

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

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

CRIMINAL APPEAL NO. 199 OF 2015

PAULO GADYE.....APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Massengi, J.)

Dated the 13th day of February, 2014

In

Criminal Sess. No. 19 of 2013

JUDGMENT OF THE COURT

8th & 13th October, 2015

JUMA, J.A.:

The appellant in this appeal Paulo s/o Gadye was in the High Court of Tanzania at Babati, convicted of the offence of murder contrary to section 196 of the Penal Code, Chapter 16 R.E. of 2002. The particulars of the offence were that the appellant murdered Patrice s/o Mathias Akonay (the deceased). Upon his conviction, the trial Judge (Massengi, J.) sentenced him to suffer death by hanging.

The background facts are as follows. Around 9.00 a.m. on the 8/10/2010, at Hewasi village, Babati District in Manyara Region the

deceased paid a visit at the appellant's household. He was following up on the appellant to pay him Tshs. 1,500/= which was due to him after uprooting a tree stump, a task which the appellant had given him. The appellant was not at home. He promised the appellant's wife, Christina Gamunga (PW2) that he would return later.

The appellant was at home when the deceased returned for a second time that day, to demand his payment. According to PW2, there was a brief exchange of words outside, with the appellant explaining that he did not have the money. The appellant then picked his hoe and asked the deceased to join him inside the house. It was when the deceased had sat down in a chair when the appellant struck him both on his forehead and at back of his head, felling him down. The appellant's wife, Christina Gamunga (PW2) and his two children, a thirteen-year old Martin Paul (PW3) and twelve year-old Rebecca Paulo (PW4), all testified to have witnessed how the appellant hit the deceased with a hoe.

In her evidence, PW2 narrated how, after the deceased had been hit, the appellant threatened her that he would slash her with a machete should she raise any alarm. The appellant then sent his children away to

his son's homestead. It is also alleged that later in the evening, the appellant with the assistance of two people, carried the body of the deceased from the house. The body of the deceased was later discovered in Hewasi River where it had been thrown. According to E.1112 Detective Corporal John (PW1) who was in charge of the investigations, the discovery followed information which the police received on 9/10/2010.

PW1 testified that the body had sustained a wound on its forehead and on the back of its head. Beside the body was a hoe and unspecified quantity of millet. The appellant's wife and his two children identified the hoe (exhibit PE1) to PW1 to be belonging to the appellant. The Post-Mortem Examination Report (Exhibit PE3) was not objected to by defence counsel when PW1 offered for its exhibition as evidence. According to this report, the death was due to severe brain injury.

When his time to testify came, the appellant denied any responsibility in the death of the deceased who is described as his uncle. He testified that although the hoe that was found beside the body of the deceased was his, he had earlier on 5/11/2009 given it to the deceased. He blamed his

wife for fabricating evidence against him and coaching his two children to implicate him in the murder he did not commit.

While convicting the appellant, the learned trial Judge found that the appellant had malice aforethought when he attacked the deceased who had gone to demand his money for work he had done for the appellant.

The trial Judge stated:

"...In this case malice aforethought is demonstrated by the way accused attacked the deceased that is hitting him with a hoe twice on and part of the body which he directed the blow that is the head. I am fully satisfied that the accused person had malice aforethought when he caused the deceased's death."

Being dissatisfied by the conviction and sentence, he brought the present appeal containing five grounds of appeal. In the **first** ground, the appellant complains that the evidence of PW2, PW3 and PW4 is doubtful for alleging without any semblance of proof, that the appellant hit the deceased whilst inside the house. **Secondly**, the appellant faults the trial court for convicting him without so much as considering his defence. In his **third** ground of appeal, the appellant once again faulted the evidence of PW2, PW3 and PW4 on the failure of these witnesses to report the incident

to any person. In his **fourth** ground, the appellant faults the trial court for convicting him on the basis of the evidence of the hoe without any proof that it was his property. **Finally**, the appellant summed up the prosecution case against him to be nothing but a cooked up story.

At the hearing of the appeal, learned advocate Ms Christina Kimale represented the appellant while Ms. Lilian Aloyce Mmasi, learned Senior State Attorney represented the respondent Republic.

Submitting on the fourth and fifth grounds of appeal contending that the case against the appellant is anything but a fabricated story, Ms. Kimale took issue with relevance of the hoe and finger millet which were collectively tendered as exhibit P1. She did not see any evidential link between these items to the appellant. No witness testified that exhibit P1 which was found beside the body of the deceased, actually belonged to the appellant, Ms. Kimale submitted.

Ms. Kimale then attacked the evidence of the appellant's son Martin Paulo (PW3), describing it as a tutored evidence. The evidence of PW3 is couched because if their father had in the morning sent them away to his other son's house till 20:00 hours, how could the two children give such

details on how the deceased was hit by a hoe, she wondered. The learned advocate raised the question regarding the correct ages of the appellant's two children (PW3 and PW4) as another reason why she thought the two children were taught by their mother to fabricate evidence against the appellant. The learned advocate submitted that when he consulted the appellant before coming to Court, he said that Rebecca Paulo (PW4), who is testified as a 12-year old girl, is in fact older than Martin Paulo (PW3) whose age is indicated as 13 years old.

Ms. Kimale took head on the evidence of PW4 who under cross examination stated that *"my father and mother do quarrel frequently"* and that of PW2 who also under cross examination stated- *"we sometime quarrel with my husband..."*. To the learned advocate, this is a confirmation that the household of the appellant and his wife (PW2) was not peaceful and hence why the children were coached to fabricate evidence against their father. In light of such disharmonious house, the learned advocate submitted that the prosecution should have brought an independent witness to testify objectively.

With the evidence of PW2, PW3 and PW4 discredited that much, Ms. Kimale urged us to allow the fourth and fifth grounds of appeal.

In so far as the first and second grounds of appeal are concerned, Ms. Kimale concentrated on the failure by the trial court to consider the appellant's defence. The learned advocate wondered why the trial Judge failed to consider the evidence that the appellant and his wife were not in good terms hence the way his wife and two children ganged up against him in their fabricated evidence.

After abandoning the third ground of appeal, Ms. Kimale took exception to the summing up notes of the trial Judge by suggesting that the hoe which was found besides the body of the deceased, had "blood stains". There is no witness, she submitted, who testified that the hoe had bloodstains. For the trial Judge to suggest the existence of blood stains without any support of evidence was misdirection to the assessors.

Ms. Mmasi, learned Senior State Attorney for the respondent on the other hand, opposed the appeal and contended the two children, PW3 and PW4, were eye witnesses who saw what actually happened to the deceased when he went twice to demand his payments from the appellant.

Regarding how the appellant is linked to the hoe and millet found beside the deceased's body, Ms. Mmasi had several lines of submissions. In the first line, she submitted that the hoe and the millet are relevant evidence because they were found together with the body of the deceased. Secondly, the appellant's wife identified that hoe to belong to their household. Thirdly, Ms. Mmasi referred to the evidence of the appellant himself who testified in his defence that on 5/11/2009 the deceased had asked for a hoe, which he gave him. Fourthly, the learned Senior State Attorney urged us not to dwell much on the hoe but on the ingredients of the offence of murder which are at stake.

Regarding the complaint that in her summing up notes, the trial Judge had included the aspect of blood-stained hoe which was not stated by any witness, Ms. Mmasi saw nothing wrong for the trial Judge to mention blood-stained hoe while revisiting the evidence offered by the defence, which did not influence the final Judgment of the trial court.

Ms. Mmasi did not agree with the suggestion that the occasional quarrels which sometimes took place in the appellant's household, had so

much alienated him from his wife and children that they resorted to fabrication of evidence against him.

From the submissions of the learned counsel, we must begin from the premise that this appeal originates from the High Court in exercise of its original jurisdiction. On first appeal, we are enjoined to make our own evaluation of evidence by rehearing (-see **Salim Petro Ngalawa vs. R.**, Criminal Appeal No. 85 of 2004 and **1. John Balagomwa, 2. Hakizimana Zebedayo, Deo Mhidini 3. vs. R.**, Criminal Appeal No. 56 of 2013 (both unreported). Using the ingredients constituting the offence of murder as our point of reference, we shall re-evaluate the evidence and arrive at our own conclusions.

The appellant's main ground of complaint boils down to his disappointment with the credibility of his wife Christian Gamunga, PW2; and his two children, Martin Paulo (PW3) and Rebecca Paulo (PW4) whose evidence according to the trial Judge, proved that it was the appellant who with malice aforethought, caused the death of the deceased. The learned trial Judge was satisfied that these three prosecution witnesses were credible witnesses and they had ample opportunity to see the appellant

hitting and killing the deceased before taking the body away at night. The learned trial Judge expressed herself in the following way:

"...In the present case I have warned myself upon the danger of acting upon unsworn evidence of children of tender age that is PW2 and PW3 and I find that my conscience is to the effect that the two witnesses are telling nothing but the truth. Even their demeanour when they were giving evidence proved that they were credible witnesses. ... I am therefore fully satisfied that prosecution evidence has proved that it was the accused who hit deceased with the hoe on the forehead and it was the cause of his death..."

"...until PW3 and PW4 went to bed the body was still in their house and when they returned home after being sent to their in law by accused they found the body was still in their house covered and accused warned them not to disturb it.."

In **Siza Patrice vs. R.**, Criminal Appeal No. 19 of 2010 (unreported) this Court embraced some principles which may guide a first appellate

court when re-evaluating the way a trial court determined the credibility of witnesses:

*"..we are alive to the fact that the credibility of a witness in any judicial proceeding, be it criminal or civil, has always been recognized as the monopoly of the trial court. But as this Court succinctly stated in the case of **Shabani Daud v. R.**, Criminal Appeal No. 28 of 2000 (unreported) this is-*

*'...only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: **One**, when assessing the coherence of the testimony of that witness. **Two, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court.'***..."[Emphasis is ours].

After reading and evaluating the evidence of the three main prosecution witnesses, we found nothing to justify any interference with the way the trial Judge assessed their credibility. These prosecution eye witnesses gave a coherent and mutually supportive account of what they actually witnessed. Their evidence was consistent even under cross examination.

There is no dispute that the deceased died an unlawful death and his body was thrown into a river. Apart from evidence of PW2, PW3 and PW4 who witnessed how the deceased was hit with a hoe when he went to demand his payments from the appellant, the extent of his fatal injuries is shown in the post-mortem examination report. Apart from establishing that it was the appellant who caused the death of the deceased, we upon revaluation found that the evidence of eye witnesses also established malice aforethought. The object the appellant used (a hoe) to attack the deceased, directing it at the head, which is a vulnerable part of the body, manifested an intention to kill. The appellant knew what he had done was wrong. He threatened his wife with dire consequences should she raise an

alarm. He then took advantage of the cover of darkness to transfer the body of the deceased to the river where he dumped it.


In the net result, this appeal has no merit and we order that it be and is hereby dismissed.

Dated at Arusha this 9th 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