

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**(CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.)**

**CRIMINAL APPEAL NO. 243 OF 2011**

**JUMA JUMA MOHAMED.....APPELLANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Vuga at Zanzibar)**

**(Hamid, C.J.)**

**dated the 27<sup>th</sup> day of April, 2011  
in  
Criminal Sessions Case No. 21 of 2004**

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**JUDGMENT OF THE COURT**

**5 & 12 December, 2011**

**BWANA, J.A.:**

Juma Juma Mohamed, the appellant, lived in concubinage with Monica Gervas Mtahondi, the deceased, at Mwera, Hawaii, Zanzibar. It was alleged before the trial court, the High Court of Zanzibar, that on the 10<sup>th</sup> day of February 2003 at about 10.00 pm at Mwera Hawaii, Central District within the Southern Region of Unguja, the appellant murdered his concubine, Monica Gervas Mtahondi. He was arrested and charged with the offence of murder contrary to sections 180 and 181 of the Penal

Decree, Cap 13 of the Laws of Zanzibar. The appellant denied to have committed the offence. He was however, found guilty of murder, convicted and sentenced to suffer the mandatory sentence of death by hanging.

Aggrieved by that decision of the trial court, the appellant preferred this appeal. Before us, he was represented by Mr. Hamid Mbwezeleni, learned counsel. The respondent, was The Director of Public Prosecutions, represented by Mr. Suleiman Masoud Makame assisted by Ms Sabra Mselem Khamis and Mr. Ali Haidar Mohamed, all learned State Attorneys.

To appraise ourselves with the issues involved in this case, we find it apposite to recapitulate, albeit briefly, the facts of the case as may be culled out from the record of the said case.

The appellant and his concubine, Monica, now deceased, lived close to where Omar Juma, PW1, and his wife, Ruzuna Ali, PW2, lived. According to PW1's evidence, they were neighbours for about three years. They therefore, knew one another. On the fateful night, that is on the 10<sup>th</sup> day of February, 2003 at about 10.00 pm, while at his home and in the

company of PW2; Masoud Haji Ibrahim, PW4; together with other people, he heard Monica shouting words such as "*Juma unaniua*". He also heard the appellant responding that "*utakoma leo*". Those words were being uttered from the direction where the appellant lived with the deceased. Both PW1 and PW2 gave approximate distances between the houses of the two couples.

Shortly after hearing those exchanges between the appellant and the deceased, the former went to PW1 and PW2's house whereat the two witnesses urged the appellant not to beat his concubine like that. The appellant told them not to interfere in his affairs and left but after he had warned the two witnesses, that whoever interferes will face the consequences.

A short while later those witnesses, heard again, some fracas coming from the direction of the appellant's house, followed by dead silence. Both PW1 and PW2 testified that the following morning, around 7.00 am, they saw Monica laying down, outside the house she lived with the appellant. She was dead. A while later the appellant went to PW2's house and told

her that he had killed Monica and that he was going to report the matter to the deceased's brother, Peter Gervas Mtahondi, PW3.

PW3 testified before the trial court that indeed that morning, the 11<sup>th</sup> day of February 2003, the appellant went to his home and informed him of his sister's death and that he (PW3) should go to collect the body. PW3 complied and the police were informed.

Dr. Rashid Salim Said, PW8, examined the body of the deceased and came to the conclusion that there were two likely causes of death. According to his postmortem examination report, the said causes were; -

*"(1) Possible cause due to haematoma after trauma-led to heart failure.*

*(2) Alcohol intoxication...Blood for alcohol taken on 11/02/03...Results confirmed that 172.5ml of 100% alcohol..."*

The report also showed that the deceased body had multiple bruises on the right ear region and on both arms. Bruises were also noticed at the back of the body, with swelling. However, according to his evidence in court, Dr.

Rashid asserted that the primary cause of death was due to (1) above, that is, haematoma after trauma that led to heart failure.

As stated above, the appellant denied responsibility to the killing of Monica. He attributed her death to excessive intoxication that led her lose balance while walking. She may have fallen on a hard object thus leading to the injuries sustained, injuries that subsequently led to her death. He denied that he beat up the deceased.

Before us, the appellant raised eight grounds of appeal. However, in the course of arguing the appeal, Mr. Mbwezeleni, withdrew ground no. 2. The remaining seven grounds were divided into two groups. Ground no. 1 concerns the delay in the delivery of the judgment by the trial judge. It is claimed that the delay violated Article 12(6) (e) of the Zanzibar Constitution of 1984 thus making the said judgment illegal and void. The said Article states –

"12(6) *Kwa madhumuni ya kuhakikisha usawa mbele ya Sheria Serikali itaweka taratibu zinazofaa na zitakazo zingatia misingi kwamba:*

(e) *kesi za jinai zinasikilizwa na hukumu*

*kusomwa haraka;*

(f) *..."*

On further consideration of the above ground of appeal we are of the settled view that we cannot discuss that issue here for two basic reasons.

**First**, because it was not an issue raised before the trial court. It has come before us for the first time. This Court has no original jurisdiction and the issue was not raised "*suo motu*" by this Court. **Second**, we cannot discuss the issue without discussing the Constitution of Zanzibar of which this Court does not have jurisdiction as provided under Art. 99 thus –

*"99. Mahakama ya Rufaa ya Jamuhuri ya Muungano wa Tanzania itakuwa na uwezo wa kusikiliza rufaa kutoka Mahakama Kuu ya Zanzibar isipokuwa kesi zozote zinazohusika na:*

*(a) Tafsiri ya Katiba hii;*

*(b) ...".*

The remaining grounds of appeal may be considered together. The prosecution case hinges on circumstantial evidence, evidence that should lead the court find that the inculpatory facts are incompatible with the

innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt (See: **Elisha Ndatange v R**, Criminal Appeal No. 51 of 1999; **Mathias Bundala v Republic**, Criminal Appeal No. 62 of 2004 (both unreported)).

It is not in dispute that Monica Gervas Mtahondi lived in concubinage with the appellant. It is also not in dispute that she died on the 10<sup>th</sup> day of February 2003. There is no direct evidence linking her death with the appellant or the cause of her death. It is however, settled law that homicide can be proved without first establishing the cause of death (see **Mathias Bundala v Republic** (*supra*)). Immediately before her death, Monica was in the company of the appellant, with whom they had a quarrel. Further, before the discovery of her death, the appellant had warned both PW1 and PW2, his neighbours, not to interfere in his affairs with Monica, lest they face the consequences. There were no other people around Monica and the appellant's house during the material hours immediately before the discovery of her dead body. The appellant is also said to have told PW2 that he had killed Monica and that he was going to inform his brother to that effect. All the above sequence of events are

incompatible with the innocence of the appellant. They are equally incapable of any hypothesis, other than that the appellant is the one who killed Monica.

There is more that can be added here to confirm the above stated hypothesis. One is the quarrel between the two as was narrated by PW1 and PW2. It may have been dark and at night but the two neighbours heard what was being uttered between the appellant and Monica. They had been neighbours for about three years and that on the same evening they were together, taking an alcoholic drink. We are aware of the danger presented by relying on voice identification in evidence (See **Muhu Selemani v Republic** (1984) TLR 93; **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004; **Mussa Maongezi @ Pilato v The Republic**, Criminal Appeal No. 263 of 2005, (all unreported.) In **Badwin Komba @ Ballo v Republic**, Criminal Appeal No. 56 of 2003 (unreported), it was held that for voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime (See also **Kanganja Ally and Juma Ally v Republic** (1980) TLR 270).

In the instant case it is pertinent that the appellant and Pw1 and Pw2 were neighbours for about three years and knew one another well. Therefore their identification of the appellant's voice as well as that of Monica, cannot, in our considered view, be disputed. It was at night. A silent night that PW1 and PW2 could easily identify the voices of the appellant and that of the deceased.

The other point is the kind of injury sustained by the deceased. The appellant raised, in his defence, the possibility of Monica having fallen over a hard object due to heavy intoxication that led her to lose balance while in motion thus injuring her head. That may be said to be a possibility but it is incompatible with the evidence that her body was found laying outside with bruises in the right ear region; on both arms and swollen parts at her back. Such injuries cannot be attributed to a fall due to drunkardness.

The grounds of appeal also touched on issues such as the appellant's defence evidence was not accorded due consideration; and alleged dubious character of PW1, PW2 and PW3. We have read the trial record and judgment of the trial court and we are convinced that the trial Chief Justice took into consideration those and other relevant issues and arrived at

correct decisions. The issue of dubious characters, for example, was not raised during the trial. The trial court was better positioned to examine the demeanour of those witnesses.

All the above considered, we find this appeal lacks merit. It is dismissed in its entirety.

**DATED at ZANZIBAR** this 8<sup>th</sup> day of December, 2011

J. H. MSOFFE  
**JUSTICE OF APPEAL**

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. J. BWANA  
**JUSTICE OF APPEAL**



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

(M. A. Malewo)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**