IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 233 of 2013

1. AMI OMARY @SENGA
2. ISSA NDOLOMA .....APPELLANTS
3. NZWIBA RASHIDI @ SHALO
4. RWENDA YUSUPH

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Rumanyika, J.)

dated 21st day of June, 2013
in
Criminal Sessions Case No. 178 of 2012
.....

JUDGMENT OF THE COURT

11th & 13th March 2014

MSOFFE, J.A.

The Appellants appeared before the High Court of Tanzania sitting at Kigoma on an information of murder contrary to section 196 of the Penal Code (CAP 16 R.E. 2002). After a full trial, with the aid of assessors who returned verdicts of not guilty, they were convicted of the lesser offence of

manslaughter contrary to section 195 of the Penal Code. Each was sentenced to a term of imprisonment for three years. Aggrieved, the Appellants have preferred this appeal.

The Appellants' respective memoranda of appeal are similar and common to all of them. In other words, their grounds of appeal are identical. In this sense, we will quote the grounds of appeal in the first Appellant's memorandum of appeal which, for our purposes, will also cater for the other Appellants, thus:-

1. ***That,*** *since according to the testimony of* ***PW.3, DR INNOCENT JUSTINE MOSHA,*** *as corroborated by* ***Exhibit*** *P.1 on record, it was not in dispute that the cause of death of the deceased person was due to liver* ***failure caused by cancerous virus Hepalitis B,*** *the Honourable trial judge grossly misdirected himself when he rejected such strong evidence on record and proceeded to convict the Appellant with the offence of Manslaughter, c/s 195 of the Penal Code- Chapter 16 of the RE, 2002.*

2. ***That,*** *the learned trial judge grossly erred in law and fact for not according due weight to the evidence of* ***PW3, DR INNOCENT JUSTINE MOSHA*** *and* ***Exhibit P.1*** *on record.*

3. ***That,*** *the learned trial judge grossly erred in law and fact when he held that there was (sic) acts of the Appellant that triggered the death of the deceased person.*

4. ***That,*** *the Appellant was wrongly convicted with the offence of Manslaughter, c/s 195 of the Penal Code- Chapter 16 of the R.E, 2002 and he was wrongly sentenced to such a stiff sentence of three (3) years imprisonment since the same was not thoroughly identified by* ***PW.1 (SAID HUSSEIN MBOGO)*** *and* ***PW.2 (SHABAN RAMADHANI),*** *the only available eye witnesses at the scene of crime, assaulting the deceased person.*

Briefly stated, the prosecution case was that the Appellants and Rashid Iddy@ Mtusi (the deceased) belonged to a Muslim religious sect known as "*Answar Sunni*" and they all worshipped at a mosque known as Masjid Dubai located at Gungu, Kigoma. On 5/2/2011 the prayers were just about to begin. The deceased being one of the leaders in the mosque had preferred the fourth Appellant herein not to lead the prayers because he was no longer the *Imam*. This led into a fracas. In the ensuing confrontation and commotion the appellants set upon the deceased, attacked him and forced, or rather took, him out of the mosque. The deceased was taken to Maweni Hospital at Kigoma and was later discharged. However, he went on complaining that he was still feeling pains inside his body. In view of this change in his health, he was taken back to Maweni Hospital, and was later referred to Muhimbili National Hospital in Dar es Salaam where he died on 11/3/2011 while undergoing treatment. On the following day, that is on 12/3/2011, PW3 Dr. Innocent Justine Mosha conducted an autopsy on the body of the deceased. He prepared a post-mortem examination report which was later produced and admitted in evidence without objection on 28/5/2013. According to PW3, the

death was due to HEPATIC FAILURE (LIVER CANCER) AND SMALL STICHED LIVER LACERATION WITH MILD HEMORRHAGE.

In their respective defences, the Appellants admitted that there was a fracas as aforesaid on the material day. They denied assaulting the deceased to death. In their testimonies they generally asserted that the deceased was the cause of the events of the day for his adamant behaviour, or rather preference, that the fourth Appellant should not lead prayers on that day. They were supported that much by their witnesses DW5 Kivoga Thabit and DW6 Saidi Yusufu.

Before us Mr. Method R.G. Kabuguzi, learned counsel, advocated for the Appellants and the effort was partially supported by Mr. Ildephonce Mukandara, learned State Attorney for the respondent Republic, who supported the second and fourth Appellants' appeal and opposed the appeal in respect of the first and third Appellants.

Before we address the grounds of appeal we wish to observe that although the trial judge did not say so in so many words, in

convicting the appellants he in fact invoked the doctrine of common intention as per the provisions of section 23 of the Penal Code(CAP 16 R.E. 2002) which provides:-

> *23. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.*

The above doctrine has been propounded in a number of decisions in our jurisdiction and beyond. In **Wanyiro Wamiero and Others v. R** [1955] 22 EACA at page 523 the defunct Eastern Africa Court of Appeal, in relation to section 21 of the Penal Code of Kenya which was identical with our section 23, said:-

> *... in order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of the crime, a common intention to pursue a*

specific unlawful purpose which led to the commission of the offence charged...

In **Solomoni Mungai and Others v. R**[1965] EA 782 the above Court, at page 788, stated:-

...In the opinion of this Court, where the case against two accused persons proceeds on the basis of their acting in concert then both can be found guilty, if the evidence establishes that they were acting jointly; but if there was no pre-conceived plan, or acting together then a conviction based on common intention cannot stand. In this latter case a conviction can be recorded against only one accused, if the offence is proved to have been committed by him independently. But where more than two persons are charged with committing a joint offence, the acquittal of one accused does not, in our opinion, affect convictions of the others provided these others share a common purpose to commit the offence charged...

Yet again, in **R v. Tabulanyeka s/o Kirya and Others** [1942] 10 EACA 51 at page 52 the same Court stated:-

> *To constitute such common intention it is not necessary that there should have been any concerted agreement between the accused prior to the attack on the so called thief. Their common intention may be inferred from their presence, their actions and the omission of any of them to dissociate himself from the attack...*

The above authorities and others of the same nature, to which we fully associate ourselves with, have consistently been cited in our jurisdiction in support of the doctrine. Notable among those authorities are this Court's decisions in **Mathias Mhyeni and Another v. Republic** [1980] TLR 290, **Alex Kapinga and three Others,** Criminal Appeal No. 252 of 2005 and **Daimon Malekela @ Maunganya v. Republic,** Criminal Appeal No. 205 of 2005 (both unreported), to mention only a few. On the basis of these authorities, it is trite law that for the doctrine to apply under section 23 there must be **cogent positive evidence** to establish that one or more persons had shared with the accused a common

intention to pursue an unlawful act and that in the execution of the said pre-conceived plan an offence was committed by both or some or all of them. The catch - words for our purposes are **cogent positive evidence**. The question is whether or not there was such evidence in the instant case. As shall be demonstrated hereunder, our answer will be in the negative.

In the light of the above authorities and the evidence on record the trial judge ought to have known that this was a case which to a big extent depended on the doctrine of common intention. To this end, he ought to have addressed the assessors on this doctrine in his summing-up to them in order to solicit their views on whether or not the doctrine was applicable in the case. In similar vein, in his judgment be ought to have considered the doctrine and make a finding on whether or not the doctrine could be invoked in the case.

Back to the grounds of appeal. Like Mr. Kabuguzi and Mr. Mukandara we too propose to dispose of grounds one and two together. The main complaint here is that the trial judge misdirected himself in not according weight to the evidence of

PW3. Dealing with this aspect of the case the trial judge reasoned, *inter alia*, as follows:-

> *...Nevertheless it is trite law that expert opinion cannot be final and conclusive. Courts are always at liberty not to consider it provided that they assign good reasons thereof...* ***The deceased had no prior clinical history of the attacks or the infection itself...***
>
> (Emphasis added.)

The trial judge was certainly correct in law in saying that courts are not bound by expert opinions provided there are good reasons for not considering such opinions. In the justice of this case however, we think, with respect, the trial judge erred in not giving the evidence of PW3 the necessary weight it deserved. As it is, the assertion that the deceased had *"no prior clinical history of the attacks or the infection itself"* was not supported by the evidence of PW3 or any other evidence in the case for that matter. At best, this was the judge's own opinion which was not backed up by the evidence on record, as already observed. The judge ought to have considered with keen interest the evidence of PW3, the

expert on the subject, and not to dismiss his evidence outright as he appears to have done.

While we are on this point, we wish to state that it is trite law that on a charge of murder the onus is always on the prosecution to prove not only the death but also the link between the death and the accused -See **Mohamed Said Matula v. R** [1995] TLR 3 and **Daimon Malekela @ Maunganya (supra).** In this case the prosecution proved the death of RASHID IDDY @ MTUSI by virtue of the evidence of PW3 that it was due to liver failure caused by cancerous virus Hepatitis B. If so, it is evident that this death had no direct link with the Appellants. This is where the Ugandan case of **Waihi and Another v. Uganda** [1968] E A 278 at page 280, also cited **in Leonard Mpoma v. R** [1978] LRT 58, becomes relevant, thus:-

> *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.*

So, in the light of the decision in **Waihi**, to which we fully agree, once the evidence of PW3 was believed that the death was due to natural causes it followed that the Appellants' defence that they were not responsible for the said death was sufficient to raise reasonable doubt in the prosecution case against them. By parity of reasoning, once that happened the doctrine of common intention in the case died a natural death.

Very briefly, we wish to say a few words about Mr. Mukandara's inclination not to support the appeal lodged by the first and third Appellants. His strong point in his submission in this regard was that PW1 was positive that he saw these Appellants assaulting the deceased. With respect, that may well have been so. But, since it is trite law that to ground a conviction the prosecution case is generally taken as a whole it will be noted that this evidence was not watertight and a true reflection of the whole story because it was contradicted by PW2 who testified that there was no such assault. This was no doubt a material contradiction that dented the prosecution case on this important aspect of the case.

Yet again, Mr. Mukandara referred us to section 203(d) of the Penal Code which provides:-

> *(d) if by any act or omission he hastens the death of a person suffering under any disease or injury which, apart from that act or omission, would have caused death.*

In his submission, Mr. Mukandara was of the view that in terms of section 203(d) the Appellants ought to have been deemed to have caused the death of the deceased by their act of assaulting the deceased thereby hastening his death. With respect, this submission has its own difficulty. No cogent and positive evidence came from PW3, or any other witness for that matter, that the Appellants' assault on the deceased, if any, hastened his death. In the absence of such evidence it will be evident that section 203 (d) could not be invoked in the circumstances of the case.

This judgment will not be complete without making the following observations. **One,** in convicting the appellants of the lesser offence of manslaughter the trial judge did not lay out the necessary foundation as to why he thought the evidence disclosed

the offence of manslaughter instead of murder. To start with, he ought to have addressed the assessors in his summing-up on this alternative offence. In the process, he could have, for instance, defined to them the essence of the crime as per section 195 of the Penal Code where the common feature is lack of malice aforethought - Also see **BLACK'S LAW DICTIONARY, NINTH EDITION** by Bryan A. Garner. Then, he could have gone further to narrate the evidence to them in this context in an attempt at showing that a conviction on the lesser offence of manslaughter was possible in the case. Ultimately, to cap it all he should have indicated in his judgment why he thought the Appellants were guilty of manslaughter and not murder. As it is, his was a general statement that the Appellants were guilty of manslaughter without showing whether or not the evidence on record disclosed this offence.

Two, before sentencing the Appellants to the three years respective terms of imprisonment the trial judge did not call upon the defence to say anything in mitigation of sentence. This was contrary to established law and practice. His starting point in this

context ought to have been section 198 of the Penal Code where, unlike murder under section 197, the court has a discretion to impose a sentence of imprisonment for life. That being so, he should then have invoked section 320 of the Criminal Procedure Act which, for ease of reference, we quote as under:-

> *320. The court may, before passing the sentence, receive* ***such evidence*** *as it thinks fit in order to inform itself as to the sentence proper to be passed.*
>
> (Emphasis added.)

In our jurisdiction, the nature of "such evidence" referred to above normally arises after the court asks the prosecutor to say if the accused person has any previous record, followed by anything else that may be said by the said accused in mitigation. In this regard, after asking the prosecutor as to whether or not the Appellants had any previous record of convictions, the judge should then have asked the defence to say anything in mitigation of sentence. Once that was done then it would have been open and appropriate for the said judge to pass a sentence he deemed fit in the justice of the case. This procedure is important because in

the event of an appeal the appellate court will always wish to know whether or not in sentencing an accused person the trial court acted upon some wrong principle or overlooked some material factors, whether the sentence meted out is either patently inadequate or manifestly excessive, etc. The appellate court will only be able to discern these factors, and others, if an accused person was given the opportunity to say something in mitigation. See, for instance, this Court's decision in **Bernadeta Paul v. Republic** [1992] TLR 97 where we cited, with approval, the following decisions, to wit:-

R v. Mohamed Ali Jamal [1948] 15 EACA 126 that:-

> *An appellate court should not interfere with the discretion exercised by a trial judge as to sentence except in such cases where it appears that in assessing sentence the judge has acted upon* ***some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive.***
>
> (Emphasis added.)

And **James s/o Yoram v. R** [1951]18 EACA 147 that:-

A court of appeal will not ordinarily interfere with the discretion exercised by a trial judge in a matter of sentence unless it is evident that he has acted upon ***some wrong principle or over-looked some material factor.***

(Emphasis added.)

Three, as correctly submitted by Mr. Kabuguzi, a look at page 66 of the record will show that in his judgment the judge used the first Appellant's statement made to the police on 16/3/2011 in grounding his conviction. With respect, this was not proper in law because the statement was never tendered in evidence at the trial. It is trite law that evidence not tendered in evidence at the trial cannot be used to convict. Evidence has to be tendered in evidence, be subjected to cross-examination, etc. before it can be acted upon in grounding a conviction.

It will be noted at once that by virtue of what we have stated above we have actually also dealt with the complaints in grounds three and four which, needless to say, have merit.

For the foregoing reasons, we are satisfied that the appeal has merit. We hereby allow it, quash the convictions and set aside the sentences. The Appellants are to be released from prison unless held in connection with lawful causes.

DATED at TABORA this 12th day of March 2014.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL