IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

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

CRIMINAL APPEAL NO. 351 OF 2013

MAKUNGU MISALABA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Teemba, J.)

dated 10th day of October, 2013
in
Criminal Sessions Case No. 121 of 2012.

.....

JUDGMENT OF THE COURT

27th & 30th October, 2014

MMILLA, J. A.:

The appellant, Makungu Misalaba was charged with two counts of murder contrary to section 196 of the Penal Code Cap 16 of the Revised Edition, 2002. It was alleged that he unlawfully killed Mwikami Ndole, his wife and Abel Makungu, his son. He was found guilty in respect of both counts and sentenced to death. This appeal is against conviction and sentence.

On 30.4.2003 at around 9.00 a.m, Mwikami Ndole and Abel Makungu were violently killed at the home of the appellant. The prosecution asserted, basing on

the evidence of PW1 Ndole Seni, the father of the late Mwikami Ndole and PW2 Maluho Michael, the appellant's hamlet chairman, among other evidence, that those two people were killed by the appellant.

According to PW1, the appellant was married to his daughter, Mwikami Ndole. On 29.4.2003 his son in law (the appellant) and his wife called at his home. The former complained that he had problems with his wife and asked his indulgence to reconcile them. PW1 successfully reconciled them after which the two went back to their home.

While at his farm on 30.4.2003 in the morning, one Haile Cherehani passed by and informed him that his daughter (Mwikami Ndole) was wounded on the head and had died. He hurried to the scene at which he confirmed that she was dead, and that there was also a dead body of a young boy in the same compound. At the time he arrived at the scene, the appellant and his mother were present thereat, among other persons. He related that both his daughter and the boy had big cut wounds on the heads. He also said that the appellant, who was laying on the ground side way, had wounds on his private parts and was bleeding, and that he was covered with a khanga.

On that same day around 9.00 a.m, while on his way to the village dispensary building site, PW2 met Haile Cherehani who told him that there

occurred a very bad incident at the home of one Misalaba Mahumo whereat his son, Makungu Misalaba (the appellant), had wounded his wife and son with a panga. He rushed to the scene. On arrival there he found the appellant and the dead bodies of two persons, Mwikami Ndole and Abel Makungu. He raised an alarm and people rushed to the scene. This witness said that Mwikami Ndole had a cut wound at the rear head from one side to another, while the deceased boy had a cut wound on the head. Like PW1 had observed, PW2 said the appellant had wounds on his private parts. On interrogating the appellant, he denied that he killed those two persons, but that he was suspecting his brother in law one Donald Alex. He did not believe him. He notified the Village Executive Officer (VEO) who reported the incident to the police.

There were two other prosecution witnesses, PW3 John Metusela, a primary court magistrate who in his capacity as a justice of the peace recorded the appellant's extra - judicial statement constituted in exhibit P2, and PW4 Aloyce Leole, an assistant clinical officer who medically examined the dead bodies of the deceased persons. While PW3 said that the appellant confessed that he killed both the deceased persons, PW4 said that both deceased persons died due to their respective cut wounds which resulted in the loss of blood.

On the other hand, the appellant denied involvement in the deaths of both deceased persons. He said that on 30.4.2003 at around 6.30 a.m he left his home for his rice farm. He left his deceased wife, his children and other persons at home. He returned at around 9.00 a.m.

On arrival at his home he found three persons namely; Haile Cherehani, Martin Joseph and Kasubi Galua all of whom were standing in the compound. After greeting them, he proceeded to the kitchen to prepare himself to milk the cows. On coming out, after covering a distance of about three paces he saw his son, Abel Makungu on the ground. He went closer and found that he was dead. The three men told him that his wife too was dead and showed him where her dead body was laying. Again, he went closer and confirmed that she was dead.

According to the appellant, the late Abel Makungu was his son born from his first wife known as Doto d/o Alex whom he had divorced. When PW2 arrived at the scene of crime, he told him that he suspected that his wife and son were killed by his brother in law one Donald Alex, the brother of Doto d/o Alex and uncle of the late Abel Makungu, the person who was unhappy with him for having divorced his sister.

He similarly contended that he was arrested in connection with the death of deceased persons merely on the basis of the false allegations of PW1 that he had asked him to reconcile him and his wife on the previous day.

He denied to have volunteered to make a statement before the justice of the peace, and that he was on 1.5.2003 severely beaten by the police who on 2.5.2003 took him to the justice of the peace before whom they forced him to sign a document which had already been written and was at PW3's office table. He had pleaded with the trial High Court to acquit him of both charges.

Before us, the appellant, who was also present in Court was represented by Mr. Deya Outa, learned advocate, while Ms Mwamini Fyeregete, learned State Attorney appeared for the respondent Republic. She said she was supporting conviction and sentence.

The appellant's memorandum of appeal raised five (5) grounds, but Mr. Outa abandoned the first, fourth and fifth, thereby leaving only two of them; the second and third grounds, but he argued the third in the alternative to the second.

The complaint in the first ground is that the extra - judicial statement constituted in exhibit P2 was wrongly received as evidence in the case. Mr. Outa

contended that the said statement was not voluntary, therefore that the trial court had duty to carefully weigh its reliability especially so, he said, when it is considered that the appellant alleged to have been tortured. Mr. Outa claimed that the evidence of PW3 that the appellant had an injury on his private parts, also that the he was walking with difficulties and the contents of exhibit D2 suggested that he could have been subjected to torture. He referred the Court to the case of **Anthony Kigodi v. Republic** Criminal Appeal No. 94 of 2005, CAT (unreported) in which the court said at page 10 thereof that where actual torture is involved, the purported confession should not be admitted in evidence because it is doubtful that the accused was a free agent when he made the confession.

Mr. Outa submitted similarly that there was no evidence on how the appellant sustained the said injuries on his private parts. In his view, the reasonable inference was that he sustained those injuries in the hands of the police as he testified in his defence. He requested the Court to find and hold that the evidence in exhibit P2 was not properly relied upon by the trial court.

In his view, if this ground is upheld, thus leading to expunging the evidence in exhibit P2, then there will be no evidence remaining to sustain conviction. He therefore pressed the Court to allow the appeal.

On her part, Ms Fyeregete submitted that the extra - judicial statement was freely given, therefore that it was properly received and relied upon by the trial court. She clarified that since the appellant did not disclose to the justice of the peace that he was tortured, or that he was intimidated to attract his confession, the trial court properly held in its ruling after a trial within trial that there was no cogent evidence of torture. She also said that the said PF3 constituted in exhibit D2 was secured after the appellant was done with the justice of the peace.

Ms Fyeregete submitted similarly that apart from the appellant's confession before the justice of the peace, there was cogent circumstantial evidence which came from PW1 and PW2 linking the appellant to the commission of the offence. Both those witnesses said that at the time they arrived at the scene of crime, they found the appellant lying down and had injuries on his private parts which were self inflicted in his attempt to kill himself. She urged the court to dismiss the appeal.

On our part, we appreciate in the first place that the prosecution case largely depended on the evidence constituted in exhibit P2, an extra - judicial statement which was recorded by PW3, and to a limited extent on the evidence of PW1, PW2 and PW4. Also, there is no controversy that the appellant retracted

his confession, necessitating the trial court to hold a trial within trial. That court was satisfied that the extra - judicial statement was freely given, it received that evidence and relied on it.

We have considered the rival arguments of learned counsel for the parties on whether or not the said statement was properly received and relied upon. We are of the settled view that the trial court was justified in holding in its ruling which arose from a trial within trial that the said statement was freely given for reasons we endeavour to give.

In the first place, PW3 ordered the policeman who sent the appellant to him to leave his office after which he informed him that he was a justice of the peace, therefore that he was in safe hands. The witness testified that upon the appellant telling him that he was volunteering to make a statement, he inspected him before he started recording his statement. He found that he had injuries on his private parts. It was then that he recorded his statement. As aforesaid, he retracted that statement.

After a trial within trial, the trial court believed PW3's evidence that the appellant never complained to him that he was tortured or that he was in any way forced by anyone to appear before him and make a statement. Also, that court believed him on the aspect that there were no policemen in his office at

the time he made the statement. Further, in upholding that the statement was freely given, the trial court considered the detailed particulars in his statement which were attributable to his personal knowledge as no other person could have known them except through him. At the end of it all, it held the view that PW3 was a credible, truthful and believable witness.

We are entirely in agreement with the conclusion of the trial court. We hold the same view, as did that court, that the appellant's allegations that he was not a free agent were correctly rejected as being nothing else but an afterthought which, as was properly stated by the trial court, did not affect the truth stated in that statement - See the case of **Hemed Kigodi v. Republic,** [1995] T.L.R. 172 (page 174 over to 175) in which one of the reasons why the court rejected the appellant's claim of torture was that he had not disclosed that fact before the justice of peace.

As we have already said, in his defence the appellant retracted the evidence contained in exhibit P2. We are aware that where this is the case, the need to look for other cogent independent evidence to corroborate the evidence consisted in the retracted statement arises – See the cases of **Ali Salehe Msutu v. Republic** [1980] T. L.R. 1 and **Amiri Ramadhani v. Republic** Criminal Appeal No. 228 of 2005, CAT (unreported). The crucial issue becomes whether

or not there was such corroborative evidence in the circumstances of this case.

In our view, the answer is in the positive.

There were pieces of evidence from the testimonies of PW1 and PW2 which linked the appellant to the commission of the offence. These witnesses testified in common that the appellant was found at the scene of crime with self inflicted injuries at his private parts in an attempt to kill himself in an endeavour to escape the long hand of the law – See for example Exhibit D1, at page 2 thereof, last but one paragraph. Also, PW1 was clear, for example, that the appellant and his wife had called at his home on a previous day to the date on which the incident occurred and sought to be reconciled. He had complained to PW1 that his wife was not obedient to him. This shows that the appellant harboured a grudge against his wife.

Also important on the point is the evidence in Exhibit P2 in which the appellant confessed that he was the one who killed his wife and son because he believed that she intended to kill him after he suspected her to have given him medicine through his son, Abel Makungu.

In view of what we have explained above, we are satisfied that the appellant's defence was properly rejected by the trial court, and that it properly

found him responsible for the deaths of two persons. Thus, ground number two is dismissed.

There is the question on whether there was evidence of malice aforethought in the circumstances of this case. Section 200 of the Penal Code, particularly sub section (1), (a) and (b) thereof, stipulate circumstances under which malice aforethought may be inferred. That provision states that:-

> *"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances–*
>
> *(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."*

In the circumstances of the present case, there are several things to infer malice aforethought. First in the agenda, was the appellant's belief that his

deceased wife and son were attempting to kill him. That, we think, pushed him to pre-meditating his victims' deaths.

Secondly, the injuries on the bodies of both deceased persons clearly suggested that he used a dangerous sharp weapon to inflict them, and indeed, the said wounds were inflicted on venerable parts of the bodies of his victims. Reference is on the post - mortem examination reports constituted in exhibits P1 and P3 of the late Abel Makungu and Mwikami Ndole respectively, which show that in both instances the cut wounds were inflicted on the necks and heads. ***Ipso facto,*** malice aforethought can be inferred from these aspects too – See the case of **Enock Kipela v. Republic** Criminal Appeal No. 150 of 1994, CAT (unreported) in which the Court said that:-

> *"....usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any,*

made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."

For reasons we have endeavoured to give herein, we are of the settled view that there was evidence to infer malice aforethought, therefore that the appellant was properly convicted of murder in respect of both counts as was charged. Thus, the appeal lacks merit and is dismissed in its entirety.

DATED at MWANZA this 30th day of October, 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

K. K. ORIYO
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