IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 348 OF 2013

WAISIKO RUCHERE @ MWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ndika, J.)

dated 1st day of October, 2013
in
Criminal Sessions Case No. 13 of 2008

.....

JUDGMENT OF THE COURT

23rd & 28th October, 2014

MSOFFE, J.A.:

The appellant stood trial for murder contrary to section 196 of the Penal Code upon information that on 17/11/2006 at Buhemba village within the District of Tarime in Mara Region he murdered Bakari Ibrahim. In conformity with the dictates of section 265 of the Criminal Procedure Act (CAP 20 R.E. 2002) the trial was with the aid of assessors. After the judge's summing-up and upon inviting them to give their opinions they

returned verdicts of guilty to the lesser offence of manslaughter contrary to section 195 of the Penal Code. In his judgment, and in convicting the appellant, the trial judge did not agree with the assessors, and as the law requires, he gave his views for differing with them. In view of the position we have taken on the appeal, and as we shall demonstrate hereunder, the judge was justified in taking that course of action.

Before us Mr. Constantine Mutalemwa, learned advocate, appeared on behalf of the appellant. On the other hand, the respondent Republic had the services of Mr. Hemedi Halidi Halfani, learned State Attorney. In the process, both learned counsel carried us through the evidence and the law thereby citing a number of authorities in support of their respective positions on the appeal. While we commend them for the effort they will bear with us that we will not address each and everything that was raised in their respective submissions. We will not do so not out of discourtesy to them but because we are of the opinion that justice will better be served in the manner we will adopt hereunder in disposing of the appeal.

The appellant filed his memorandum of appeal on 9/10/2014. This was complemented by the memorandum of appeal filed on his behalf on 20/10/2014 by Mr. Mutalemwa. In arguing the appeal Mr. Mutalemwa

mainly concentrated on the grounds of appeal articulated in the latter memorandum. Mr. Mutalemwa argued the grounds *seriatim* and Mr. Halfani responded in the same manner. We too propose to do the same and in this sense we will address the grounds one after another.

The complaint in the first ground of appeal has a direct bearing on exhibits P1 and P2, the post mortem examination report and the sketch map of the scene of crime, respectively. The two documents were produced and admitted at the trial without objection and henceforth formed part of the matters that were not in dispute. After drawing up the "memorandum of matters not in dispute" part of the proceedings of that date (1/12/2008) then went on as follows:-

> ***Court:*** *Explained the matters not in dispute to the accused who stated:-*
>
> ***Accused:-*** *That is correct, I have understood.*
>
> ***Sgd: A.N.M. Sumari,***
> ***Judge.***
> ***1/12/2008***
>
> ***Signed by:***
> *1. Accused Weisiko Ruchere Mwita:- Sgd:*
> *2. Mr. Makowe, Advocate: Sgd:*
> *3. Mr. Mkemwa, State Attorney:- Sgd:*
>
> ***Sgd: A.N.M. Sumari,***
> ***Judge.***
> ***1/12/2008***

In the submission of Mr. Mutalemwa, the trial judge erred in not reading over exh. P1 and P2 as per the requirement under section 192 (3) of the Criminal Procedure Act (CAP 20 R.E. 2002) (the Act) that the memorandum "**be read over** and **explained** to the accused ...". (Our emphasis.) As per the above proceedings, the memorandum was simply **explained**; it was not **read over**. This, in Mr. Mutalemwa's view, offended part of the dictates of the above provisions. On this, we are in agreement with Mr.Mutalemwa. Indeed, Mr. Halfani also agreed that much. It was not enough to explain only. The judge was duty bound to **read over** the memorandum and then **explain** it to the appellant. However, as contended by Mr. Halfani, quite correctly in our view, the failure to **read over** the memorandum was not a fatal irregularity. It was a curable irregularity in terms of section 388 (1) of the Act. We say so because, as again pointed out by Mr. Halfani, there is no evidence, let alone a strong suggestion, that the appellant was prejudiced by the failure to comply with the law to the letter. If anything, we are in agreement with Mr. Halfani that the fact that the memorandum was explained to the appellant after which he duly signed shows that he appreciated and understood the contents of the above documents.

The second ground of appeal relates also to the post-mortem examination report. The complaint here is that whereas it was dated 18/11/2006 it is indicated that the autopsy on the deceased's body was conducted on 18/11/2007, a year later. With respect, and without much ado, we agree with Mr. Halfani that the difference in dates was nothing but a pure human error. This must have been a slip of the pen. The record is clear that the death occurred on 17/11/2006, a fact which is not in dispute. The post-mortem examination must have been conducted on the same day.

The third ground of appeal is based on the proceedings of 20/9/2013 where the appellant's cautioned statement was introduced in evidence as exh. D1 for purposes of impeaching the appellant. Citing **Sarkar's LAW OF EVIDENCE VOL. 2**, at page 2090, Mr. Mutalemwa submitted that the judge erred in not adhering to the principle that when impeaching the credit of a witness by proof of a previous contradictory statement his attention must first be drawn to it and the same opportunity should be given to the witness of explaining the discrepancy or inconsistency in court. The failure to adhere to this principle, Mr. Mutalemwa went on to submit,

entailed that the prosecution failed to discharge the burden placed on it under section 169 (3) of the Act which reads:-

> *(3) The burden of satisfying the court that evidence obtained in contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted.*

With respect, we agree with Mr. Mutalemwa that impeachment proceedings have to be conducted in the manner he described and supported by **Sarkar** (*supra*). We also agree with him that in an ideal case when objection is taken under sub-section (1) of section 169 of the Act the burden under sub-section (3) thereto lies on the party who seeks to have the evidence admitted. However, in our respectful opinion, sub-sections (1) and (3) above are usually invoked when determining admissibility of statements taken under the scheme of sections 50-58 of the Act. That scheme is, in our view, different from this case where at stake were only impeachment proceedings.

Ground four seeks to challenge the evidence of PW1 and PW2. The general complaint here is that these witnesses were not creditworthy and that the trial judge ought not to have relied on their evidence in grounding the conviction. Closely related to this ground is ground number five where the trial court is sought to be faulted for not convicting and sentencing the appellant for the lesser offence of manslaughter. In order to address these grounds properly it is pertinent at this juncture, that we state the facts as borne out by both the prosecution and the defence cases at the trial.

To establish the case against the appellant, the prosecution led evidence from two witnesses namely PW1 Monica Ibrahim, and PW2 Magaya Bakari Ibrahim, the deceased's wife and daughter, respectively. PW1 adduced evidence that she married the deceased in 1990 and that their marriage was blessed with one issue (PW2). For some reason, in 2003 she separated from her husband and moved from their matrimonial home at Mafarasini and relocated in Buhemba. During the separation she befriended the appellant and in the course of the concubinage the appellant provided her the necessary care and maintenance. Sometime in 2006 she reconciled with the deceased and returned to her matrimonial home to live with him. On 17/11/2006 at around 18:00 hours the

appellant waylaid the deceased and herself as they were riding home on the deceased's motor cycle. In her testimony, as they approached the front side of the appellant's home they heard a gunshot and both fell off from the motor cycle to the ground. She instantly heard the deceased pleading with the appellant for their lives saying "*Weisike usituue*" whereupon she realized that the appellant had ambushed them. Since it was daylight she saw the appellant clearly holding a gun. In her further testimony, the deceased rose up and ran a few paces away but the appellant pursued him. She ran to a nearby maize field leaving the appellant still pursuing the deceased. A few moments later she heard a burst of gunfire whereupon she fell on the ground and passed out. Later on, she gained consciousness only to learn that her husband had been killed.

In the meantime PW2 testified that in the evening of the day in question she was at home with a relative, one Wige Mkolasi, when their attention was drawn to a pathway outside their home by what seemed like a tyre burst. On walking out she saw the deceased squatting on the ground along the pathway while holding a helmet in his hands. The appellant, whom she knew very well, was standing infront of him holding a

gun. Seconds later, the appellant fired the gun and the deceased fell to the ground. In her evidence, PW2 was emphatic that she saw the appellant shoot at her deceased father.

In his evidence on oath, the appellant denied criminal responsibility for the said murder by stating that the incident happened after his shotgun accidentally went off and a bullet hit and killed the deceased without intention. He stated that prior to the date of incident the deceased used to abuse him with words like "*wewe ni mjinga*", "*wewe ni hanithi*", "*kwani umepata nini*?", and "*Ndio maana wanawake wote wanakukimbia*". He recalled that on the fateful day he had been sitting outside his home with his gun which he had been cleaning earlier in the day. The deceased passed by and abused him. On hearing the deceased's abusive words, he rose up and walked to him with a request to stop the obscene words. As he stood near the deceased, the gun went off accidentally and unexpectedly and a stray bullet hit the deceased. He was shocked to see the deceased facing to the ground. He had not realized that the gun had a bullet in it. An hour later, he surrendered himself to the police at the Tarime Police Station.

Having analyzed both the prosecution and the defence cases the trial judge was satisfied that the above prosecution case established the appellant's guilt beyond reasonable doubt and accordingly convicted him of murder contrary to section 196 of the Penal Code and sentenced him to death.

This takes us back to the fourth ground of appeal. This ground need not detain us. For what is worth, it is alleged here that PW1 and PW2 were not creditworthy because they were inconsistent in their testimonies. Upon probing Mr. Mutalemwa on the gist of this complaint it turned out here that really the key point is that PW1 was not creditworthy because having been a former lover to the appellant there was bad blood between her and the appellant and, therefore, that the possibility of cooking up a story against the appellant could not be ruled out. With respect, from the available record we do not see any evidence to suggest bad blood. On the contrary, like the trial court, we are satisfied that this was a credible witness who testified on the events of the day in the manner and mode in which she saw and appreciated them. At any rate, at the time of incident she had already separated from the appellant. Indeed, at the time of leaving the appellant she politely bid him farewell. If so, and looking at her

evidence in its totality we do not get the impression that she was all out to frame the appellant. On the contrary, we are satisfied that her testimony was a true account of the events of the day.

In similar vein, there is nothing to doubt PW2. Both PW1 and PW2 were not positioned at one and the same place during the whole episode. Each observed the incident from her own vantage point and perspective, PW2 in particular was emphatic, and she was not seriously contradicted, that she saw the appellant killing the deceased. We have nothing to doubt her testimony. Hence, we will not say anything more about this witness. We will leave it at that.

In view of the position we have taken on the evidence of PW1 and PW2 there is no serious need to discuss the fifth and last ground of appeal in detail in which the key point is that the judge ought to have convicted the appellant of the lesser offence of manslaughter. It is the appellant's view that there was no evidence of malice aforethought. So, according to him, a conviction for manslaughter was open in the case.

Much as there is no serious and compelling need to discuss malice aforethought in this case, for purposes of completeness we will nevertheless address this point, *albeit* briefly.

Under section 200 of the Penal Code malice aforethought is deemed to be established by proving one or more of the stated circumstances. Key among the circumstances are (a) and (b) thereof i.e. intention to cause death, etc. and knowledge that the act, etc. will cause death. In our appreciation of the evidence in its totality, we are satisfied that the evidence of PW1 and PW2 is clear testimony to the fact that the appellant intended to kill the deceased and he also knew that his act was going to lead to the death of the deceased.

It is also trite law that malice aforethought may be inferred from other factors like the weapon used, the part of the body inflicted with injury, etc. In this case, the weapon used was a shotgun which was, no doubt, a dangerous weapon. According to the post mortem examination report, the bullet was aimed at a vulnerable part of the deceased's body. The report is clear that the body had "*a penetrative wound at the back and exit at left side of the neck*". By any stretch of imagination, this was, no doubt, a very serious injury.

In conclusion on this aspect of the case we are satisfied that the appellant killed with malice aforethought.

Mr. Halfani pointed out to us a number of inconsistencies in the appellant's defence at the trial. He did all this in an attempt at showing that the appellant's defence did not raise reasonable doubt on the prosecution case against him. With respect, much as we appreciate that it is true that the appellant contradicted himself greatly in his own defence at the trial we see no compelling need to address this point.

When all is said and done, we are satisfied that there is no merit in the appeal. We hereby dismiss it.

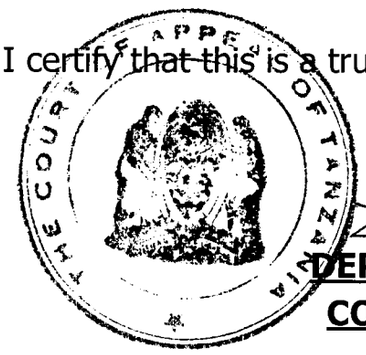
DATED at MWANZA this 27th day of October, 2014.

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.



. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL