IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO,J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 13 OF 2012

CLEMENT ALOYCE...APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

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

(Teemba, J.)

dated the 23rd day of July, 2010
in
Criminal Sessions Case No. 16 of 2008

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JUDGEMENT OF THE COURT

25th & 27th June, & 4th July, 2012

KIMARO, J,A.:

On 25th March 2006 Agnes Aloyce (PW2) woke up in the morning. She noted that the appellant who was her son, and his house was located not very far from that of PW2, had not opened his door. Appellant was married to Anjelina Francis who is the deceased. PW2 was a peasant and resident of Lukozi Ndabwa village. The appellant had a kiosk, located not very far from his house, where he sold foodstuffs and other commodities. On that morning it was raining. PW2 needed to buy meal flour from the kiosk of the appellant for preparing some bites for her breakfast. PW2 waited for long, without the appellant opening the door of his house or the kiosk. At that juncture she became suspicious and she went to the house

of the appellant to see what was wrong. The mother of the appellant noted that the door was not locked from outside. She called but no one responded. PW2 went inside and she found the deceased lying on the bed, dead, and there was lot of blood in the room. Beside the body of the deceased was a helpless baby. PW2 did not see the appellant.

It was then PW2 raised an alarm and people gathered at the scene of crime. Among the persons who responded to the alarm were Aloyce Frank (PW3), the sub-village chairman, Shabani Ramadhani (PW4) who was employed by Celtel as security guard, and Francis Martin Marando (PW5) the father of the deceased. All the witnesses said they went to the scene of crime where they saw the deceased lying on the bed, dead. They said she had several cut wounds in the body and a "panga" with blood stains was also found near the bed. All the witnesses corroborated the evidence of PW2 that the appellant was not seen and his whereabouts were not known.

The matter was reported to the Police and No. C 7180 D/Sergeant Kedmond (PW1) did the investigation. He visited the scene of crime on the same day accompanied by Dr. Anna from the Lushoto Government Hospital. PW 1 was shown the scene of crime by the Village Executive Officer one Mr. Omar who was not among the witnesses who testified in the trial. He also gathered information from the mother of the appellant (PW2) on how she discovered the body of the deceased. After the briefing by PW2 on how the deceased was found lying on the bed dead, he

went to the house where he found the deceased with several cut wounds as explained by PW2, and a "panga" was also found near the bed. The "panga" had blood stains. Using gloves, PW1 took the "panga" and kept it for investigation on whether the blood on the "panga" was that of a human being or something else.

The doctor who accompanied PW1 did an autopsy on the body of the deceased and prepared a report. It was admitted in court as exhibit P1 without objection from the other side, during the preliminary hearing. It showed that the deceased died because of severe haemorrhage as a result of deep lacerated wounds. PW1 drew a sketch map of the scene of crime. It was admitted in court as exhibit P2. The "panga" that was retrieved from the scene of crime was also taken to Government Chemist for examination. The report of examination showed that the blood that was found on the "panga" was that of a human being. However, the examination could not ascertain the blood group. It was tendered and admitted in court as exhibit P3.

After the examination the relatives were allowed to bury the body of the deceased. With this summary of facts the appellant was then charged with murder contrary to section 196 of the Penal Code, [CAP 16 R.E. 2002]. He was alleged to have intentionally killed Anjelina D/O Francis on 25th day of March, 2006 at Ndabwa village within Lushoto District.

Further evidence from PW2 was that she saw the appellant with the deceased having lunch together at their house in the afternoon of 24th March 2006. During the evening she saw the deceased at the matrimonial home and the appellant at the kiosk. The deceased was buried in the absence of the appellant. As already indicated, no one knew of his whereabouts. As for the relationship of the appellant and the deceased, the evidence of PW5, the father of the deceased was that the couple had a quarrel which made the deceased to leave the matrimonial home and went to stay at his house for sometime. Because PW5 had a sick father, he could not attend to the quarrel. Unfortunately, the father of PW5 died and the appellant attended the burial and stayed at his house for two days. According to Sambaa customs, PW5 said, the deceased had to return to the matrimonial home without a solution to the quarrel, and wait until the burying rituals were performed. It was then the quarrel could be attended to. However, that opportune time never came because the deceased lost her life in a violent way.

The evidence on the arrest of the appellant came from PW4. He said on 27th March 2006 at 10.00 am he was at his home. One Aloyce who did not testify went to him and informed him that the appellant was in his kiosk where he locked himself in. The witness went with the said Aloyce and arrested the appellant. They boarded a bus and drove with him to Lushoto Police Station. According to PW1 who conducted the investigation, he had an opportunity to see the appellant after his arrest. The appellant was very dirty with blood on his head and a wound on his waist. This

information was also corroborated by PW4 who arrested the appellant. He took the appellant to hospital for treatment. Later on when PW1 interrogated the appellant, he completely denied being involved in the commission of the offence.

On the 26th day of October, 2009 when the case was called for trial in the High Court, Mr. Sangawe, learned advocate who represented the accused requested the trial court to invoke the provisions of 220 (1) of the Criminal Procedure Act, CAP 20 R.E. 2002 to have the sanity of the appellant tested at a Mental Institution as to his fitness to stand for the trial. This was prompted by the fact that the learned advocate had difficulties in communicating with the appellant. The Republic did not have any objection to that request. The learned trial judge also made an observation that the appellant looked confused. She allowed the request.

The trial was resumed on 26th June 2010. However, on that day the learned trial judge without making any reference to the mental fitness of the appellant after the order she made for his examination in a mental Institution, the trial proceeded. Even the learned advocate for the appellant at whose request the order was made, never made any comment. The prosecution side also remained silent on the matter. It was after the prosecution case was closed, that Mr. Marandu, learned State Attorney who prosecuted the case for the Republic informed the trial court about the results of the examination. He said that the results of the examination were ready and he tendered in court the report which was not

objected to by the learned advocate for the appellant. It was admitted in court as exhibit P5 and it showed that the appellant was sane when he committed the offence and also he was fit to stand for the trial.

At this stage, we find it important to point out that this was irregular. The trial court was duty bound to put on record the results of the examination on the fitness of the accused to stand trial before the trial started. The rationale is simple. That is what the law requires. Apart from good sequence of the court records, an appellate court will be in a position to have a good approach in determining the appeal before it. It will also save the time and costs for litigation and allow the appellate court to focus on real issues in dispute. We emphasise here the need and importance of the trial courts to keep proper records of the proceedings. Where the record shows that the proceedings were adjourned to resolve a certain matter, like in this case the sanity of the accused person to stand trial, the trial court must indicate in the proceedings before starting the trial, how the problem was resolved before the prosecution is called upon to call witnesses to prove its case.

Coming back to the trial, the appellant in his defence denied the commission of the offence. He gave the defence of alibi that he left for Tanga on the evening of the 25th March to buy shop commodities and returned on 27th March 2006. He said his relationship with his deceased's wife was good. His explanation on why he did not attend the burial was that he was not aware of the death of his wife. Since he had no cellular

phone, he never communicated with any one since he left for Tanga. When he returned he decided to see his kiosk first.

In her judgment the learned trial judge held that the evidence relied upon by the prosecution to prove its case was purely circumstantial. Citing the case of **Abdul Muganyizi v. R** [1980] T.L.R. 262, the learned judge said the chain of events was not broken. Her starting point was the relationship between the appellant and the witnesses for the prosecution who had no grudges against him, hence no possibility of framing the case against him. Second was the "panga "which was found at the scene of crime with blood stains, and the investigation showed that the blood was that of a human being. She said although the appellant said it did not belong to him that did not rule out the possibility that he used it to kill the deceased. The third was the misunderstanding between the appellant and the deceased as given by PW5. Her opinion was that the testimony of PW2, the mother of the appellant, that the appellant and the deceased had no misunderstanding was given in order to save the appellant. The fourth was the fact that the body was found dead in the matrimonial home and the house was not broken, and the house of the mother of the appellant was not far from his house. Fifth, was the conduct of the appellant who was not seen after the death of the deceased, and his whereabouts were not known. She also wondered why the appellant did not go straight to his house or that of his mother when he returned on 27th March 2006. Sixth, was the behaviour of the appellant at the time of his arrest. He succumbed to the arrest, cool and without being surprised at all. Lastly

was the dried blood which was seen on his head, face and neck at the time of his arrest.

The trial court rejected the defence of alibi that was raised by the appellant contending that, apart from non compliance with sections 194 (4) and (5) of the Criminal Procedure Act, it did not raise any doubt in the prosecution case. Moreover, the appellant gave a contradictory defence on when he was last seen with the deceased. After summing up to the assessors, all returned a verdict of not guilty on the ground that the circumstantial evidence was not watertight to link the appellant with the commission of the offence. However, the learned trial judge differed with the opinion of the assessors. She said the circumstantial evidence was watertight and the chain of events was not broken. The appellant was then convicted as charged and sentenced to suffer death by hanging.

Aggrieved by the conviction and the sentence, the appellant through Mr Sangawe, learned advocate, has filed three grounds of appeal as follows:

> *"1. That the trial judge erred in law and facts, when she failed to observe that since the prosecution case was based on circumstantial evidence, the same was not adequate and or sufficient to base on, the conviction of the offence of murder, especially after the judge agreed in his judgment that there was no evidence from the*

prosecution, showing the where about of the appellant, either before or after the incidence, hence with that inadequate evidence, the appellant ought to be given benefit of doubt.

2. *That the trial judge erred in Law and facts , when she held that, there were unbroken chain of events linking the appellant with the death of the deceased , whereas, those chains or link of events were easily explainable and there was nothing strange or unusual to pin point an accusing finger to the appellant as the person who committed the alleged offence of murder,*
3. *That the trial judge erred in Law and facts when she failed to assign any reason as to why she did not accord weight to the Appellant's defence of alibi, and simply rejected it by saying that, the Appellant, was telling lies, hence, by doing so, she threw the burden of proof to the Appellant to prove the alibi, a duty, which he did not have in law."*

At the hearing of the appeal, Mr. Sangawe, learned advocate represented the appellant. He also represented him in the trial court. The

travelled to Tanga to buy commodities for his shop and returned on 27th June, 2006 the day he was arrested. By then the deceased had been buried. On the evidence that he was the last person seen with the deceased, the learned advocate said PW2 was the last person to see the couple. The deceased was at her matrimonial home and the appellant was at his kiosk and evidence was led that he used to sleep in the kiosk. Citing the case of **Abdul Muganyizi v R** (supra) the learned advocate for the appellant said the evidence of circumstantial evidence was not watertight and it was not true that the chain was not broken. He prayed to the Court to allow the two grounds of appeal.

The submission of Mr. Sangawe on the second ground of appeal was very brief. He admitted that the judge had discretion under the law to reject the defence of alibi which the appellant gave. However, Mr. Sangawe said, the judge had to give reasons. But in this case the judge did not give reasons. He prayed that the appeal be allowed and the appellant be acquitted.

On her part, Ms Makondo, learned Senior State Attorney, supported the conviction and the sentence. She cited the cases of **Swahibu Ally Bakari v R.** Criminal Appeal No.309 of 2010 (unreported), **Mt. 69664 PTE Robert Maushi Machibya v R**. Criminal Appeal No. 76 of 2005 (unreported) and **Sijali Juma Kocho v R** [1994] T.L.R 206 to support her case. On the first and the third grounds the learned Senior State Attorney reiterated the evidence of PW2 on the last time the appellant was seen

of the "panga" the evidence was contradictory, said the learned advocate. Whereas PW2 said the appellant had no "panga" and he used to borrow hers, PW1 said the appellant admitted that the "panga" was his. Regarding the blood that was found on the body of the appellant and his clothes, the learned advocate said it could not be relied upon to link the appellant with the commission of the offence because no steps were taken to show how it related the appellant with the commission of the offence. Moreover, said the learned advocate, the appellant gave explanation why he was found with blood in his clothes. He was injured during the arrest. As for the misunderstanding between the appellant and the deceased, the learned advocate said the trial court erred in linking the appellant with it in the commission of the offence. PW5 said the appellant did not talk about it and he spoke of the appellant as a good person. Furthermore, said the learned advocate, PW5 said the couple had a good marriage. If they had any misunderstanding, the best person who would have known it was PW2. However she did not say in her evidence that the deceased and the appellant had any misunderstanding.

The learned advocate further faulted the learned judge for saying that PW2 spoke in favour of the appellant on the misunderstanding because she had interest to serve. But PW5 the father of the deceased, contended learned advocate, also spoke in favour of the appellant. Regarding the failure by the appellant to attend the burial, the learned advocate said the appellant had an explanation. He was not present and he was not even aware of the death of the deceased as he said he

travelled to Tanga to buy commodities for his shop and returned on 27th June, 2006 the day he was arrested. By then the deceased had been buried. On the evidence that he was the last person seen with the deceased, the learned advocate said PW2 was the last person to see the couple. The deceased was at her matrimonial home and the appellant was at his kiosk and evidence was led that he used to sleep in the kiosk. Citing the case of **Abdul Muganyizi v R** (supra) the learned advocate for the appellant said the evidence of circumstantial evidence was not watertight and it was not true that the chain was not broken. He prayed to the Court to allow the two grounds of appeal.

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with the deceased, the cut wounds found in the body of the deceased which was lying at the matrimonial home, the misunderstanding which was said to be in existence between the appellant and the deceased and said the learned judge made a correct analysis of the evidence and arrived at a correct conclusion in convicting the appellant as charged. Much as she admitted shortfalls in the prosecution evidence on the aspect of the "panga", the blood that was found on it and on the appellant's body, and his clothes, and omission to take DNA evidence of the deceased and the appellant and see if it pointed to the appellant as the only killer, the learned State Attorney said the discrepancy was minor. Also admitted by the learned State Attorney was the necessity to have finger prints evidence on the "panga" and show how it related the appellant with the killing of the deceased. However, she did not see the omission to have broken the chain of circumstantial evidence.

On the defence of alibi of the appellant, Ms Makondo said the judge rightly rejected it, because apart from the defence failing to raise it in accordance with the procedure, it was found to have casted no doubt to the prosecution case. She prayed that the appeal be dismissed.

In his brief reply Mr. Sangawe still insisted that the evidence of the conduct of the appellant could not assist the prosecution. He said the facts of the case of **Bakari Salehe Ally V R** (supra) can be distinguished from the facts of this case. He reiterated his prayer that the appeal be allowed and the appellant be set free.

In this case there is no dispute that a killing has taken place. On our part we entirely agree with the learned trial judge that the evidence to support the prosecution case was purely circumstantial. No one saw the appellant killing the deceased. Bearing in mind that the burden to prove not only that the offence of murder was committed, but that it was the appellant who committed it lies on the prosecution, the only issue for our determination in this appeal is whether the circumstantial evidence that was relied upon by the prosecution pointed an accusing finger to the appellant as being the only person who could have killed the deceased. After a careful analysis of the evidence on record, and the argument advanced by both the learned advocate for the appellant and the learned Senior State Attorney for the respondent to support their respective positions in this appeal, we must say, with respect, that we agree with the learned advocate for the appellant that the chain of circumstantial evidence against the appellant did not point irresistibly at the appellant as being the one who committed the offence. In the case of **Abdul Muganyizi V R** (supra) the Court held that:

> *"...the exculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of guilty."*

In this appeal the appellant was linked with the death of the deceased because she was his wife, was found dead in the matrimonial

home, the appellant was seen having lunch with her, on the previous day before her death, a misunderstanding between the couple which was never disclosed, the "panga" that was found at the scene of crime with blood stains and the whereabouts of the appellant after the murder was not explained and he did not even attend the burial of his wife. This evidence raises suspicion that the appellant might have been the one who committed the murder. However, suspicion is not conclusive proof that the appellant killed the deceased. See the case of **James @ Shadrach Mhungilwa & Anther v R** Criminal Appeal No .214 of 2010 (unreported). In this case there is high contest on the blood which was found on the "panga" and how it related the appellant with the murder. The learned State Attorney admitted that the only evidence on the "panga" was that it showed that it had human blood. However, there was no evidence to prove that the blood was that of the deceased. There was no blood test on the deceased. The same shortfall befell on the blood that was found on the body of the appellant and his clothing. There was no blood testing to prove that it was that of the deceased. There was not even evidence of DNA on the blood of the deceased and the appellant to show that it was only the appellant who committed the offence and nobody else. Moreover, there was no fingerprint evidence to confirm that the appellant used that "panga" to kill the deceased.

As for the case of **Swahibu Ally Bakari V R** (supra), cited to us by the learned State Attorney, we agree with the learned Advocate for the appellant that the facts can be distinguished from the facts of this appeal.

all reasonable doubt. It never shifts. See **Mwingulu Madata and another v R** Criminal Appeal No. 257 of 2011 (unreported).

Since the prosecution failed to discharge its burden of proof the appellant is given the benefit of doubt. The appeal is allowed. The conviction is quashed and the sentence set aside. We order the immediate release of the appellant from prison unless he is held there for any other lawful reason.

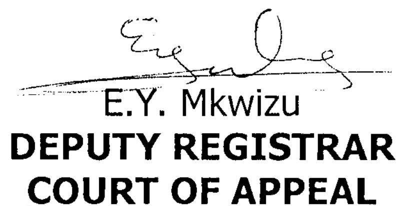
DATED at **TANGA** this 3rd day of July, 2012.

E.M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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



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