IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 46 OF 2015

GIDAMUDAIGA GIDAYAW.....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 15th day of February, 2013
In
Criminal Sess. No. 45 of 2012

JUDGMENT OF THE COURT

6th & 13th October, 2015

MWARIJA, J.A.:

The High Court of Tanzania sitting at Arusha convicted the appellant of the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E. 2002]. He was found guilty of having intentionally killed his wife, Anuwas D/O Gwaidamuy (the deceased). Following his conviction the appellant was sentenced to suffer death by hanging. He was aggrieved hence this appeal.

The background facts of the case can be briefly stated as follows: - The appellant was at the material time of the offence a resident of Garawaj

Village in Basotu ward, Hanang' district. He was a husband of two wives, Dangwee Kwakwee (PW1) and the deceased. Each of his wives lived in a separate house within the same compound with their children. The children included Qambaropta Gidamudaiga (PW2) and Mkapa Gidamudaiga (PW3) who were at the material time aged 12 and 13 years respectively. It appears from the evidence that the appellant's niece, Dissi was also staying with that family.

On 19/3/2011, the deceased died an unnatural death at home, the cause of which was associated with the appellant's acts of beating and cutting her with a bush knife (panga). The body was taken to Hydom hospital where it was examined by Dr. Mnyau Juda. According to the postmortem examination report which was admitted in the trial court as Exhibit P.E. 2, the Doctor found that the deceased had suffered cut wounds which caused the bones of her right leg to be exposed with penetrating wounds on both the right and left legs measuring 2x2 and 2x3 centimeters respectively.

It was the prosecution's case that the deceased was killed by the appellant who unlawfully attacked her by using a stick and a panga. According to the evidence tendered by prosecution witnesses, on

19/3/2011, when the appellant arrived at home, he asked the deceased the whereabouts of his niece, Dissi and the deceased replied that she did not know where the said child had gone. He then went to ask the same question to PW1 who also replied that she was also not aware. The appellant left and when he returned later, he repeated to inquire from the deceased the whereabouts of his niece. Following the reply by the deceased that she did not know where the child was, he started to beat the deceased severely using a stick and also a panga to cut her on both legs. According to PW1, the deceased who was bleeding from both legs ran to her house where the appellant followed and continued to beat her. PW1 decided to run away after the appellant had extended the beatings on her as well. She left the deceased who was helplessly beaten to death.

The evidence of PW1 was supported by that of PW2 and PW3. PW2 testified that on the material date when the appellant returned at home, a quarrel ensued between him and the deceased. According to the witness, the source of the quarrel was the deceased's reply to the appellant that she did not know the whereabouts of Dissi. He said that the appellant reacted by beating the deceased with a stick and by cutting her both legs with a panga. PW2 added that when the deceased ran to the house of her

co-wife (PW1), the appellant chased her and went on to beat her. PW3 witnessed the deceased running to PW1's house while bleeding from both legs. He also supported the evidence of PW1 that the deceased died in her house.

In his defence, the appellant denied the charge. He said that on 19/3/2011 he went to look for some money so that he could take his sick wife (the deceased) to hospital. When he returned home at 23.00 hrs, he asked his son, PW3 about the condition of the deceased and the said child replied that she was critically ill. According to the appellant he went and tried to wake her up after PW3 had failed to do so but found that the deceased was dead. It was his defence that he did not assault the deceased and that therefore he did not cause her death.

In his memorandum of appeal the appellant raised the following four grounds of appeal:-

"1. *That, the trial Court erred in law and in fact by relying on a purported medical report (post mortem Examination Report) P.E., 2 which is violative of section 291(1) of the C.P.A. Cap 20 R.E., 2002.*

2. *That, the trial Court did not state which language PW2 and PW3 expressed themselves before the Court putting into account the fact that both witnesses were minor and they have never attended any school where they could learn how to speak Kiswahili or English which is the language of the court or seek an interpreter who could translate from their vernacular language to Swahili and then Court could record in English.*

3. *That, the trial Court erred in law and in fact by allowing PW5 D2364 D/Sgt Hassan who was a Police Officer to produce in Court Exhibit P.E. 2 because he was not a medical Officer and the accused person was denied the right of being given a reasonable Notice by the Prosecution of an intention to produce the document at the trial as a result was denied the right to be heard.*

4. *That, the trial Court erred in law and in fact by addressing PW1 to the contents of section 130(1) of the Evidence Act, Cap 6 R.E. 2002 because the witness did not understand the implication or legal predicaments of the third section of the law because the same was not interpreted by the Court interpreter who was conversant in both English and*

Kiswahili and Kiswahili to Barbaing which was the language of PW1."

At the hearing of the appeal, the appellant was represented by Mr. John Materu, learned counsel while the respondent Republic was represented by Ms. Elizabeth Swai, learned State Attorney assisted by Ms. Tarsila Assenga, learned State Attorney.

In arguing the 1st and 3rd grounds of appeal, Mr. Materu started by contending that the postmortem examination report was received in evidence in contravention of section 291 (1) and (3) of the Criminal Procedure Act, [Cap 20 R.E. 2002] (hereinafter "the CPA"). He argued that neither the appellant nor his advocate was provided with a copy of the report before the same was tendered in evidence as required by the provisions of s. 291(1) of the CPA. He argued further that that the report was improperly admitted because the witness who tendered it was not its author.

On the second ground, the learned counsel argued that since it is in evidence that the child witnesses, PW2 and PW3 had not attended any school, they could not speak Kiswahili and for this reason, the language which they used in giving their evidence and the person who did the

interpretation from the language used by the witnesses into the language of the Court should have been reflected on record. Having been referred to the contents of the record however, the learned counsel conceded that the contention that PW2 and PW3 did not understand Kiswahili is not borne out by the court record. In the course of his submission further, Mr. Materu also abandoned the fourth ground of appeal.

In abandoning that ground, Mr. Materu was of the view that in this case, PW1 was both a competent and compellable witnesses. We agree with the learned counsel that PW1 was a competent and compellable witness. This is by virtue of exceptions to S.130 (1) of the Evidence Act which are provided under subsection (2). Section 130(2) (b) which is applicable under the circumstances of this case provides as follows:

> *"130 (1)....*
>
> *(2) Any wife or husband, whether or not of a monogamous marriage, shall be a competent and compellable witness for the prosecution-*
>
> *(a).....*

(b) in any case where the person charged is charged in respect of an act or omission affecting the person or property of the wife or husband, or any of the wives of a polygamous marriage of that person or the children of either or any of them."

The same provision as then appearing in the Evidence Act, 1967 was subject to interpretation in the case of **Republic v Kihandika** (1974) 1 E.A. 372 in which Onyiuke, J held that:

"On a charge affecting the person of one wife another wife is a competent and compellable witness for the prosecution against her husband."

We agree that where, like in this case, a husband is charged with the murder of one of his wives, under S.130 (2) (b) of the Evidence Act, another wife or wives are competent and compellable witnesses.

On her part, in responding to the grounds of appeal, Ms, Swai submitted that the appeal has been brought without sufficient reasons. On the first ground, she argued that the appellant had a prior notice that the postmortem report was to be tendered in evidence. That, she said, is

because the appellant was, in compliance with s. 245 of the CPA, supplied with the record of preliminary inquiry. As regards the contention that s. 291(3) of the CPA was not complied with, the learned State Attorney responded by stating that the contention lacks merit because when the appellant was asked whether he would require the doctor who conducted postmortem examination on the deceased to be called to testify, his advocate chose not to exercise that right.

On the second ground, the learned State Attorney argued in response that from the record, the witnesses, PW2 and PW3 had their evidence recorded following their responses to the questions put to them, meaning that they understood the language of the court. She argued thus that this ground also lacks merit.

We think, as rightly conceded by the learned counsel for the appellant, the second ground of appeal was improperly raised because it lacks basis. There is nothing on record to show that the two child witnesses did not understand Kiswahili. The fact that the said children have not attended school does not necessarily mean that they did not understand Kiswahili. This ground was therefore, in our considered view, raised on the basis of a wrong assumption.

Like the 2nd ground of appeal, we also find that the third ground is devoid of merit. Section 291 (1) and (3) which Mr. Materu contents to have been breached, provide as follows:-

> *"291 (1) in any trial before the High Court, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter, shall be receivable in evidence save that this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial together with a copy of the document, has been given to the accused or his advocate.*
>
> *(2).....*
>
> *(3) Where the evidence is received by the Court, the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report; and the court shall inform the accused person of his*

right to require the person who made the report to be summoned in accordance with the provisions of this subsection".

The requirements of giving the appellant notice of the prosecution's intention to produce the medical report was, in our view, complied with. The nature of the charge with which the appellant was charged and convicted has a specific and elaborate procedure to be followed before an accused person is tried. The procedure involves compliance with sections 243 – 251 of the CPA. Sections 249 (1) – (3) provide as follows:-

"249 (1) A person who has been committed for trial before the High Court shall be entitled at any time before the trial to have a copy of the record of the committal proceedings without payment.

(2) The court shall, at the time of committing him for trial, inform the accused person of his right to a copy of the record of committal proceedings without payment.

(3) Every record of the proceedings supplied to the accused pursuant to this section ***shall contain a copy of the charge or charges, copies of the statements and documents produced to the court during the committal proceedings*** *and a copy of the record of the proceedings before the court" (Emphasis added).*

As argued by Ms. Swai, since there was compliance with the procedure of conducting a preliminary inquiry, the appellant had the notice that a postmortem report would be tendered in evidence. This is reflected by the fact that during the hearing, the appellant did not raise any complaint that he was not provided with a copy of the information which contained the documents produced in court, including a copy of the postmortem examination report. He cannot therefore, at this stage, raise this issue of fact that he did not get the notice complained of.

As to the third ground, we agree with the learned State Attorney that the same also lacks merit. Having gone through the record, it is clear that the appellant was informed of his right to require that the doctor who prepared the postmortem report be summoned to testify. The learned

counsel who represented the appellant at the trial did not only express that he did not have any objection as to the admissibility of the document but that he did not intend to cross-examine the author of the medical report. The learned counsel stated as follows:-

> *"No objection and we don't intend to cross-examine the doctor who conducted the postmortem examination."*

Although the record shows that learned trial judge addressed the appellant under s. 241 of the CPA, the nature of the reply by the advocate leaves no doubt that the provision of s. 291 (1) and (3) were complied with. We do not therefore find merit in the contention that the document was improperly tendered by a person who was not the author thereof. Even if however, we were to agree with the learned counsel that the appellant was not notified of the prosecution's intention to rely on the postmortem report and as a result expunge it from the record, there will still be sufficient evidence proving that the deceased's death was due to cut wounds.

The evidence of PW1, PW2 and PW3 which was believed by the trial

Court proved that it was the appellant who caused the death of the deceased by beating her with a stick and by cutting her legs using a panga. All the three witnesses were unanimous in their evidence that the deceased died shortly after she had been severely assaulted by the appellant. The witnesses were found by the trial court to be credible. On our part, we do not find any sufficient reason to interfere with that finding. As held by this Court in the case of **Kaniki v. Republic** (1990-1994) 1 EA 152;

> *"matters of credibility of the witnesses are primarily the domain of the trial court which has the advantage of assessing the demeanor of the witnesses and evaluating the credibility of such evidence. The Court of Appeal will not readily interfere with the decision of the trial Court on such an issue."*

We also agree with the learned trial judge that the appellant killed the deceased with malice aforethought. He used a lethal weapon (a panga) to cut the deceased's both legs. The nature of injuries as shown in the postmortem report was such that it exposed the bones proving that the deceased was severely wounded. There is no doubt that the appellant intended to cause grievous harm to the deceased. After he had severely

hospital or giving her any first aid. Such act by the appellant proves that he killed the deceased with malice aforethought.

On the basis of the above stated reasons, we find the appeal to be devoid of any merit and hereby dismiss it.

DATED at **ARUSHA** this 12th day of October, 2015.

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL