IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.

CRIMINAL APPEAL NO.76 OF 2014

LUSUNGU DUWE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mbinga.)

(Chocha, J.)

dated 30th May, 2012
in
Criminal Sessions Case No. 5 of 2010.
.....

JUDGMENT OF THE COURT

12th & 16th June, 2014

MMILLA, J.A.:

Lusungu s/o Duwe was charged with murder c/s 196 of the Penal Code Cap 16 of the Revised Edition, 2002 before the High Court sitting at Mbinga, it having been alleged that he murdered one Stephano s/o Joseph Chale. He had protested his innocence.

After considering the evidence of the 5 prosecution witnesses and appellant's defence, the trial High Court was satisfied that the said evidence established the offence of manslaughter and not murder. It convicted the

appellant of that offence and sentenced him to 10 years' imprisonment term. The appellant was aggrieved, hence the present appeal which is against both, conviction and sentence.

The background facts of the case were that, on 1.7.2009 PW1 Tadei Damas Nombo and the deceased repaired the motor vehicle of Barnabas Yohana Zilinde. After they were through, the two of them and the owner of the motor vehicle, the said Barnabas Yohana Zilinde who unfortunately did not testify but his statement was tendered as Exh. P3, drove that motor vehicle to Ngo'mbo village which was 22 kilometres away from their garage. On their way back to where they came from, they saw a seemingly drunk person on the road who sort of blocked the road. They tried their level best to avoid him but that person kept on coming their way. They were forced to plunge the vehicle out of the road to save that person's life. To their dismay, despite efforts to avoid him, that person broke the motor vehicle's site mirror after which he ran away. They gave a chase and succeeded to apprehend him after which they demanded to be paid T. shs 50,000/= for the broken site mirror. He refused. They decided to take him to police. In that he was resistant and violent, they tie his hands together in order to prevent him from jumping out of the vehicle and left the place.

After covering a short distance from there, they stopped to allow one of their passengers to alight and give him his luggage. Whilst there, the Village Executive Officer of Ng'ombo village one Frank Sylvester Chintawi (PW2) arrived at that place and told them that they had no authority to take any person from his jurisdiction without his permission and asked them to release that person but they resisted. Upon that refusal, PW2 left the place but came back about 5 minutes later with a seemingly violent group of people. PW1 and his colleagues found themselves surrounded by that group of people which blocked the road with logs both in front and behind, thus preventing them from leaving the place. After that, the group started beating them. Those assaulted included the owner of the vehicle and the driver of that motor vehicle. The group was demanding the release of the "prisoner". Then, the deceased was seated on the back of the motor vehicle. People kept on flocking at the scene, amongst which late comers was the appellant who was seen holding a fairly thick log. He threatened to smash the window screen of that motor vehicle but changed his mind and went to the place where the deceased was seated and hit him with the weapon he had, dealing his victim a terrible blow that sent him rolling on the ground unconscious. After that the appellant ran away. Meanwhile, PW1 and his colleagues picked the deceased who was still alive, put him in the motor vehicle and left the place. They

drove straight to Police Station at Mbambabay at which after reporting the incident, they collected the PF3 and rushed to hospital. On 2.7.2009 at around 02.00 hours, the deceased died. They reported the death to police.

The first thing the police did was to go to the scene of crime in the company of PW1 and look for persons who were mentioned by the latter, of whom PW2 was one. PW2 named the appellant to the police as having been the person who had attacked the deceased. The appellant was traced, found and subsequently charged with murder, as it were.

Before us, the appellant was represented by Mr. Jackson Abraham Chaula, learned advocate, while the respondent/ Republic was represented by Mr. Renatus Mkude who was assisted by Mr. Shaban Mwegole, learned State Attorneys who expressed support of conviction on the offence of manslaughter as was found by the trial High Court and the sentence that resulted.

The memorandum of appeal filed by Mr. Chaula on behalf of the appellant raised 3 grounds; **one** that, appellant's conviction was anchored on insufficient evidence of identification given the fact that the deceased was killed in a mob justice episode; **two** that, PW2's evidence was wrongly relied

upon having been an accomplice; and **three** that, there was no sufficient evidence to establish the offence of manslaughter.

In the course of hearing the appeal, Mr. Chaula implored the Court to allow him to add one more ground of appeal, a prayer we granted on account of there having been no objection from the Republic. The additional ground alleges that the High Court improperly relied on the contradictory evidence of PW1 and PW2 in founding appellant's conviction of the offence of manslaughter.

We wish to point out at this juncture that for purposes of convenience, we intend to discuss the crucial ground touching on the aspect of identification together with the second ground that PW2's evidence was wrongly relied upon having been an accomplice.

The general principle regarding evidence of visual identification is that in order to ground a conviction on such evidence, the court must be satisfied that it is absolutely water tight, also that all possibilities of mistaken identity have been eliminated. See the case of **Waziri Amani v. Republic** [1980] L.R.T. 250. The rationale is that if not properly vouched, such evidence can bring about miscarriage of justice. See the case of **Philipo Rukaiza @**

Kichechembogo v. Republic, Criminal Appeal No. 215 of 1994, CAT, (unreported).

In our present case, two witnesses testified on the point; PW1 Tadei Damas Nombo and PW2 Frank Sylvester Chintawi. Both of them testified that the appellant was the person who hit the deceased with a thick log resulting into the latter's death.

In his submission however, Mr. Chaula urged us to hold that the evidence of those two witnesses on this point was erroneously relied upon by the trial High Court for reasons he assigned. While he urged us to fault the trial High Court for having believed and relied on the evidence of PW1 merely because he had not known the appellant before that day and no identification parade was held to afford him opportunity to identify the suspect, he similarly invited us to find and hold that the evidence of PW2 was not correctly believed and relied upon on account that he was an accomplice, therefore that he could not have given rational evidence, justifying that he had cause to implicate the appellant in order to exonerate himself.

On his part, Mr. Mwegole maintained that the trial High Court properly believed and relied on the evidence of those two witnesses for reasons he assigned. We hasten to say that we agree with him.

In the first place, the charged incident occurred in broad daylight, that is at around 17.40 hours, therefore that both PW1 and PW2 were in a better position to identify the person who inflicted the fatal blow on the deceased.

Secondly, the fact that the appellant was there at the scene of crime was not at all in controversy. This is particularly so when it is noted that the appellant himself was express that he was indeed there at the scene of crime though he qualified that he left the place before deceased's assault.

Thirdly, while PW1 maintained all through his testimony that he saw the appellant at a very close range striking the deceased with a log after which he ran away, and that he knew his name after it was mentioned to them by PW2 soon after the incident; PW2 testified on the other hand that he saw the appellant, a person he had known for a long time because they lived in the same locality, striking the deceased with a log, and that he ran away soon after that.

In our firm view, the submission by Mr. Chaula that PW2 could have purported he identified the appellant as the person who hit the deceased in order to save his own skin having been previously charged along with the appellant of that offence does not hold water because the record shows that

he named the appellant to PW1 and his team soon after the incident, and also that he did the same thing to the police after they followed him at Ng'ombo village soon after news reached them that the deceased had died, which was well before any steps were taken to implicate and subsequently charge him along with the appellant. In our strong opinion, that dispels prejudice. It should be appreciated, as was expressed in **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39 at page 43, that the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry. In the premises, we find and hold that the trial High Court properly believed and relied on the evidence of those two witnesses.

Also, though we agree with Mr. Chaula that PW2 was an accomplice, we are strongly opposed to his view that his evidence generally ought to have not been believed and relied upon on that basis alone. We are saying so because that is contrary to the spirit of section 142 of the Evidence Act Cap 6 of the Revised Edition, 2002 which is to the effect that an accomplice shall be a competent witness against an accused person; and conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, we are aware that as a matter of practice, such

evidence should be taken with due care, or that it may require corroboration. See the cases of **Mwinyi Mohamed Abdalla v. SMZ** [1988] T.L.R. 37 (CA) and **Patrick Jeremiah v. Republic,** Criminal Appeal No. 34 of 2006, CAT, (unreported). We are comfortable that in our present case, the evidence of PW2 was corroborated by that of PW1.

In view of the reasons we have assigned, we find and hold that the first and second grounds of appeal are not well grounded and we dismiss them.

Next is the additional ground that the High Court improperly relied on the contradictory evidence of PW1 and PW2 in founding appellant's conviction of the offence of manslaughter.

Mr. Chaula cited one area of what he regarded as a contradiction between the evidence of PW1 and PW2. That evidence related to events after PW2's arrival at the scene of crime. While PW1 testified that PW2 arrived at the scene of crime at the time they had stopped to offload the luggage of one of their passengers and queried that they had no authority to take any person from his jurisdiction without his permission, also that he asked them to release that person, further that he left the place upon their refusal to release that person only to come back about 5 minutes later accompanied by a seemingly violent group of people; PW2 was recorded to have said that on

arrival at the scene of crime he found a motor vehicle which was surrounded by many people carrying one Benjamin Mbelile whose hands were tied together, and that they left soon after his inquiry as to the reasons for taking that man away, only to stop upon covering about 10 paces because Veronica Msema and Vicent Yusufu stopped the motor vehicle. Mr. Chaula maintained that that evidence constituted a fundamental contradiction.

On his part however, Mr. Mwegole submitted, rightly so in our view, that the contradiction was not material to the case, therefore that it was a minor one supposed to be ignored. We will illustrate our support.

We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case. See **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, CAT, (unreported). It was stated in that case that in all trials, normal contradictions and discrepancies are bound to occur in the testimonies of the witnesses due to normal errors of observation, or errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. The Court added that material contradictions are those which are not normal and not expected of a normal person, and that courts have to label the category to which a contradiction, discrepancy or

inconsistency may be categorized. Minor contradictions, inconsistencies, or discrepancies which do not affect the case of the prosecution, it went on to say, should not be made a ground on which the evidence can be rejected in its entirety. While minor contradictions and discrepancies do not corrode the credibility of a party's case, material contradictions and discrepancies do.

We have no hesitation to state here that the contradiction cited in the present case was not material as it could not deflect the fact that Stephano s/o Joseph Chale was dead. We are saying so because, whether or not PW2 was the one who came back to the scene with the angry mob is immaterial. What was important was existence of evidence tending to show that the appellant was the one who inflicted the fatal blow on the deceased that led to his death. Thus, this ground is similarly baseless and we dismiss it.

The last ground for our consideration is the complaint that there was no sufficient evidence to establish the offence of manslaughter. Unfortunately, Mr. Chaula did not offer elaborations, so did Mr. Mwegole.

The offence of manslaughter is deemed to be proven where the prosecution advances evidence capable of establishing that:-

1. The deceased had died.

2. The death of the deceased was unlawfully caused by the accused, and
3. The unlawful act or omission which caused death of the deceased was unintentional and without knowledge that death or grievous bodily harm was a probable consequence.

As was properly pointed out in the judgment of the trial High Court, the appellant in the present case was the person against whom evidence showed that he inflicted the fatal blow on the deceased, and that though he employed a thick log in executing his intention to punish one of the captors of his uncle, he did not premeditate to kill the deceased which is a salient ingredient of murder. This is why, in our well-grounded view, the trial court properly found that the offence of manslaughter was established, hence the justification to reduce the offence of murder to a lesser offence of manslaughter. In the circumstances, we have no cause to fault that court on that finding. In consequence, this ground too lacks merit and is hereby dismissed.

However, we have two observations to make in the passing before we may take leave; firstly the fact that the trial judge did not first acquit the appellant on the charge of murder before finding him guilty of the offence of

manslaughter, and secondly that he inadvertently cited section 196 of the Penal Code as being the basis of conviction of the substituted offence of manslaughter.

We need not dwell much on this point, but we have a duty to concisely point out that procedurally, the trial judge ought to have had first acquitted the appellant of the charge of murder before he proceeded to convict him on the lesser offence of manslaughter. See the case of **Inspector Baraka Hongoli & 2 others v. Republic**, Criminal Appeal No. 238 of 2014, CAT, (unreported).

Also, it is beyond controversy that the trial court was not keen when it founded appellant's conviction for the offence of manslaughter under section 196 of the Penal Code which enacts for the offence of murder, instead of the appropriate section 195 of the same Act.

In our view however, both errors were minor because they did not work injustice in the case or that they did not go to the root of justice, and that they were cured by the fact that focus was on manslaughter as mirrored by the sentence which was imposed. We leave it at that.

In conclusion, we are satisfied that for reasons we have dispensed, the trial court properly held that the prosecution proved its case beyond reasonable doubt and we have no reasons to interfere with that finding. We thus dismiss the appeal in its entirety.

DATED at IRINGA this 16th day of June, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL