IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 12 OF 2012

ENOCK YASIN..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Teemba, J.)

dated 21st October, 2011

in

Criminal Appeal No. 1 of 2008

.....

JUDGMENT OF THE COURT

25th June, & 3rd July, 2012

RUTAKANGWA, J.A.:

The appellant was tried on an information for murder c/ss 196 and 197 of the Penal Code, Cap. 20. Vol. 1 R.E.2002 [the Code]. He was convicted as charged and sentenced to suffer death by hanging. Aggrieved by the conviction he has lodged this appeal.

The memorandum of appeal lodged by his counsel, Mr. Alfred Akaro, learned advocate, lists three grounds of complaint against the judgment of the trial High Court. These are:

> *"1. That the learned trial Judge erred in fact by finding that the death of the deceased was caused by the Appellant as there was no sufficient evidence to establish that fact.*
>
> *2. That the learned trial Judge erred in law and fact by admitting into evidence the purported dying declaration of the deceased whose alleged signature was more or less missing.*
>
> *3. That in the alternative but without prejudice to the first and second grounds of appeal the learned trial Judge erred in law and fact by finding that the appellant killed the deceased with malice aforethought."*

At the hearing of this appeal, Mr. Akaro appeared for the appellant, who was also present in person. The respondent Republic, which resisted the appeal, was represented by Mr. Saraji Iboru, learned State Attorney.

Before canvassing the arguments advanced by counsel in support of their respective positions, we have found it convenient to give the following account of what led to the conviction of the appellant.

The prosecution charged the appellant with the murder of one Eliza Subagila (the deceased). The deceased was the mother of both Eva Mvula and Ezekiel Malugu. Both testified as PW3 and PW4 respectively at the trial of the appellant. PW3 Eva is the mother of the appellant.

As of 17th November, 2006 the deceased was staying with PW3 Eva and PW4 Ezekiel at Mkaramo Village in Pangani district. At around 17.00 hours on that day, the deceased was at home with PW4 Ezekiel. PW3 Eva was not at home. At a distance of about "75 paces", PW4 Ezekiel saw the appellant approaching, armed with a knife. He warned the deceased of the coming of the appellant. As he was fearful of the appellant, he went into hiding. As he put it, he safely hid himself at a place roughly "70 paces" away from their house. From that place he heard the deceased beseeching the appellant not to harm her. After half an hour had elapsed, he came out of hiding only to find the deceased alone lying on the very place he had left her, with a cut ear which was bleeding. He went to report the matter at Makaramo police post, where he was not helped but was advised to report the matter to the "kitongoji chairman" in order to have the appellant arrested.

When PW3 Eva subsequently arrived home, the deceased complained to her that she had been "beaten by Enock." She saw the wounded ear and although the appellant was allegedly around, she did not take any steps, not even questioning him to learn from him what had happened. She waited until the following morning when they took the deceased to Mkaramo dispensary. At the said dispensary they found PW2 Khalid

Malamba, a Clinical Officer, who administered first aid to the deceased and then referred her to Pangani District Hospital.

Before going to Mkaramo dispensary, PW3 Eva and the deceased passed at Mkaramo Police Post where PW5 No. D 8822 Cpl. Sudi issued them with a PF3. PW5 Cpl. Sudi testified that when he interrogated the deceased, she told him that the appellant had "attacked her by fist and kicking and then cut her left ear." He recorded her statement under section 34 B (2) of the Evidence Act, Cap 6 (the Evidence Act). He tendered the statement in evidence as Exh. P3.

The deceased was admitted at Pangani District hospital, where she passed away on 25th November, 2006. The autopsy carried out on the same day established the cause of death as "uncontrollable severe hemorrhage due to delayed spontaneous rupture of the liver." The autopsy report was tendered in evidence without any objection from the defence as Exh. P1. The appellant, having been arrested on 18th November, 2006, was subsequently charged for the murder of his maternal grandmother.

The appellant was formally arraigned in the trial High Court at Tanga on 5th May, 2008. When the information for murder was read out to him, he entered a plea of not guilty. A preliminary hearing was conducted on the same day. The appellant only admitted the death of the deceased and the cause of her death as shown on exh. P1. He did not indicate that he was relying either on the defence of insanity as is mandatorily required

under section 219 (1) of the Criminal Procedure Act, Cap. 20 (the Act) or the defence of *alibi*. The trial was scheduled to commence on a future date to be fixed by the District Registrar. The 10th day of November, 2008, was the date subsequently fixed for the trial to commence.

On 10th November, 2008, the appellant was reminded of the charge he was facing. Again, he returned a plea of not guilty. It was at this point in time that Mr. Akaro asked the trial High Court to refer the appellant to a "mental institution for medical examination" under section 220 of the Act. He thought the appellant might have been "insane at the time of the commission of the offence." Miss Pendo Makondo, learned State Attorney, did not oppose the application. The appellant was accordingly committed to Isanga Institution, Dodoma. The trial eventually took off on 7th February, 2011.

Apart from PW2 Khalid, PW3 Eva, PW4 Ezekiel and PW5 Cpl. Sudi, the prosecution also fielded Dr. Mndeme Erasmus, who testified as PW1. PW1 Mndeme was the Medical Officer incharge of Isanga Mental Institution and Mirembe hospital and he had prepared the appellant's mental condition examination report which he tendered in evidence as exh. P2. Briefly, PW1 Mndeme told the trial High Court that the appellant was sane at the time he committed the alleged murder.

The appellant gave sworn evidence in which he unequivocally denied being in any way connected with what he called the **alleged** death of the

deceased. He claimed in his evidence that on 17th November, 2006 he was at Gubiko Sub-Village looking for coconuts. He returned to Mkaramo at 19.30 hours. He then tellingly said:

> *"After that I did not go outside my house that evening. I did not go to the place of my grandmother."*

The trial of the appellant was conducted with the aid of three assessors. All of them opined that the appellant was guilty as charged. Going by the evidence of PW1 Dr. Mndema, they were all of the view that the appellant was sane at the time he committed the murder, although this defence was not pursued by the appellant.

Relying on the deceased dying declaration as corroborated by the evidence of PW3 Eva, PW4 Ezekiel and PW5 Cpl. Sudi, the learned trial judge held that the appellant was responsible for the death of the deceased, which he caused with malice aforethought.

On the existence of malice aforethought, the learned trial judge held:

> *"There is no doubt that the evidence on record reveals that the accused intended to cause grievous harm to the deceased. The assaults inflicted by the fist accused used excessive force against a weak old lady and led to the rupture of*

her liver. In addition, the ***wounding of her left ear by a sharp object cannot be explained that the accused had no malice to cause grievous harm*** *to the victim. Thus it is my conclusion that the accused malice aforethought is proved in this case." (Emphasis* is *ours).*

The appellant was accordingly convicted as charged.

As we have alluded to above, the finding of fact on the sanity of the appellant was based on the evidence of PW1 Dr. Mndeme. However, during the course of the hearing of the appeal, it was found out that the evidence of PW1 Dr. Mndeme was received in utter disregard of the mandatory provisions of section 289 of the C.P.A. Briefly, this section provides that in trials before the High Court "**no witness** whose statement or substance of evidence was not read at the committal proceedings, **shall be called by the prosecution** at the trial unless" it has given a reasonable notice in writing to the defence side of its intention to do so. Both counsel agreed that the evidence of PW1 Dr. Mndeme be expunged. We accept this prayer and expunge this evidence. We also expunge exh. P3, as urged by both counsel, as it was tendered in evidence without complying with section 34 B (2) (d) of the Evidence Act.

All the same, we have to comment in passing that the prosecution was unnecessarily overzealous in calling Dr. Mndeme. His report was admissible in evidence under section 220 (2) of the C.P.A. Furthermore,

even if the said report was not favourable to the defence that was not the end of the road. As held by this Court in the case of **Hilda Abel v R** (1993) T.L.R. 246, courts are not bound to accept a medical expert's evidence if there are good reasons for not doing so. The Court further held that insanity is a question of fact which could be inferred from the circumstances of the case. Therefore, expert evidence is not the only mode of proving or disproving insanity. That's why it is provided as follows in section 220 (3) of the C.P.A.:-

> *"Where the court admits a medical report signed by the medical officer in charge of the mental hospital where the accused was detained the accused and the prosecution* ***shall be entitled to adduce such evidence relevant to*** *the issue of insanity as they may consider fit." (Emphasis is ours.)*

See also, **D.P.P. v. Omari Jabili** (1998) T.L.R. 151.

In this particular case, the prosecution case would not have been fatally affected by the exclusion of the evidence of PW1 Dr. Mndeme, in view of the categorical evidence of PW3 Eva to the effect that the appellant has never been "mentally disturbed." This is all we have to say on the issue in view of the obvious fact that the defence side abandoned the defence of insanity and opted for the defence of *alibi*.

Submitting in support of the appeal, Mr. Akaro combined the first two grounds and argued them together. It was his contention that the

appellant was wrongly convicted as the charge of murder was not proved beyond reasonable doubt. To start with, he candidly told us that the appellant no longer disputes that Eliza Subagila is dead, that the appellant assaulted the deceased and that the cause of the death was as indicated in the report on post-mortem examination. He, however, vehemently argued that the appellant never caused the death of the deceased.

Relying heavily on Exh. P1, Mr. Akaro submitted that it cannot be convincingly argued that the undisputed cause of death was caused by the admitted physical assaults of the appellant. The pith of his argument was that since the cause of death was "spontaneous" rupture of the liver, this ruled out completely any possibility of the said "rupture" being caused by the assaults of the appellant. He was of this stance because the word "spontaneous" implies a thing occurring on its own without being caused by external powers or forces. In support of his argument he referred us to the definition of the word in Oxford Advanced Learner's Dictionary (low priced) at page 1142. He accordingly pressed us to allow the first ground of appeal and quash the conviction of the appellant.

On his part, Mr. Saraji strongly argued that the prosecution discharged its legal burden of proof by proving, beyond reasonable doubt, the death of the deceased which was caused by the appellant with malice aforethought. He invited us to accept as true, the evidence of PW3 Eva, PW4 Ezekiel and PW5 Cpl. Sudi and deceased's dying declaration to PW5 Sudi which established that the appellant kicked her in the abdominal

region. It was those kicks, he continued, which caused the "spontaneous" rupture of the Liver thus causing the death of the deceased,

In his bid to outsmart Mr. Akaro, Mr. Saraji invited us to adopt the definition of the word "spontaneous crime" found on page 400 of BLACK'S LAW DICTIONARY, 8th edition. The phrase is defined therein to mean:

> *"A Criminal act that occurs suddenly and without premeditation in response to an unforeseen stimulus."*

Very confidently, he went on to refer us to this example provided thereunder:

> *"For example a husband who discovers his wife in bed with another man and shoots him could be said to have committed an effectively spontaneous crime."*

We must confess more in sorrow than in fear of dismaying anybody that we have found this phrase inappropriately invoked here. This is because we are not dealing with the issue of "spontaneous crime" here, but the meaning of the adjective "spontaneous." Nor is Eliza Subagila being charged with commiting a "Spontaneous Crime." The submission of Mr. Akaro, therefore, on the issue of the cause of death remains uncontroverted.

As we have sufficiently demonstrated, the fact that Eliza Subagila is dead and that she died from "uncontrollable severe hemorrhage due to delayed spontaneous rupture of the liver," is no longer an issue. The pertinent issue here is whether she was murdered or unlawfully killed and if so, who did that.

We take it to be settled law that on a charge of murder, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused. The burden of proof never shifts to the accused, and the standard of proof is always beyond reasonable doubt. See, for instance, **Mohamed Said Matula v R,** (1995) T.L.R. 3 and **Diamon s/o Malekela. @ Muunganye v. R,** Criminal Appeal No. 205 of 2005 (unreported).

In this case the prosecution, admittedly, proved the death of Eliza Subagila and the cause of her death. However, as correctly argued by Mr. Akaro, we have found no cogent evidence going to inextricably link her death with the appellant. This is notwithstanding the fact that the appellant had assaulted her eight days prior to her death. We are saying so advisedly because apart from mere surmises, there is no evidence on record going to show that the cause of her death was related to the assaults inflicted on her by the appellant. Both the prosecution/Republic in the trial High Court and in this Court, unfortunately, proceeded on this assumption, in utter disregard of the unambiguous contents of exh. P1, a crucial piece of prosecution evidence. The plea of Mr. Akaro to that effect

in his final submission in the High Court, with due respect to the learned trial judge, was not considered at all.

It is very vivid from Exh. P1 that the cause of the death was uncontrollable severe hemorrhage due to the **spontaneous rupture** of the liver. The slitting of the deceased's ear had nothing to do with her death as the learned trial judge tried to show while piecing together evidence to establish malice aforethought. That this was the case is even confirmed by the evidence of PW2 Khalid. Answering the third assessor's question, he said that the deceased had one cut wound on the ear which only needed stitching. So, what caused the "spontaneous" rupture of the liver?

The prosecution evidence does not provide a credible and/or convincing answer. But for certain, it was not the blows and kicks of the appellant, because those were external stimuli or agencies. By its very nature or essence a spontaneous action or incident occurs naturally and is not forced. It occurs or happens because of a voluntary impulse from within, not caused by somebody or something outside as well elaborated by Mr. Akaro. Apart from the definition of "spontaneous crime" referred to earlier on in this judgment, the learned authors of **BLACK'S LAW DICTIONARY (supra),** give at page 1019 another illustration. This is "spontaneous miscarriage or abortion." Which is defined as an "involuntary premature expelling of a nonviable fetus"? The foetus is expelled from the body by natural causes, without the involvement of external forces or

stimuli. These definitions and illustrations lead to only one reasonable inference: that the rupture of the liver, in the absence of irrefragable evidence to the contrary, was due to natural causes within the body of the deceased, not attributable to the appellant: See, **Rex v. Petro Mangongo s/o Katwa** [1944] II EACA 100 .

From the above discussion, it cannot be held without demur that the cause of the spontaneous rupture of the liver was proved by the prosecution. But what is certain, going by exh. P1, is that it was caused by something within the deceased body and not outside it. This is because a spontaneous event is self – generated and requires no outside influence. This then totally absolves the appellant. In the case of **Leonard Mpoma v. R,** [1978] LTR n. 58 the East African Court of Appeal held that in a charge for murder the court should not convict the accused where the evidence is wholly circumstantial, as was the case here, and falls short of proving the charge. Citing the case of **Waihi and Another v. Uganda** [1968] EA 278 at page 280, it went on to hold thus:-

> *"Where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained."*

We subscribe wholly to the above holding. We have not been shown any "exceptional circumstances" here. Furthermore, the only medical

this reason, the appellant's conviction cannot be sustained. We accordingly allow the first ground of appeal, quash the conviction, and set aside the death sentence. We also order the release forthwith of the appellant from prison unless he is otherwise lawfully held.

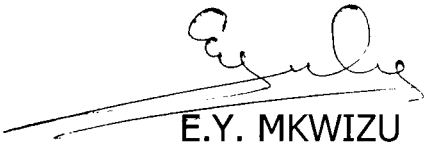
DATED at **TANGA** this 29th day of June, 2012.

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.



E.Y. MKWIZU
DEPUTY REGISTRAR
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