IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 309 OF 2010

SWAHIBU ALLY BAKARI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 2nd day of July, 2010
in
Criminal Sessions Case No. 3 of 2007

JUDGMENT OF THE COURT

24 & 29 March 2011

MSOFFE, J.A.:

The appellant SWAHIBU ALLY BAKARI was charged with the offence of murder contrary to section 196 of the Penal Code. The High Court (Teemba, J.) convicted and sentenced him to death. He is aggrieved, hence this appeal in which he had the services of Mr. Alfred Akaro, learned advocate. On the other hand, Mr. Faraja Nchimbi and Ms. Pendo Makondo learned State Attorneys appeared and resisted the appeal on behalf of the respondent Republic.

Mr. Akaro preferred two grounds of appeal which read as follows:-

1. *That the learned trial Judge erred in fact by convicting the Appellant whereas there was no sufficient evidence to establish beyond all reasonable doubt that the deceased was killed by the Appellant.*

2. *That without prejudice to the first ground of appeal the learned trial Judge erred in law and fact by failing to find that even if the Appellant killed the deceased he did so under provocation and/or in self defence.*

It occurs to us that the second ground is actually in the alternative to the first ground. In fact, in arguing the appeal before us Mr. Akaro argued the second ground in the alternative to the first one. In our reading and appreciation of the evidence, we are satisfied that the appeal can safely be determined on the basis of the first ground alone. We therefore propose to determine the appeal on the basis of the complaint in the first ground in which the key complaint is that the available circumstantial evidence did not

conclusively determine or prove the case against the appellant beyond reasonable doubt.

In advancing the above point, Mr. Akaro was of the view that in the absence of medical evidence that the human heart that was found with the appellant was that of the deceased the "chain of events" in the circumstantial evidence on record was broken. According to Mr. Akaro, there ought to have been some evidence in the form of medical analysis to the effect that the blood in the heart that the appellant was found with was that of the deceased. In the absence of evidence to that effect, the appellant ought to have been given the benefit of doubt and thereby earn an acquittal, Mr. Akaro concluded on the crucial issue of circumstantial evidence.

On the other hand, Mr. Nchimbi, argued that there was sufficient circumstantial evidence to warrant the conviction in question. In the process, he carried us through the circumstantial evidence in the case and invited us to hold that it is enough to sustain the conviction.

Before stating the facts, we think it is opportune and helpful at this juncture to restate the law on circumstantial evidence. Fortunately, there are a lot of authorities by this Court and from other jurisdictions on the subject. Briefly, the law on the subject is settled that in a case depending conclusively on circumstantial evidence, the court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilty - See for instance **Taper v R** (1952) A.C. 480, **Elisha Ndatange v R** C.A.T Criminal Appeal No. 51 of 1999, **Mathias Bundala,** C.A.T Criminal Appeal No. 62 of 2004 (both unreported) and **Abdul Muganyizi v R** (1980) TLR 263.

At this stage, it is now pertinent to state briefly the facts of the case. The deceased ASHA BAKARI and the appellant were related. The deceased was the appellant's paternal grandmother. They both lived in the same compound but in different houses. In the night of 5/10/2004 they both slept within the compound. In the morning of 6/10/2004 news spread around the village that the deceased had

been killed. At the same time, there was no serious dispute that the appellant left the homestead in the early morning hours of that day. After the villagers had assembled they saw the body of the deceased lying in her house. Beside the body there was a knife and a kitenge both of which were blood stained. In the circumstances, the appellant naturally became the prime suspect. Accordingly, a search for him ensued immediately. On 7/10/2003 he was found hiding on top of a mango tree. He was ordered to climb down but he refused to do so. He finally climbed down after the villagers stoned him. He was accordingly arrested. Upon being searched, he was found with the heart of a human being. In the meantime, autopsy was conducted on the body of the deceased. In the post-mortem examination report the doctor observed and opined that the body had a:-

> *penetrating wound on the neck and large cut wound on abdominal wall ... Heart organ not found in the body during examination ... The cause of death was severe bleeding.*

In the meantime also, the heart, knife and kitenge were sent to the Chief Government Chemist for medical analysis. The Chemist confirmed, as per exh. P5, that the heart was that of a human being and also that the blood on the knife and kitenge was that of a human being.

As intimated earlier, we are determining this appeal purely on the basis of the circumstantial evidence on record. In this sense, we are from the outset satisfied that the evidence on record established the appellant's guilt beyond reasonable doubt. In saying so, we are mindful of the fact that in this sense **time** was of the essence in the matter. In this regard, we will repeat the evidence even if it is at the expense of making this judgment long. News spread around the village that the deceased had been killed. In the meantime, it was also known that the appellant disappeared from the compound he was living in with the deceased in the early hours of that morning. Villagers assembled quickly at the scene of incident. They saw the dead body. Beside the body were the blood stained knife and kitenge. A search for the appellant was quickly mounted. Just a day

after the incident the appellant was seen hiding on top of a mango tree. Following his arrest he was found with the heart of a human being. The body was examined and found to have no heart. Surely, the above events, which took place within a short time, taken together suggest that no other person(s) besides the appellant killed the deceased. The deceased died at the hands of the appellant. We appreciate the force of argument in Mr. Akaro's submission but we are unable to agree with him. True, the suggestion put forward by Mr. Akaro is a attractive but even in the absence of the medical analysis the available circumstantial evidence pointed an accusing finger at the appellant.

Before we conclude this judgment there is one point we wish to address. The point, though not a specific ground of appeal, relates to the "chain of custody" in the handling of the exhibits (the heart, knife and kitenge). We will address the point just for the sake of the avoidance of doubt. The point is important in determining whether or not there was a possibility of the exhibits being tampered with.

Indeed, the trial judge dealt with this point, *albeit* briefly, when she stated in her judgment as follows:-

> *... However, chances are high that the blood on the knife and kitenge was from the deceased taking into account that these items were taken from the scene and sealed before they were sent straight to the Chief Government Chemist. There is no evidence to suggest that the exhibits were tampered with ...*

Section 38 (1) (b) and (3) of the Criminal Procedure Act (CAP 20 R.E. 2002) read as follows:-

> *38 – (1) If a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box receptacle or place –*
>
> *(a) ...*
>
> *(b) anything in respect of which there are reasonable grounds to believe that it will*

afford evidence as to the commission of an offence;

(c) ...

(2) ...

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner of occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

In fact, Police General Order No. 229 on the classification, handling, labeling, recording, custody, packing, final disposal and retention of exhibits is also relevant in this context.

The above provisions are particularly relevant for purposes of this case in that they help to shed light on "the chain of custody" in the general handling of exhibits. As observed by this Court in **Paulo Maduka and Others,** Criminal Appeal No. 110 of 2007 (unreported) the chain has something to do with:-

> *... the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis, and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody ... is to establish that the alleged evidence is in fact related to the alleged crime – rather than, for instance, having been planted fraudulently to make someone guilty. The chain of custody requires that from the moment the evidence is collected, its very transfer from one person to another must be documented and that it be provable that nobody else could have accessed it.*

In this case, "the chain of custody" in the handling of the above exhibits is best captured by the evidence of PW4 C 7180 D/Sgt. Kedmond thus:-

> *... We were shown the parcel containing the heart. The doctor confirms that the heart was of a human body. We took the heart to a clinic/health centre at Mbuzii where the heart was treated to preserve it. It was also kept in a plastic container for safety.*
>
> *We then went to police having the knife, kitenge and the heart. I labeled all of them and dispatched them to the chief chemist for further examination and investigation. They were sealed properly on the same day but were dispatched on 16/10/2004.*
>
> *A report from the Chief Chemist was brought back to our station with the kitenge and knife.*
>
> ***Exh. 'A'** was a knife and the results shows that it had blood stains of a human being. The blood was Group B.*

> ***Exh. 'B'*** *was the heart. The report reveals that it was a heart of a human being.*
>
> ***Exh 'C'*** *was a kitenge with blood stains. This was also examined and revealed that the blood was Group B of a human being.*
>
> *The Report was from the Chief Chemist. It was written on a Headed Paper and stamped by the seal of Chief Chemist. It bears a name and signature of a Senior Chemist who conducted the examination.*

From the above "chain of custody" two points come to our minds. **One,** PW4 was not contradicted by anybody in his evidence on the manner of the handling of the above exhibits. It follows that what he stated was true. **Two,** looking at the above evidence of PW4 we do not get the impression that anyone could have tampered with the exhibits. It is apparent that the exhibits were carefully handled and documented. In the circumstances, we are satisfied that the above "chain of custody" gave no room for tampering. So, since the above exhibits had a direct bearing on the murder in

question, to which we have already found that the appellant was responsible, we are satisfied that the conviction was well founded.

There is no merit in the appeal. We hereby dismiss it.

DATED at TANGA this 28th day of March, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

(E.Y. Mkwizu)
DEPUTY REGISTRAR