IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 87 OF 2010

CHACHA NG'ERA .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Mlay, J.)

dated 15th day of December, 2010
in
Criminal Sessions Case No. 26 of 1997

JUDGMENT OF THE COURT

24th & 26th July ,2013

MSOFFE, J.A.:

This appeal arises from the decision of the High Court (Mlay, J.) sitting at Musoma whereby the appellant CHACHA NG'ERA was convicted of murder contrary to section 196 of the Penal Code and sentenced to death.

The High Court believed the prosecution version of the case that PW1 Bhoke Paulo Nyaichowa lived in concubinage with the appellant for a period of one year and eight months. They lived happily up to the time(s) when the appellant started beating PW1 and her children. As a result of

the misunderstandings the two separated. The appellant went to live in a nearby village known as Machowe. On 13/10/1993 at about 1.30 a.m. PW1 and her son MARWA PAULO NYAICHOWA (the deceased) were asleep. The appellant came in and assaulted the deceased with a stick. PW1 querried the appellant as to why he was hitting the deceased. In response, the appellant told her that he would kill both of them. The appellant continued hitting the deceased with the stick. PW1 went out to alert the deceased's brothers leaving the appellant with the persistent onslaught on the deceased. The brothers came in eventually and found the deceased in a critical condition. As the brothers tried to touch the deceased he died. The incident was reported to the relevant authorities and an autopsy was eventually conducted on the deceased's body. PW3 Dr. Donald Kisaka examined the body and observed that the death was due to haemorrhage leading to circulatory failure.

The appellant's defence was a brief one. Briefly, his testimony was to the effect that he was not responsible for the death in question. In his view, the death was probably due to yellow fever.

Mr. Anthony Nasimire, learned advocate for the appellant, filed a sole ground of appeal which reads:

1. That there is no sufficient evidence on the record to justify the conviction of the Appellant.

If we may digress a bit here initially the appellant had filed his own memorandum of appeal with five grounds of appeal. At the hearing of the appeal Mr. Nasimire, with the consent of the appellant, abandoned the memorandum of appeal filed by the appellant and concentrated his oral submissions on the ground of appeal filed by him.

Before discussing the merits or otherwise of the complaint in the above ground of appeal it is pertinent that we make the following general observations. There was no dispute at the trial, and indeed even at this stage, that Marwa Paulo Nyaichowa is dead. Both PW1 and PW2 were, and still are, the most important witnesses because these are the witnesses who testified to have witnessed the alleged killing. In this context, therefore, it is important that we look at their evidence, or rather subject the said evidence, to a very careful, objective and critical scrutiny in order to be able to ascertain meaningfully whether or not the credibility

attached to them by the High Court was justified. Again, there is no dispute that the appellant visited the house in which PW1 and PW2 were sleeping in on the date of the alleged incident. Furthermore, there is no dispute that the appellant was present when the deceased met his death. The crucial issue was, and indeed still is, whether the appellant was responsible for the death in question.

This brings us to the complaint in the above ground of appeal. Mr. Nasimire addressed us at length on the complaint. In the process, he made a spirited effort at discrediting the credibility attached to PW1 and PW2 by the High Court.

In the same pattern, Mr. Athumani Matuma, learned State Attorney for the respondent Republic, who argued in support of the appeal was also of the affirmative view that PW1 and PW2 were not all that credible, after all. Both learned counsel referred us to certain pieces of the evidence of PW1 and PW2 which when taken together show that these witnesses were not all that credible. In the end, both learned counsel were of the view that the prosecution case taken as a whole did not justify the conviction.

We do not intend to mention each and every aspect of the evidence that was addressed to us by learned counsel. Rather, we propose to deal with, or dispose of, the appeal generally and in the process, we hope, we will capture the material aspects of the submissions made by learned counsel.

There are a number of aspects in the evidence of PW1 and PW2 which create doubt in the prosecution case against the appellant. To start with, it defeats reason that the appellant could come into the house with the sole aim of killing the deceased and while this was going on PW1 and PW2 would sit back and not raise an alarm to alert neighbours so that they could come in and assist them! If for some reason PW1 could not raise an alarm for fear of the appellant who was still in the house we wonder why she could not raise such alarm the moment she went out to alert the deceased's brothers! Also, it defeats reason why she did not report the incident to her immediate neighbours instead of travelling all that way to another village to call for help of the brothers! As if that was not enough, when the brothers came in we do not read anything from the record to suggest that they took any positive steps of containing the

situation or arresting the appellant and thereafter taking him to the police station. These brothers together with PW1 and PW2 stayed put, calm and composed as if nothing serious had happened. As it is therefore, there is nothing in the record to show when and how the appellant was arrested because apparently the investigating police officer, if any, did not testify. If the said officer had testified probably that would have helped in shedding some light on how the appellant was arrested and brought to justice and the overall circumstances on how the incident was reported to, and investigated by the police. Furthermore we ask ourselves this question. In the absence of clear testimony to the contrary, wasn't it also possible that the deceased met his death when the brothers attempted to lie him down? If so, couldn't it be possible that the brothers were responsible for the death?

In the absence of concrete answers to the above points and the others mentioned by learned counsel which we have not repeated here, it may be fair to say that the appellant's version that he was not responsible for the death was probably true. The death was probably caused by another person or some other factors and not necessarily by the appellant.

Indeed, the appellant's assertion in his defence that the deceased was "injured" by a person known as SPOTI was not contradicted by the prosecution.

There is yet one important point that was raised by Mr. Nasimire and Mr. Matuma in relation to the post mortem examination report. The information filed against the appellant showed that the death occurred on 13/10/1993. In their respective testimonies in court PW1 and PW2 did not mention this date. Anyhow, in his testimony the doctor (PW5 Dr. Donald Kisaka) told the High Court that he examined the body on 14/10/1993 which was a day after the incident. Yet, in the post mortem examination report the same doctor indicated that the death took place more than 72 hours before the examination. By any stretch of imagination, our rough calculation tells us that if the report is anything to go by then the death must have occurred before 13/10/1993. We do not think that that was likely to have been the case. As it is, therefore, in the circumstances of the case it was probable that the doctor's evidence coupled with the post mortem examination report were not necessarily true. This assertion may be stretched further that it was possible that on 14/10/1993 the doctor

examined another body and not necessarily the deceased's body in this case.

So, the above are some of the aspects of the case which raise doubt in the prosecution case against the appellant. The doubts should be resolved in the favour of the appellant. Put simply, the prosecution case was not necessarily credible to warrant the conviction. In this serious charge of murder which attracts the death penalty the expectation is that there would have been more positive evidence upon which a conviction could safely lie. Apparently no such evidence was forthcoming in the case.

In the midst of the above shortcomings, we are in agreement with both learned counsel that this was a fit case in which the appellant ought to have been given the benefit of doubt and thereby be acquitted in the process.

Our final and general comment is that the case taken as a whole appears to have been poorly investigated and prosecuted. In this regard, we have decided to give the appellant the benefit of doubt.

The appeal has merit. We hereby allow it, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

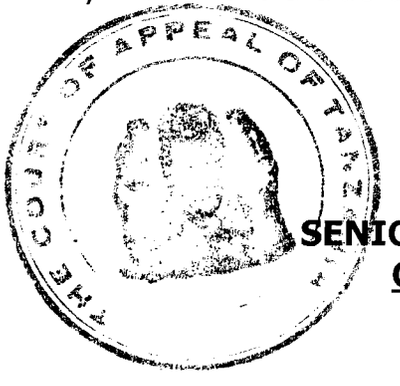
DATED at MWANZA this 26th day of July 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL