, PW3 and PW6 in a circuitous itinerary of Bars or clubs they had gone to with the deceased on 22/4/2000 and not to make similar concerted efforts to search in the area in and around the ferry where they had gone the night of 22/4/2000 or where they were allegedly ambushed by the three youths...*

In our view, it may well be true that the appellant chose to take the witnesses in the alleged "**circuitous**" manner. But this factor did not necessarily establish that he was doing so out of guilt conscience. Very unfortunately he was not cross – examined on this aspect of his alleged conduct. If he had been cross – examined perhaps he would have given a reason which had nothing to do with guilt conscience. In fact, in the absence of cross – examination on the point, we might as well speculate that if PW3 had not grabbed his shirt thereby ending the search mission, probably he would have eventually taken the search party to the place he alleged he parted with the deceased the previous night.

The judge, correctly and sufficiently in our view, underlined the law governing circumstantial evidence. In the process, he cited a number of authorities, some of which we think we should also cite here because of their importance in the law relating to circumstantial evidence.

In the case of **Halima Mohamed and Another v R,** C.A.T. Criminal Appeal No. 30 of 2001 (unreported) it was stated:-

> *In a criminal case in which the evidence is based purely on circumstantial evidence, in order for the court to found a conviction on such evidence,* ***it must be established that the evidence irresistibly points to the guilt of the accused to the exclusion of any other person.***
>
> *(Emphasis supplied.)*

In **Ilanda Kisongo v R** (1960) EA 780 at 782, quoting with approval the judgment of the Privy Council in **Teper v R** (4) 1952 A.C.480 at 489 it was stated:-

> *It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence* ***to be sure that there are no other co-existing circumstances which weaken or destroy the inference.***
>
> *(Emphasis supplied.)*

And in **Ally Bakari and Pili Bakari v Republic** (1992) TLR 10 it was held:-

> ***The circumstances*** *from which an inference as to the guilt of the accused is drawn* ***have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from these circumstances.***
>
> *(Emphasis supplied.)*

Applying the principle(s) discerned from the above cases to the facts of this case, it is clear that the circumstantial evidence in the case did not irresistibly point to the guilt of the appellant to the exclusion of any other person. There were other co-existing circumstances in the case, especially the ***SAWA MAHINDUKA factor,*** which weakened or destroyed the inference of guilt.

In conclusion, we wish to point out two matters. **One,** there is no doubt that murder is a very serious offence which, in the event of a conviction, attracts the death penalty. Great care must therefore, be taken in ensuring that there is strong evidence against an accused person before a conviction can safely lie. If there is doubt in the prosecution case it is always safe to acquit. **Two,** in our evaluation of the entire evidence it occurs to us that, at best, there was very strong suspicion against the appellant. However, as was held in **Abdallah Wendo and Another v Reginam** (1953) 20 EACA 166 at 170:-

Suspicion, however strong, cannot supply a basis for inferring guilt when proof of guilt cannot be safely inferred beyond reasonable doubt.

(Also see **Thobias Mbilinyi Ngasimula v Republic** (1980) TLR 129 at page 134).

For the foregoing reasons, we are satisfied that this is a case in which the appellant ought to have been given the benefit of doubt and thereby earn an acquittal. We accordingly allow the appeal quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is otherwise lawfully held therein.

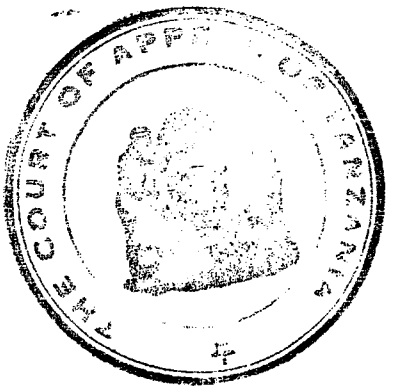
DATED at DAR ES SALAAM this 4th day of June, 2009.

J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



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