

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

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

CRIMINAL APPEAL NO. 156 OF 2014

KENETH JONAS..... APPELLANT

VERSUS

**THE REPUBLIC RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Arusha)**

(Mwaimu, J.)

**Dated the 04th day of December, 2013
in**

Criminal Sessions No. 66 of 2012

JUDGMENT OF THE COURT

17th & 26th September, 2014

ORIYO, J.A.:

The appellant Keneth Jonas, was charged with and convicted of murder, contrary to section 196 of the Penal Code, by the High Court of Tanzania sitting at Babati in Criminal Session No. 66 of 2012. He was sentenced to the mandatory punishment of death by hanging. Aggrieved, the appellant has preferred this appeal.

It was the prosecution case before the trial court that on 6th June, 2010, at about 05:00 p.m., Keneth Jonas, and his deceased's wife, Christina Joseph, together with their infant child left their home at Lairupa area to Mbeli suburb where the appellant's mother lived. On the same day at about 8.00 p.m., the appellant returned home alone, took his bicycle

and left to an unknown destination. On the following morning a dead body of a woman was recovered and identified to be that of Christina, the deceased. The appellant was not traced until 12/6/2010 and subsequently charged in court. At the trial, five (5) prosecution witnesses testified while the appellant gave his defence on oath.

PW3, Joyce Joseph, was the young sister of the late Christina Joseph, and she resided in the same house. She testified that on the fateful day, the appellant and the deceased told her that they were leaving for Mbeli suburb to see the appellant's mother. On the same day, at about 07:00 p.m., PW1 **Mathias Mnyanyika**, who was PW3's relative visited the appellant's house asking for the deceased Christina who left with his money as the deceased was selling "pombe". PW3 continued to testify that, at around 08:00 p.m., the appellant returned home alone and when PW3 and PW1 made inquiries about Christina and the infant, he replied that they were on their way back home. Both PW1 and PW3 testified that, thereafter, the appellant took his bicycle and left to an unknown place, and they never saw him again until on the date they testified in court and pointed him out as he was in the dock. **PW4, Jeremia Ningari**, testified to the effect that, early in the morning at about 06:00 a.m. on 7/6/2010, while on his way taking his cattle to a water drinking place, he found a child estimated to be about two years old, wearing dirty, blood stained clothes and walking with difficulty. He picked up the child and handed him over to **PW5**.

PW5, Bakari Lugage, who was the Village Executive Officer of Kimana village but lived at Mbeli, testified how PW4's announcements at the village about the child. Apparently, the information reached the mother of the appellant. She followed it up, identified the child as his grandson and took him into her custody. Further, PW5 told the Court on how they took initiatives to trace the child's mother and they managed to find the deceased's body on the roadside between Lairupa and Mbeli.

A report was accordingly made to the police and **PW2, Inspector Peter** visited the scene of the crime together with Doctor Chilagwire of Kibaya District Hospital, who conducted the post mortem examination and prepared the report which was tendered and admitted in evidence as exhibit "P2". The report shows that, the late Christina died from very severe bleeding caused by cutting with a sharp instrument.

In his sworn defence statement, the appellant retracted the confessional statement in Exhibit "P3" and denied to have committed the offence. His story was that on the fateful day he was not at the scene of the crime. He said that he left his home on 25/05/2010 and left his wife and child at home. He further testified that on 12th day of June, 2010 he was at his farm and later left for Kidongo Chekundu area, allegedly to buy amenities. While at the shop, he was arrested by two men who later handed him over to the Police at Kibaya where the appellant was remanded until on 14th day of June, 2010, when he was taken to court and charged accordingly. He vehemently denied killing his wife.

At the hearing of the appeal Mr. Francis Kiwanga, learned advocate, represented the appellant, whereas Mr. Augustino Kombe, learned State Attorney, represented the respondent/ Republic. Mr. Kiwanga had lodged three (3) grounds of appeal as follows:-

1. The High Court erred in law and fact in admitting and relying on the confession statement to convict and sentence the appellant, a confession which was not freely and voluntarily taken.
2. That, the learned trial judge erred in law in finding the appellant guilty of the offence in relying on the caution statement which was not voluntarily given and taken against the mandatory requirements of the law.
3. That the learned trial judge, erred in law and fact in convicting the appellant relying on circumstantial evidence without testing the link between the evidence and malice aforethought of the appellant and therefore failed to prove the case beyond reasonable doubts.

Submitting on the grounds of appeal, the learned advocate opted to argue grounds 1 and 2 of appeal together, while ground 3 was proceeded with separately.

Mr. Kiwanga's first attack was against the cautioned statement of the appellant taken before a police officer. He submitted that Exhibit "P3" was illegally taken without compliance with the mandatory provisions of sections 27 and 28 of the Evidence Act.

Mr. Kiwanga further submitted that according to sections 27 and 28 of the Tanzania Evidence Act, a confession can be made before a police officer or a Justice of Peace. He was of the view that Exhibit "P3" the Cautioned Statement of the appellant was illegally taken contrary to sections 57 and 58 of the Criminal Procedure Act, CAP 20. He argued that although in the trial court, the defence side did not object to the tendering of Exhibit "P3"; the trial court, had a duty to see that the law was complied with before proceeding to admit it as evidence.

Submitting on **ground three**, Mr. Kiwanga stated that the conviction of the appellant was based on circumstantial evidence, which, in his opinion, was insufficient to convict the appellant as each link/circumstance had to be tested against the evidence on record, but in this case, there is evidence that the prosecution failed to test each link.

On his part, Mr. Kombe, learned State Attorney, supported the conviction and sentence imposed on the appellant. He submitted that grounds one and two of appeal were without merit, because the record is clear as shown at page 14 that the cautioned statement was admitted in court and the defence did not offer any objection thereto. The issue of the cautioned statement not indicating the time it began and ended, the learned State Attorney was of view that since the appellant accepted the truthfulness of the contents of the said cautioned statement when the same was read out to him, in the presence of his learned counsel, the issue raised now is an afterthought. In support of his submissions on the shortcomings raised by Mr. Kiwanga, the learned State Attorney cited the

decision of the Court in the case of **Nyerere Nyague Versus Republic**, Criminal Appeal No. 67 of 2010, CAT Arusha, (Unreported), where the Court held:-

"...as a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be stopped from asking the trial court to disbelieve what the witness said."

He strongly submitted that failure by the defence to cross examine on the said statement at the trial, the same should be taken that the defence had conceded to the contents thereof. Mr. Kombe further submitted that, according to the evidence of PW3, who the court found to be a credible witness, the appellant left with the deceased together with their child, and just three hours later, he returned home alone and when PW3 made inquiries on the whereabouts of the deceased, the appellant replied that the deceased and the child were on the way back home. In support of his submission the learned State Attorney cited the case of **Makungire Matani Versus Republic**, [1983] T.L.R. 179. Where the court held;

"In the circumstances of the present case there was more than considerable suspicion against the appellant, for he refused to give an explanation of how the deceased mysteriously disappeared from his compound."

On the basis of his submissions, Mr. Kombe prayed for the dismissal of the appeal.

In the case, there is no gainsaying that the prosecution managed to prove to the required standard that Christina died a violent death and the cause of her death is as per Exhibit "P2", the Post Mortem Examination Report, which states the cause of death being:-

"Very severe bleeding (haemorrhage) caused by cutting with sharp instrument"

In short, Christina was murdered. The burning issue is who murdered her?

The answer provided by the learned trial High Court judge was that Christina was murdered by the appellant. This answer was predicated primarily on the evidence of PW3 who was found by the learned trial judge to be a witness of truth; the cautioned statement of the appellant and the circumstantial evidence links which irresistibly point to the appellant's guilt because he was the last person to be seen with the deceased alive. The evidence before the trial court was purely circumstantial, as there was no eye witness who testified to have seen the appellant kill the deceased. Those circumstantial links were that:-

(a) The appellant was the last person seen with the deceased and he failed to give any explanation on the death of Christina as she was his wife.

- (b) *The child who was in the company of the parents, was found alone, early on the following morning after the trio had left together to Mbeli, and the child was identified as Kelcha Keneth, the child who left home with the appellant and the deceased.*
- (c) *The dead body was found located at an area between Lairupa and Mbeli where the couple said they were going to.*
- (d) *The appellant failed to give any explanation on what transpired on the fateful day. Instead he raised the defence of **alibi**.*

On the basis of these circumstances, the said evidence irresistibly leads to the inference that it was the appellant and nobody else who committed the offence. The evidence is incapable of more than one interpretation and the chain linking the circumstantial pieces of evidence was not broken since the time the appellant left with the deceased until the recovery of her dead body.

In the case of **Julius Justine and Others versus Republic**, Criminal Appeal No. 155 of 2005, the Court held:-

"...the circumstances, from which an inference of guilt is sought to be drawn, must be cogently and firmly established and that those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused and that circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else..."

In this case the facts from which an inference adverse to the appellant was sought to be drawn were proved beyond reasonable doubt.

Another link as submitted by Mr. Kombe was the doctrine of the last person seen to be with the deceased. The evidence of PW3, that the appellant left home together with the deceased and their child and on the same day, just after three hours later, he returned home alone, and when asked by PW1 and PW3 on the whereabouts of the deceased and the child, the appellant replied that they were on their way back home, and immediately thereafter, the appellant took his bicycle and left to an unknown destination until his arrest.

In the case of **Mathayo Mwalimu and Another versus Republic**, Criminal Appeal No. 147 of 2008, the court held:-

"...where a person is alleged to have been the last to be seen with the deceased, in the absence of the plausible examination to explain away the circumstances leading to the death, he/she will be presumed to be the killer."

In the instant case, the appellant did not give any plausible explanation as to how he parted company with Christina and Kelcha. He cannot escape responsibility for the murder of his wife in the circumstances. See also the case of **Armandi Guehi versus Republic**, Criminal Appeal No. 22 of 2010, (Unreported), **Makungire Matani versus Republic**, (1983) T.L.R. 179 (supra).

Another link to prove the guilt of the appellant is on whether malice aforethought, a necessary ingredient in crimes of this kind was established. Having read the evidence on record, the trial court found that, his conduct after the incident was not consistent with an innocent person, as the appellant on the same day returned home, took his bicycle and disappeared to unknown place, since 6th day of June, 2010 till 12th day of June, 2010 when he was arrested by militia men at Kidongo Chekundu area.

In the case of **Obadid Kijalo versus Republic**, Criminal Appeal No. 95 of 2007, the Court held:-

*"It suffices to state that **malice aforethought** may be demonstrated by looking at the motive for the offence and the conduct of the suspect immediately before and after the act or omission."*

In this case the way the appellant behaved, after the death of his wife, is clearly supportive of the holding that there was malice aforethought and he knew that what he did was wrong and that was why he disappeared until his arrest at Kidongo Chekundu.

On the issue of the cautioned statement, reading the proceedings at page 14 of the record, when prosecution prayed to tender it, the proceedings show the following to have taken place:-

"MR. RUGE:

The accused do not know how to read and write. The law has not been followed, in terms of section 57(4) of the Criminal Procedure Act, which requires the accused to be informed of his right to amend his statement. However, we have no objection as the accused has certified that the statement was read over to him and agreed that the statement contained the true facts of what happened.

COURT

The caution statement admitted as exhibit "P3".

The caution statement was then properly tendered in court and the same was read over to the appellant who agreed to the contents thereof, save for some minor defects, which we do not think, prejudiced the appellant in any way, as he did not deny to have given the statement. The trial court was of the view that the circumstantial evidence on record was overwhelming and the evidence irresistibly point to the appellant's guilt and the said cautioned statement was corroborated by the circumstantial evidence. At the trial the advocate for the appellant objected the admission of the cautioned statement on the ground that the appellant was not given the right to amend it but on reflection, he changed his stand and agreed with the truthful of the said statement.

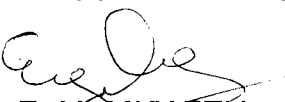
The foregoing said and done, we hold that the appeal is devoid of merit and accordingly it is dismissed. We uphold the statutory sentence imposed by the trial court, that of death by hanging.

DATED at **ARUSHA** this 26th day of September, 2014.

K. K. ORIYO
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL