IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: OTHMAN,C.J., BWANA, J.A. And ORIYO, J.A)

CRIMINAL APPEAL NO. 89 OF 2009

IJUMAA BAKARI SENDEU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mzuna, P.R.M. EXT.J)

dated 7th day of October, 2008
in
Criminal Session Case No. 19 of 2003

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JUDGEMENT OF THE COURT

22nd & 28TH March, 2011

OTHMAN,C.J:

On 7.10.2008, the learned Principal Resident Magistrate with Extended Jurisdiction (Hon. M.G. Nzuna) in PRM Criminal Session Case No. 19 of 2003 convicted the appellant, Ijumaa Bakari Sendeu, of manslaughter c/s 195 of the Penal Code, Cap 16, R.E. 2002 instead of murder c/s 196 thereof, the offence that he was charged with. He

sentenced the appellant to a term of twenty years imprisonment. Aggrieved, he instituted this appeal on 8.10.2009.

At the hearing of the appeal, the appellant was represented by Mr. Deus Nyabiri, learned Counsel. The Respondent Republic was represented by Mr. Victor Kahangwa, Senior State Attorney.

In brief, the summary of the facts are these. The prosecution case, essentially supported by the evidence of PW1(Ayubu Juma) PW2 (Iddi Mustapha) and PW3 (Zubeda Msokolo) was that on 11.03.2001 at about 7.45 pm at Chukuru village, Kondoa District, the appellant went to the house of Joseph s/o Simon Mwanga (deceased) to buy "Choya", a local brew. The appellant made noises inside the house. The deceased requested the appellant to stay quiet. The house was located "in a quarters". The appellant did not heed to the request. The deceased pushed him and he fell down. He drew out a knife and stabbed the deceased. As a result thereof, the deceased died of hypovalemic shock due to severe bleeding. PW1, PW2 and PW3 claimed that they had

identified the appellant, whom they knew well before the event, with the aid of a lamp light (taa ya chemli) that was on.

In his defence, the appellant claimed that he was in Dar es Salaam on the date of the incident (i.e. 11.03.2001). This was supported by DW2 (Zamda Selemani) his wife, and DW3 (Amiri Bakari Sendeu), his brother.

Ground one of the appeal faults the trial court's finding on the evidence of visual identification which it had relied upon to convict the appellant. Mr. Nyabiri relying on **Waziri Amani V Republic** (1980)T.L.R. 250 submitted that the conditions for proper identification at the crime scene did not exist. The brightness of the only source of light, i.e the lamp was unknown. The appellant was also neither previously known to PW1, PW2 and PW3 nor was there any cogent evidence that he ever gambled at the Auction Mart as they had alleged.

That after the incident, these witnesses also did not immediately name the appellant to the Village or Ward Executive Officers. They only mentioned him at the Police Station on 13.03.2011. It was also not

enough for them to have reported to the police that the suspect was "Mr. Sendeu, a resident of Busi" as there could have been other Sendeus in Busi Village. Moreover, PW4's (Mohamed Hassan) evidence that he also met the appellant at 8pm that night had no weight at all as this identification was by moonlight. They did not have close ties for such an encounter to have taken place outside PW4's house.

On his part, Mr. Kahangwa who supported the conviction submitted that the visual identification by PW1, PW2 and PW3 left no doubt that the appellant was properly identified. PW1 knew the appellant since 1970 and PW2 since 1998. PW3 knew him as he used to come to her house to drink local brew. Like them, he was a resident of Busi Village. The identification was rendered proper by the lamp light and the size of the room they were all in at the time the deceased was stabbed. He relied on **Kisinza Richard V Republic 1989** T.L.R. 144 where the Court relying on lamp light illumination at the house and the witnesses' though knowledge of the appellant before the incident as a fellow villager, held that this had left no doubt as to the identification of the appellant in that case.

Going by the record, the trial court found out that the appellant had been properly identified at the crime scene as PW1, PW2 and PW3 knew him before, having seen him at the Auction Mart where he gambled or the Pombe Shop or at PW3's house where he went to buy local brew. There was also a lamp light and the sitting room they were in, measured 4x4 footsteps. That as confirmed by PW4, "Mr. Sendeu, a resident of Busi" at the material time was the appellant.

Paying close attention to the submissions, as we must, the vital question for determination is whether the conditions enabling correct identification inside the deceased's house were favourable and if so, whether the identification was absolutely watertight and had eliminated all possibilities of mistaken identification(See, **Waziri Amani's Case, Igola Iguna and Noni @ Dindai V Republic,** Criminal Appeal No. 34 of 2001 (C.A.) (unreported); **Raymond Francis V Republic** 1994 T.L.R. 100). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent- **R. V. Forbes** (2001) 1 ALL E.R 686 at p.689.

After a careful consideration of the totality of the evidence, with respect, we are of the settled view that the condition for visual identification inside the deceased's house left no doubt as to the correct and unmistaken identification of the appellant by PW1, PW2 and PW3, much as the incident took place at 7.45 pm, night time. **One,** the appellant was known to PW1 since 1970 and to PW2 since 1998. He used to buy local brew at PW3's pombe shop. **Two**, there was illumination by lamp light. That same source of light had enabled PW3 to measure one litre (Kideko) of brew ordered by the appellant that fateful night. **Three**, the small size of the room they were in, which measured 4x4 footsteps involved proximity by those present. There were five people therein (PW1, PW2, PW3, the deceased and the appellant). **Four,** PW3 was able to describe what the appellant wore and its colour - a brown "balagashia" (i.e. cap).

We have given due regard to the chain of events that unfolded. Viewed in their proper context, the immediate non-naming of the appellant as the suspect to the Village Executive Officer (VEO) is

reasonably explainable in that even before PW3 finished her statement, she was directed to report the incident to the Jangalu Ward Officer where PW1, PW2 and she went on 12.03.2001, the same day the police came to Churuku Village and took all of them to Kondoa Police Station where they named the appellant to PW5, a Policeman, as "Mr. Sendeu, a resident of Busi". The name Sendeu may have been very popular as claimed by the appellant (DW1), but we have not the remotest doubt in our minds that PW1, PW2 and PW3 thoroughly knew him long before the incident and were in fact together with him inside the deceased's house for them to have mixed him with any other person, all the identifying circumstances we have stated earlier borne to bear. All considered there is no merit in ground one of the appeal.

Ground two of the appeal alleges that the trial court erred in law and fact in rejecting the appellant's alibi that he was in Dar es Salaam on 11.03.2001, the date of the incident. It is well established law that:

> *"an accused person putting forward an alibi as an answer to a charge made against him does*

*not in law thereby assume the burden of proving that answer and if the accused by adducing evidence of an alibi introduces in the mind of the Court a doubt that is not unreasonable, then the court must acquit him"(**Leonard Aniseth V Republic** [1963] E.A. 206; see also **Ali Salehe Msutu V Republic** 1980 T.L.R 1).*

Having scrutinized the evidence we would agree with Mr. Nyabiri that PW4's evidence that the appellant came to his house on 11.03.2001 at 8pm should not have been relied upon by the Court. Even though PW4 said that he shared the same father–in-law with the appellant, surprisingly, he did not know the name of the appellant's wife nor that of any of his children; could not tell the Court where the appellant's house was located and had never visited him. Considering the closeness of the relationship which is not revealed by these circumstances, we are not fully assured of the veracity of PW4's evidence, as we ought to, that places the appellant at PW4's house the night of 13.03.2001.

That notwithstanding, as stated earlier we are of the respectful opinion that the evidence of PW1, PW2 and PW3 correctly, unmistakenly and without any doubt places the appellant inside the deceased house the night he was fatally stabbed. No reasonable doubt is raised that the appellant was in Dar es Salaam that very night. Like the trial court, we too would reject the alibi, but for all the above reasons. Not the failure by the appellant to tender a bus ticket to show that he travelled to Dar es Salaam on 5.03.2001 and only returned to Churuku on 8.04.2001 as the trial court had reasoned. With respect, the burden of proving alibi did not rest with him, but was that of the prosecution. This it had fully discharged by disproving the alibi beyond reasonable doubt on the reliable identification evidence of PW1, PW2 and PW3. Accordingly, there is no merit in ground two of the appeal.

The complaint in ground three of the appeal, raised in the alternative, is that the sentence of twenty years imprisonment levied by the trial court on the appellant was manifestly excessive. Mr. Nyabiri submitted that the Court took into account wrong considerations,

namely, that the appellant was arrogant and had consumed the precious time of the Court, this at a cost. Moreover, as the appellant was a first offender, the emphasis should have been on his reformation.

In reply, Mr. Kahangwa readily conceded that the sentence imposed was indeed manifestly excessive. He added that as mitigating factors, the appellant's age, 52 years old and the fact that he had been in custody for seven and a half years, should have been given weight.

It is on record that the trial court in imposing the sentence of twenty years imprisonment also took into account the appellant's purported arrogance showed by not abiding to the deceased's plea for him to maintain silence while inside his house and by abusing him in front of his wife (PW3) and children. It also considered relevant that the appellant had consumed the precious time of the Court and had occasioned costs when there was no need to do so.

The imposition of sentence is at the discretion of the trial Court. In **Rashid s/o Kaniki V Republic** (1993) T.L.R. 258, the Court stated:

> *"It is trite principle that before a Court of Appeal can interfere with the trial court's sentence, the Appeal Court must be satisfied that either the sentence imposed was manifestly excessive or that the trial court ignored an important matter or circumstances which ought to have been considered while passing the sentence or that the sentence imposed was wrong in principle"(**See also Benadetta Paul V R**[1992] T.L.R. 97).*

The categories of error which justify appellate intervention include occasions where the sentencing trial Court has, (a) allowed extraneous or irrelevant matters to guide or affect the decision, (b) failed to take into account a relevant consideration, (c) given insufficient or excessive

weight to a relevant consideration – **Winter vs R** (2006) V.S.C.A 144 at Para 53.

The prime question that we have anxiously asked ourselves is whether the trial court exercised its sentencing discretionary power in the terms outlined above. On a close consideration of the record, with respect, we would agree with both Mr. Nyabiri and Mr. Kahangwa that the trial court erred, **first**, by taking into account the appellant's purported arrogance and his consumption of the court's precious time, and at a cost, all irrelevant considerations. These two considerations should not have excited the trial court at all. The Court and costs, as Mr. Nyabiri correctly submitted, are unavoidable in the dispensation of criminal justice. **Second,** the trial court also erred by giving insufficient weight, if not any weight at all, to the appellant's age, at 52 years and the fact that he had been in custody for seven and a half years. **Third**, we find as an omitted relevant consideration the fact that the deceased's death resulted out of a "fracas" between him and the appellant.