IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 256 OF 2008

DOROVICO SIMEO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania, at Bukoba)

(Rugazia, J.)

dated the 27th day of October, 2004
in
Criminal Sessions No. 23 of 1998

JUDGMENT OF THE COURT

4th & 14th November, 2011

MUNUO, J.A.:

The appellant, Dorovico s/o Simeo was in Criminal Sessions Case No. 23 of 1998 in the High Court of Tanzania at Bukoba, convicted of murder on the 27th October, 2004, before Rugazia, J. Aggrieved, the appellant preferred Criminal Appeal No. 218 of 2004 out of time whereupon the Court struck out the incompetent appeal on the 15 day of April, 2008. Thereafter, the appellant instituted Miscellaneous Criminal Application No.

36 of 2008 in the High Court of Tanzania at Bukoba seeking extension of time to appeal against the conviction for murder. Lyimo, J. granted extension of time to appeal within fourteen days from the 3rd September, 2008. Hence the present appeal.

The appellant was charged with two counts of murder namely:-

> Count 1: Murder c/s 196 of the Penal Code in that on the 17th day of June, 1993 at Kasindaga village in Muleba District within Kagera Region, the appellant murdered one Bosco s/o Theophil.
>
> In Count 2: Murder c/s 196 of the Penal Code in that on the 17th day of June, 1993 at Kasindaga village in Muleba District within Kagera Region, the appellant murdered one Theophil s/o Felician.

The appellant pleaded not guilty to either charge. Two of the three assessors who assisted the learned trial judge found the appellant guilty of

murder as charged. One of the assessors hesitated to enter a verdict of guilty on the ground that the killing occurred at night and the identity of the killer was not established with certainty. On his part, the learned trial judge grounded a conviction for murder on both counts and sentenced the appellant to death by hanging. The sentence, we wish to point out, should have been imposed on count 1 only as a convict suffers death by hanging only on one count. The second count or where there are more than two counts of murder, would not carry any death sentence unlike in ordinary Criminal Cases where each count carries a penalty, the sentences to run consecutively or concurrently as the court may deem fit.

The facts of the case are not complicated. On the fateful night, the deceased Theophil Felician, his wife Augusta who did not testify in this case but who had a child called Bosco on her back, the deceased in Count 1, and two other co – villagers PW1 Laurent Tibaulila and PW2 Reverian Mufuruki had been partaking local brew in a pombe shop at Kasindaga village in Muleba District within Kagera Region. The appellant stated in his defence that he had been drinking at the same local brew club from 4.00 p.m. to 9.00 p.m. on the said night and the parties were familiar with each

other. For reasons not disclosed in the evidence, a quarrell erupted and the late Theophil Felician allegedly assaulted the appellant. The latter hit his assailant with a piece of timber on the head.

The fight was quelled by PW1 and PW2. The said eye witnesses deposed that upon their intervention to stop the fight, the appellant left the scene. The late Theophil Felician and his group partook more liquor to celebrate the end of the fight. Meanwhile, the wife of the Theophil Felician alerted the group that she had spotted someone peeping at them from the corner of the club. The suspect suddenly advanced and fatally slashed her husband, Theophil Felician and the baby she had tied on her back, Bosco Theophil, causing their deaths there and then. Augusta, the wife of Theophil, sustained serious head injuries but she fortunately survived. She was not, however, called to testify at the trial. Her PF3 was tendered at the preliminary hearing as Exhibit P3. The second panga assault on her head missed her but it landed on the two year old child she had tied on her back causing him to die instantly.

The postmortem examination reports of the deceased were admitted at the preliminary hearing without objection as Exhibits P1 and P2 respectively. Both deceased died from severe head cut wounds deep into the skull. They died from severe haemorrhage. We wish to note here that the postmortem examinations were conducted on the 20th June, 1994 after 12 hours of the murder. We further note that the sketch map which was tendered at the trial by PW3 C 4211 Dt/Stg Prosper, also bears the date 20th June, 1994 while the PF 3 of Augusta w/o Thephil, Exhibit P3, is dated the 23rd June, 1994. The PF 3 of the appellant who was arrested a few months after the murder is dated the 29th August, 1994. These dates will have significance when we consider the grounds of appeal and the submissions of learned counsel for the parties to this appeal. We further note that at the preliminary hearing, Mr. Katabalwa, learned advocate for the appellant at the material proceedings, indicated that the late Theophil, his son Bosco and the appellant as well as Theophil's widow, Augusta, were present at the local liquor club on the 17th June, 1994. The prosecution alleged that the appellant killed the deceased, father and son respectively, and escaped the from village. He was later apprehended at

Mgusu village in Geita District and repatriated to Biharamulo to answer the murder charges which he categorically denied.

In this appeal, Mr. Rugaimukamu, learned advocate represented the appellant. The respondent Republic was represented by Ms Jacqueline Mrema, learned State Attorney. Learned counsel for the appellant abandoned the grounds of appeal the appellant had filed and he filed a memorandum of appeal comprising three grounds namely;

1. That the learned judge erred in law to accept and base the conviction of the appellant on the evidence of the witnesses which was inconsistent, contradictory and unreliable.
2. That the learned trial judge erred in law when he turned himself to be a prosecutor with regard to the period when the offence took place.
3. That the learned trial judge did not analyse the evidence as a whole and particularly the defence.
4. That the conviction and sentence be vacated in the circumstances.

At the hearing, counsel for the appellant contended that the prosecution evidence was shaky and unreliable for grounding a conviction. The information on the respective counts, counsel further observed, contradicts the evidence adduced by the eye witnesses PW1 and PW2 who stated that the murder occurred on the 17th June, 1993 whereas PW3 the investigating officer stated that the offence was committed on the 20th June, 1993. The appellant on the other hand, claimed that the murder occurred on the night of the 17th June, 1994, counsel submitted. Coupled with the omission to call the widow of the deceased Theophil who spotted the assailant before he swiftly advanced and fatally slashed the heads of the victims with a *machete*, the prosecution evidence is weak and cannot sustain a conviction for a capital offence of murder, counsel for the appellant argued.

Exonerating the appellant, Mr. Rugaimukamu observed that the appellant learnt of the murder incidents after he had left the club so he was not the killer of the deceased persons. The appellant also attended the funeral of the victims and nobody arrested him. Had the appellant been the killer of the victims, counsel maintained, he would have been apprehended at the funeral. Counsel for the appellant faulted the

prosecution for failing to rectify the charge to reflect with certainty, the day the victims were killed. Mr. Rugaimukamu cited the cases of **Robinson Mwanjis and 3 others versus Republic (2003) TLR 218 at page 228** and **Lucas Kapinga and 2 others versus Republic (2006) TLR 374 at page 377** wherein the Court considered the effect of contradictions and discrepancies in the prosecution evidence and the duty of the investigator to correctly report facts. Observing that the investigator has an obligation to accurately investigate the case, collect facts and later give evidence, counsel for the appellant referred us to **Robison Mwanjis'** case cited *supra* in which the Court stated the duty of an investigator at page 228:

> "...The purpose of investigation is to collect facts and later to give evidence. There is no law or authority which declares an investigator incompetent to testify."

In view of the contradiction in the evidence of the prosecution, counsel for the appellant urged us to allow the appeal, quash the conviction and set aside the sentence of death thereby acquitting the appellant.

Ms Jacqueline Mrema, learned State Attorney, did not support the conviction. She conceded that the prosecution evidence was inconsistent and confusing thereby rendering the standard of proof inadequate and unsatisfactory. The learned State Attorney referred us to several cases in which the court held that material discrepancies and contradictions weakened the prosecution case so such doubt should be resolved in favour of the appellant.

In the case of **Bahati Makeja versus Republic, Criminal Appeal No. 118 of 2006 (CA) at Mwanz**a (unreported), the Court considered discrepancies in the prosecution evidence and stated;

"another observation worth making here is that while normal discrepancies do not corrode the credibility of the witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of the occurrence of the event. Material ones are those going to the root of the matter and or not expected of a normal person."

The learned State Attorney further cited the case of **Wilfred Lukago versus Republic (1994) TLR 189 (CA)** at Mwanza (unreported) wherein the court, while deliberating on a murder charge and the circumstances under which the deceased was killed, held that:-

"The prosecution evidence has some serious contradictions, and in the circumstances of that

case, it was impossible to assess the credibility of the appellant's wife whose evidence was heavily relied on in reaching the conviction; all these raise a grave doubt as to the appellant's guilt."

Furthermore, the learned State Attorney referred us to the case of Mohamed Said Matula versus Republic (1995) TLR 3 in which the Court considered among other issues, contradictions and inconsistencies in the prosecution evidence and the duty of the trial court to address the same. In that case the Court held;

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

All in all, the learned State Attorney supported the appeal and she urged us to allow the appeal for it has merit.

The record shows that the learned judge made an observation on the date of the killing by stating at page 37 of the record of appeal.

> "You will note that while the information says that the offences were committed in 1993, some prosecution witnesses made reference to 1994. I think this might be a typing error (it has to read 1994) so this should not confuse you..."

We indicated earlier on that the postmortem reports Exh. P1, P2 as well as the sketch map of the scene of crime all bear the date 20th June, 1994. The PF 3 of Augusta, the widow of Theophil Felician was admitted at he preliminary hearing, it is dated 18th June, 1994, which is to say the killing

was executed on the night before the 17th June, 1994. It is also pertinent to note the date on the appellant's PF 3 on page 47 of the record of appeal, is dated the 25th August, 1994. Considering that all the documents linked to the killing of the deceased persons are dated the 20th June, 1994, and that the appellant was arrested a few months after the murder because he had escaped to Mgusu village in Geita District, we are of the firm view that the learned trial judge correctly directed the assessors that the murder occurred on the 17th June, 1994 or thereabouts. Hence the charge sheet bears a wrong date. The investigating officer conceded that he mistook the date of the killing because he had been distressed by the sad demise of his wife. Under the circumstances, there is no speck of doubt that the murder occurred in June, 1994. The trial commenced in October, 2004, ten years after the murder. Ordinary villagers like PW1 and PW2 could easily confuse dates of events which occurred ten years previously. We rest the confusion of dates there and go along with the learned judge's opinion that the murder occurred in June, 1994.

The crucial issue in this appeal is whether the killer of the deceased was properly identified.

While tackling the issue of the identification of the killer, the learned trial judge observed:-

> "…. I cannot doubt PW1 and PW2's testimonies on this because they were eye witnesses and took part in pacifying. The accused was very well known to them also. After the fight the group was taking their drink outside and I am not prepared to believe that they were drinking in darkness when there was light inside the pombe shop and therefore make a finding that there was moonlight."

The learned trial judge continued:-

> "…. I also find that the accused was properly identified because not only was he known to the witnesses but they had seen him prior to the earlier fight and it was almost soon thereafter that he

> came back.....I cannot subscribe to the view that it was not the accused who committed the crimes in view of the available evidence. I do not think a certain lunatic came from the blues to butcher the unfortunate victims."

We have to revisit the testimonies of the two eye witnesses to assess the accuracy of the learned trial judge's observation on the identification of the killer.

PW1 stated at the trial:

> ".... On that day at 21.00 hrs I was at Kasindaga Market. I went there at 18.00 hrs. I found Theophil with his wife there. They were drinking local brew known as ***Kwete***. We left there at 21.00 hrs."

PW1 further deposed that on the way they met the appellant and that the appellant and the late Theophil started to insult each other. PW1 stated

that he could not remember the insults "*due to lapse of time.*" He remembered, however, that he intervened and separated the adversaries whereafter the deceased and his party returned to the club for a treat.

PW1 further deposed that he could not remember the clothes the appellant was wearing *due to lapse of time.* He said that when Augusta cried out that the appellant had cut her with a *machete,* he ran home instantly in apprehension and shock as the appellant charged at Augusta.

During cross – examination, PW1 stated that he was illiterate for he never went to school, that he had known the appellant from childhood and that both the deceased and the appellant were his neighbours.

Another eye witness, PW2 Reverian Mufuruki, also a neighbour of the deceased, deposed that he found the deceased and the appellant fighting but that the appellant left and returned four minutes later armed with a *machete.* The appellant then charged at Augusta, fatally wounded the

child on her back and seriously wounded the mother. Like PW1, PW2 stated that they ran for their lives but returned later only to find Theophil and his son dead. They reported the matter to the police and took Augusta to the hospital.

From the evidence of the two eye witnesses, we would have upheld the conviction if Augusta Theophil, the person who alerted the late Theophil's drinking party that the appellant had been hiding at the corner armed with a *machete*, had testified. Augusta was, in our view the key prosecution witness but for unknown reasons she was left out of the trial.

Being a survivor of the grisly murder of her late husband and son, she ought to have been called to testify to establish beyond all reasonable that the suspect she saw hiding or waylaying them was the appellant. The omission to call Augusta as a witness, in our humble view, created doubt in the prosecution evidence. Under the circumstances, we have no option but to give the appellant the benefit of doubt.

We accordingly quash the conviction and set aside the death sentence. We order that the appellant be set at liberty forthwith if he is not detained for other lawful cause. The appeal if hereby allowed.

DATED at MWANZA this 9th day of November, 2011

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL