

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 332 OF 2010

MAPINDUZI LUMINAGA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

at Bukoba)

(Lyimo, J.)

dated the 30th day of August, 2010

in

Criminal Sessions Case No. 59 of 2007

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JUDGMENT OF THE COURT

25th & 29th November, 2013

RUTAKANGWA, J.A.:

It was not without good cause when the ancient sages observed that in the course of human affairs, "History repeats itself." We are saying so advisedly as we shall presently demonstrate.

The erstwhile East Africa Court of Appeal in the case of **John Emitus V. Uganda**, Criminal Appeal No. 103 of 1972 (unreported) appalled by the frequent laxities in the way some forensic pathologists discharged their duties, lamentably said:-

"Some Post-mortem reports are of little value when the doctor merely reports ... on what he believed to be the cause of death and fails to examine the body carefully..."

We shall allude to this observation later on.

The appellant was arraigned in the High Court sitting at Bukoba with the murder of his father, one Luminaga s/o Masele on 22nd December, 2005. He flatly denied the charge. However, the learned trial judge having been positively impressed by the prosecution evidence, he found him guilty as charged, convicted and sentenced him to suffer death by hanging. Convinced of his innocence, the appellant has preferred this appeal through Mr. Alex Banturaki, learned advocate. The appeal was initially resisted by Mr. Paschal Marungu, learned State Attorney.

Mr. Banturaki listed three grounds of complaint against the decision of the trial High Court. These are:-

- "1. That the Learned Judge erred in law and fact in convicting the appellant of the offence of murder when there was no eye witness to the killing of the deceased and when the circumstantial evidence was not watertight to sustain the conviction.*
- 2. That the Learned Judge erred in law to deny the appellant the defence of torture.*

3. *That the Learned Judge erred in law to convict the appellant of the offence of murder when the cause of death was not immediately established after the deceased's death"*

Before canvassing these grounds of appeal, we have found it instructive to attempt to give an honest synopsis of the prosecution case against the appellant. However, this exercise, we admit, is encumbered by the irreconcilable contradictions in the prosecution evidence. This evidence came from PW1 Vumilia Luminaga, PW2 No. D7603 D/C Rajabu, PW3 Maneno Julius, PW4 Mussa Masoud, the Report on Post-mortem Examination (exh. P1), and the appellant's extra judicial statement (exh. P6).

The prosecution's star witness was PW1 Vumilia, the appellant's sister. We are saying so deliberately not of our own accord. The learned trial judge, in his judgment, credited her as being **"the most important witness in the case"**. It was her evidence which weighed heavily against the appellant leading to his conviction for murder. Indeed the learned judge had found her to be **"a credible witness whose evidence does not need corroboration"** as "was suggested by the learned defence counsel." But what attributes were in her evidence so as to be found worthy of these eye-catching superlatives? After dispassionately reading his judgment and the entire evidence on record, we have learnt that this was all because she had cut out a good figure while in the witness box, for she "remained steady and cool." That might have been the case but this bold assertion is not borne out

by the record of proceedings. And what then was the nature of her evidence, anyway? Her story, we have learnt, makes a good leisure reading.

PW1 Vumilia premised her seemingly damning evidence on the undenied fact that she is the young sister of the appellant. Thereafter she told the trial High Court that their "father died in December, 2005 and his body was found in **April, 2005.**" Prior to their father's alleged death, she had in July, 2005 gone to Mtakuja B from Kadeda Geita, with the intention of staying with their father there. Their father who had more than four wives and 17 children, was not disposed to live with her. Instead, he directed her to go and live at Buziku – Bugege with the appellant, where he (the father) had three houses. She and the appellant were given a house each, while the third was retained to be used as a kitchen-cum-bathroom. The latter house, they popularly called as "the slope house" and we shall refer to it by that name in this judgment.

Apart from the houses, their father gave the appellant some maize grains out of his own stock. However, the appellant not only sold his share but also his father's stock, an action that led to a misunderstanding between the two, which "the village office" failed to resolve. As fate would have it, one of PW1 Vumilia's children fell ill. She had no money. She resolved to go to Mtakuja 'B' to get money from their father to buy medicine. The appellant would not let her go and gave her the needed money instead. All the same, when she went to buy the medicines, she passed by her father's house. He was not there and there was no sign of life, "or of anyone having stayed at

the house recently/lately”, as she put it. She returned to Bugege and informed the appellant accordingly. The appellant allegedly went to Mtakuja ‘B’ to verify the information. Upon his return he informed her that he had wanted to take their father’s properties, but the village authorities wouldn’t allow him until she was present. Subsequently they went together to Mtakuja ‘B’. In the presence of the unidentified “village leadership”, the house was opened. They did not find therein some of their father’s properties. All the same, they took back with them two beds, coats, shoes and two hoes. She was specific that it “was in December, 2005.” In spite of all these details, her evidence is silent on who was living with their father.

PW1 Vumilia further testified that upon returning home, the appellant barred them from using the slope house. Shortly thereafter, she witnessed the appellant, Maneno, Abeid Ibrahim and Issa Ibrahim, perform a ritual therein. A sheep was slaughtered inside that house and “after the ceremony Mapinduzi collected all bones and placed them in a bag and went to dispose them off.”

Continuing with her tale, PW1 Vumilia testified that one afternoon she decided to take a bath inside the slope house. While inside, she saw “areas where the floor had been dug out” and “there was a lot of pungent smell.” When she inquired from the appellant’s wife, one Dotto, she told her to stop “sneaking into issues” that never concerned her. Her experience with the puzzling antics of her brother never ended with the ritual.

She went on to claim that one evening, she saw the appellant, Issa Ibrahim and Maneno engaged in a conversation outside the appellant's house which was about 13 metres from the slope house. The trio then left together and returned together after mid-night. They entered the slope house only to come out shortly later "carrying a big parcel wrapped in a bag" which "they placed on their bicycle and drove into" their "adjoining shambas." In the morning she entered the slope house and saw "a place they had dug out." This time, she claimed," was shortly after the 2005 Christmas holidays".

As luck would have it, after that night incident, the appellant and Dotto began to quarrel frequently. On one such occasion when the appellant called Dotto a fool, she "retorted by calling him a fool also because he had killed his own father." She claimed that this happened sometime in February, 2006. She had resolved to go and inform her brothers but she had no money for the fare to Kiduda. She accordingly worked as a shamba labourer and earned Tshs. 3,000/= . She gave this money to her brother Bahati, who had chanced to arrive at Buziku – Bugege, with instructions to go to Katoro in Geita to inform their brothers that their father was missing and the appellant "was being suspected to have killed him."

Bahati left for Katoro in March, 2006. Ironically, without waiting for the response of her brothers nor reporting to the relevant authorities at the village the tribulations she had undergone and/or what she had witnessed and heard, she decided to leave Buziku-Bugege and got married to one Samazina

in Mkunguzi village. It was from the latter village, that in April, 2006 she was called by the Police to give her statement on how she "had lived with Mapinduzi." It was apparently against this background that the appellant and Maneno Julius, but not Issa Ibrahim, were arrested by unknown people and the appellant found himself in the hands of PW2 D/C Rajabu at Bwanga police post on 30/4/2006.

On 1/5/2006 PW2 D.C. Rajabu allegedly visited Buziku where he met Maneno Julius under arrest. He allegedly interrogated Maneno who told him that on 22/12/2005 he had gone with the appellant, a friend of his, to Mtakuja, where the latter killed his father. After tying and putting the deceased body in gunny sacks, they rode back to Bugege and buried the body in the slope house. Two months later, Maneno told him, they exhumed the body and re-buried it at a nearby stream. Maneno then showed him the burial spot.

After obtaining an exhumation permit, the body was exhumed on 4/5/2006. According to PW2 D.C. Rajabu, the body "was intact" and was identified by **PW1 Vumilia**, Jamali Luminaga and Saada to be that of Luminaga Masele. A post-mortem examination performed at the site, established the cause of death to be asphyxia (exhibit P1). The appellant was formally arrested, and taken before PW4 Musa Masoud, a Justice of the Peace. In his extra judicial statement (exhibit P6), the appellant appears to

have unequivocally confessed to have murdered his father in collaboration with Maneno.

At the trial of the appellant, Maneno Julius testified for the prosecution (after PW1 Vumilia and PW2 D.C Rajabu) as PW3. In very unambiguous words he fundamentally belied not only the two prosecution witnesses but also the contents of exhibit P6 regarding his alleged complicity in the alleged murder of Luminaga Masele. All that he said was that on a day he could not recall, while on a drinking spree, the appellant told him that he had killed his father and buried his body at a place which he later showed him, warning him not to divulge that information.

In his sworn evidence, the appellant, in no uncertain terms, denied killing his father. He again re-tracked exhibit P6 claiming that he was forced to sign it as a result of torture and being denied food for over four days when he was in police custody. He also claimed that PW4 Mussa did not read over that statement to him. He challenged the evidence of PW1 Vumilia as sheer lies because she was interested in taking over the family shamba from him. He wondered why PW1 Vumilia never reported him, if she was aware that their father had been murdered and he was the murderer. He accordingly prayed for his acquittal.

The three assessors who aided in the trial of the appellant were unanimous in their verdict. Each one found PW1 Vumilia to be a credible witness and found the appellant guilty as charged.

We have already shown that the learned trial judge found PW1 Vumilia a very credible witness. Regarding the extra judicial statement, he said:-

"A reading of the extra-judicial statement above makes this court to be of the settled view that the statement amounted to a full confession, one containing facts within the personal knowledge of the accused thereby irresistibly proving what the accused told the Justice of Peace was nothing but the truth."

With this conviction, the learned judge immediately concluded thus:-

*"Going by the evidence of PW1, PW2 and PW4 read together with the extra-judicial statement, there is no doubt that the accused and his two brothers planned to kill the deceased in order to take over the properties. **Both PW1 and PW2 described how the body of the deceased had been tied before being placed inside four gunny bags and later buried him. The deceased was living at Mtakuja 'B' but his body was recovered at***

Buziku-Bugege some four kilometers away and four months from the time he disappeared from his house. Like the three court assessors I am fully satisfied that the accused is the person who killed his father and in doing so he acted with malice aforethought. He is accordingly convicted.”
[Emphasis is ours.]

It has occurred to us that from the above extract, the learned trial judge, in his decision, relied heavily on the evidence of PW1 Vumilia, PW2 D/C Rajab and PW4 Mussa, as well as the Report on Post-mortem examination. As a result, he took it as proved beyond any reasonable doubt that one Luminaga s/o Masele is dead that he was murdered on 22/12/2005 at Mtakuja 'B' village and surreptitiously buried at Buziku-Bugege, and that his murderer was the appellant. These findings did not find purchase with Mr. Banturaki, who is contending that they are predicated on contrived evidence.

As already shown in this judgment, Mr. Banturaki came before us with only three grounds of appeal which he argued generally. It was his strong argument that the conviction of the appellant was flawed as it resulted from hearsay, implausible and self-contradictory evidence of PW1 Vumilia. On top of that, he stressed, the story of PW1 Vumilia was fundamentally contradicted by the evidence of PW3 Maneno Julius who also belied PW2 D/C. Rajabu. He invited us to reject the report on post-mortem examination as it does not

reflect the truth. It is impossible, he argued, that whoever conducted the post-mortem examination could have positively and conclusively established the cause of death to be asphyxia, after the body had been in the grave for five months. Regarding the extra judicial statement, he pressed us to disregard it as it was not only retracted, but it does not contain any grain of truth in it.

On his part, Mr. Marungu had vehemently urged us to sustain the conviction of the appellant on the same grounds relied on by the learned trial judge. However, following a constructive engagement with the Court during the course of his submission, based on the record of proceedings, he changed his stance and supported the appeal when it dawned on him that PW1 Vumilia after all, was a liar.

In disposing of this now uncontested appeal, we have found it convenient to begin by stating the obvious. We take it to be settled law that on a murder charge, the duty has always been on the prosecution to prove beyond reasonable doubt not only the death of a person, but also to link that death with the accused: see, for instance, **Mohamed Said Mutula v. R** [1995] T.L.R. 3, **Diamon s/o Malekela @ Muunganye v.R**, [CAT] Criminal Appeal No. 205 of 2005 and **Enock Yasin v. R.**, [CAT] Criminal Appeal No. 12 of 2012 (both unreported). We shall begin with the issue of whether or not the death of Luminaga s/o Masele was satisfactorily proved, or rather it was only assumed.

The prosecution, in its bid to prove the death of Luminaga, relied on the evidence of PW1 Vumilia, PW2 D/C. Rajabu, PW3 Maneno Julius, the report on post-mortem examination and the appellant's retracted extra judicial statement. May be, it will refreshing to canvass the latter document (exhibit P.6) first.

Exhibit P6 was, by any standards, very brief. In it, the appellant appears to be confessing the murder of his father in collaboration with Maneno Julius who happened to be PW3. It mostly reads thus:-

"Hivyo tarehe 22/12/2005 kama saa 06:00 usiku mimi na rafiki yangu aitwaye Maneno s/o Julius tulikwenda nyumbani kwa mzee huyo tukamnyonga kwa kumfunga kamba shingoni tukamfungasha ndani ya gunia tukamsafirisha kwa baiskeli usiku huo huo hadi nyumbani kwetu Bugege – Buziku. Tulichimba shimo penye kijito tukamzika humo. Nilitengana na mke wangu aitwaye Dotto Mbubute wa Mtakuja Buziku ambaye ndiye alitoa siri hiyo kwa mdogo wangu aitwaye Bahati ambaye naye aiiwajulisha Jamali na Masele. Ili kujihami ndipo walitoa taarifa serikalini nikakamatwa na rafiki yangu Maneno..."

If this piece of evidence is anything to go by, then it reduces the evidence of PW1 Vumilia, as purposely given in detail earlier on in this judgment, to a mere pack of lies. This is because, it was her unequivocal assertions that it was herself who informed Bahati of the death of their father and the one who sent Bahati to Geita to inform their brothers of this fact. Worse still, contrary to the contents of exhibit P6, she unashamedly testified that the appellant first buried the body in the slope house only to exhume it months later in order to re-bury it at a nearby stream. Furthermore, this evidence is totally inconsistent with the evidence of PW3 Maneno, who totally belied PW1 Vumilia and PW2 Rajabu, and was not impeached by the prosecution. The contents of exhibit P6, and the evidence of PW1 Vumilia, PW2 D/C. Rajabu and PW3 Maneno, we respectfully think, cannot all be true at the same time. This entire evidence appears to be contrived as argued by Mr. Banturaki. It is very unfortunate that the learned trial judge did not, while summing up to the assessors or at any stage in his judgment, address himself to these patent contradictions or blatant lies. We have accordingly found it very unsafe to hold, as the trial judge unfortunately did, that exhibit P6 contains nothing but the truth.

Coming to the Report on Post-mortem examination, we must confess more in sorrow than in fear of disappointing anybody, that we have found it to be highly suspect. Although it regularly occurs that such reports are filled in days or even months subsequent to the day the examination was conducted,

we have found some disquieting features in it. Although the post-mortem examination was allegedly conducted on **4/5/2005**, exhibit P1 was signed on **24/07/2007**. But what has aroused our genuine suspicions so as to doubt its genuineness, is the naked fact that it was authored by two different people. The person who purportedly examined the body on 4/5/2005 and filled in the routine particulars in the form (M.F.L. 21), is not the one who signed it on 24/7/2007. The handwritings are patently different.

Furthermore, Exhibit P1 shows that the post-mortem examination was performed at Buziku Bugege village in the presence of PW2 D/C. Rajabu. It goes on to show that it was PW1 Vumilia and one Jamali Luminaga Masele who identified the body to be of Luminaga Masele. This appears to be confirmed by PW1 Vumilia. The latter, in her examination in chief, had the courage to say that she was present and was able to identify the exhumed body to be that of their deceased father by a piece of 'kitenge' in which the head was wrapped as he "used to wear" it and more so by his "nice diasterma on the upper jaw", which "was quite distinctive." It was this piece of apparently paralyingly compelling evidence, which led the learned trial judge, while assessing her credibility to hold thus:-

*"It would be noted that throughout her evidence, PW1 did not assign a specific date to a specific event **except for the 4th May, 2005 the date of the exhumation of her father's body. She was one***

of the witnesses who identified the body to the doctor who conducted the post-mortem.”

[Emphasis is ours.]

We have a duty here to respectfully point out that the learned trial judge did not read the entire evidence of PW1 Vumilia. If he did, he did not read it with an objective mind. Had he done so, he would have immediately realized that PW1 Vumilia’s story was not worth of any credence. She was lying. This is proved by her evidence while being cross-examined by counsel for the appellant. After being cornered, she inadvertently unravelled the mystery. Without mincing words, **she conceded that on 4/5/2006 the day the exhumation and post-mortem examination was conducted she was not present at Bugege.** She was only “informed that it was Julius Maneno who led the search partly to that area.” We have noted with great regrets that the learned trial judge did not address his mind to this piece of highly dicrediting evidence. We are sure that had he done so, and had he drawn the attention of the lady and gentlemen assessors of this concession, they all would not have found PW1 Vumilia to be a credible witness at all.

The untruthfulness of PW1 Vumilia’s evidence is further demonstrated not only by her evidence in chief to the effect that the deceased body was “found in April, 2006”, but by her failure to report the alleged disappearance

of his father to the Mtakuja 'B' village authorities and his alleged murder by the appellant to the Buziku-Bugege village authorities and his brothers who, curiously, none of them testified at the trial of the appellant, not even Bahati. We take all this not to be a lapse on the part of the prosecution. That was why Mr. Marungu candidly admitted that PW1 Vumilia was a liar and urged us to allow this appeal.

We have also found exh. P1 to be highly suspect because on its Schedule of Observation, apart from the entries showing the age of the deceased to be 75 years, and the skull being, admittedly, "intact", the only other entry is in item 13 concerning "Large Blood vessels." It is shown here, by whoever did the examination, that he observed the carotid arteries (i.e. the two large arteries in the neck that carry blood to the head) and veins were "obstructed." We are wondering, as Mr. Marungu was, as to how this observation was positively made after the body had been "5 months" in the grave. We are, therefore, of the considered opinion that this finding was based on conjecture, as it had been reported that the deceased was strangulated, rather than a physical observation.

In his attempts to over-egg the pudding, PW2 D/C. Rajabu who was also believed by the trial judge, testified that the body "was intact", whatever he meant by that, and "was identified by Jamali Luminaga, **Vumilia** and

Saada". This witness, too, was lying. The body could not have been identified by PW1 Vumilia who was not present at this scene. And unfortunately, for undisclosed reasons, Jamali and Saada never testified. It goes without saying, therefore, that even if we assume that a human body was exhumed near the home of the appellant, in the latter's absence, and a claim not vouched for by any resident of Buziku-Bugege village, we have found no iota of evidence going to prove even on a balance of probabilities that it was the body of Luminaga s/o Masele. It is not insignificant to point out here, at least in passing, that no single witness from Mtakuja 'B' village testified to the effect that Luminaga Masele went missing from December, 2005. In view of the fact that PW1 Vumilia never identified that body to be of their father, we find exhibit P1 of no probative value. We cannot now tell with any degree of certitude what caused the death of that exhumed body. Indeed history repeats itself. Here, a valueless post-mortem report again, was being used to secure a conviction for murder.

In view of the above, we respectfully find that it would be risk taking to hold that Luminaga Masele is dead and/or that if he is dead, he was murdered. Since the death by murder of Luminaga Masele, has not been proved, we find it unsafe to uphold the appellant's conviction. We accordingly allow this appeal in its entirety by quashing and setting aside both the

conviction and the death sentence. We order that the appellant be immediately released from prison, unless he is otherwise lawfully held.

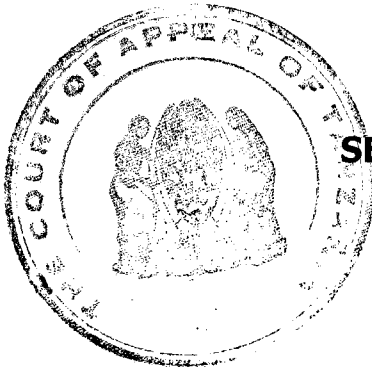
DATED at MWANZA the 29th day of November, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K. MUSSA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL