IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 48 OF 2013

OSCAR NZELANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the
Court of Resident Magistrate at Sumbawanga)

(Dyansobera - PRM, (E.J.))

Dated the 3rd day of August, 2010
in
Criminal Sessions Case No. 19 of 2008

JUDGMENT OF THE COURT

17th & 20th June, 2013

RUTAKANGWA, J.A.:

Oscar s/o Nzelani (the appellant), was convicted by the Court of the Resident Magistrate at Sumbawanga (W.D. Dyansobera - Principal Resident Magistrate with Extended Jurisdiction) of the murder of one Severina d/o Kafola @ Mama Mawela (the deceased). The undisputed murder took place on 8th June, 2005 at Isunta village in Nkasi District. The appellant was sentenced to suffer death by hanging. Convinced of

his innocence, he has lodged this appeal against the conviction and sentence.

The material evidence establishing all the essential ingredients of murder is not in dispute. What is hotly contested, and apparently not without good cause, is the identity of the murderer or murderers. This evidence is briefly, as follows:

The deceased, a widow, and the appellant, had a love affair for quite some time. Prior to her death, the deceased was living with her daughter, PW2 Jane Mawela, at Isunta village (the village), and she had a habit of regularly imbing alcohol. Together with the appellant, they were patrons of PW1 Phillipa Kampehelwa, who used to sell locally brewed liquor at the village.

On the fateful day, an unidentified black and slender young man had called at her residence with a black bag. Then the deceased left in the late evening, telling PW2 Jane that she was going to eat some "Kande" at Kalwana. She never returned home alive. Her dead body was found on the morning of 9th June, 2005 at a playing field, hardly

100 meters from her residence. A report was made to the police immediately. A team of seven police investigators, led by PW3 A.S.P. (then Inspector) Emmanuel Kalinga was dispatched to the scene of the crime.

PW3 ASP Kalinga and his team found the deceased:

> *"lying supine and her legs lying apart. Besides her, there was an underpant, a 'chupi', underskirt and shorts."*

The police investigators also spotted blood oozing from her vagina and also semen on it. They took photographs of the body, which were collectively tendered in evidence as exhibit P1.

When PW3 A.S.P. Kalinga interrogated PW2 Jane, she told him that the deceased had left her home in the company of Pieta Mwanandenje @ Mama Ntengu. The latter used to drink with the deceased. When contacted, the said Mama Ntengu confirmed PW2 Jane's claim but quickly added that she "had left at 20.00 hrs. leaving behind the deceased with Oscar Nzelani, Gidion Chalula, Onesmo Chatanda and Patrick Chamafa". The evidence of PW3 A.S.P. Kalinga is

starkly silent on where the said Mama Ntengu, who for reasons not on record never testified, had left the deceased. Armed with this piece of information, PW3 A.S.P. Kalinga, easily traced the appellant, Gidion, Onesmo and Patrick at their place of work, arrested them and sent them to the police station. PW3 A.S.P. further told the trial court that at the time of his arrest, the appellant was donning a pair of trousers which he (PW3) saw had "a lot of blood and semen at the zip" as well as wet underpants which also had "blood and semen." PW3 ASP Kalinga took possession of those clothes and gave the appellant "other clothes." PW4 No. E 1646 D/Staff Sgt. Phillipo drew a sketch map of the scene of the crime, which he tendered in evidence as exh. P.3. Near the body were faeces, which the investigators found to be of little significance. The body was then taken to Namanyere hospital.

On 10th June, 2005, PW5 Felista Mango, an Assistant Medical Officer, performed a post-mortem examination of the deceased body. The examination was performed in the presence of PW2 Jane and PW3 A.S.P. Kalinga. She opined that the cause of death was "suffocation following raping." She also noted bruises on the deceased face and neck and laceration on the vulva and blood stains. The report on Post-

mortem examination was tendered in evidence as exhibit P.4. On the basis of these facts and information obtained from PW1 Phillipa that the deceased had left her pombe shop at 22.00 hrs. on 8th June, 2005 with the appellant and Gidion, the two were subsequently arraigned for the murder of the deceased, while some clothes and some blood samples, were sent to the Chief Government Chemist for DNA profiling.

The DNA profiling was carried out by PW6 Gloria T. Machuve. Although no witness testified to have taken blood samples from one Grace Mawela, allegedly the daughter of the deceased who never testified, PW6. Gloria testified and indicated in her report (exhibit P5) that the blood stains on the clothes "underwent DNA analysis". The result of the analysis was that "the blood from the clothes of the accused is the blood of the deceased."

In his sworn evidence the appellant had denied murdering the deceased while admitting to have been in love with the deceased, with whom he had regular consensual sexual intercourse. He flatly denied having been in the company of the deceased at PW1 Philipa's pombe shop and/or having seen her on the fateful day. He also unequivocally

rejected PW3 A.S.P. Kalinga's claims that at the time of his arrest he was putting on blood and semen-stained clothes which were taken by PW3. On all this he was supported by his co-accused Gidion. Gidion told the trial court that on the evening of 8th June, 2005, he was with the appellant at the pombe shop and they left together for home. He also denied having been with or seeing the deceased on that day.

On the basis of the evidence of PW1 Phillipa, PW3 ASP Kalinga and PW6 Gloria, the learned trial Principal Resident Magistrate - Extd. Jurisdiction, found the appellant to have been the murderer of the deceased. He rejected the evidence of the appellant while he accepted that of Gidion whom he acquitted.

In this appeal, the appellant is challenging the judgment of the trial court on the basis that:-

(a) the circumstancial evidence on which the conviction was predicated (i.e. the DNA results and the last person to be with the deceased doctrine) was totally inconclusive; and

(b) the defence evidence was wrongly rejected on the basis that it was tainted with falsehood while it was not.

To prosecute the appeal, the appellant appeared before us in person and had the legal services of Mr. Justinian Mushokorwa, learned advocate. For the respondent Republic, which supported the appeal, Ms. Scholastica Lugongo and Mr. Stambuli Ahmed, both learned State Attorneys, appeared.

In his brief but very focussed submission, with which Mr. Ahmed was in agreement, Mr. Mushokorwa strongly contended that the learned trial Principal Resident Magistrate - E.J., wrongly held that the appellant was the last person to be seen with the deceased alive. He invited us to find the evidence of PW1 Philipa alone on which this finding was premised, to be materially contradictory as to lack any probative value.

We have carefully read the evidence of PW1 Philipa and we are in agreement with Mr. Mushokorwa and Mr. Ahmed that her evidence standing alone left much to be desired. In her very brief evidence in chief, she testified that on the fateful day, the deceased arrived at her

pombe shop with "people including the two accused." She did not disclose the time of their arrival. But she went on to tell the trial court that:

> *"After they had drunk at about 22.00 hrs. two men (accused) and a woman (deceased) left."*

This is the piece of evidence, which very much influenced the learned trial Principal Resident Magistrate, to the extent of holding in his judgment that:

> *"The deceased was last seen alive in the company of the accused persons. The 1st accused was her lover. The 1st accused refused or failed to give any explanation of how the deceased mysteriously disappeared from his company. He did not even tell this court when and how he parted company with the deceased. It is a wonder if the 1st accused had nothing to do with the death of the deceased one would certainly expect him to say at what point he parted company with the deceased that night* ***after having set out from the club together. The accused gave a false statement that he was not with the deceased on 8.6.2005****."*
> *[Emphasis is ours.]*

After reading the entire evidence of PW1 Philipa, the appellant and DW2 Gidion, which we respectfully believe the learned trial Principal Resident Magistrate appears not to have read objectively, we have found his above reasoning unconvincing. As we have already shown, the appellant had denied being in the company of the deceased on the day or seeing her at all. On this he was supported by DW1 Gidion, whose evidence was believed. Since DW1 Gidion testified to have been with the appellant throughout and left the pombe shop with him alone and was believed, it is inconceivable that the denial of the appellant of not having been with the deceased on that evening could be safely held to be a "false statement." Moreover, the appellant had no duty to prove his innocence. The denial of the appellant was supported by a witness (DW1) whose word was believed by the trial P.R. Magistrate. PW1 Philipa and DW2 could not both have been telling the truth on this issue at the same time. On the other hand, the allegation of PW1 Philipa was not supported by anybody. We are saying so deliberately but not that her evidence, on the face of it, needed corroboration. We shall elaborate.

It was PW1 Philipa's evidence that after the alleged departure of the appellant, Gidion and the deceased at about 22.00 hrs, she had remained at her pombe shop doing business until midnight when she went to sleep. This means there were other people buying and drinking her "pombe". If indeed the deceased had been there with the appellant and DW2 Gidion, definitely they would have been seen by these other customers of PW1 Philipa, and at least one or two of them, who were the last to leave, would have testified to that effect. Indeed, PW1 Philipa, while under cross-examination, told the trial court that:

> *"On that material day there were many people, about 60."*

That none of these 57 material or essential witnesses testified, in respect of such a serious offence, leads to an irresistible inference that had they testified they would have given evidence belying PW1 Philipa, that is, adverse to the prosecution: See, **Soda Busiga @ Sumu ya Mamba v.R.,** Criminal Appeal No. 58 of 2012 (unreported). It is our finding, therefore, that had the learned trial P.R. Magistrate evaluated the entire defence evidence together, he would not have readily taken the word of PW1 Philipa against the appellant at its face value.

That PW1 Philipa might have lied against the appellant to save her own neck or of the real culprit, is put beyond doubt by her evidence while under cross-examination, the evidence which was never considered by the learned trial P.R. Magistrate in his assessment of the credibility of PW1 Philipa. It is trite law that in assessing a witness' credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and/or implausibility; or if it is entirely consistent with the rest of the evidence on record: See, for instance, **Shabani Daudi v. R.,** [CAT] Criminal Appeal No. 28 of 2000 (unreported) and **Soda Busiga** (supra).

Answering questions from the defence counsel, PW1 Philipa said that on that day, the deceased was "drunk" while the "accused was sober." But the most telling aspect was her evidence that the "three men", that is the appellant and Gidion, etc, were the first to leave while the deceased remained behind and left shortly later. No iota of evidence was led to show that the "drunk" deceased overtook the "sober" appellant and his colleague(s) who had left earlier. Nobody testified to have seen the appellant and the deceased together after they had each separately left the pombe shop of PW1 Philipa, if her

evidence were to be believed. It goes without saying, therefore, that the claims of the appellant being the last person to be with the appellant have no factual basis. These claims do not add up. The learned trial P.R. Magistrate, therefore, misdirected himself when he held that the deceased and the appellant "set out from the club together." Going by the categorical piece of evidence of PW1 Philipa, it can be held without any risk of being contradicted that as between the appellant and PW1 Philipa, the last person to be with the deceased alive was PW1 Philipa and not the appellant. This is further confirmed by PW1 Philipa when she testified that the deceased "bade farewell that she was leaving." This was after the departure of the appellant. So rather than burdening the appellant with giving an "explanation of how the deceased mysteriously disappeared", such a burden ought to have been directed to PW1 Philipa, if she was not lying, or Mama Ntengu. At any rate, in view of the implausible evidence of PW1 Philipa, the greatest probality is that the deceased was waylaid by other marauders and lavished to death as Mr. Mushokorwa convincingly argued. After all, she had left her home in the company of Mama Ntengu, who for unknown reasons never testified. The question where Mama Ntengu took the deceased and the mission of the "black and slender young man" who had visited

her home, remain unsolved. Could they have been behind the death of Severina?

Notwithstanding the above findings, we are alive to the fact that the prosecution had also relied on the evidence of PW6 Gloria, a DNA expert. As we have alluded to already, PW3 ASP Kalinga testified that he:

> *"took the blood sample of all four suspects and took all of them to the Government chemist for analysis."*

He never mentioned when and by what means he did so. Worse still, in his entire evidence he also never stated to have sent any of the appellant's clothes to the Chief Government Chemist. Indeed, he never even alluded to the DNA profiling exercise, be it of blood or clothes at all. The word DNA and the name of Gloria Machuve never came out of his mouth in his entire evidence.

In spite of the lacuna in PW3 A.S.P. Kalinga's evidence, PW6 Gloria testified, while under cross-examination, that in 2005 she had "received some exhibits, that is blood of the accused and the blood of the

deceased," which unfortunately, "did not yield fruitful results." They were accordingly destroyed.

All the same, PW6 Gloria went on to testify that she subsequently received other samples which included the blood sample of one Grace Mawela, who was said to be the daughter of the deceased. She analysed the said blood and the blood on the pair of trousers, T-shirt and a "chupi". She got good results and thus concluded:

> *"The DNA from the daughter of the deceased and from the clothes of the accused tallied."*

In all sincerity, we must confess more in sorrow than in fear of dismaying anybody that we have found this evidence highly suspect and unreliable. This is on account of the genuine suspicions, expressed by Mr. Mushokorwa both in the trial court and before us, on the source and therefore autherticity of the analysed samples of blood and clothes. The suspicions centre on these nagging but pertinent questions which remain unanswered. Who is this Grace Mawela and when was her blood sample taken and by whom? The other evidence on record shows that the daughter of the deceased was PW2 Jane. Neither PW1 Philipa, PW2 Jane, PW3 ASP Kalinga nor PW5 Felista (a self - confessed neighbour

and friend of the deceased) testified that the deceased had another daughter by the name of Grace. If Grace was in existence and her blood sample was taken in the process of tracing the deceased's murder why did she not testify? Who stored her blood sample and subsequently took it to the Chief Government Chemist for analysis? We have learnt from the evidence that at the trial of the appellant, Mr. Mushokorwa had raised these questions while cross-examing PW6 Gloria. In reply she said:

> *"It is not my duty to follow up the collection of exhibits."*

She cannot be blamed. She received, analysed them and reported accordingly, regardless of the gunuineness of their source.

The blood samples apart, we found ourselves greatly perturbed by the way the other potential exhibits were handled. Even if we assume that the appellant's blood-cum-semen stained clothes were taken by PW3 ASP Kalinga, we have traced no scintilla of evidence on record to convince any objective observer that these were the very clothes which were analysed by PW6 Gloria and formed the basis of her report (Exh. P5) which was prepared in February, 2008. Who had stored these

clothes and how, so as to remove any possibility of substitution or tampering? Who took them to the Chief Government Chemist?: See, **Abuhi Omari Abdallah and Three Others v.R.,** [CAT] Criminal Appeal No. 28 of 2010 (unreported), in which it was held that failure to lead evidence providing a "foolproof chain of custody" of potential exhibits is fatal to the prosecution case.

Going by the evidence PW6 Gloria, only specimens which do not "yield good results" are disposed of. Since the alleged appellant's clothes yielded "good results", we should safely assume they were preserved. In that case why were they not tendered in evidence to reinforce the findings of PW6 Gloria? We are posing this question deliberately. This is because PW1 Philipa was specific in her evidence on the type of clothes the appellant was putting on the fateful day. Were the clothes PW1 Philipa saw the very ones analysed by PW6 Gloria? Incidentially, she mentioned a red shirt and not a T-Shirt. Were the clothes, the subject of PW6 Gloria's evidence, the very ones taken by PW3 ASP Kalinga from the appellant? Positive answers to these questions were unavoidable before predicating the conviction on PW6 Gloria's evidence. This is all because both the appellant and DW2 Gidion

had unequivocally stated that the clothes the appellant was putting on at the time of arrest had neither blood nor semen traces on them. It was, therefore, the duty of the prosecution to prove beyond reasonable doubt that the clothes which PW6 Gloria analysed were the very ones which were taken from the body of the appellant and not otherwise. This they completely failed to do. We have been forced to hold so because the evidence on record shows that prior to her death the deceased had in her custody the appellant's clothes at her home which she had retained for washing. Both PW2 Jane and PW3 ASP Kalinga conceded that much.

In conclusion, we hold without demur that the evidence of PW1 Philipa to the effect that the appellant was the last person to be with the deceased is unreliable as it is self-contradictory and is also contradicted by that of DW2 Gidion, a competent witness, whose evidence was accepted by the trial court. Furthermore, we have found the DNA profiling evidence totally unsafe to rely on as it was not proved that the analysed clothes belonged to the appellant and/or if they were his, were the very ones he was allegedly wearing at the time of his arrest. In our respectful opinion, had the learned trial Principal Resident Magistrate-

Extended jurisdiction, considered these glaring shortcomings, he would not have readily concluded that the only circumstantial evidence against the appellant irresistibly led to his guilt. On account of these deficiencies, the respondent Republic, through Mr. Stambuli Ahmed, found itself constrained to support the appeal.

In fine, we hold that the appellant was wrongly convicted for the murder of Severina d/o Kafola @ Mama Mawela. We accordingly allow his appeal in its entirety. The murder conviction and the death sentence imposed on him are hereby quashed and set aside. He is to be released forthwith from prison unless he is otherwise lawfully held.

DATED at **MBEYA** this 19th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL