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

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

**CRIMINAL APPEAL NO. 321 OF 2008**

**ROBERT MAPUNDA @ TALL ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mtwara)**

**(Mjemmas, J.)**

**dated the 30th day of April, 2008**
**in**
**Criminal Sessions Case No. 22 of 2005**

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**JUDGMENT OF THE COURT**

**28 September & 5 October 2011**

**MBAROUK, J.A.:**

On 30/4/2008, the High Court of Tanzania at Mtwara before Mjemmas, J. in Criminal Sessions Case No. 22 of 2005 convicted the appellant Robert s/o Mapunda @ Tall of the offence of murder contrary to section 196 of the Penal Code, Cap. 16, R.E. 2002. He was sentenced to

death. Aggrieved by the conviction and sentence, the appellant instituted this appeal.

Briefly, the prosecution case against the appellant was as follows: on 13/7/2004, the deceased was selling local brew commonly known as "wanzuki" at the local "pombe" club owned by one Mzee Mbogo. Sometimes between 21.00 hours and 22.00 hours, there appeared an exchange of words between the deceased, Zakia d/o Mohamed Tengeneza and a customer by the name of Bakari s/o Mohamed. The quarrel erupted after the said Bakari demanded service of "pombe" and cigarettes without payment. The quarrel was resolved by the people who were present at the said local "pombe" club. Shortly thereafter, Bakari Mohamed left the place. Then, the appellant arrived at the said local "pombe" club and allegedly sat with the deceased. He ordered a local brew and issued TShs. 2,000/= currency note. According to PW2, Zainabu Abdallah, the seller in that "pombe" club, deposed that after the closure of the club, the appellant left with the deceased and herself up to the house of Kapundi where there is a mango tree and a junction. PW2 said she left the deceased and the appellant at the mango tree.

The deceased could not be seen alive until early morning on 14/7/2004 at about 6.30 hours when her body was found lying naked nearby PW1's house, Saidi Abdallah Kipeta. The Post-Mortem Examination Report revealed that the body was found with peripheral blood vessels enlargement, bruises involving the face and neck, massive bruises and laceration in the vagina and the cause of death as per the autopsy report was due to Asphyxia.

In his defence, the appellant denied to have committed the offence charged against him. He deponed that on 13/7/2004, he went to Kimbemba village where he had a contract to build a house of one Kaley. He then at around 4.00 p.m., returned to Makonjaganga where he lived. At around 7.45 p.m. he went at a "pombe" club owned by Mzee Mbogo and stayed there for about ten minutes and left to Mama Kibibi "pombe" club. The appellant denied to have stayed at Mbogo's club up to the closing time at 10.00 p.m. as PW2 claimed. He also denied to have sat with the deceased or left with her. However, he acknowledged to have known the deceased. The appellant mentioned some people who saw him at

Mbogo's club after staying for a short period of time. He said, the witnesses supported him that he did not leave with the deceased. The appellant added that, PW2 mentioned his name at the police station, because she was also among those who were arrested in connection with the death of the deceased. The appellant said he failed to attend the burial ceremony as he was already in police custody. His defence was rejected by the trial High Court.

In this appeal, the appellant was represented by Mr. John Mapinduzi, learned advocate, whereas the respondent Republic was represented by Mr. Ismail Manjoti, learned State Attorney assisted by Mr. Prudens Rweyongeza, learned Senior State Attorney.

Mr. Mapinduzi, started his submission by contending that he does not support the conviction and sentence imposed to his client in this appeal. Although the appellant's memorandum of appeal contains ten grounds of appeal, Mr. Mapinduzi opted to argue the appeal on the issue of whether there was sufficient evidence to prove the offence against his client or not.

He submitted that, the record shows that the case depended mainly on the evidence of PW2 who was the last person who saw the appellant with the deceased. However, Mr. Mapinduzi discredited the evidence of PW2 and said she was not a credible witness because she was an accomplice, after she was arrested for the same offence with the appellant. He then urged us to find that PW2 had her own interest to serve which is to exculpate herself from the murder of the deceased.

In his submission, Mr. Mapinduzi added that, PW2 failed to name the appellant at the earliest opportunity when she wrote her 1st statement just two days after the murder. He said that the only names mentioned by PW2 at the police station were Felician, the deceased daughter Niyule, Mama Lusi Vestina Mbogo, Yasini Mbanila, the deceased, Bakari and herself. Mr. Mapinduzi strongly argued that PW2's failure to name the appellant at earliest opportunity just two days after the incident while her memory was still fresh created doubt as to her truthfulness.

Furthermore, Mr. Mapinduzi submitted that, at the "pombe" club there was no sufficient light to enable the appellant to be identified. He

said, PW4 Niyule John Eugeni who was the daughter of PW2 testified to the effect that although she knew the appellant before, but on that day she did not recognize the appellant because there was no sufficient light. Mr. Mapinduzi then urged us to find that a person named by PW2 as the person who left with her at the closure of the "pombe" club was not the appellant.

In addition to that, Mr. Mapinduzi submitted that even DW3, Yusufu Mohamed Madogo, the deceased's son testified to the effect that at around 8.00 p.m. when he returned home he met his mother – deceased. DW3 said, his mother prepared food and they ate. After eating, his mother went to her room to sleep and he too went to his room to sleep, and that, he was not sure whether his mother left or not after she went to sleep. Mr. Mapinduzi said this creates doubt as to whether PW2 was truthful.

All in all, the advocate for the appellant submitted that, PW2 is the only prosecution witness who testified that she saw the appellant as the last person with the deceased, but her evidence lacked corroboration. Furthermore, he added that, there was a dispute between some one by the

name of Bakari and the deceased who told the deceased "tutaonana". He urged us to consider the impact of those words from Bakari to the deceased which were not considered by the trial High Court.

Finally, Mr. Mapinduzi submitted that in those circumstances, the High Court Judge erroneously believed and found PW2 as reliable and credible witness. However, he said considering those doubts, that makes the prosecution evidence not sufficient to prove beyond reasonable doubt who killed the deceased.

Having pointed out those doubts, Mr. Mapinduzi contended, it is very dangerous to rely on the evidence of PW2, because there is no other evidence at all for corroboration. For those reasons, he prayed for the appeal to be allowed and his client be set free.

On the other hand, Mr. Manjoti supported the appeal. He briefly submitted that, he agrees with his learned friend advocate for the appellant to the effect that generally this case relied on the evidence of PW2 as a last person who saw the appellant with the deceased. That

means, he said, the evidence as a whole is circumstantial. However, he added that, being circumstantial, such evidence has to be watertight. But in this case, he contended that the evidence contain full of doubts. **Firstly,** he said, DW3 who was the deceased's son confirmed that his mother was with him at home as from 8.00 p.m. to around 9.00 p.m. He added that, DW3 left his mother going to sleep, and he is not sure whether she left or not after she went to sleep. He further contended that, such evidence creates doubt as to whether PW2 was truthful or not. Mr. Manjoti, then submitted that, that makes a chain of prosecution evidence broken in establishing whether the deceased reached her home. He added that, there is no clear evidence which has established that the deceased went out of her house and no one knows as to how she went out and met her death.

**Secondly,** Mr. Manjoti submitted that, the High Court judge failed to consider the impact of the dispute which arose between Bakari and the deceased and also the impact of the words uttered by Bakari when he said "tutaonana" after he quarrelled with the deceased.

Generally, Mr. Manjoti argued, there are a lot of doubts as pointed out earlier by his learned friend. He thus urged us to give the benefit of those doubts in favour of the appellant by allowing the appeal.

It is common ground that the evidence used to convict the appellant was circumstantial, as none of the prosecution witnesses saw the commission of the offence. The prosecution mainly relied upon PW2's evidence as the last person who saw the appellant with the deceased. As a whole, the appellant was convicted relying on circumstantial evidence. In the case of **Simon Musoke v. R.** (1958) EA 715 it was stated that:

> "In a case depending conclusively upon circumstantial evidence, the court must, before deciding upon a conviction, 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."

Also, in the case of **R. v. George William Senkatuka** (1946) 13 EACA 89 it has been stated that:

> "circumstantial evidence, to sustain a conviction must point irresistibly to the accused."

All in all, we think a point to be considered is that, in cases whereby its evidence is entirely based on circumstantial evidence, such evidence has to be watertight, suspicion is not enough, however strong it may be.

As pointed out earlier by the advocate for the appellant and the learned State Attorney, in the instant case it appears that, several doubts have arisen to make the chain of events broken. **Firstly,** PW4 did not support the evidence of PW2 that the appellant was present in that "pombe" shop up to its closure. After-all, as PW4 said, she did not identify the appellant to be in that "pombe" shop because of darkness. We are of the opinion that, PW4's testimony supports the appellant's testimony that he was there at the club for only few minutes and not until the club was closed.

**Secondly,** we are of the opinion that, PW2's failure to name the appellant at the earliest opportunity at the police station, raised doubts as to whether she was a reliable and credible witness. It is very important for

a witness to name a suspect at the earliest opportunity. In the case of **Marwa Wangiti Mwita and Another v. Republic,** Criminal Appeal No. 6 of 1995 (unreported), this Court stated that:-

> "**The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability,** in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry." (Emphasis added).

In the instant case, as the record shows in her first statement at the police, PW2 did not mention the appellant as one among those who left the club at its closure. Instead, after PW2 was arrested, she then mentioned the appellant in her second statement on the 19/7/2004 about six days later. As stated in the case of **Marwa Wangiti** *(supra)* the delay in not naming the appellant at the earliest opportunity led PW2's evidence in involving the appellant in this case, to remain unreliable.

**Thirdly,** DW3's testimony to the effect that he was with her mother until they went to sleep, that creates another doubt as to when the deceased left the house. There is no clear evidence to that effect and furthermore, no one knows with certainty as to how the deceased went out after DW3 saw her going to sleep.

**Fourthly,** as the record shows, there was a dispute and quarrel which arose between the deceased and one Bakari, and later Bakari threatened the deceased "tutaonana". The High Court Judge failed to consider the impact of those threatening words to the deceased.

In the event, having seen those doubts, and bearing in mind that the decision of this case at the High Court mainly relied on PW2's evidence, without any corroborative evidence, we are of the considered opinion that it will be very unsafe to sustain the appellant's conviction. In the circumstances, and for the reasons stated herein above, we are constrained to allow the appeal. Hence, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith, unless he is otherwise lawfully held.

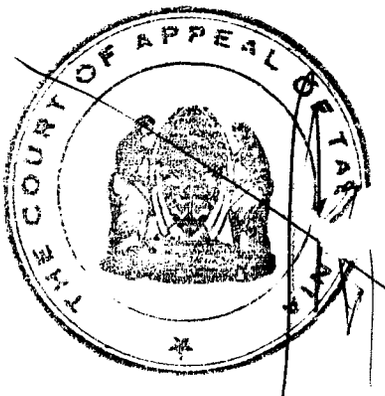
DATED at MTWARA this 30th day of September, 2011.

E.N. MUNUO
**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**