IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: OTHMAN, C.J., MSOFFE, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 172 OF 2011

1. JOHN PETRO MBUGUNI
2. BOAY AMMA SURUMBU ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Sambo, J.)

dated the 24th day of February, 2011

in

Criminal Sessions Case No. 50 of 2008

.....

JUDGMENT OF THE COURT

7 &12th March, 2013

MSOFFE, J.A.:

The appellants JOHN PETRO MBUGUNI and BOAH AMMA SURUMBU together with one ELIUD ELIAS DAUDI appeared before the High court of Tanzania at Arusha upon a notice of information for murder contrary to Section 196 of the Penal Code (CAP 16 R.E. 2002). It was alleged that on or about the 22nd day of February, 2008 at about 4.00 a.m at Mang'ola Barazani, Karatu District in Arusha Region they murdered one LOHI DARSI. Following the closure of the prosecution case on 10/2/2011

LOHI DARSI. Following the closure of the prosecution case on 10/2/2011 the said ELIUD ELIAS DAUDI was acquitted in terms of Section 293 (1) of the Criminal Procedure Act (CAP 20 R.E.2002) (the Act). After a full trial the appellants were convicted as charged and sentenced to death. Aggrieved, they have preferred this appeal in which Mr. Bernard Buberwa Buhoma, learned advocate, argued the appeal on their behalf. The respondent Republic had the services of Ms. Veritas S. Mlay, learned Principal State Attorney, who argued in support of the conviction and sentence.

Mr. Buhoma filed a memorandum of appeal with three grounds, namely:-

1. *The court below erred in law and on the facts in admitting in evidence cautioned statements of the appellants and in holding that the same corroborated evidence of PW2.*
2. *The trial court grossly erred in both law and facts in convicting the appellants on evidence that was unreliable and contradictory.*
3. *The High Court grossly erred in law and on the facts in grounding its decision on circumstantial evidence that was capable of more than one interpretation.*

Before addressing the above grounds of appeal it is pertinent that we at this functure set out in sufficient detail the facts as narrated by the prosecution

out the facts in detail in order to be able to appreciate the essence of this appeal. The gist of the prosecution evidence was that on the fateful night the appellants and the deceased were drinking "gongo" at the house cum "club" of one Bura Akonaay. Thereafter, the deceased and the second appellant went to the deceased's daughter PW2 Regina Seha. The deceased told PW2 that the appellants had raped her on that same night. She asked PW2 to take her to hospital. PW2 advised her to sleep there till the next day when she would be taken to hospital after reporting the incident at the nearby police station. The deceased declined the offer or advice to sleep there and instead left with the second appellant. PW4 Tasiana Zakayo, who was also the deceased's daughter, testified and told the trial court that on the next day i.e. on 23/2/2008 at about 7.00 a.m. the second appellant came to her house with the deceased's bedsheet and told her that the deceased would come soon to see her. The testimonies of PW2 and PW3 are similar and to the same effect that in that morning the second appellant came with the deceased's bedsheet. The deceased did not come back as suggested by the second appellant. Instead, on 23/2/2008 at around 7.00 a.m. PW1 Michael Kirway and other people saw the deceased's body hanging on a tree branch near Mang'ola Barazani Primary School. According to PW1, it appeared that the deceased had been strangled to death elsewhere and then brought to the tree branch. The incident was reported to the police and the appellants were arrested. According to PW3 Faustine Langida, the second appellant was the first to be arrested and then the search party:-

> *...asked him about Lohi Darsi, he showed us how they took the woman along the way with Mbuguni. At one point, he sat down, and said from here they went away with Mbuguni ... We also searched for Mbuguni and got him at Ausa*

Suall village, and we arrested him hiding in a store of onions, lying down hiding...

PW6 No. D6419D/Sgt. Victor recorded the appellants' cautioned statements in which it was alleged that they admitted killing the deceased. The post-mortem examination report which was produced and admitted in evidence without objection at the preliminary hearing showed that the death was caused by asphyxia following strangulation and on further observations the doctor saw *"vaginal smear-wet ex-spermatozoa find"* in her vagina.

In arguing the above grounds of appeal Mr. Buhoma argued the first ground on its own and the second and third grounds together. We propose to adopt the same approach in disposing of the appeal.

In the first ground, there are essentially two main complaints. The first complaint is that the statements were admitted in evidence in contravention of Section 50(1)(a) of the Act which prescribes a period of four hours for interviewing a person under restraint commencing at the time when he was taken under restraint in respect of the offence in question. In Mr. Buhoma's view, the interview was conducted beyond the stipulated period. In view of this, the cautioned statements were wrongly admitted in evidence, he emphasized. Admittedly, this point was not raised at the trial and Mr. Buhoma conceded that much. If so, in our respectful view, it is too late in the day to canvass it at this late stage. We say so because objection, if any, to the statements ought to have been taken at the trial in terms of Section 169 (1) of the Act. If that had been done, as correctly submitted by Ms. Mlay, then the prosecution would have been in a position of discharging the burden prescribed under sub-section (3) thereto of satisfying the court that the statements should be admitted in evidence. It goes without saying that the prosecution cannot discharge that burden at this

burden at this stage of the appeal process. In other words, the provisions of Section 169 can only be invoked in a trial and not in an appeal.

It occurs to us that the second complaint in the first ground of appeal arises from that portion of the Ruling given by the trial judge in the trial within trial wherein he stated:-

> *... PW6 could not know the particulars of the contents of the two cautioned statements if the accused persons had not revealed them to him...*

If we understood Mr. Buhoma correctly, and we think we did, he was of the view that since in their respective defences the appellants had only admitted their personal particulars it was wrong for the judge to make the above finding in admitting the cautioned statements. With respect, we do not agree with him. As we stated in **Nyerere Nyague V. Republic,** Criminal Appeal No. 67 of 2010 (unreported) in a trial within trial the court only determines whether the accused made the statement at all, or whether he made it voluntarily. Having ruled that the appellants made the cautioned statements it was therefore quite in order for the judge in this case to admit them in evidence. Indeed, we go along with the judge that a careful and close look at the statements will show that they actually contain some information or material which could have only been within the knowledge of the appellants alone. We are therefore satisfied that they were properly admitted in evidence.

The complaint in the second and third grounds of appeal is that the judge erred in grounding his decision on circumstantial evidence which was unreliable and contradictory and which was capable of more than one interpretation. In elaboration, Mr. Buhoma was of the view that the conduct of the second

appellant in particular was compatible with innocence. This is explained by a number of factors in the evidence that when the second appellant and the deceased went to PW2 the said deceased was charming; that if he was not innocent he would not have left with the deceased after meeting PW2; if he had truly raped and eventually killed the deceased he would not have gone to PW2, PW3 and PW4 with the bedsheet, etc. On the alleged contradictions, he singled out the evidence of PW3 and PW4 on the bedsheet i.e. that PW3 said that the second appellant brought the bedsheet in that same night while PW4 said that he brought it on the following day.

The law on circumstantial evidence is settled. This Court's decisions in **Sadiki Ally Mkindi vs Republic,** Criminal Appeal No. 207 of 2009 (unreported) and **Hamidu Musa Timotheo and Majid Mussa Timotheo vs Republic** (1993) TLR 125, and many others of the same nature, are to the effect that in a case which depends wholly upon circumstantial evidence the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. The incriminating facts and circumstances must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt.

In this case, the evidence as narrated above is clear. The starting point, and which has no dispute, is that the appellants and the deceased were drinking together. At the time of leaving they left together. The second appellant and the deceased went together to PW2. On arrival the deceased named the appellants to PW2 as her rapists. The naming of the appellants at that early opportunity was significant in lending credence to the prosecution case. Then the second appellant left with the deceased. The deceased was never to be seen again alive. In the morning of 23/2/2008 the body of the deceased was

seen hanging on a tree branch. On examination, it was observed, *inter alia,* that the deceased was raped. In that same morning the second appellant went to PW2, PW3 and PW4 with the deceased's bedsheet. Yet again, in that same morning the body of the deceased was seen by PW1 and other people hanging on a tree branch. The body was examined by a doctor who opined that the death was due to strangulation. Surely, in our view, the chain of events in the above evidence was unbroken.

In our considered opinion, the above chain coupled with the other pieces of evidence in the case in relation to the cautioned statements; the circumstantial evidence; and the evidence of PW2 that the deceased named the appellants; the evidence of PW3 that the appellants led the search party to the place where the appellants killed the deceased; were enough to ground the conviction. And the motive for the killing, though not an essential component in a case of murder, is well stated in the cautioned statements. That they killed the deceased because she had revealed the rape incident to PW2. Hence in the light of the evidence on record the factors mentioned above by Mr. Buhoma to explain the second appellant's "innocent" conduct are inconsequential in view of the strong prosecution evidence against the appellants.

The alleged inconsistency on the evidence regarding the bedsheet is non-existent. As correctly pointed out by Ms. Mlay, PW3 did not say that the second appellant brought the bedsheet to him, PW2 and PW4 on the fateful night. All he said was that he heard the second appellant saying that he had the deceased's bedsheet. He did not say anywhere that the second appellant brought the bedsheet to him, PW2 and PW4 on that fateful night. The evidence of PW3 is consistent with that of PW2 and PW4 that the bedsheet was brought in the morning of the following day.

In their respective defences in court the appellants denied killing the deceased. They admitted drinking with the deceased on the fateful night but denied the killing. The trial judge carefully considered their defences and rejected them. We have no reason(s) for faulting the judge in his findings and conclusions on the point. Once the cautioned statements were admitted in evidence coupled with the other strong evidence in the case a conviction was inevitable. In this sence, the record is clear that the defence case was well considered and ultimately rejected by the trial judge in view of the strong prosecution case against the appellants.

There are other aspects of the case which are worth mentioning here. **One,** as already stated, in the post-mortem examination report the doctor observed signs of rape on the deceased's vagina. This evidence, in our view, corroborated the deceased's version to PW2 that she was raped by the appellants. **Two,** it was not seriously disputed that at some stage of the events of that fateful night the appellants were the last persons to be seen with the deceased. The second appellant in particular was the last person to be seen with the deceased by PW2. If so, in law in the absence of strong evidence to the contrary the reasonable inference is that they were criminally responsible for the death of the deceased. And as we observed in **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v Republic** (2006) TLR 395 this proposition of law presupposes that an accused person was last seen with a deceased while he was still alive. In the instant case, the evidence is clear that the appellants were last seen with the deceased while she was still alive.

On the whole, we are satisfied that this appeal has no merit. We hereby dismiss it.

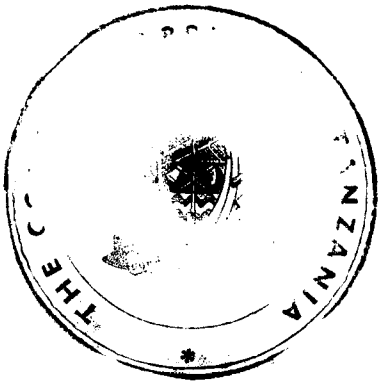
DATED at ARUSHA this 8th day of March, 2013.

M.C. OTHMAN
CHIEF JUSTICE

J.H. MSOFFE
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL