

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KILEO, J.A., LUANDA, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 154 OF 2013

DOMINICK DAMIAN APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Conviction and Judgment of the High Court
of Tanzania at Bukoba)
(Mjemmas, J.)**

dated the 14th day of December, 2012

in

Criminal Session Case No. 61 of 2008

JUDGEMENT OF THE COURT

10th & 17th March, 2014

LUANDA, J.A.:

The above named appellant was convicted of murder and sentenced to death by hanging on the basis of a dying declaration made by the deceased to a number of people including three prosecution witnesses coupled with visual identification.

The trial High Court was satisfied that those three witnesses were credible that the deceased mentioned the appellant as one of the culprits who unlawfully killed her and he was properly identified. The appellant is aggrieved by that finding and he has preferred this appeal in this Court.

Mr. Aaron Kabunga learned counsel for the appellant raised three grounds. But the three grounds could be condensed into two namely; that the evidence of visual identification of Thereza w/o Tryphone (PW1) is unworthy of belief and it requires corroboration. Two, the dying declaration of the deceased also requires corroboration.

Mr. Kabunga attacked the finding of the trial High Court to have found out that the conditions were favourable for correct identification. He said the incident occurred around 6.00 a.m. which was still dark. PW1 did not say how she identified the appellant. He referred us to **Waziri Amani V. R.** [1980] TLR 250. He was of the opinion that that evidence ought to have been corroborated by Beatrisa Joseph who responded to the alarm raised by PW1 who was not called as witness.

As regards to the dying declaration, he said that evidence required to be corroborated. In our case there is none, the learned counsel argued.

Mr. Kabunga then attacked the credibility of the witnesses. He said they were not credible. He pointed out for instance when PW1 went to report to the area Chairman one Mathias Machobongo (PW2) she did not mention the assailants. And further the evidence of PW1 and PW2 differ in material particulars. PW1 did not mention what point in time the deceased passed away. It is only mentioned by PW2.

On the other hand the respondent/Republic through Mr. Athumani Matuma learned State Attorney resisted the appeal saying the finding of the trial High Court was sound in law.

Referring to identification, Mr. Matuma said the appellant was a familiar face to PW1. She knew him and his relatives. Further, PW1 had conversation with the appellant and Daniel who is at large.

As regards the need of dying declaration to be corroborated, he said in the circumstance of this case it was not necessary. In any case if it is required then the conduct of the appellant who ran away after the death of the deceased corroborates the dying declaration. Reacting to the need of calling Beatrisa as a witness he said there was no need.

Briefly the prosecution case was that on the fateful day i.e. 27/8/2007 around 6.00 a.m. while PW1 was asleep she heard a woman crying for help within her compound. She woke up and rushed to see what the fuss was all about. On arrival she saw the deceased lying on the ground bleeding while the appellant and his brother Daniel were assaulting the deceased, their mother. When she asked why they were doing that she was told to mind her own business. PW1 raised an alarm. Daniel who is at large took banana leaves wrapped the deceased with the view to set alight the body of the deceased. PW1 intervened by pushing the appellant away. Luckily her neighbor one Beatrisa Joseph arrived. The appellant and Daniel took to their heels. The two went to the hamlet chairman PW2 to report. With PW2 they went to where the deceased was. It was this time when the deceased was asked who did it, she named the appellant and Daniel who were her children. She repeated the same version when her husband Damian Theodory (PW3) asked her. Shortly thereafter she passed away.

The trial High Court was satisfied firstly that PW1 identified the appellant as the conditions were favourable. We have travelled through the record, we are satisfied that the finding of the trial High Court is

correct. **One**, PW1 knew the appellant and his brother for quite a long time since 1995. PW1 mentioned the appellant's relatives. The appellant was a familiar face. **Two**, PW1 talked to them and they were at a very close range. **Three**, the incident did not take place in a flash. **Four**, she even had physical contact with the appellant when the latter intended to burn the deceased by pushing him. And to show the conditions were favourable, she even mentioned the shirt he put on; white shirt. It is clear that PW1 witnessed the duo beating the deceased, their mother which caused her death. PW1 was credible witness. It is our considered opinion that the evidence of PW1 alone would have carried the day.

But that is not the only evidence. PW1, PW2 and PW3 testified to have heard the deceased mentioning the appellant and Daniel as her assailants. Again we find the finding of the High Court correct. And that evidence was not seriously challenged, save a denial. The evidence of PW3 who was the father of the appellant deserves a special attention. Under normal circumstances, a father like PW3 would not have prepared to loose both his wife and his children upon conviction of a murder charge. By stating to have heard his deceased wife mentioning the appellant and Daniel, and he testified in Court that it were his two sons who did it, PW3

was courageous. We are settled in our mind he spoke nothing than the truth.

In view of the foregoing like the High Court we are satisfied that the deceased made such declaration in mentioning the appellant and Daniel as her assailants. In law does such statement require corroboration?

In **Rex V Eligu s/o Odel and Another** [1943] EACA 90 the erstwhile Court of Appeal for Eastern Africa said:-

"That whilst corroboration of a statement as to the cause of death made before his death by the deceased is desirable it is not always necessary in order to support a conviction. To say so would be to place such evidence on the same plane as accomplice evidence and would be incorrect."

Stated differently it is not a rule of thumb that corroboration should always be required in all cases involving dying declarations in order to secure a conviction. Corroboration will or will not be required depending on the circumstances of each case.

In our case, in view of the strong evidence on the record corroboration is not necessary. In any case there is corroboration in this case; the appellant's conduct of escaping from his homestead and arrested two weeks later. That corroborates both the dying declaration of deceased and the evidence of visual identification of PW1.

In fine we find the appeal to have no merit. We dismiss it in its entirety.

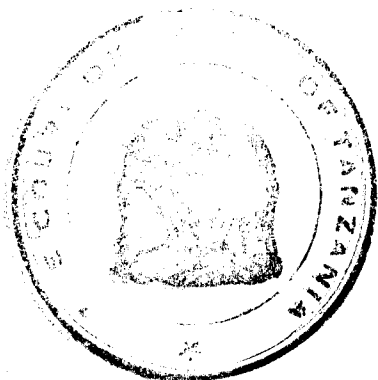
Order accordingly.

DATED at **BUKOB**A this 17th day of March, 2014.

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL