

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 57 OF 2013

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|----------------------------|---|-----------------|
| 1. MANYANDA HAMULI@ KASATO | } |APPELLANTS |
| 2. MASONGA MAZIKU | | |
| VERSUS | | |

THE REPUBLIC.....RESPONDENT

**(Appeal from the Judgment of the High Court of
Tanzania at Sumbawanga)**

(Khaday, J.)

**Dated 3rd day of August, 2010
in
Criminal Sessions Case No. 28 of 2009**

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JUDGMENT OF THE COURT

5th & 10th JUNE 2013

LUANDA, J.A:

This is an appeal against conviction and sentence of death passed on the above named appellants by the High Court (Khaday, J.) sitting at Sumbawanga. The said appellants were convicted of the murder of

Mashauri Kako on or about the month of June, 2007 at Igalula – Ifinsi Village within Mpanda District in Rukwa Region.

The case against the appellants was based on circumstantial evidence. The prosecution case was to the following effect. On an unknown day in June, 2007, Emmanuel s/o Mashauri (PW1) saw the 2nd appellant (Masoga Maziku), a friend of his father (Mashauri Kako) arriving at their homestead. PW1 however did not say the purpose of the visit nor did he say the time the 2nd appellant had arrived. It is the defence case of the 2nd appellant which filled the gap that he went there to buy groundnuts and it was around 4.00 pm. Whatever the position, it appears the 2nd appellant did not stay long as he left together with Mashauri Kako and went to a business place. Indeed that was the last day PW1 to have seen his father.

Sometime later PW1, who did not say the date or stated how many days had passed from the day his father disappeared, heard from the chairman of the area (Kitongoji) one Rehani Ramadhani (PW2) that his father is dead. PW2 said so because Mashauri Kako was nowhere to be

seen within the village for some time. Further when he asked the 1st appellant (Manyanda Hamili) who was a cousin to Mashauri Kako, the 1st appellant kept on changing his version as to the place Mashauri Kako had gone. At times he is reported to have told PW2 that Mashauri Kako had gone to Kigoma. And some other time he said he had gone to Mwanza. Furthermore, the 1st appellant had approached him for a space to store some foodstuff of Mashauri Kako. When he was queried the whereabouts of Mashauri Kako, the 1st appellant told PW2 that Mashauri Kako had disappeared and his wife had left their homestead. He suspected Mashauri Kako might not come again. It is further the version of PW2 that he heard the 1st appellant talking about the 2nd appellant to have seen a shoe belonging to Mashauri Kako at the place where they parted company and further that next to the shoe there appear to be a grave. On hearing that story, PW2 became suspicious. He then decided to arrest the 1st appellant and raised an alarm. The villagers assembled and the 2nd appellant was arrested. They then went to the place but they could neither see the shoe nor the grave on that day.

The following day they made a further follow up and managed to find a fresh grave not properly covered and a skull. Not only that, they also saw a white shirt and a black trouser allegedly belonging to Mashauri Kako. Police were informed. Police went to the place accompanied by a medical personnel one Christopher Mazwile (PW5) who performed the postmortem examination there and then after the remains of the deceased person were exhumed and a report prepared (Exht P2). According to the Doctor's observation, death was caused due to head injury.

The appellants denied to have committed the offence.

On the strength of the above evidence, the appellants were convicted and sentenced as aforesaid.

In this appeal, Mr. Simon Mwakolo learned advocate appeared for the appellants; whereas the Republic had the services of Mr. Prosper Rwegerera, learned Senior State Attorney assisted by Ms. Scolastica Lugongo learned State Attorney. Mr. Rwegerera supported the appeal.

Mr. Mwakolo filed three grounds of appeal, namely:-

- (1) The Learned Honourable trial Judge erred both in points of law and facts when she convicted and sentenced the appellants to suffer death by hanging on circumstantial evidence which left a lot to be desired.
- (2) The learned Honourable Trial Judge erred both in points of law and fact when she convicted and sentenced the 2nd respondent (sic) on the fact that he was the last person to be seen with the deceased and totally failed to take into consideration his defence.
- (3) That the learned Honourable Trial Court erred both in points of law and facts when she believed that the remains found, exhumed and buried at the place was that of the late Mashauri Kako.

Mr. Mwakolo submitted generally to the effect that the prosecution did not prove its case to the standard required – beyond reasonable doubt. First, he said PW1 and PW2 contradicted in their testimonies. Second, the

evidence on the prosecution side is not strong to ground a conviction. Third, it is not shown in evidence whether Mashauri Kako was killed and the remains exhumed were of Mashauri. This is because the shirt, trouser and shoe were not tendered in Court. He accordingly prayed that the appeal be allowed.

As earlier said, Mr. Rwegerera supported the appeal. He confined himself to ground number three of the appellants' memorandum of appeal. He said there is no evidence to show that Mashauri Kako is in fact dead and the remains exhumed were that of Mashauri Kako.

For the offence of murder to stick, the prosecution must prove the following ingredients beyond reasonable doubt. One, the named deceased is dead and he died unnatural death. Two, the accused, with malice aforethought is the one who caused his death. The starting point in this case then is whether the evidence in the prosecution side had established Mashauri Kako is no more.

This case proceeded to hearing without conducting a preliminary hearing. There are no undisputed matters which the parties had agreed upon. So, it is the duty of the prosecution side to establish the two elements beyond any reasonable doubt. The question now is whether there is evidence to establish that Mashauri Kako is dead.

PW5 in his evidence told the trial court that the remains of the body exhumed were of a human being. And PW5 said it was PW2 who informed him that it was the body of Mashauri Kako. PW2 claimed to have identified the body because it had a black trouser and a white shirt. PW1 also said the same thing. But the clothes alleged Mashauri Kako was wearing, which could have conclusively proved his death, were not identified by way of any special marks and worst of all were not tendered in Court as exhibit. There are so many clothes with such description. It is clear then that someone could possess them. It is not certain whether the alleged clothes belonged to Mashauri Kako. That allegation does not conclusively establish that the human body exhumed was of Mashauri Kako. Since the clothes and shoe were not part of the evidence, it is our firm holding that the

learned that judge erred in law in relying on them to conclude that those human remains were of Mashauri Kako.

In view of the foregoing therefore, we are not satisfied that the death of Mashauri Kako had been conclusively proved. Even if, for the sake of argument, the remains were of Mashauri Kako, there is still insufficient evidence to connect the appellants with the offence. The facts do not irresistibly point to their guilt and incapable of any other reasonable explanation. (*See Kipkering arap Koske and Another* (1949) 16 EACA. 135).

Having taken these factors into consideration, we are satisfied that the Republic had not proved that Mashauri Kako is dead.

We allow the appeal, quash the conviction and set aside the sentence of death and order the appellants to be released from prison forthwith unless they are detained in connection with another matter.

Order accordingly.

DATED at MBEYA, this 7th day of JUNE, 2013

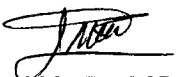
E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
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