IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: OTHMAN, C.J., LUANDA, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 264 OF 2014

1. **JULIUS MICHAEL**
2. **MARICK JUMA HEMED**
3. **GABRIEL MICHAEL** } **.....APPELLANTS**
4. **THIOTIM THADEI MUSHI**
5. **EMMANUEL JOHN KIMARO**

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Makuru, J.)

dated 2nd day of May, 2013
in
Criminal Session No. 38 of 2008

JUDGMENT OF THE COURT

23rd & 31st October, 2014

OTHMAN, C.J.:

The appellants were tried on an information of murder, of Christian Ngambani Mboya under section 196 of the Penal Code, Cap 16 R.E. 2002 by the High Court (Makuru, J.) on

02/05/2013. Each was sentenced to the mandatory sentence of death. Aggrieved, they have preferred this appeal.

In an armed robbery, the deceased was attacked by a group of armed assailants at his son's (PW1, Prosper Mbuya) grocery store on 17/07/2006 at 22:00 hrs at Katanini, Kibosho Road, Moshi District. He was injured, immediately admitted to hospital and discharged. He succumbed to death on 01/01/2007, five months and seventeen days later. Prior to the deceased's death and the appellants' conviction for his murder by the High Court, the appellants were charged with armed robbery c/ss. 285 and 286 of the Penal Code by the District Court of Moshi at Moshi in Criminal Case No. 650 of 2006. Therein the 1st, 2nd, 3rd, 4th and 5th appellants were, respectively, the 1st, 2nd, 3rd, 11th and 10th accused. The District Court convicted the 1st, 2nd, 3rd and 4th appellant and acquitted the 5th appellant. On appeal, in (DC) Criminal Appeal No 55 of 2007, the High Court (Mugasha, J.) on 28/8/2008 acquitted all the four appellants.

At the hearing of the appeal, the 1st appellant was represented by Mr. John Shirima, learned Advocate and the 2nd, 3rd, 4th and 5th Appellants were represented by Mr. Ronilick Mchami, learned Advocate. The respondent Republic, which supported the appeal was represented by Mr. Patrick Mwita, learned State Attorney.

Having closely examined the record and the parties submissions, we are of the considered view that ground 5 of the 1st appellant's appeal is decisive in the disposal of the appeal. Paraphrased, it reads:

> *"That the trial High Court Judge grossly erred in law and fact to convict the appellants basing on identification by PW1, PW2, PW3 and PW4 at the scene of the crime, while the same had already been dealt with by the same court in (DC) Criminal Appeal No. 55 of 2007".*

Mr. Shirima submitted that in this case, the appellants' visual identification as an issue of fact was the same as that resolved in (DC) Criminal Appeal No 55 of 2007. That the former Court found out that the visual identification was not favourable for the appellants' correct identification. It had held that they were not properly identified. That the doctrine of issue estoppel applied in the instant case and the prosecution had misdirected itself in bringing a new PW1, PW2, PW3 and PW4's evidence of visual identification to contradict the High Court's earlier finding of fact. The prosecution was barred from bringing that evidence, which was an issue of fact previously determined in the appellants' favour by the same Court in (DC) Criminal Appeal No. 55 of 2007, and a court of competent jurisdiction. He invited the Court to allow the appeal in respect of the 1st appellant.

Mr. Mchami agreed with Mr. Shirima's submission. He added that the High Court had erred in finding that in (DC) Criminal Appeal No. 55 of 2007, the appellants were acquitted

on technicalities of the law. That the issue of the appellants' visual identification was properly addressed and the court held that they were not properly identified at the scene of the crime. The appellants' appeal was allowed by the High Court because that was no evidence or weak evidence of visual identification. Mr. Mchami further contended that the learned Judge in (DC) Criminal Appeal No 55 of 2007 was conscious of the principle of double jeopardy and had refused to order a retrial. He called for the appeal by the 2nd, 3rd, 4th and 5th appellant to be allowed.

In response, Mr. Mwita supported the appeal, but for different reasons. He disagreed that any double jeopardy was involved in this case. That following the unnatural death of the deceased, the prosecution was entitled to institute an information for murder against the appellants arising out of the armed robbery, which was the same transaction that led to the deceased's death. Relying on **Emmanuel Ndendeni and Another v. R**, Criminal Appeal No 86 of 2008 (CAT,

unreported), he submitted that on his appeal the visual identifying conditions were doubtful and not favorable for the appellants' correct and unmistaken identification.

The prime question for determination in ground 5 of the appeal is whether or not the doctrine of issue estoppel, operated against the prosecution's visual identification evidence in this case?

In **Issa Athumani Tojo v.R.** [2003] T.L.R. 199, the Court found out that the doctrine of issue estoppel is applicable in criminal trials. It held:

> *"where an issue of fact has been tried by a competent Court on a former occasion, and a finding has been reached in favour of the accused, such finding would constitute an estoppel against the prosecution, and thus evidence to disturb that finding of fact when the accused is tried subsequently,*

even for a different offence, will not be received".

In **State of Andhra Pradesh v. Kokkiliaada Meerayya and Another** (1968) INSC 300, AIR 1970 SC 771, the Supreme Court of India also explained the doctrine this way:

> *"The rule of "issue estoppel" prevents relitigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of a transaction a transaction has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which required the Court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is*

prohibited by the rule of issue estoppel". (See, also ***Pritam Singh v. State of Punjab****, AIR 1956 S.C.R. 415).*

In Canada where the doctrine of issue estoppel is part of Canadian Criminal Law, the Supreme Court of Cananda, in **R.v. Mahalingan** (2008) 3 S.C.R 316, paras. 2, 38-42, gave the following reasons as its rationale:

"Issue estoppel serves three purposes, and all integral to a fair criminal justice system: (1) fairness to the accused who should not be called upon to answer questions already determined in his or her favour; (2) the intergrity and coherency of the criminal law; and (3) the institutional values of judicial finding and economy".

In **Issa Athumani Tojo**, one of the key issues in the appellant's second trial was identical as that in the first trial, namely, whether the appellant and his co-accused had been

in possession of a rifle. The learned Judge on the first trial had answered the issue in the negative. In the second and subsequent trial, the prosecution sought to lead evidence to establish that the appellant and his co-accused were found in possession of that rifle. The Court held that the prosecution was estopped in the second trial from seeking to prove that contrary to the High Court's earlier finding, that the appellant and his co-accused were found in possession of that rifle. The prosecution was bound, it said, to accept the correctness of that finding and was precluded from taking any steps to challenge it in the subsequent trial. (See, also, **Joseph Keneth Ngole and 3 Others v.R.**, Criminal Appeal No. 99, 100, 101 and 102 of 1999, CAT, unreported).

Going by the Judgment of the District Court in Criminal Case No 650 of 2006 and that of the High Court in (DC) Criminal Appeal No 55 of 2007, the prosecution's key witnesses who were at the scene of crime during the armed robbery were PW1 (Prosper Christian); PW2 the deceased;

(Christian Ngabana); PW3 Didas Mboya; PW4 (John Christian) and PW5 (Gloria Pius). Central to their evidence was the appellants' identification by these witnesses on the night of the armed robbery by moonlight and a *chemli* lamp inside PW1's grocery store. The District Court held that the 1st, 2nd, 3rd and 4th appellant had been properly identified and convicted them of armed robbery c/ss. 285 and 286 of the Penal Code. It acquitted the 5th appellant. On appeal, in (DC) Criminal Appeal No. 55 of 2007, the High Court held that the 1st, 2nd, 3rd and 4th appellants' visual identification evidence by moonlight and a lantern was not favourable for their easy and unmistaken identification. It quashed and set aside their convictions and sentences. As no appeal was preferred by the prosecution against that judgment, it stands.

Now, in this case, which arises out of the same fateful events of 17/07/2006 at PW1's grocery store, the key prosecution witnesses were PW1 (Prosper Christian Mboya), PW2 (Didas Mboya), PW3 (John Cristina Mboya) and PW4

(Gloria Pius). The deceased could not testify as he had passed away on 01/01/2007. These prosecution witnesses were allowed to narrate the same visual identification evidence by moonlight and a lamp that had been the central fact in issue for resolution in both Criminal Case No. 650 of 2006 and (DC) Criminal Appeal No. 55 of 2007, and which had been the subject of a specific finding by those courts in favour of the appellants.

The pertinent question that arises is whether or not the prosecution was allowed to do so? With respect, in our considered view, it was precluded from proceeding in the way it did. The doctrine of issue estoppel fully operated against the respondent Republic. Under that doctrine, it could not in this case lead anew the evidence of PW1, PW2, PW3 and PW4 to prove the appellants' visual identification, which was a pertinent fact in issue as regards which evidence was already led by the same witnesses in Criminal Case No 650 of 2006 and (DC) Criminal Appeal No. 55 of 2007 and that had been

the subject of a specific findings by the District Court and High Court (Mugasha, J.) and in favour of the acquitted appellants. It is worth recalling that the District Court acquitted the 5th appellant and the 1st, 2nd, 3rd and 4th appellant were on appeal acquitted by the High Court. The evidence of visual identification by PW1, PW2, PW3 and PW4 had been distinctively put forward by these witnesses for resolution and was distinctively adjudicated upon and in favour of the appellants by respectively, the District Court and High Court. It could not be reopened in this case because of the rule of issue estoppel and pressed to negate the District Court's and the High Court's earlier finding of fact by arriving at a finding inconsistent with the appellants' prior acquittal on the visual identification evidence. To say the least, the substratum of the former case rested on visual identification.

In this case, the learned Judge reasoned that the 1st, 2nd, 3rd and 4th appellant in (DC) Criminal Appeal No 55 of 2007 were acquitted on technicalities and the issue of

identification was not properly addressed by the High Court. With utmost respect, the High Court seriously misdirected itself. First, we agree with Mr. Mchami that the appellants were acquitted in (DC) Criminal Appeal No 55 of 2007 because the High Court had found out that the conditions for visual identification were not favourable for their identification; but were rather susceptible for mistaken identification. It held that it was not proved that the appellants were identified at the scene of crime in the light of the evidence paraded by the prosecution. This could hardly be labeled an acquitted on technicalities. Second, it was improper for the learned Judge to pass those remarks on the judgment of a Judge of the same court and a court of concurrent jurisdiction.

For clarity, we would agree with Mr. Mwita that double jeopardy does not arise. The prosecution was entitled to charge the appellants for the deceased's murder, a separate offence, that it alleged arose out of the same transaction. The

disturb the earlier findings of fact on visual identification reached in the above cases, when the appellants were tried subsequently, in the instant case. It is also trite law that the doctrine of issue estoppel does not operate where new evidence has emerged since the High Court's earlier decision. For example, the prosecution was perfectly entitled in this case to tender as it did, the deceased's post mortem medical report (Exhibit P.3).

Having closely examined the whole record, and discounting the appellants' visual identification evidence distinctly at issue and decided in their favour, respectively, in the District Court and the High Court, in our considered view, the remaining prosecution evidence in this case is rendered extremely weak to have proved the information of murder beyond reasonable doubt.

Much as the above, would have been sufficient to dispose of the appeal, we think that it is desirable to address

doctrine of issue estoppel is not the same thing as the plea of double jeopardy, which finds expression in the pleas of *autrefois acquit* and *autrefois convict* in section 280 of the Criminal Procedure Act, Cap 20 R.E. 2002. It does not prevent a second prosecution as does the latter; it only preludes evidence being led by the prosecution to prove a fact in issue as regards which evidence had already been led and a specific finding arrived at an earlier criminal trial before a court of competent jurisdiction (See, **Manipur Administration v Thuckchom Bira Singh** (1964) 7 S.C.R. 123; **Lalta and Others v State of Ultar Pradesh** AIR 1970 SC 1381).

The High Court's finding on visual identification in respect of the 1st, 2nd, 3rd and 4th appellant in (DC) Criminal Appeal No 55 of 2007 and that of the 5th appellant in Criminal Case No. 650 of 2006 operated as an issue estoppel against the prosecution, not a bar to the trial of the appellants for a distinct and different offence (i.e. murder). It only precluded the reception of the evidence of PW1, PW2, PW3 and PW4 to

ground 3 of the 1st appellant's memorandum of appeal which challenges the High Court's finding on the cause of the deceased's death. Mr. Shirima submitted that the finding by the learned Judge that the deceased passed away as a result of inflicted wounds is not supported by the evidence. More reliance should have been placed on the evidence of PW5 (Dr. William Sindato Seiya), the medical officer who conducted the post mortem medical examination report (Exh. P.3) than on that of the eye witnesses. If the High Court had done so, it would have arrived at a different conclusion.

Mr. Mchami submitted that the post mortem medical examination report (Exh. P.3) attributed the deceased's death to multiple causes, including anaemia. PW5 was not emphatic that the deceased had died an unnatural death. Although the learned Judge was not bound by the medical opinion of PW5, as no scars were found on the deceased's skull, he may have died a natural death.

Mr. Mwita submitted that PW5 conducted an external and internal medical examination of the deceased's body. That although the learned Judge was not bound by PW5's medical opinion that the deceased's death was due to many causes, she was required to give reasons for disagreeing with it. She did not.

The post mortem medical examination report (Exh P.3) conducted on 6/1/2007 attributed the deceased's cause of death as due to cardio pulmonary insufficiency, anemia, severe pulmonary congession, and left ventricular wall hypertrophy. PW1, PW2, PW3 and PW4 gave evidence that the deceased received several cut wounds on the head and other parts of his body and was seriously bleeding. He was admitted to hospital, discharged, readmitted and succumbed to death on 1/7/2007. He was then about 84 years old.

The law is well established that for a charge of murder to be sustained, the prosecution must prove beyond

reasonable doubt that the deceased died an unnatural death. No scars were found on the deceased's scalp and there were no wounds in his body (Exh P.3). On the totality of the evidence, it would appear to us that PW5 was uncertain whether or not the deceased died a natural or unnatural death. On one hand, he testified that he could not say that his demise was a natural death, and on the other side, he was of the view that there was a connection between the deceased's heavy bleeding from the cut wounds and his death. We would agree with Mr. Mchami that, with respect, the High Court erred in holding that the deceased died because of the inflicted wounds. No reason was afforded by the High Court for departing from the causes of death established by PW5 through the autopsy. There was no medical evidence before the Court on the deceased health condition between the date of the incident on 17/7/2006 and his death on 1/1/2007, to link the alleged cut wounds and severe bleeding and its connection and effect on the deceased's death.

In **Waihi and Another v Uganda** (1968) E.A. 278 at 280, the defunct East African Court of Appeal held:

> *"where there is medical evidence and it does not exclude the possibility of death from natural causes, the task of the prosecution is very much harder and only in exceptional circumstances could a conviction for murder be sustained".*

No exceptional circumstances have been demonstrated in this case. Given the doubt raised and the possibility of the deceased having died a natural death not having been entirely excluded by the prosecution, in our respectful view, it could not be held that it was proved beyond reasonable doubt that his death was unnatural.

In the final analysis and for all the above reasons, the appellants' conviction cannot be sustained. We accordingly quash their convictions and set aside the sentences imposed

on them. We also order the release of all the appellants forthwith from prison, unless otherwise lawfully held.

DATED at **ARUSHA** this 30th day of October, 2014.

M.C. OTHMAN
CHIEF JUSTICE

B. M. LUANDA
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

F. J. KABWE
DEPUTY REGISTRAR
COURT OF APPEAL