

IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 51 OF 2013

1. JIDAI DONALD @ SHULI
2. JUMA MAKONO @ JISUSI }.....APPELLANTS

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. 4 of 2009**

.....

JUDGMENT OF THE COURT

11th & 19th JUNE 2013

LUANDA, J.A:

The appellants JIDAI DONALD @ SHULI and JUMA MAKONO @ JISUSI (hereinafter referred to as the 1st appellant and 2nd appellant respectively) were charged and convicted of murder by the High Court of

Tanzania at Sumbawanga contrary to section 196 of the Penal Code, Cap. 16 RE. 2002 and sentenced to suffer death by hanging. Aggrieved by the finding of the High Court, they have preferred this appeal in this Court.

In this appeal, both appellants were represented by Mr. Simon Mwakolo learned advocate; whereas the respondent/Republic had the services of Mr. Prosper Rwegerera learned Senior State Attorney who supported the appeal.

The prosecution case which was found credible by the trial High Court was that on the day of the incident around 4.00 pm people started gathering at the residence of Julita Paulo (PW1) and Andrea Billa (PW2), who were wife and husband respectively, to drink a local brew (gongo) on sale. Among the earlier comers were the 1st appellant, Njila, Banzali and Batabize. The 2nd appellant who did not take the stuff appeared to have arrived later on.

At some stage, a quarrel erupted between the 1st appellant and one Peter, whereby PW2 managed to intervene and restore the condition to

normality. Then the 1st appellant left presumably went home, the record is silent, and returned. The 1st appellant came with a knife whereby PW2 persuaded him to surrender, which he did. PW2 took it and gave it to the 2nd appellant for safe keeping.

Shortly thereafter the 1st appellant started uttering uncivil words towards JIGADI s/o HUSSEIN (the deceased). Had it not been PW2 who intervened, the two would have fought. PW2 persuaded the deceased to go home which the deceased agreed. The 2nd appellant led the deceased out of the place. After a while when the deceased had left the house, PW1 and PW2 heard the deceased while running towards the house lamenting that the 1st appellant had stabbed him with a knife while the 2nd appellant held him to facilitate the stabbing. It is the evidence of PW1 that she saw blood coming out from the person of the deceased. She tied him with two khangas, kitenge and bed sheet but in vain. The deceased kept on mentioning the appellants as the ones who stabbed him. PW2 reported the matter to the village executive officer one Leopord Mpepo (PW3) who in turn reported to the village chairman. Along with the chairman, they went to the scene of crime. On arrival they saw the deceased lying down

complaining that he had been stabbed by the 1st appellant three times and that the 2nd appellant helped the 1st appellant by taking him under the tree where he was stabbed. PW3 reduced the oral statement of the deceased into writing Exht P3. The deceased was then rushed to Namanyere hospital where he passed away.

The appellants denied to have committed the offence.

Mr. Mwakolo raised two grounds in the memorandum of appeal, namely:-

- (1) The Honourable Judge erred in law and facts when she convicted and sentenced the appellants to death by relying on the testimonies of PW1, PW2 and PW3 which evidence left to be desired.
- (2) The Honourable Judge erred in law and facts when she admitted exht P3 which was tendered by PW3 without taking into account the circumstances it was recorded.

Submitting on the first ground, Mr. Mwakolo said the evidence of PW1, PW2 and PW3 is doubtful. Elaborating, he said the place where the offence was committed was the residence of PW1 and PW2. These witnesses might have an interest to serve as they were selling illicit liquor. Under the aforesaid circumstances, the two appeared to be suspects. There was a need to have an independent witness to corroborate their evidence. He wondered as to why those other people who were about seven or ten, no one came to testify as a witness. Further, Mr. Mwakolo said under normal circumstances the deceased would have been rushed to hospital first instead of reporting to the Village Executive Officer (PW3) who went to the scene after a considerable time had passed.

As regards evidence of PW3 in respect of the dying declaration, he said his evidence should not have been given weight because the circumstances under which the statement was recorded and its contents thereof are doubtful. In any case the dying declaration requires corroboration, he charged. There is no such evidence to corroborate. He referred us to two cases (i) **Godson Hemedi VR** [1993] TLR 241 (ii) **Achira VR** (2003) vol. 2 The East Africa Law Report.

As earlier said, Mr. Rwegerera supported the appeal. In his brief submission, he said the conviction of the appellants was based on a dying declaration but the evidence of PW1, PW2 and PW3 ought to have been corroborated. Since corroboration is lacking, the conviction was not properly entered.

Basically the learned trial Judge convicted the appellants on the strength of the dying declaration made by the deceased to PW1, PW2 and PW3. Generally evidence of this nature requires corroboration to ground conviction.

In **Pius Jasunga s/o Akumu VR**, (1954) 21 EACA 331 the then Court of Appeal for Eastern Africa said:-

" We have examined the decisions of this Court on the subject of dying declarations since 1935 and we have been unable to find a single case where a conviction has been upheld which was based upon

a dying declaration without satisfactory corroboration."

(See also **RV Mohamed Shedaffa & Three Others** [1984] TLR 95; **Africa Mwambogo VR** [1984] TLR 240 and **Onael Danson Macha VR**, Criminal Appeal No. 214 of 2007 CAT (unreported))

When convicting the appellants, after she was satisfied that the deceased was murdered, the learned trial judge said as follows:-

" I have carefully weighed the evidence by PW1 and PW2, and I found the same to be worth a trust. The witnesses were there when the 1st accused was using a knife to threaten the deceased while having arguments with him. The accused also had called out the deceased so that they fight. And later, the 2nd accused had lured the deceased to go out in a pretext that he (the deceased) is taken to his home place. Then within no time, the deceased is stabbed, and the accused had disappeared. I also find nothing wrong with exhibit P3 a dying declaration by the deceased"

The learned judge went on, she said:-

" The contents of exhibit P3 had been uttered by the deceased to PW1 and PW2 even prior to the arrival of PW3. So even without exhibit P3, there is ample evidence that the deceased had named the accused person as his assailants."

From the above, it is not in dispute that the deceased was murdered. The pertinent question in this appeal is whether the appellants are the ones who killed him as found by the trial Court. As already observed, the conviction of the appellants was based on the dying declaration of the deceased. So, the question is whether, in the first place, the deceased made such statements pertaining to his cause of death as narrated by PW1, PW2, and PW3. And if the answer is in the affirmative, whether the same was sufficiently corroborated.

We have gone through the record. We think there are unsatisfactory features in the prosecution case which tend to render the deceased's dying declaration unreliable.

The deceased in his dying declaration claimed to have stated that the 1st appellant was the one who stabbed him in collaboration with the 2nd appellant under a tree which was 20 meters from the house of PW1 and PW2. But there is no evidence on the prosecution side to have been shown that the 1st appellant had left the drinking place prior to the alleged stabbing. This is relevant because it would show at least the 1st appellant to have gone much earlier to way lay the deceased so to speak. Further, the alleged stabbing took place at night around 8.00 p.m. - 9.00 p.m. No prosecution witness had testified that there was any source of light around or near the tree. How did the deceased identify the 1st appellant? The conditions prevailing were not conducive for proper visual identification. It is quite possible the deceased mentioned the 1st appellant believing the one who did it because they quarreled while at the residence of PW1 and PW2. Also it is possible that someone other than the 1st appellant might have stabbed the deceased.

Another piece of evidence which is also relevant and which raises eyebrow is the place where the deceased was stabbed. It is in evidence that the deceased was stabbed near a tree and thereafter rushed towards

the house of PW1 and PW2. According to the sketch plan Exht P2 drawn by D/CPL Patrick with the assistance of PW1, hardly a day after the incident the drops of blood were shown to have been around the tree only. Under normal circumstances the drops of blood would have been still there and the same ought to have been shown from the tree up to the house. Failure to indicate the same raises doubt whether really the deceased was stabbed at the tree. Besides, the sketch plan does not show the place where the deceased had fallen. In addition, PW2 reported the matter to PW3 who was within the same village after more than three hours after the incident while leaving the deceased un attended! We failed to comprehend.

As regards Exht P3 alleged reduced into writing by PW3, we find it is not consistent with the evidence of PW2 and PW3. The said Exht P3 read in part thus:

" Nakumbuka majira ya saa 4.30 usiku nilikuwa kwenye mji wa ndugu Andrea Bilia nikiwa nakunywa pombe. Kidogo alikuja ndugu Juma s/o Kuzenza (Makono) akawa amenivuta na kunipeleka

*barabarani kwenye mwembe nilipofika tu ndugu
Kangwa Donald Shuli akanichoma kisu ubavuni
upande wa kulia (Mkono). Sababu hazielewi"*

This is the evidence of PW1 and PW2 where they said the 2nd appellant was there for a long time and also claimed even when the 1st appellant quarreled with the deceased he was present. Further he claimed the knife brought by the 1st appellant was his. Second, PW1 and PW2 in their evidence did not say the 2nd appellant on arrival to have pulled the deceased towards a road which was near the tree as shown in Exh P3. Third, the deceased was stabbed on his right side of his chest as per Post mortem Report Exhit P1 and not on his right ribs as shown in Exht P3. We don't think the deceased would have mistaken to mention the exact area he was stabbed.

Given the above features, like Mr. Mwakolo we are in doubt whether the deceased made such statements. Since it has been shown that it is doubtful the deceased to have made such statements as to his cause of death, the question of corroboration does not arise.

In the upshot the appeal is allowed. The conviction is quashed and sentence set aside. The appellants to be released from prison forthwith unless they are otherwise lawfully held in custody.

Order accordingly.

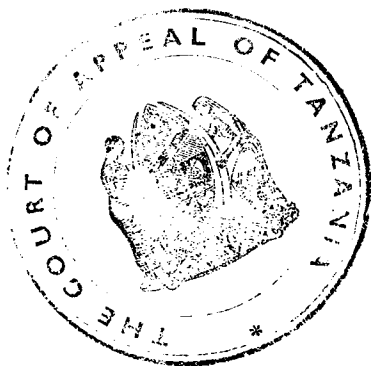
DATED at MBEYA, this 18th day of JUNE, 2013


B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
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