IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MUNUO, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 70 OF 2011

LEONARD MGATA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(UZIA, J.)

Dated the 10th day of March, 2010
in
Criminal Session Case No. 31 of 2009

JUDGMENT OF THE COURT

24 & 28 June, 2011

MJASIRI, J.A.

In the High Court of Tanzania at Iringa, the appellant Leornard Mgata was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002. He was found guilty of the offence of murder and he was given the mandatory death penalty. Being aggrieved by the decision of the High Court, he appealed to this Court.

At the hearing of the appeal, the appellant was represented by Mr. Onesmo Francis, learned Advocate and the respondent Republic was represented by Mr. Josephat Mkizungo, learned State Attorney.

The appellant filed four (4) grounds of appeal which are reproduced as follows:-

1. That the trial Judge erred in law and in fact in convicting and sentencing the appellant of the offence of murder in relying heavily on the evidence of PW2 and PW1 who were accomplices of the offence.

2. That the trial Judge erred in fact in not according any weight at all to the defence of accident and /or misfortune raised by the appellant.

3. That the trial Judge erred in fact in believing the evidence of PW2 that the appellant punched the deceased on the fateful date while there was no evidence whatsoever that the deceased was punched by a fist on its back prior to its death.

4. That the trial Judge erred in fact in holding that the appellant had a criminal motive to commit the offence.

The chilling facts of this case resemble a script from an **Alfred Hitchcock** movie. The incident occurred at Ihimbo Village within Iringa

District in Iringa Region at around 19:00 hours. The mother of the deceased, Titus Kivamba, was married to the appellant. However, the deceased a two years old boy (2) was not the appellant's son. While the appellant was away from home serving a prison term, his wife developed a relationship with the appellant's cousin, one Godfrey Kivamba. She then became pregnant. Upon returning home after being released from prison, the appellant found his wife pregnant. He continued living with her wife and their four (4) daughters, on his return. A move was made to reconcile the appellant and the deceased's father. He was asked by the Village authorities to pay compensation to the appellant. Only a small fraction of the said compensation was paid to the appellant.

It was the prosecution case according to the testimony of PW1 and PW2, that the appellant resented the deceased so much. He even threatened to make him disappear. PW1 testified that there were instances when she was in the middle of breast feeding the child, the appellant would pull the child from his mother's breast and throw him on the ground. The appellant had also on several occasions burnt the child's clothes. She complained about the appellant's strange behaviour to the Village

authorities and the appellant received a warning. He promised to leave the child alone. On the fateful day the deceased was in the kitchen with his other sisters including PW1, there was a huge pot of boiling water on the fire. PW1 testified that the appellant suddenly came in the kitchen carrying a sulphate bag. He threw the sulphate bag into the fire which ignited the fire and gave out a huge flame. The appellant then pushed the deceased toward the fire and the boiling pot of water. As the child screamed, the appellant did not pull him out of the fire but left him until he was severely burnt. He instead asked for a light. The incident was reported to PW2. The deceased suffered severe burns, thirty percent according to the post mortem report. The deceased was taken to hospital but did not make it. PW1 also testified that the appellant resented the deceased so much and he threatened on several occasion that he would make him vanish. The appellant denied having any criminal intentions and stated in his defence that it was an accident and /or an unfortunate incident.

Mr. Onesmo submitted that the appellant did not have any criminal intentions and the whole incident was an accident. He stated the trial

Judge erred in law in basing the conviction of the appellant on the evidence of PW1 and PW2. He argued further that the credibility of their evidence was questionable, as they were accomplices. The trial Judge did not give any weight to the Appellant's defence. According to him, there were discrepancies in their evidence, whereas the mother PW2 testified that she was the one who prepared the evening meal, PW1, the daughter, testified that she was the one who did it.

Mr. Mkizungo on his part, forcefully argued that the incident was neither an accident nor a misfortune. He submitted that the defence raised by the appellant is not supported by the evidence on record. PW1 gave a detailed account of what transpired and PW2 supported the evidence of PW1. They were both found to be credible witnesses by the trial Court and there is no evidence on the record to challenge that. He further submitted that the discrepancies in the evidence of PW1 and PW2 were minor and did not go to the root of the matter. The evidence against the appellant was watertight. It has been clearly established that the appellant had motive to kill the deceased.

We on our part, do not consider the discrepancies and contradictions in the evidence of PW1 and PW2 material so as to affect the credibility and reliability of their evidence. See **John Gilikola v Republic,** Criminal Appeal No. 31 of 1999 CA (unreported) and **Mohamed Said Matula v Republic [**1995] TLR 3 (CA).

In our view the crucial issue to be determined in this appeal is whether the evidence on record justified the conviction of the appellant of the offence of murder. The conviction of the appellant was based on the evidence of PW1, PW2 and the cautioned statement of the Appellant. Upon our own evaluation of the evidence of PW1 and PW2 we can find no ground to fault the trial Judge in his finding that PW1 and PW2 were credible witnesses. In **Dickson Elia Nsamba Shapwata and Another v R,** Criminal Appeal No. 92 of 2007, CA (unreported) it was stated as under:-

> *"A trial Court's finding as to the credibility of witnesses is usually binding on an appeal Court unless there are circumstances on an appeal Court on the record which calls for the re-assessment of their credibility."*
>
> See also **Omari Ahmed v Republic** [1983] TLR 52.

The trial Judge very carefully reviewed the evidence and found PW1 and PW2 to be credible witnesses. PW1 is the appellant's daughter and PW2 is the appellant's wife and no cause has been established as to why they would give false evidence against the appellant. Given the way the appellant behaved towards the little boy and the unhidden resentment he had for him we have no doubts in our minds that he had a motive for killing the deceased. We are aware that it is a settled principle of law that motive can be considered when weighing the prosecution case. See for instance, **R v K. Tindikawa** (1940) 7 EACA 67. We are settled in our minds that given the appellant's behavior which was so bizarre, it was evident that he was bent on getting rid of the deceased. Motive was therefore appropriately invoked in this case. We are aware of the fact that it is not necessary to prove motive in order to establish the offence of murder, however the absence of motive weakens the prosecution case and its presence strengthens the prosecution case. We are therefore of the firm view that the established facts are consistent with the existence of malice aforethought.

With regards to the cautioned statement of the appellant, we have observed that the procedure required under the law was not followed when the statement was admitted in Court as Exhibit P2, hence the said cautioned statement is in - admissible. We therefore expunge the said statement from the record. However this does not change the basic version of the prosecution case, as expunging the cautioned statement does not dilute the evidence of PW1 and PW2 in any way. The said evidence is enough to ground a conviction against the appellant.

We therefore have no problem in reaching a conclusion that the evidence on record supports the allegation of the offence of murder and we are satisfied that the prosecution has established on the standards required under the law that it was the appellant who committed the offence of murder. There is nothing on record compelling us to find otherwise.

We note with concern that despite the enactment of the Law of the Child Act in 2009, a landmark legislation domesticating the UN Convention on the Rights of the Child (CRC) and providing the legal framework through

which the rights of the country's children can be protected and realized, children are still being subjected to cruelty and abuse. Following the behavior of the appellant towards the deceased, the deceased should not have been subjected to continue living with the appellant which led to his horrible death. There is a need for sensitisation of the society on the law and the protection accorded to children under the said law.

For the foregoing reasons, we hold that there is no merit in the appeal and we accordingly dismiss the appeal in its entirety. It is so ordered.

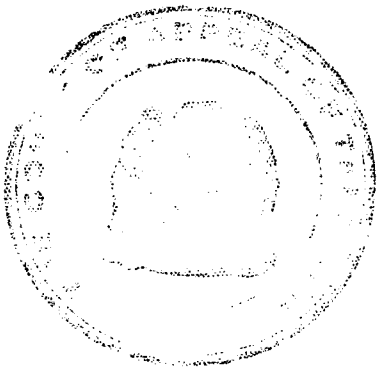
Dated at **Iringa** this 27th day of June, 2011

E.N.MUNUO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL