

IN THE COURT OF APPEAL OF TANZANIA

AT DARE S SALAAM

(CORAM: LUANDA, J.A., MASSATI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 266 OF 2011

MWITA SANGALIAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Masengi, J.)

dated the 24th day of March, 2010

in

Criminal Sessions Case No. 95 of 2008

JUDGMENT OF THE COURT

10th December, 2012 & 14 June, 2013

MANDIA, J.A.:

The appellant MWITA SANGALI appeared before the High Court of Tanzania at Dar es Salaam on a charge of Murder c/s 196 of the Penal Code. He was found guilty, convicted and sentenced to the mandatory sentence of death by hanging. He was aggrieved by both the conviction and sentence, hence this appeal. At the hearing of the appeal he was

represented by Mr. Wilson Ogunde, learned advocate, while the respondent Republic was represented by Ms Mariam Mvano, learned Senior State Attorney assisted by Ms Beata Kittau, learned State Attorney. Mr. Wilson Ogunde filed a memorandum of appeal containing four grounds of appeal which he adopted at the commencement of hearing of the appeal which go as hereunder:-

- "1. *THAT, having regard to the totality of the evidence on record and the circumstances of the case, the learned trial judge misdirected herself in fact and in law in finding that the prosecution had proved the case beyond reasonable doubt.*
2. *THAT, the trial Judge misdirected herself in fact and in law in failing to analyse properly the evidence adduced by the defence at the trial.*
3. *THAT, the learned trial Judge misdirected herself in fact and in law in relying on the*

dying declaration contrary to the requirement under Section 34B(2) of the Tanzania Evidence Act Cap 6 R.E. 2002.

4. THAT, the learned trial judge misdirected herself in fact and in law in convicting the appellant."

The evidence relied upon by the trial High Court to convict the appellant consisted of the testimonies of a couple, PW George PW3 Nyamonge and his wife PW2 Marina George, Dr. William John Mulai, Medical Officer who conducted a post-mortem examination of the body of the deceased, and PW4 F 2255 D/C Mboka, a police officer who recorded a statement from the deceased on 13/8/2010.

The evidence of the couple PW1 George Nyamonge and his wife PW2 Merina George shows that on 13/8/2006 between 4.00 P.m. and 8.30 p.m. they were at the house of one Kalambo at Mwanagati area, Kitunda. Kalambo was holding a traditional Kurya ceremony called "giving soup" whereby a couple who have just had a new baby invites guests to their

house and entertains them with food and drinks. After the entertainment the invited guests give presents to the couple. It is this prize giving which is called "giving soup" PW1 and PW2 testified that they left the ceremony house at 8.30 p.m. in the company of the deceased **MARWA MASEKE** who was a close friend of PW1 George Nyamonge. The evidence of PW1 also shows that just before the guest left the party giver i.e. Mr. Kalambo announced that none of the invited guests was allowed to leave the place with a bottle of beer. According to PW1 George Nyamonge, after they left, and while they were on their way a little distance from Mr. Kalambo's house, Mr. Kalambo followed them and asked the deceased to return bottles of beer he had taken. The deceased refused and the two fought. He separated them. PW1 testified that the appellant came onto the scene and asked "Nani anamsumbua Kalambo?" and Kalambo told the appellant it was the deceased who was leaving with beer bottles. According to PW1 a second fight ensued between the deceased and the appellant and he separated the two. According to PW1 the appellant went back to Kalambo's house and came back to stab the deceased several times on the hand and neck. PW1 testified that "it was somehow dark but there was enough light to see what was happening. PW1 George Nyamonge helped take the

deceased to Kitunda Police Post where they met PW4 F 2255 D/C Mboka who recorded the deceased's statement. D/C Mboka testified that the deceased had to thumbprint his statement because he had wounds on both hands so he could not hold a pen. The deceased's statement was put in evidence purportedly under Section 34A of the Evidence Act.

On 21/8/2006, eight days after the incident narrated by PW1 George Nyamonge and PW2 Merina George, PW3 Dr. William John Mulai of Muhimbili National Hospital performed a post-mortem examination on the body of Mwita Maseke- the deceased. The report, put in evidence during the preliminary hearing as Exhibit 1, shows the deceased to have sustained cut wounds on the chin, one cut wound on the right arm and one cut wound on the wrist of the right arm as well as two cut wounds on the left arm. The cause of death is given as haemorrhagic shock.

In a rather long and detailed defence the appellant narrated the events at or the prize giving ceremony in the same way as PW1 and PW2. The appellant further testified he left the ceremony house at the time mentioned by PW1 and PW2 and in the company of PW1 and PW2. The

prosecution evidence does not shed light on the lighting at the scene. It is the appellant in his defence who elaborates on the lighting at the scene when he says:-

"We decided to have (sic) and before leaving we had to give gifts so as table was prepared outside and a lamp."

The above extract shows the source of light at the ceremony was a lamp, though what type of lamp is not shown. In his defence, the appellant showed that it was him and the deceased who oversaw the prize giving ceremony when he said:-

"Then I and Marwa were the one who were accepting the presents until all the presents were given".

In his defence, the appellant acknowledged that a fight ensued at a place a bit removed from the ceremony house when he says:

*"And while in the same area Julius Kalambo and others I did not know **followed us** and told us not to leave with bottles and Marwa Maseke insisted to leave and with bottle as he till have beer. A quarrel erupted (sic) and Kilambo told Marwa and two others come to take the bottles from him and they had a fight and I interviewed and asked them to tell us to go with the bottles and we will return the bottles and also I separated those who were fighting and I saw the wife of Maseke falling down and didn't (sic) what was going and also Maseke has fall down and on picking him we noted that Maseke was injured and we carried him up to Kitunda and I could see a wound on the right arm (sic)."*

A defence witness, DW2 Marwa Protas acknowledged his own presence and that of the appellant during the ceremony and up to the time himself and the appellant left the ceremony. The testimony of DW2 Marwa

Protas tends to show that there was only one fight, and that it was between the deceased and Kalambo and that it was during this fight that the deceased was wounded. DW2 Marwa Protas helped take the deceased to Kitunda from where the deceased's brother took the deceased to hospital.

In a well-researched judgment, authority wise, the learned trial High Court Judge based his judgment on two basic premises. The first premise is that the case before her was based on positive identification of the perpetrator of the crime. She discussed the law on identification very exhaustively and came to the opinion that the appellant was positively identified at the scene of the crime. The second premise upon which the learned trial High Court judge based her opinion is the statement which the deceased recorded at Kitunda Police post prior to his death. The trial High Court judge took this statement to be dying declaration purportedly made under section 34(a) of the Evidence Act, Chapter Six R.E. 2002 of the Laws. The defence had disputed the introduction of the statement of the deceased as a dying declaration because it fell short of the requirements of section 34B (2), of the evidence. The learned trial High Court Judge

seemed to accept the argument of the defence that the statement fell short of the requirements of section 34B (2), but decided the statement fell under section 34 (a) of the Evidence Act. The relevant part of the judgment reads thus"

"...It is my opinion that the statement has conveyed (sic) these limitations and the statement falls within the scope of section 34(a) of T.E.A. I don't agree with the defence counsel that the statement falls within the scope of section 34B (2) of TEA because it is merely in writing then it must be subjected to section 34B (2) of TEA. Dying declaration can either be given orally or even in writing...."

Mr. Wilson Ogunde for the appellant argued ground number 1,2 and 4 together since they all raise a general complaint of misdirection on the facts and law on the part of the trial court. As a first appellate court, we have the duty of re-evaluating the evidence adduced in the trial court. In **SIZA PATRICE versus THE REPUBLIC**, Criminal Appeal No. 19 of 2010 (unreported) this Court had occasion to say:-

"We understand that it is settled law that a first appeal is in the form of a rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary..."

Again, in

1. MARAMO S/O SLAA HOFU	} APPELLANTS
2. TSAQUWARA S/O NGAIDA		
3. DAHANA S/O BURA		
4. MATLE S/O QWANG		

Versus

THE REPUBLIC RESPONDENT

This Court made the following observation :-

*"We are aware of the rule that usually the trial court is best placed to determine the credibility of witnesses (See **AUGUSTINO KAHANYA ETHANOS NYAMOGA AND WILLIAM MWANYENJE V REPUBLIC** (1994) TLR 16 (CA). This is specially so where the decision of the case is wholly based on the credibility of witnesses such as the present one) See ALI **ABDALLAH RAJABU V SAADA ABDALLAH RAJABU AND OTHERS** (1994) T.L.R 132. But it is also settled law that the*

*duty of the first appellate court, such as what we are now, is to reconsider come to its own conclusions bearing in mind that it never saw the witnesses as they testified (see **PANDYA V. REPUBLIC** (1957) EA 336.”*

We did not see PW1 George Nyamange and PW2 Merina George while each was testifying in Court. The trial court took their evidence and found them to be credible witnesses. Both witnesses testified that they left Kalambo's house in the company of the deceased while the deceased and PW2 Merina George were carrying bottles of beer against instructions given by Kalambo. Both witnesses testified that Kalambo followed PW1, PW2, and the deceased to a place just near Kalambo's house where Kalambo fought with the deceased over the bottles of beer which the deceased had taken. Both witnesses testified that the appellant joined them after PW1 George Nyamonge had separated Kalambo from the deceased. **None of the two witnesses testified that Kalambo had left the scene.** Both witnesses testified that on joining them the appellant asked "Nani anamsumbua Kalambo? After which the appellant grappled with the deceased. PW1 George Nyamonge testified that the appellant went back

to Kalambo's house and came therefrom with a knife with which he stabbed the deceased repeatedly. PW1 does not mention what the appellant did after the deceased was injured, but his wife PW2 Merina George testified that the deceased ran away.

A different, and opposite story emerges from the defence. The appellant, while testifying in his own defence, alleged that those who left the scene together were himself, DW2, Marwa Maseke and his wife and PW2 Merina George. The appellant alleged that PW1 George Nyamonge was not in the group which left together after the "soup giving" ceremony at Kalambo's house. He was emphatic about this. During cross-examination by the State Attorney he said.

"I know PW1, who is a relative of deceased. He was not present during the fight. Only his wife was present."

Marwa Protas testified for the defence. He mentions only one fight between the deceased and Kalambo. In his defence the appellant testifies that he is one of the persons who took the deceased to Kitunda Police

Station. This statement was not contradicted by the prosecution. The evidence of PW4 F2255 PC Mboka does not shed any light. He testified he received the deceased who had wounds from relatives. There was a question from the appellant's advocate during cross-examination which elicited the following reply from PC Mboka:-

"There were a lot of people and I didn't ask them their names and address."

In his defence the appellant claimed that he was arrested at about 3 a.m. which is about six hours after the fight which resulted into the death of the deceased. While he was in police remand custody, the appellant claims to have seen Kalambo who was also under arrest but only him was charged with the murder of the deceased fourteen days later.

Given these circumstances it was very important that the trial court makes a finding of fact on how many fights were there, and who was at the fight or fights. The trial court would have been able to make a sound finding only after considering both the prosecution and the defence

versions of the fight. The last paragraph of the trial court's judgment opens with the following words:-

"Finally after full analyze (sic) prosecution evidence and defence evidence I am satisfied that prosecution evidence have proved beyond reasonable doubt that accused person Mwita Sangali with malice a forethought caused the death of Marwa Masele by unlawful act of inflicting wounds in his body by stabbing him with a knife five times and the wounds were caused (sic) of the death by haemorrhage shock..."

We are of the opinion that where there is a conclusion that **a full analysis of evidence** has been made by a Court to justify a certain finding, such analysis must be shown to exist on the record. In this case empirical analysis of both versions between the prosecution and the defence would have shown how many fights were there, and who was in those fights. The trial court made a finding that PW1 and PW2 was at the scene by observing thus:-

"The defence counsel heard accused himself and his witness admitting that PW1 and PW2 were at the scene of the crime apart from prosecution witnesses. Therefore it is not true that PW1 and PW2 were not present as there is no doubt raised on their presence."

This finding, however, is not, with due respect to the trial court, supported by the record. What the appellant and DW2 Marwa Protas supported in their defence is the presence of PW1 George Nyamonge and his wife PW2 Merina George at the "soup giving" ceremony, and not at the scene where the deceased was stabbed. In view of the dispute on who was at the scene of the stabbing, the trial court ought to have addressed itself on this contradiction by weighing both the prosecution story and the defence. This is the only way in which the trial court would have resolved the conflict on whether the appellant left together with the deceased and Protas Marwa as claimed by the defence, or whether the deceased left with PW1 George Nyamonge and his wife PW2 Merina George, to be joined later

by the appellant after a fight between the deceased and one Kalambo. The failure to consider the defence led to the prosecution story hanging in the air. This Court has emphasized the need for a trial court to consider the defence in order to arrive at a balanced conclusion, and that failure to consider the defence is fatal, and usually vitiates the conviction. Instances where this Court has emphasized the principle are:

1. **MOSES MAYANJA@MSOKE V. THE REPUBLIC,**
CRIMINAL APPEAL NO. 56 OF 2009 (Unreported)
2. **SIZA PATRICE VS THE REPUBLIC** Criminal Appeal No. 19
of 2010 (Unreported)
3. **LOCKHART –SMITH V. REPUBLIC** (1965) E.A. 211

In the case at hand, the central plank of the defence is that the death of the deceased resulted from a fight between the deceased and a person called Kalambo who followed the deceased to the dark area where the fight occurred. Both the prosecution and the defence give the reason for the fight as the anger shown by Kalambo after his instructions to his visitors not to carry beer away from the party house were ignored. The

trial court made a finding that the fight between Kalambo and the deceased occurred. The trial court also made a finding that the appellant joined the group after the fight between Kalambo and the deceased but did not comment on the aftermath of the fight between Kalambo and the deceased. Indeed, no mention was made of Kalambo after his fight with the deceased. Kalambo briefly surfaced in the appellant's defence thus:-

"While they were returning to lock up I found Julius Kalambo in another room and we were not allowed to talk. After 14 days I was charged with the murder of Marwa Maseke".

In answer to a question put to him by the third accessor, the appellant replied:-

"Kalambo was arrested."

This brief mention of Kalambo by the appellant shows that Kalambo was arrested and "locked up" together with the appellant, but only the

appellant appeared in court fourteen days after the arrest. No mention whatsoever is mentioned on how Kalambo freed himself from custody.

The fact that Kalambo was spring out of jail and did not even appear as a witness for the prosecution was the subject matter of argument in the trial court. The trial court made a finding that the presence of Kalambo as a witness was not called for, relying on section 143 of the Evidence Act and the case of **AZIZ ABDALLA VS THE REPUBLIC** (1991) TLR 71. We are in agreement with the trial court on the statement of the law but feel that the court should have gone further in its analysis. We say so because of the contradiction on whether there was one fight or not which the court did not resolve, and also because we learned from the defence that Kalambo was in fact arrested and later released mysteriously. The failure in analyzing both the prosecution and defence cases properly created doubt as to the identity of the real assailant of the deceased.

In view of the shortcomings we have pointed out above, we are of the opinion that grounds 2 and 4 of the memorandum of appeal have merit and are allowed. We therefore find merit in the appeal. The appellant's

conviction is hereby quashed and set aside. We set aside the sentence imposed on him. We order his immediate release from prison unless he is held on some other lawful cause.

DATED at **DAR ES SALAAM** this 30th day of May, 2013.

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL