IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., LUANDA, J.A., And MASSATI, J.A:)

CRIMINAL APPEAL NO. 437 OF 2007

GABRIEL SIMON MNYELE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the
High Court of Tanzania at Dar es Salaam)

(Mandia, J.)

dated the 19th day of October, 2009
in
Criminal Sessions No. 28 of 2004

JUDGMENT OF THE COURT

24th November, & 22nd December, 2010

MASSATI, J.A.

GABRIEL SIMON MNYELE (hereinafter "the appellant") was charged with the offence of manslaughter, contrary to section 195 of the Penal Code (Cap 16-RE 2002) before the High Court of Tanzania, at Dar es Salaam. It was alleged that, on or about the 10th November 2003, at Hugo House, Kinondoni District, Dar es Salaam Region, he unlawfully killed one PAMELA NGUNYALI "(the deceased") who was his wife. He was convicted as charged and sentenced to 18 months

suspended sentence. He was aggrieved by the conviction and has preferred an appeal against it in this Court.

Before the Court, the appellant was represented by Mr. Mabere Marando and Mr. Richard Rweyongeza, learned counsel, and the respondent Republic, was represented by Mr. Stanslaus Boniface, learned Principal State Attorney, and Ms. Dionisia Saiga, learned State Attorney.

Most of the facts in the case are not in dispute. On the material day, i.e on the 10th November 2003, the deceased went to the appellant's office at Hugo House, Kinondoni. The appellant, who at that time had closed office, met her down stairs. Together, they had a few drinks at a bar on the ground floor. Then, they went upstairs to the Appellant's office. It appears that a misunderstanding cropped up in the office. Soon after, the appellant came to collect the office guards to assist him carry the deceased downstairs, as she was bleeding from one of her legs which was wrapped up in a piece of cloth. A taxi was called in, and the appellant and the deceased were rushed to Dar Group Occupational Hospital. After some treatments

there, her condition deteriorated, and the hospital recommended her transfer to Muhimbili National Hospital on the 11/11/2003 where she was admitted in the Intensive Care Unit. She received treatment there but on the 20th November, 2003 she succumbed to death. At the trial and before this Court, the prosecution contended that it was the appellant who caused that death. The appellant maintained that except for the self inflicted wound on her leg which she sustained by kicking the glass panes of his office door, he never assaulted her.

In his judgment that led to the conviction of the appellant, the learned trial court judge (Mandia, J (as he then was) first found that the deceased's cause of death was head injury. He based that finding on the opinion of PW3 Dr Henny Adam Mwakyoma, a pathologist together with his post mortem examination report (Exh P2) which he authored. Then he went on to build inferences from the circumstances of the case, and concluded that there was irresistible circumstantial evidence to show that it was the appellant who inflicted the head injuries on the deceased.

Learned counsel for the appellant filed 17 grounds in total. But at the hearing of this appeal, Mr. Marando argued grounds 1,2,3,4,5,7,12 and 13 and abandoned the rest. He also argued them in clusters of those interrelated grounds.

In grounds 1,2, and 4, Mr. Marando attacked the finding relating to the cause of death on two fronts. First, he complained that the prosecution failed to produce in court, the deceased's patient file, which would have shown the type of treatment she received before she died; despite all the efforts made by the defence to call for the record. This, he submitted, showed that the prosecution had something to hide, and invited the Court to draw adverse inference against the prosecution under section 122 of the Evidence Act (Cap 6 – RE 2002) and the decision of this Court in HERMAN HENJEWELE Vs R, Criminal Appeal No. 154 of 2005 (unreported). The second attack was directed at the credibility of PW 3 and the short comings in the postmortem examination report (Exh p2). Briefly, Mr. Marando submitted that, going by the contents of Exh p2, it was evident that PW3 did not open the skull of the deceased, as he claimed before concluding that the deceased had head injuries. To strengthen the

defence case, DW3 another Professor of medicine was called to the stand to discredit what PW3 did. So the leamed counsel, wound up by asking us to disbelieve PW3 and give little weight to Exh P2 citing a number of decided cases as authorities.

Mr. Marando, then submitted on grounds 3, 7, and 13 together as the second cluster, but we think, these can be considered together with grounds 5 and 13 on which he also submitted separately as a third cluster. We think it is convenient to examine them together because, condensed, they all attack the trial judge's second finding, that there was strong circumstantial evidence that it was the appellant who inflicted the head injuries that led to the death of the deceased.

The learned counsel's argument was that, in arriving at that finding the learned judge created his own theory and coloured it with conjecture, for instance, in holding that the appellant was a disgruntled man and that he gave a thorough beating to the deceased. He said, this was contrary to the evidence on the ground (PW1 and PW2) and was contrary to law. **(MOHAMED MSORO vs**

R (1993) TLR. 290. On the second leg of his argument, the learned counsel for the appellant submitted that, while the trial court was right in finding that the case depended on circumstantial evidence to establish that the appellant caused the deceased's death, the circumstantial evidence on record, did not irresistibly point to the guilt of the appellant as found by the trial court. He cited the decisions of **MUSOKE vR** (1958) E.A 716 **HASSAN MOHAMED MTEPELA vs R** Criminal Appeal No. 66 of 2004 (unreported) and **HASSAN FADHILI vR** (1994) TLR 89 to bolster his arguments.

Mr. Boniface supported the conviction. In his brief, but elaborate submission, the learned Principal State Attorney, submitted that the prosecution duty was to prove, beyond any reasonable doubt the cause of death, and that it was the appellant who caused it. It was his view that even if Exh p2 (the post mortem examination report) which in his view, was improperly received into evidence, was excluded, the opinion of PW3 who conducted the autopsy, in his oral testimony, firmly established the cause of death, to be due to head injury. He further, submitted that from the appellant's own admission, that there was a "fracas" (which is defined in the Oxford

Learners Dictionary to be "a noisy argument or fight") in his office when he was alone with the deceased, could only point that the two had a *fight"* in the course of which something must have happened that led to the deceased's head injuries, which was the cause of her death. He therefore prayed for the dismissal of the appeal.

We are aware that this is a first appeal, and we have powers to reappraise the evidence tendered at the trial, and if need be to come to our own conclusions.

There are two issues that dominated in the trial and in this appeal. The first, is, what was the cause of death of the deceased ? The second, is whether it was the appellant who caused the death of the deceased ?

In the course of his submission, Mr. Boniface, once remarked that since the prosecution had proved the cause of death, the burden of proof shifted to the defence to disprove it. We think, this is not the law. In criminal cases with the exception of a few, the burden is always on the prosecution to prove its case beyond reasonable

doubt, which burden never shifts. Similarly, in this case, the defence never shouldered the burden of disproving the cause of death. Its duty was only to raise reasonable doubts.

In establishing the cause of death, both the prosecution and the trial court relied heavily on the medical opinion of PW3 and Exh P2, (the post mortem examination report). However Mr. Boniface was of the view that Exh P2 was not properly received in evidence, because it was admitted, when the prosecution was narrating the facts in the preliminary hearing and not listed in the memorandum of matters not in dispute. But all the same the oral opinion of PW3 as to the cause of death was still valuable.

We agree with Mr. Boniface, but we will take a different route. A post mortem examination report derives its legal authority from section 11 of the Inquests Act. (cap 24 of the Laws), formerly, the Inquests Ordinance. Section 11(1) reads:

> *"(1) The medical practitioner shall upon receipt of an order for a postmortem*

examination immediately make an examination of the body with a view to determine from it the cause of death and to ascertain the circumstances connected with it unless he procures the services of some other medical practitioner"

And section 11(3) provides

"11(3) The medical practitioner shall make a report to be in the Form C prescribed in the schedule stating the cause of death and shall be signed by him, and on being read at the inquest shall be prima facie evidence of the facts stated in it, but the Coroner may call the medical practitioner if he consider it necessary."

In our view, the making of a post mortem examination report by the medical practitioner is not an option but a statutory duty. The evidential value of that report is shown in section 11(3) of the Inquests Act: This evidential value of the post mortem examination report is implied in section 291 of the Criminal Procedure Act (Cap 20 – RE 2002) which reads:-

> 291(1) In any trial before the High Court any document purpoting to be a report signed by a medical witness upon a purely medical or surgical matter shall be receivable in evidence save this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial together with a copy of the document has been given to the accused or his advocate.
>
> (2) (not relevant)

(3) Where the evidence is received by the court, the court may, if it thinks fit and shall if so requested by the accused or his advocate, summon and examine or make available for cross examination the person who made the report and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.

(4) (not relevant)

In our considered view, on a true construction of section 291(1) of the Criminal Procedure Act, a report of a medical witness is prima facie evidence of the contents therein and is receivable in evidence without any formal proof if no objection is taken to its admissibility. Once it is properly admitted the contents of the report would stand admitted in evidence and no objection could be taken against it. But if the court, or the accused decides to summon the person who made

the report for examination, section 291(3) of the Criminal Procedure Act comes into play, and the report must be formally admitted like all other pieces of documentary evidence.

In the present case, although the defence had "no objection" to the admission of the post mortem examination report when it was introduced when the State Attorney was outlining the facts for the purposes of preliminary hearing, it was received there and then and marked Exh P2. We think, this was a wrong approach. Since the defence had already put the court and the prosecution on notice of their intention to contest the contents of the report, it was more prudent for the trial court to have waited for the report to be formally proved. It is for this reason, that we agree with Mr. Boniface that Exh P2 was neither formally admitted as an exhibit, nor contained in a memorandum of matters not in dispute. So it should be expunged from the record as we hereby do.

Mr. Bonifance, has however, argued that even without the benefit of Exh P2, the evidence of PW3 DR MWAKYOMA, as to the

cause of death of the deceased is still valid. We find it difficult to follow this argument

As we have demonstrated above, the law requires a doctor who carries out an autopsy to prepare a post mortem examination report. It is the presence of the report or intention to produce one in court that gives rise to the need to call the medical practitioner to court for examination, and not the other way round. He was not an eye witness, but an expert and his evidence, that of an opinion based on the examination he conducted on the body of the deceased. We agree with Mr. Boniface and the trial court that the opinion of DW3 Professor, Mbise, called by the defence who based his opinion only on the postmortem report and notes on that report (Exh P2) was, ordinarily, of lesser value than that of PW3 who conducted the postmortem examination, but once the post mortem examination report is discarded, and since the law demands that such report must be made and received in court and since such report is not in court, the opinions of the two experts, would in our view, be on the same footing in terms of the weight and value.

Now, the opinion of DW3 was based on Exhibit P2. For the sake of argument, assuming that Exhibit P2 was not discarded for reasons of misadmissibility ordinarily the opinion of PW3, who had seen the injuries of the deceased quite closely would hold sway. This is the general rule, but there are exceptions. We shall demonstrate this rule by borrowing a passage from SARKAR ON EVIDENCE, (15th ed. vol. 1 p. 902)

> *"The doctor who had held the post mortem examination had occasion to see the injuries of the deceased quite closely,* ***and in the absence of any convincing evidence that he had deliberately given a wrong report his evidence is not liable to be discarded."*** *(emphasis ours)*

In this appeal, Mr. Marando has attacked the findings of PW3 in Exh P2. His attack is supported by DW3 Professor Mbise. The force of their argument is that from the contents of Exhibit P2, it was most

likely that PW3 did not open the skull of the deceased. Both have pointed out that if PW3 did so, first he would have filled up item no. 11 on the post mortem examination report form; and secondly, he would not have recorded to have found," Leucorrhoea "which means discharge from the private parts of a woman on the summary of the report. According to DW3 there is no link between the two, as it could not be linked up with the brain. In short, according to DW3, the post mortem report shows no evidence of head injury and points out to many other possibilities of causes of death. It was also his view that by putting a dash in item II of the form, it could mean that either the doctor did not see anything, or did not examine the body. When asked about the blank in item II, DW3 is recorded to have answered:-

> *"Dash does not mean there is nothing. The dash shows that the observations appear in the summary"*

We do not think that this was a convincing answer. If that is what he meant, it would have made more sense if he had directed

the reader to the summary. We will therefore readily agree with DW3 that in item 11, the doctor would have recorded his observations and material to back up the summary. We say, so because, we think every expert evidence has two aspects, the data evidence and the opinion. The opinion must be supported by the data, if the court is to attach any weight to it. But the worst part of the report is the inclusion of a woman's private part's discharge, linking it with PW3's observations on opening the skull, if he did. If not negligently slipped in, we think, the inclusion of that item in the report was intended to deliberately mislead the court, and to that extent, it was a wrong report, because it provides cause for uncertainty and seriously prejudiced the course of justice. It is unfortunate that the trial court treated the evidence of DW3 in the manner it did. Had it paid sufficient attention to both opinions, we think, it would have come to a different opinion on the value of Exhibit P2. In the circumstances the post mortem examination report Exhibit P2 must be discarded.

But even if we assume that the evidence of PW3 could be acted upon independent of the post mortem examination report of the

deceased (Exh P2) we must now consider his evidence in the light of the rest of the prosecution evidence.

The learned counsel for the defence has submitted that and it was not disputed that, first, that, when the deceased was admitted at the Dar Group Occupation Hospital, none of the doctors who attended her and testified in court, could observe any external injuries on the deceased's head: two, that on reaching Muhimbili National Hospital, the deceased underwent an examination of the head called "CT Scan" and her picture diagnosed by a specialist, one Dr. Kinasha, but the results of this examination were not known. Thirdly, the deceased was admitted at the Muhimbili National Hospital for 10 days undergoing treatment and attended by several doctors, but the patient's treatment file was not produced on demand and despite a court order given by Shangwa, J. on 14/2/2005. Even PW3, the doctor who carried out the autopsy admitted to have seen the CT Scan picture and the deceased's treatment file but was not ready to disclose their contents. What is the significance of these facts.?

Mr. Marando has forcefully submitted that his client was not accorded a fair assistance by the court and the prosecution, and for that invited us to infer that the prosecution had something to hide by withholding all these witnesses and pieces of evidence. Mr. Boniface's answer was that the prosecution had no obligation to produce all the witnesses and evidence provided it was able to produce only those which it thought were relevant, and in his opinion, the evidence on record sufficiently proved the prosecution case beyond any reasonable doubt.

In our considered view, it is no doubt the law, that under section 143 of the Evidence Act (Cap 6-RE 2002) no amount of witnesses is required to prove a fact (See **YOHANA MSIGWA vR** (1990) TLR 148. But it is also the law (section 122 of the Evidence Act) that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons. (See **AZIZ ABDALLA vR** (1991) TLR 71) In the present case the cause of death of the deceased was in issue. It was in the interests of justice for the prosecution to have tendered all the available medical evidence as to

the cause of death. We take this heed from the decision of the Eastern African Court of Appeal in **PAULO s/o MABULA vR** (1953) 20 EACA 207 where the defunct Court said:-

> *"In a capital case the Crown should tender any medical evidence as to death that may be available and where the accused alleges the fatal wound to have been inflicted accidentally it may well be vital to the interests of justice for any medical evidence to be before the trial judge, in as much as expert testimony may either establish or refute such a defence.* "

And in **YOHANA LUBAWA v REGINAN** (1953) EACA 274, the same court again warned:-

> *"In cases of homicide, where a person dies in hospital following an attack upon him causing his death evidence should always*

be given as to the deceased's admission to hospital the treatment given him, therein and the date and time of death."

In the present case the prosecution's case was that the appellant bruised the deceased, but the appellant maintained that the deceased's visible wounds were self inflicted. We think that, on the authority of the guidelines in the above cited cases, the prosecution had a duty not only to call witnesses who treated the deceased at Muhimbili National Hospital before her demise, who would have testified, on the details of her treatment, but also to have cleared any doubts before the trial court as to the cause of death. Had the trial court adverted its mind to the order of Shangwa, J. dated 14/2/2005 directing the Director of Muhimbili National Hospital, to avail Dr. Mwakyoma to come with the deceased's treatment file and the failure of the prosecution to follow its, order enforcing the issuance of the for summons dated 8/10/2007 without assigning any reasons; it would, in our view, have felt that there was imminent threat to a failure of justice, because it deprived the appellant of the legal assistance he had required of making vital witnesses available. The

trial court would no doubt have commented on this omission and its effect in its judgment but miserably it did not.

In the circumstances above, we cannot say with any certitude that the prosecution has proved the deceased's cause of death as alleged beyond any reasonable doubt. We therefore answer the first issue in the negative.

We now come to the second issue, which we think it is necessary to discuss in the interests of justice, although the answer to the first would have been sufficient to dispose of the appeal. Was there any sufficient circumstantial evidence to prove that it was the appellant who caused the deceased's death ?

It is common ground that for circumstantial evidence to found a conviction, it must be such that it irresistibly points to the guilt of the accused. From the authorities we are settled in our minds that when a case rests on circumstantial evidence such evidence must satisfy three tests:-

(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused:

(iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

(See **SARKAR** p. 63)

In the instant case, the learned trial judge drew his conclusion from the following circumstances (i) that the appellant was disgruntled by the accusations of infidelity raised by the deceased (ii) that while in the appellant's office, the appellant gave a "thorough beating" on the deceased (iii) that the deceased was so hurt that she had to be carried downstairs by the assistance of two office watchmen, (iv) that when she reached the Dar Group Occupational

Hospital the deceased's hair was ruffled, (v) that when she was transferred to Muhimbili, the deceased was in an un conscious state and (vi) the scratches on the neck and chin of the deceased. On the other hand, Mr. Boniface based his submission that since the appellant admitted that there was a scuffle in his office with the deceased, that scuffle must have meant a fight and that fight was the cause of the head injuries, and death of the deceased. As seen above Mr. Marando's argument was that these circumstances were based on conjecture and none on the real evidence on the ground.

It must be borne in mind that at the scene of the crime there were only the deceased and the appellant. The appellant gave a graphic description of what happened. The trial court believed and adopted most of the appellant's narration, but we do not see any attempt at assessing the credibility of his testimony. The trial court should have given a critical analysis of the evidence of the prosecution and the defence. If he accepted his defence we do not see why the trial court decided to believe some and disbelieve some. We can only take this to mean that the appellant's credibility stood

unassailed. Now there is nothing in the appellant's testimony in which he said that when he and the deceased went to his office he was a "disgruntled" man. The trial court only thought so because being a lawyer the appellant must have been "upset by the threat to his integrity". But that in our view, is pure conjecture. In such cases the trial court should always be guided by the opinions of the assessors. Then, the trial court and Mr. Bonifance inferred that since, the deceased was well sometime before being taken down by two watchmen the appellant must have "thoroughly beaten" her in his office. The trial court also connects the "thorough beating" with the ruffling of her hair, the scratches on the chin and neck and her inability to walk down the stairs supported by the appellant alone considering his "athletic" physique. Again, we think this is not supported by the evidence. In response to Mr. Bonifance's argument that the appellant admitted there having been a fracas, "and that under the Oxford Learners'. Dictionary, the word means "noisy quarrel or fight "the general rule of circumstantial evidence, is that where two views are possible, one pointing to the guilt, and another pointing to the innocence, of an accused, the court should adopt the

one favourable to the accused. As to the inability of the appellant or only one watchman helping the deceased down the stairs, the court should not have ventured into such surmise without considering the deceased's physique which according to the appellant she must have been fat necessitating the additional assistance. As for the scratches in the neck and chin, one witness for the prosecution (PW1) said she did not notice any wounds in the head, contrary to the observations of PW3. The trial court made up its own theory that the scratches could not be seen externally, because they were "internal." So the only circumstance which was consistent with the evidence on record was that the deceased's hair was disheveled or ruffled when she reached the Dar Group Occupational Health Hospital. The rest of the circumstances relied upon by the trial court and the prosecution were not proved, but were based on conjectures and surmises. And we are far from being convinced that the mere fact that the deceased's hair was ruffled, or that she was taken to Muhimbili National Hospital, the next morning unconscious, unerringly point, to the guilt of the appellant. The absence of the treatment record of the patient at Muhimbili National Hospital is certainly the missing link here.

We are therefore satisfied that the circumstantial evidence on record has failed the tests applicable to such types of evidence in proving that, if the cause of death of the deceased was head injuries, it was the appellant who caused those injuries.

In the result, and for the foregoing reasons, we allow the appeal and quash the conviction, and in exercise of our revisional jurisdiction, also quash the sentence.

Order accordingly

DATED at DAR ES SALAAM this 15th day of December, 2010

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.

(Z.A. MARUMA)
DEPUTY REGISTRAR