IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 164 OF 2007

(CORAM: RUTAKANGWA, J.A., KALEGEYA, J.A., and ORIYO, J.A.)

JOHN NHWANGA @MOJELWA @ FIKIRI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Dar es Salaam)

(Aboud, J.)

Dated the 7th day of May, 2007
In
Criminal Sessions Case No.31 of 2006

JUDGMENT OF THE COURT

RUTAKANGWA, J.A.:

Aggrieved by a conviction by the High Court, sitting at Dar es Salaam for the murder of one Stamili d/o Marangu, the appellant has lodged this appeal protesting his innocence. Through the services of Mr. Samson Mbamba, learned advocate, the appellant had lodged a memorandum of appeal listing only two grounds of complaint against the decision of the trial High Court. However, on the day the appeal was called on for hearing, Mr. Mbamba, abandoned the second ground of appeal.

The remaining sole ground reads as follows:

> *"The trial judge erred in law and fact in convicting the appellant for the offence of murder on the basis of unreliable evidence, instead of convicting him of manslaughter to which the appellant pleaded guilty."*

Indeed, when the appellant was first formally arraigned in the trial High Court before Mihayo, J. on 24th November, 2006, he readily pleaded to have killed the deceased "but not intentionally". The learned judge rightly entered a "plea of not guilty to the charge of murder". Immediately thereafter, a preliminary hearing was held. In the memorandum of undisputed facts, it is clearly shown that:

> *"It is admitted that the accused killed the deceased but not with malice aforethought."*

This glaring admitted fact notwithstanding, the appellant was not convicted immediately of the lesser offence of manslaughter. Instead, the case was scheduled for a full trial for murder which commenced on 30th April, 2007.

On the day the trial commenced, immediately after the selection of the assessors who were to aid the trial judge, the prosecuting State Attorney, one Ms Sinda, rose to address the judge thus:

> *"Madame J. I pray to tender the statement of Paulina John who is dead as part of our evidence. I am tendering it under section 34B of the Evidence Act."*

There being no objection from the defence counsel, one Ms. Msuya, the learned trial judge accepted the said statement in evidence as exh. P4. Then two witnesses, PW1 Mkatika Shomi and PW2 No. C9736 D./Sgt. Leornard testified for the prosecution and the Republic closed its case.

PW1 Mkatika testified that on one Sunday morning in 2002, he was informed by one man that the deceased Stamili had been wounded by the appellant who was her husband. He went to the home of the appellant and found Stamili with cut wounds. The matter was reported to the police. When the police officers arrived at the scene they found Stamili dead. One of these officers was PW2 D./Sgt. Leonard.

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the appellant closed the room intending to leave the house. The deceased grabbed him and knocked his head against the wall. As if that was not enough, she took a knife wanting to stab him. In a fit of anger, he snatched the knife from her and stabbed her. The deceased fell down bleeding. He was shocked. He stabbed himself too and surrendered himself to his landlord. He denied to have given any statement.

The two assessors found the appellant to have murdered the deceased. The learned trial judge agreed. In finding the appellant guilty of murder as charged, the learned trial judge relied very heavily on the alleged confession contained in the appellant's alleged cautioned statement, the statement of Paulina (Exh. P4) and the appellant's admission to have killed Stamili. The alleged cautioned statement was tendered in evidence as exh. P3 at the stage of the preliminary hearing.

As indicated earlier on, the appellant was advocated for by Mr. Mbamba in this appeal. The respondent Republic was represented by Mr. Boniface Stanislaus, learned Principal State Attorney, being assisted by Miss Lilian Itemba, learned State Attorney.

Arguing in support of the appeal Mr. Mbamba urged us to take cognizance of the fact that neither PW1 Mkatika nor PW2 D./Sgt. Leonard witnessed the killing of the deceased. Their evidence, he said, ought to have been given little weight, if at all. Regarding the Report on Post-mortem examination (exh. P1) he invited us to expunge it as it was irregularly admitted for its contents were not read out at all in court and it is not part of the memorandum of undisputed facts. To bolster his argument, he referred us to section 192 of the Criminal Procedure Act, Cap 20 (the Act) and the decision of this Court in **JUMA SALUM SINGANO v. R.,** Criminal Appeal No. 172 of 2008 at pg. 10-11 (unreported).

Mr. Mbamba also urged us to discount Paulina's statement (exh. P4). This is because, he argued, it was tendered in evidence by the prosecutor, instead of a witness (relying on **MHINA HAMIS v. R.,** Criminal Appeal No. 83 of 2005 (unreported), and without the mandatory provisions of S. 34 B(1) of the Evidence Act, being complied with (**ATHMAN NDAGALA v. R.,** Criminal Appeal No. 63 of 2007 (unreported)).

Lastly, Mr. Mbamba also pressed us to discount the alleged confessional statement (exh. P3) as it was received as evidence in

contravention of the provisions of s. 192(4) and (5) of the Act, and Rule 6 of the Accelerated Trial and Disposal of Cases Rules (GN. No. 192 of 1998.)

The respondent Republic through Mr. Boniface supported the appeal for similar reasons. It was Mr. Boniface's contention that the appellant, going by his version, the only credible one available going to show how the deceased met her death, ought to have been convicted of the offence of manslaughter. On the authority of **EFRAIM LUTAMBI v. R.** (CAT) Criminal Appeal No. 30 of 1996 (unreported) he invited us to nullify the preliminary hearing proceedings.

As we indicated much earlier, exhibit P4 was irregularly tendered and received in evidence through the prosecuting counsel without the mandatory cumulative conditions stipulated in s. 34 B(1) of the Evidence Act., being complied with. This was an incurable error committed by the prosecution. We are enjoined by law to expunge it from the record as correctly urged by both counsel in this appeal.

In his evidence, PW2 D/Sgt. Leonard claimed to have recorded a cautioned statement of the appellant. We have already shown that inspite

tender one in evidence. The appellant, while under cross-

unequivocally denied making any statement to anybody leave alone PW2 D./Sgt. Leonard. In our view he could only be credibly contradicted by the production of the alleged statement by PW2. As this was not done, it would be totally unsafe to hold, as the learned trial judge did, that Exh. P3 was recorded by PW2 whom she found not to have "any reason to tell lies to the court".

Coming to exhibit PW3 itself we have found ourselves in full agreement with the contentions of both Mr. Mbamba and Mr. Boniface to the effect that it ought not to have been accorded any weight by the learned trial judge. This is because it was not part of the admissible evidence.

Exh. P3 was purportedly tendered by Miss Choma learned State Attorney, at the time of the preliminary hearing. We have found out that the contents of this statement were not read over to the appellant at all. So it was evidence received without the knowledge of the appellant. Furthermore, as already alluded to in this judgment, in the contents of the

said statement are not reflected in the so called "Memorandum of Matters not Disputed" which also was not read over and explained to the appellant. Worse still, even if it were found that exh. P3 was regularly admitted in evidence, it would have been of little assistance to the prosecution for these two basic reasons. One, it was recorded three clear days after the arrest of the appellant in contravention of the mandatory provisions of sections 50 and 51 of the Act [see **JANTA & 3 OTHERS V. R.,** Criminal Appeal No. 95 of 2009]. Two, the said statement was taken in utter disregard of the mandatory requirements of sections 57(2) and (3) and 58(2) and/or (3) of the Act. See, **ALPHOCE MWALYAMA & 2 OTHERS V. R.,** Criminal Appeal No. 37 of 2004 and **MUSSA MKUSA & ANOTHER V. R.,** Criminal Appeal No. 51 of 2010 (both unreported). For these reasons, we expunge Exh. P3 from the record as asked by both counsel in the appeal.

In the absence of exhibits P3 and P4 we are left with the evidence of the appellant. The uncontroverted evidence of the appellant establish that the appellant caused the death of Stamili Marangu not with malice aforethought but in self-defence. We are accordingly constrained to agree with both Mr. Mbamba and Mr. Boniface that the appellant was wrongly

For the reasons given above, we allow this appeal against conviction for murder and the death sentence. The conviction for murder and the death sentence are hereby quashed and set aside. We substitute therefor a conviction for manslaughter c/s 195 of the Penal Code. Having regard to the fact that the appellant has been in custody from December, 2002 and had readily accepted responsibility for the death of the deceased, we sentence him to a term of imprisonment of eight (8) years from the date of his original conviction.

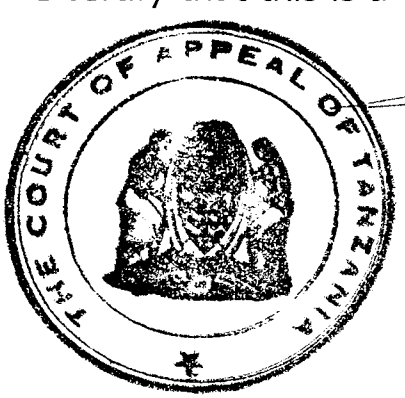
DATED at **DAR ES SALAAM** this 23rd day of February, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

L.B. KALEGEYA
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL