IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: RAMADHANI, C. J., RUTAKANGWA, J. A., And MASSATI, J. A.)

CRIMINAL APPEAL NO. 317 OF 2009

JOSEPH S/O LUGATA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Kahama,)

(Rwakibalira, J.)

dated the 21st day of October , 2009
in
Criminal Sessions Case No. 26 of 2009

.....

JUDGMENT OF THE COURT

8 June, 2010 & 15 June, 2011

RAMADHANI, C. J.:

The appellant, Joseph s/o Lugata, was convicted of the murder of Ng'wama Kimbishi on 08 January, 2009, at Kilimbu Village in Kahama District, Shinyanga Region. RWAKIBARIRA, J. sentenced him to suffer death by hanging. Aggrieved by that decision and penalty, the appellant has preferred this appeal before us.

The peaceful sleep of Kabeho Gulanija (PW 1), the husband of the deceased, was rudely interrupted on the night of 08/01/2009 by a

commotion outside their hut. He went out in the company of his wife, the deceased, and saw that their cattle had come out of the shed and were loitering outside. They managed to show them back and retired to sleep.

About half an hour later they were awoken again but this time by the presence of a stranger who got into their door-less house. The stranger pounced on PW 1, an old man of 85 years, and caused him to fall down. His wife, the deceased, at the age of 75, with bare hands, went to the rescue of her husband. Two more invaders got in and the trio fatally hacked the deceased using machetes.

PW 1 raised an alarm and emmedietely the place was flooded with people including their son Masanja Kabeho (PW 2), the Village Executive Officer, Paulo Ngulu (PW3), and the commander of *Sungusungu* of Kilimbu Village Sabini s/o Mazuri (PW6).

Soon after the invaders abandoned the premises, PW1 told the court that he picked up a black cap (Exh. P.2) which was identified by PW2, in the presence of PW3 and PW6, to belong to the appellant. PW2 was able to do so because he saw the appellant wearing it when he worked alongside the appellant in the appellant's field in 2008. PW1 claimed to have handed over

the cap to PW6 who passed it on to D/Cpl Nashon (PW4) who was taken to the scene of crime that very night by PW6.

PW1 admitted in cross-examination not to have mentioned the cap in his police statement:

> In the Exhibit D1 statement, I didn't mention anything about the Exhibit P2 cap because I was not asked to narrate anything about it. In this Exhibit D1 statement, I was narrating only matters which I was asked about. At my age, I couldn't add anything in the statement which I was not asked. You can see the way old men like me talk. I mean talking on what you are asking me alone.

PW1 again maintained in court that he did not recognize any of the three attackers and that he never knew the appellant at all. On the contrary, however, the appellant stated that he was well known to PW1 because:

> .....whenever PW1 or deceased Ng'wama Kimbishi visited Kagongwa centre, they used to visit my home at Kagongwa too and they could get their meals there. And when I was visiting

> Kilimbu Village for purposes of inspecting my plots, I used to take my meals at PW1's home at Kilimbu Village.

PW1 also stated that he told the authorities that he suspected the murderer to be his son, PW2, because they were not in good terms and hence PW2 was initially a co-accused person.

The appellant was arrested that very night and he took PWs 4 and 6 and others to his house where three bags were recovered from one of the rooms. One of the bags contained an old black jeans – short, a reddish T-shirt and whitish T-shirt. All three items (Exh. P4) were blood stained. The appellant admitted that those items were found in one room but said that they belonged to one Ngasa Malembeja who on 7/01/2009, accompanied by his wife, visited the appellant and that they departed leaving behind those items.

All these items landed in the laboratory of Gloria Tom Machuve (PW5), the Principal Government Chemist, who conducted DNA tests and found that the profiles of blood stains on the reddish T-shirt and the cap matched the profiles of the blood samples taken from PW2 and his sister, one Holo d/o Kabeho. Since PW2 and Holo were the children of the deceased then the

blood stains on the reddish T-shirt and the cap were from the deceased. PW5 also found that the profiles of samples taken from the appellant matched the profiles found on the reddish T-shirt and the cap which showed that those two pieces of property belonged to the appellant and, so, he was implicated with the murder of the deceased.

The appellant was advocated for by Mr. Kamaliza K. Kayaga, learned counsel, while the respondent/Republic was represented by Mr. Edwin Kakolaki, Senior State Attorney. Mr. Kayaga had a four ground memorandum of appeal but after an interaction with the bench he abandoned his first ground and retained three:

1. That there was an improper summing up to assessors that occasioned a miscarriage of justice on the part of the appellant.

2. That the Hon. Trial Judge erred in fact in holding that the prosecution had proved that the appellant was in contact and using the material Reddish T shirt (Exh. P4) and the black cap (Exh. P 2) found with his DNA and on rellying on the evidence of the forensic DNA expert (PW 5) as conclusive proof that the appellant was the person who murdered the deceased.

3. That the Hon. Trial Judge erred in law to convict the appellant on shaky and inconclusive circumstantial evidence.

For the first ground, summing-up to the assessors, Mr. Kayaga argued that the learned trial judge only made references to exhibits tendered by the prosecution and ignored those tendered by the defence. He pointed out that whereas PW1 told the court that he picked up the cap at the premises he did not mention this to the police. So, the defence produced the police statement as Exh D1 to give the lie to PW1. However, the learned counsel pointed out that the learned trial judge did not refer that statement to the assessors. Mr. Kayaga also submitted that PW2 in his statement to the police (Exh. D2) categorically denied to have identified the cap, Exh. P2, contrary to what it was said in court. Learned advocate lamented that the statement, too, was not brought to the attention of the assessors by the learned trial judge.

The learned advocate referred us to **Benjamin Kapula @ Zengo v.R,** Criminal Appeal No. 283 of 2006 (unreported) but in his brief reply Mr. Kakolaki said that the case was distinguishable.

As for the summing up to the assessors the learned trial judge said this:

> Mr. Kayaga further stated how both PW1 and PW2 did not mention in their statements on how the former picked the exhibit PW2 black cap at his compound on 08/01/2009, immediately after the deceased was slashed by the invaders.

We concede that the learned judge did not categorically present the police statements, Exhibits D1 and D2, to the assessors. But we are satisfied that the message was put across to the assessors in no uncertain terms that the police were not told. Does that throw some doubts as to whether or not PW1 picked the cap (Exh. P2) at the scene of incident and that PW2 identified it?

We do not think so. There is the evidence of Paulo s/o Ngulu, the Village Executive Officer (PW3) that:

> Upon my arrival at PW1's compound, this PW1 showed me a black cap. PW1 was by the time displaying that cap to people who already gathered there.

In **Benjamin Kapula** this Court referred to **Ally Juma Mawera v.R** [1993] TLR 231 where the Court said:

> Even thought the Judge committed an error by commenting on the appellant's credibility, this error did not really affect the opinion of the assessors; had it influenced their opinions, the trial would have been a nullity.

We are satisfied that there is sufficient evidence as to the recovery of Exh. P2. So we dismiss this ground of appeal.

The second ground of appeal is regarding the DNA test. Mr. Kayaga went to a great extent to lecture us on the dangers of allowing the experts to be the decision makers. He cited at length from Sarkar's Law of Evidence Vol I and II. However, there are decisions of this Court that it is for the Court to make decisions and that the most that an expert can do is to give an opinion as to the probability of an outcome.

Therefore, the evidence of PW5, the Principal Government Chemist, on DNA will have to be taken in that light. We may as well point out that we have in Tanzania the Human DNA Regulation Act, 2009 (Act No. 8 of 2009) but it does not provide how DNA evidence may be used by the courts. As

this is the first case in Tanzania to rely on this technology, we have to seek assistance from outside our jurisdiction.

What is DNA and how are their results taken? PW5 explained that DNA is the acronym of *Deoxyribo Nucleic Acid* which is a unique fundamental genetic material found in every living organism. She explained further that DNA can be found in hair, skin, sweat, blood, bones, tissues, saliva and all other living particles or body fluids like urine, tears, or sperms. She stated that every human being has his/her own DNA which determines his/her physical characteristics. Siblings will, to a certain extent, share DNA either from the same parent or both parents.

PHILIPS, L.J. in **R.v. Doheny,** [1997] 1 App. R. 369, described the DNA process so well that we better recapitulate what he has said:

DNA consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract

from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succinctly than did Lord Taylor C.J. in the case of Deen (transcript: December21, 1993), so we shall gratefully adopt his description.

> 'The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an x-ray film is placed over the membrane to

> record the band pattern. This produces an outo-radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.'

But PHILIPS, L.J. went further to say:

> The characteristics of an individual band of DNA will not be unique. The fact that the identical characteristic of a single band are to be found in the crime stain and the sample from the suspect does not prove that both have originated from the same source. Other persons will also have that identical band as part of their genetic make-up. Empirical research enables the analyst to predict the statistical likelihood of an individual DNA band being found in the genetic make-up of persons of particular racial groups "the random occurrence ratio."

Thus the fact that identical characteristics of a single band are in both the crime stain and the sample from the suspect is not conclusive proof of guilt. The matching of profiles does not establish that the tissue or fluid of

unknown origin is from the person from whom the tissue or fluid of known origin came. There is a possibility that the tissue or fluid of unknown origin came from someone else. The chances of someone having a matching profile are calculated from statistical studies. The expert has to give evidence of the random occurrence ratio, that is, the frequency with which the matching DNA characteristics are likely to be found in the population at large or sections of the population or in racial groups. The chances of someone having a matching profile will depend on the reliability of random occurrence ratio which is based on empirical statistical data.

Short of that there is what is called "The Prosecutor's Fallacy" which goes:

> Only one person in a million will have a DNA profile which matches that of the crime stain. The accused person has a DNA profile which matches the crime stain. There is a million to one probability that the accused person left the crime stain. Therefore the accused person is guilty of the crime.

In the present case PW5 did not give the random occurrence ratio for Tanzania. The reliance was just on the prosecutor's fallacy that DNA is one out of a million. But even if the random occurrence ratio had been given,

we agree with the appellant and we uphold his second ground of appeal, that that is not conclusive proof that the appellant was the person who murdered the deceased. It is always essential to have some other independent evidence on which to secure conviction apart from DNA.

That brings us to the third ground of appeal that the conviction was based on shaky and inconclusive circumstantial evidence. The appellant admits that an old black jeans – short, a reddish T-shirt and a whitish T-shirt all blood stained were found in his house but denied the items to belong to him. Instead he said that they belonged to one Ngasa Malembeja who had visited him and then departed leaving the items behind.

That is a blatant lie. The appellant's story was that:

> Ngasa Malembeja visited my home on 06/01/2009 and remained there up to next day which was 07/01/2009 with his wife. Name of the wife of Ngasa Malembseja is Mama John.

At another place the appellant said:

> But when Ngasa Malembeja and his wife left my home on 07/01/2009 in the morning, I heard

collect their bags.

The crime was committed on the night of 8/01/2009. The question is how were those items stained with the deceased's blood on 06/01/2009? We are satisfied that those items of clothing belonged to the appellant and that they have the deceased's blood stains.

In **Masumbuko s/o Matata @ Madata And Two Others v.R.** Criminal Appeals No. 318, 319 and 320 of 2009 (consolidated) (unreported) we referred to **Paschal Mwita & Others v.R** [1993] TLR 295 at p.300 where we cited with approval a decision of the East Africa Court of Appeal:

> Although lies and evasions on the part of an accused do not in themselves prove the facts alleged against him, they may, if on material issues, be taken into account along with other matters and the evidence as a whole when considering his guilt.

We said also in **Hamidu Mussa Timotheo & Another v.R** [1993] TLR 125 at 129 that:

> Secondly, they told a number of lies in a situation where, had they been innocent, telling the naked

truth was the most natural and easiest thing to do.

We take the lies of the appellant here to corroborate the prosecution's case. We are, therefore, of the decided opinion that the circumstantial evidence is neither shaky nor inconclusive. We dismiss the third ground of appeal and, consequently, the appeal itself in its entirety. It is so ordered.

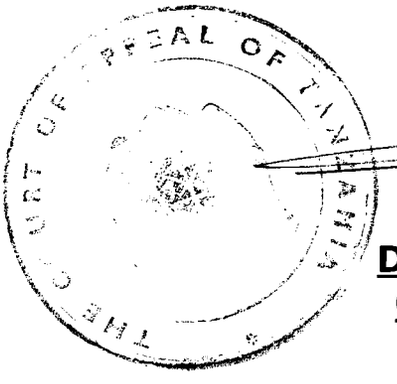
DATED at **TABORA** this 18th day of April, 2011.

A.S.L. RAMADHANI
CHIEF JUSTICE

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



(E.Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL