IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 207 OF 2010

BETWEEN

OLFAM MATHIAS @ MNOLA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mipawa, J.)

dated 28th June, 2009

in
Criminal Session Case No. 28 of 2008

JUDGMENT OF THE COURT

20th JUNE& 2nd JULY, 2012

OTHMAN, C.J.:

The appellant, Olfam Mathias @ Mnola was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 and sentenced to suffer death by hanging. Dissatisfied, he has preferred this appeal.

The appellant was represented by Mr. Michael Ngalo, learned Counsel. The respondent Republic was represented by Mr. Peter Ndjike, learned Senior State Attorney.

In brief, the prosecution case as testified by its key witness, PW2 (Yohana Chengula), aged twelve years was that on 28/1/2007 while playing football, he saw the appellant whom he knew before assaulting the deceased, Efuardi Ngairo @ Danida after he had denied the appellant a cigarette. The deceased had lost consciousness, but soon regained it. He refused the plea by Paulo Mgoma (PW3) to sleep at PW2's house and insisted that he must return to his house at "Mailisita" as he had a sick child.

On the way, the deceased passed through the house of Dominic Ntulo (PW4). There, he ate and then continued his journey home. The next morning, on 29/1/2007, he was discovered dead on the way between Mibule and "Mailisita".

In his defence, the appellant denied involvement. He claimed that he neither knew nor met the deceased on 28/01/2007.

The High Court found out that the appellant's assault on the deceased was *heavy and serious* and was feuled by *an evil motive*. It further held that it had been actuated by malice aforethought under section 200 of the Penal Code. The learned Judge considered that the appellant was criminally responsible under section 205(1) of the Penal Code as the deceased's death had occurred within a year and one day of the cause of death.

Of the seven grounds of appeal contained in the appellant's memorandum of appeal and as argued by the parties, it would appear to us that grounds 1,4 , 5 and 7 of the appeal are central. These grounds of appeal criticize the High Court for having erred in law and fact in:

> 1. *Finding that the assault, which was inflicted on the deceased was a heavy and serious one filed with an evil mind of causing death or grievous harm to the deceased in terms of section 200 of the Penal Code.*
>
> 4. *Holding that the injury on the head of the deceased where the body was found was struggling with death.*
>
> 5. *Holding that the rough state of the ground and grasses where the deceased's body was found may have been caused by the deceased dying and struggling with the separation of his spirit and the body.*

7. Holding that the respondent proved its case beyond reasonable doubt.

Submitting on these grounds of appeal collectively, Mr. Ngalo conceded that the *voire dire* examination of PW2 was properly conducted under section 127(2) of the Evidence Act, Cap 6 R.E. 2002. However, he argued that as PW2 was playing football at the time of the alleged assault it could not be excluded that he concentrated on the game and not the former. That PW2 was not in a position to visually identify the appellant or to have heard any conversation between the deceased and the appellant from the football field.

Challenging the High Court's assessment of the evidence, he forcefully submitted that no witness had testified that the deceased was heavily and seriously assaulted. That even the deceased in his dying declarations to PW3 and PW4 did not say that he was hit on the head by the appellant. The evidence of PW2 was that he was assaulted on the stomach and ribs. The post-mortem medical examination report (Exhibit P1) found that the deceased had bruises on the head, an indication that the injuries were superficial. That as head injury was the cause of death, it could not have been caused by an assault on the stomach and ribs. The

learned Judge, he urged, found as a fact something which no witness had said.

Mr. Ngalo went on to submit that the High Court's finding that the rough state of the ground and grasses where the deceased's body was discovered may have been caused by the deceased dying and struggling with the separation of his spirit and body was not established in the evidence of any of the prosecution witnesses. The scene of crime had been visited by the police, who did not testify.

On his part, Mr. Ndjike also did not support the appellant's conviction. He submitted that the High Court had not properly directed itself on the cause of death of the deceased and its connection with the assault committed by the appellant. PW3 and PW4 had seen the deceased immediately before his death. If he was seriously injured, at or after the assault, he would have said something to them on the severity of his injuries. He did not.

Mr. Ndjike submitted that the prosecution had not proved that the appellant struck the final blow that led to the appellant's death. The burden of proof to show that the blow which led to the deceased's death was caused by the assault was on the prosecution. This proof was not

established. There was no marriage, he said, between the assault and the head injury which had caused the deceased's death.

Adverting next to the merits of this appeal, the principles applicable by an appellete court on first appeal in relation to a trial court's appreciation and evaluation of the evidence and findings of fact are well known and need no rehearsing. (See, **Peter V. Sunday Post Ltd** (1958) E.A. 424; **Shantilad Maneklal Ruwala V. R, Dinkerraj R and Krishan Pandy V.R**, 1957 EA 336).

The post-mortem medical examination report conducted on 19/01/2007 (Exhibit P1) and admitted without objection by the defence during the preliminary hearing found out that the deceased had died due to head injury. His external appearance showed bruises on the head.

Having scrutinized the whole evidence and attentive to the submissions by Mr. Ngalo and Mr. Ndjike, we are of the considered view that PW2 saw the appellant, whom he knew before assaulting the deceased. There is nothing on the record to suggest as Mr. Ngalo did, that PW2 had concentrated on playing football and not on the incident. PW2 was proximate, 15 paces away. PW3 and PW4 were informed by the deceased himself, soon after the incident that it was the appellant who had

assaulted him. Then, he was in a condition to converse. Contrary to what that the appellant testified, it was conclusively proved that he met the deceased on 28/01/2007 and assaulted him.

The determinative question however is what was the nature of the assault and the extent of the injuries sustained by the deceased.

The Learned Judge found out;

> *" I am of the considered view that the assault which the deceased had from the accused was **heavy and serious** one and **fueled with evil mind** of causing death or grevious harm"*
>
> .....
>
> *"The assault which is my view was **very heavy**". (Emphasis added).*

The evidence establishes that when the deceased was assaulted, he became unconscious, but regained consciousness and walked to PW4's house, 800 meters away and beyond. Although he spoke with difficulty, he was able to recount to PW3 and PW4, the episode. He mentioned little on the seriousness or severity of the assault. Moreover, the post-mortem medical examination report (Exhibit P1) reveals nothing abnormal with his lungs, stomach, or any of his internal organs. It was PW2's evidence that

the deceased was mostly assaulted on the stomach and ribs with boots. The deceased had shown PW4 his ribs, where he felt internal pain. Not his head. With respect, on the totality of the evidence there is nothing to suggest to us that the assault was *very heavy* as inferred by the High Court. Not only that, on the prosecution evidence adduced, we are not persuaded that the deceased's cause of death was sufficiently traceable and referable to the assault.

On another finding appealed against by the appellant, the learned Judge stated:

> *"On this aspect of the grasses being rough at the place where the dead body was found as if there was a fight, I agree with the opinion of assessors that this may have been caused by the act of the deceased person when he was dying and struggling with the separation of his spirit and the body c'est a dire struggling with death.....*
>
> *I entirely agree the dying kicks when the accused was dying may have caused the rough state of the ground and grasses as of there was a fight".*

The post-mortem medical examination report (Exhibit P.1) reveals that the area where the deceased's body was discovered on 29/1/2007 was rough as if there was a fight. PW1 (Somoye Chibwana), the Ward Executive Officer (W.E.O.) and PW3 who also went there saw grasses

disturbed, which they thought were signs of a fight. The First Assessor, opinied:

> *"May Lord, usually when the person dies or wants to die he feels pain and there must have been a struggle between him and death which was at the door, it may be true that even the deceased might have caused the grasses to be as they were found, that is rough or the grasses disturbed".*

Having regard to the evidence, we would also agree with Mr. Ngalo that there was no evidence on how the deceased had met his death where he was discovered. With respect, the High Court was highly influenced by the opinion of the assessor, which is not evidence to conjecture or visualize how the deceased finally succumbed to death. There was simply no eye witness to the final moments of the deceased's death.

It was Mr. Ngalo's further submission that from a description of the rough condition of the ground and grasses where the deceased's body was found, two versions of events may have taken place there. There was a possibility that either a fight had occured or the deceased may have been ambushed or attacked by unknown persons. Relying on **Abdullah Jeje @ Mchima Mabula V. Republic**, Criminal Appeal No, 195 of 2007 (CAT,

unreported) he submitted that in the event of two versions as in the instant case, that in favour of the appellant must prevail.

We would agree with Mr. Ngalo and Mr. Ndjike that with the immediate circumstances attending to the death of the deceased uncertain, two version or more on how he met his death are reasonably possible. He may have been subjected to a second assault or an ambush by assailants or as testified by PW1 and PW3, a fight may have occurred. He may also have died of other superceding events. There is simply no evidence on which one or the other of these eventualities may have taken place. In our considered view, this further blurred the chain of events that was required to flow from the prosecution case. The deceased was last seen alive by PW4 when he passed by his residence in Mibule Village while on his way to his house in Mailisita. The two villages were 5 Kilometers apart.

In **Abdallah Teje @ Malima Mabula V.R**, (*supra*) we reiterated the principle:

> *"Now, in law, where there are two possible views on the evidence, one pointing to the guilt of the accused and the other to his innocence, a court of law must adopt the one favorable to the accused".*

Having regard to all the above, we are of the considered view that the benefit of doubt must visit the appellant to avoid a miscarriage of justice. With the visible evidential gaps in the prosecution case we have highlighted, it could not safely be held that the prosecution had proved its case beyond doubt. Accordingly, we find merit in grounds 1,4,5 and 6 of the appeal.

In the result and for the foregoing reasons, we quash the appellant's conviction and set aside the sentence imposed. The appellant is to be set at liberty forthwith, unless otherwise lawfully held.

DATED at **MTWARA** this day of 26th June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.
DEPUTY REGISTRAR