IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: OTHMAN, C.J., MJASIRI, J.A. And MMILA, J.A.)

CRIMINAL APPEAL NO. 238 OF 2014

BETWEEN

JUMA KONOLIO ABDALLAH @
STEPHANO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mzuna, J.)

dated 6th day of June, 2014

in

Criminal Case No. 19 of 2013

JUDGMENT OF THE COURT

01st October, 2015 &

OTHMAN, C.J.:

The appellant, Juma Konolio Abdallah @ Stephano was charged with the murder of his uncle, Dastan s/o Seleman Mmeho c/s. 196 of the Penal Code, Cap 16, R.E. 2002. The High Court (Mzuna, J.) sitting at Mtwara

convicted and sentenced him to the mandatory death sentence. Aggrieved, he preferred this appeal.

At the hearing of the appeal on 1/10/2015, the appellant was represented by Mr. Hussein Mtembwa, learned Advocate. The respondent Republic, which resisted the appeal was represented by Mr. Paul Kimweri, learned Senior State Attorney.

In a nutshell, the material facts at the trial were that between 10 p.m. - 11 p.m. on the night of 29/08/2012, in Manyambe Village, Newala District, Mtwara Region, the appellant hit the deceased with a panga that fatally wounded him. He succumbed to death that very night. The post-mortem medical examination report (Exhibit P.3) conducted on 30/8/2012 by PW4 (Dr. John Charles Kamtande) revealed the cause of death as severe hemorrhage due to an extensive and deep scalp wound.

Immediately following the incident, the appellant carrying the blood soaked panga in his hand went to the house of PW6 (Emmanuel Mtumika) and admitted that he hit his uncle with it. PW6 who was together with Dadi Selemani apprehended the appellant and handed him over to the police that night.

The High Court found out that the deceased's dying declaration (Exh. P.1) made to PW1 (B. 8952 Cpl Yuradi) on 29/8/2012 and which the prosecution had pressed into service against the appellant could not be relied upon as the deceased was in a state confusion and it did not meet the test in **Hamisi Said Mchana v.R.** (1984) T.L.R. 319. The learned Judge also held that the appellant's extra judicial statement (Exh. P.2) recorded by PW3 (Mwinyimanga Miwadi), a justice of the peace on 5/09/2012 was not true and ruled it out.

Essentially relying on the evidence of PW6, the High Court was of the settled view that the deceased was hit with the panga inside *his* house. The trial court also held that malice aforethought as defined under section 200 of the Penal Code had been established as the appellant had at least intended to cause grievous harm and at most death; had harbored a grudge for having been told on several occasions by the deceased to shift from his parcel of land; had used a lethal weapon on the head, a vulnerable part of the deceased's body; and instead of administering first aid or rescuing the deceased after the fatal injury, he went to report the incident to PW6. Agreeing with the opinion of the three Assessors, the learned Judge concluded that the appellant was guilty of murder.

The two grounds of appeal In the appellant's memorandum of appeal are that:

1. *The Honorable trial Court erred In law and fact by believing and acting upon the testimony of PW6 in disregard to the testimonies of PW1, PW2, PW5 and DW1 as regard to the place the deceased was slashed with a panga.*
2. *The Honorable trial Court erred in law and fact by failure to understand that having ruled out or disregarded Exhibit P1 (Dying Declaration), Exhibit P2 (Extra Judicial Statement) and the testimony of PW5, the only available story as to the circumstances leading to deceased's death was that of DW1.*

Given the facts and circumstances of the case and the interwoven nature of the two grounds of appeal, it is appropriate that we deal with them together.

Mr. Mtembwa forcefully submitted that the prosecution had failed to establish where the incident had taken place. The learned Judge should not have believed PW6 that the appellant went to the house of the deceased and slashed him with a panga, in view of the concurring testimonies of prosecution witnesses, PW1, PW2 (WP 6074 DCT Angelina) and PW5 (G

3165 DCT Alawe), which supported the appellant's (DW1) testimony that it took place inside his house. The learned Advocate submitted that PW6's evidence was an afterthought as it was contrary to the prosecution's own version at the preliminary hearing that the incident took place inside the appellant's house. The doubt that resulted, whether the incident took place inside the deceased's or the appellant's house was the prosecution's own creation, whose witnesses gave two differing stories. He faulted the High Court for not assigning any reasons in disbelieving the evidence of PW1, PW2, PW5 and DW1.

Mr. Mtembwa went on to add that there was no independent evidence of any blood stains from the appellant's house leading to the deceased's house. That once the deceased's dying declaration (Exh. P.1) is excluded, as the learned Judge had correctly done, DW1 had to be believed, because he was the only witness who was present during the incident.

Opposed, Mr. Kimweri submitted that there is no dispute that the appellant attacked the deceased with a panga. The fundamental issue for resolution was whether or not he did so with malice aforethought. He relied on **Juma Kaulule v.R.**, Criminal Appeal No. 281 of 2006 (CAT,

unreported). The place where the incident took place was thus decisive in this case. That as PW6 was the first person to speak to the appellant and had a good opportunity to obtain the truth, he was correctly given more weight by the High Court than PW1, PW2 and PW5 who did not hear the appellant directly.

Mr. Kimweri strenuously contended that PW6's evidence was supported by the totality of the circumstantial evidence. Blood stains were found at the door leading into the deceased's house. This suggested that the incident took place outside his house. The deceased had been struck on the head by two blows of the panga. PW5 who drew the sketch map (Exh. P. 4) had been directed by Hawa Rashid, the appellant's wife, who had been drunk and had slept in another room during the incident. As such, PW5's evidence could not be relied upon. The sketch map (Exh. P.4) did not indicate any traces of blood. That parts of the extra judicial statement (Exh. P. 2) were true and were corroborated with other evidence, but portions were not. The learned Senior State Attorney submitted that the appellant's evidence had not raised any doubt on the prosecution's case that the deceased was slashed with the panga at his house, and not at the appellant's home.

We advert next to the merits.

No doubt a first appellate Court has to give respect to a trial court's findings and conclusions given its live conduct of a trial and having seen and heard the witnesses. However, an appellate court is still entitled to re-examine afresh the whole evidence on record and come to its own conclusion, particularly where the trial court adopted a wrong approach in evaluating the evidence or omitted to evaluate some of the evidence of the witnesses or failed to consider some vital piece or pieces of evidence (See, **Martha Michael Wejja V. Hon. The Attorney General**, (1982) T.L.R. 35, (CAT).

There is no gainsaying that one of the decisive questions arising out of this appeal is whether or not the deceased was hit with the panga by the appellant *at his house* or *at the deceased's house*. The High Court had found out that the incident occurred inside the deceased's house.

The law is well established that in a criminal case, the burden of proof is always on the prosecution to prove the guilt of the accused person beyond reasonable doubt. The appellant and the deceased's houses were ten meters apart (Exh. P.4). Having closely examined the whole evidence, we would agree with Mr. Mtembwa that the prosecution's version of events

that the deceased was hit with the panga at his house was laden with doubt and incoherency created by its own witnesses. The record bears out that at the preliminary hearing held under section 192(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 the prosecution's narration of facts was that on 29/8/2012 "the deceased arrived at the accused house". With the deceased's dying declaration (Exh. P.1) having been correctly discounted by the High Court, as he was breathless, spoke with difficulty, was at his "last stages of survival" (PW1) and eventually passed away the night of the incident, the evidence of PW1, the first police officer to arrive at the deceased's house, could not have added any great weight on that pivotal issue. While on one side, PW2 and PW5, both police officers who also formed part of the investigation team, testified that the deceased was attacked inside the accused's house, on the other hand, PW6 was adamant that he was attacked inside the deceased's house near the door.

Furthermore, we are of the respectful view that reliance could also not be placed on the blood stains at the door of the deceased's house discovered by PW6 on the night of the incident, as the High Court had mistakenly depended on, as constituting sufficient circumstantial evidence of the fact that the deceased was attacked at his house. The blood stains

that were spotted at the door of the deceased's house, in themselves could not completely eliminate the possibility that he could have been fatally injured elsewhere other than at his house. In no way could that evidence be the silver bullet. Going by the sketch map (Exh. P.4) drawn by PW5, it is plainly indicated therein that the deceased did not die where he was hit with the panga. It noted that the deceased had been hit at the apellant's house, Point A and had died at Point B, his house.

Two essential witnesses were not called by the prosecution to augment it's version of the event. While we fully understand the prosecution for not calling Hawa Rashid, the appellant's wife who was around during the incident, because she had been drunk and had slept in another room in the house; Dadi Selemani who was with PW6 and who was the first person to go to the deceased's house immediately after the incident, and who even spoken to him before he died was not called to testify on the place the deceased was hit with the panga by the appellant. Had this piece of crucial evidence been available, it could have pointedly supported the prosecution's case.

Considered in its totality, the evidence is not sufficiently reassuring that the deceased was hit with the panga at no other place than at his

house. The discovery of blood stains at the door of the deceased's house that was relied upon by Mr. Kimweri as an incriminating circumstance on the place he was hit with the panga, was open to the possibility that the attack on the deceased could have occurred elsewhere, including at the appellant's house as PW2, PW5 and the appellant had testified. The blood stains could not unerringly point at one direction to the exclusion of any other reasonable hypothesis. As such, the circumstance was not of a conclusive nature. In our respectful view, with the above as evidence, reasonable doubt was raised by the appellant's version, which was also partly vouched for by the prosecution's own witnesses (PW2 and PW5) that the appellant hit the deceased with a panga at his house.

The next question that falls for consideration is malice aforethought. Mr. Mtembwa submitted that the incident took place at night, around 11 p.m. at the appellant's house. He had closed his door. He did not know whether or not it was a human being who had entered into the house. As he had goats, he had slept with a panga and had no evil intention in hitting the intruder who had touched him while asleep and who happened to be his deceased uncle. Resisting, Mr. Kimweri submitted that elements constituting premeditation can be found in the history of the event. The

appellant was told by the deceased to shift from his plot of land. Moreover, he struck the deceased on the head with two blows of the panga, a lethal weapon. He relied on **Juma Kaulule's case**. On factors to be considered by a court in determining the existence of malice aforethought.

For our part, having accepted on the reasons afforded earlier, the reasonable probability that the deceased was hit with a panga at the appellant's house, the additional question that falls for consideration is whether the prosecution proved that the appellant acted with malice afterthought as defined under section 200 of the Penal Code. While the High Court correctly reasoned that no premeditation could arise if it was the deceased that had gone to the appellant's house, with respect, its appreciation of the evidence and some of its findings were erroneous.

The High Court found out that the appellant had gone to the deceased's house. First, the prosecution did not sufficiently discharge its burden on this and the claim was not conclusively proved. Second, it also found out that the traces of blood seen at the deceased's house was one of the factor which proved the existence of malice afterthought. As stated earlier, the evidence of traces of blood at the door of the deceased's house as an incriminating circumstances that unmistakenly pointed to the place

where the appellant hit the deceased with the panga to the exclusion of any other place is neither here nor there. It simply could not be relied upon as sufficient circumstantial evidence of that issue. Third, the High Court had also found out that the conduct of the appellant in not administering first aid to his deceased uncle and instead, of reporting the incident to PW6 was proof of malice aforethought and inconsistent with his innocent. In our respectful view, this finding did not take sufficient account as it should have, of a piece of PW6's evidence that the appellant who immediately went to his house, plainly admitted to him what he had done, and was "remorseful".

That apart, we agree with both Mr. Mtembwa and Mr. Kimweri that a finding on where the deceased was hit with the panga is also greatly determinant of the appellant's malice aforethought. On our part, having closely re-examined the totality of the evidence, it is plain that the incident had occurred at about 11 p.m. at night and when it was dark. The appellant had made an unannounced and uninvited entry into the appellant's house. He slept with a panga as he kept goats at home. The evidence also suggests a high probability that the incident may have occurred at the spar of the moment. The appellant immediately reported

the incident and was according to PW6, remorseful. Considering all the above and the erroneous findings of the High Court discussed earlier, we would agree with Mr. Mtembwa that malice afterthought was not affirmatively proved. Moreover, there was no evidence that the deceased was hit with two blows of the panga as vainly argued by Mr. Kimweri. The post-mortem medical examination report (Exh. 3) is explicit that the deceased had received an extensive scalp wound. No doubt there is credible evidence that the deceased had told the appellant to vacate from his plot of land. However, at its best this is a true account of the history of the relations between the appellant and the deceased. We are not persuaded that this by itself could crististalize or mature into malice aforethought. Accordingly, in our considered view, malice aforethought was not proved by the prosecution to the standard required by law.

Accordingly, we find merit in the two grounds of appeal.

In conclusion and all the above reasons, we hereby invoke our revisional jurisdiction under section 4(3) of the Appellant. Jurisdiction Act, Cap 131, R.E. 2002, proceed to quash and set aside the appellant's conviction and sentence for murder and substitute it for that of manslaughter under section 195 of the Penal Code.

We asked Mt. Mtambwe and Mr. Kimweri what would an appropriate sentence be, if we were to find the appellant guilty of manslaughter and not murder, the offence he was originally charged with, convicted and sentenced. Mr. Mtwambwe submitted that taking into account the time he was arrested and the period of imprisonment he had served, either a two years sentence of imprisonment or a non-custodial sentence would be suitable. Opposed, Mr. Kimweri submitted that a sentence of 15 years imprisonment, less the time he had spent in prison would be most appropriate.

In our view and having considered the record, and the attending circumstances and factors, including the period of pre-trial custody, we proceed to impose on the appellant, a five (5) years sentence of imprisonment to run from the date of his conviction by the High Court, on 06/06/2014. In our considered view, this would meet the justice of the case.

We hereby partly allow the appeal.

Ordered accordingly.

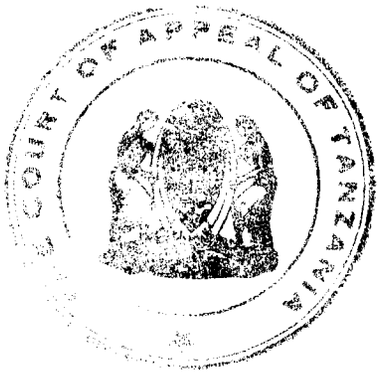
DATED at **MTWARA** this 6th day of November, 2015.

M.C. OTHMAN
CHIEF JUSTICE

S. MJASIRI
JUSTICE OF APPEAL

B.M.K MMILLA
JUSTICE OF APPEAL

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



A.TEYE
DEPUTY REGISTRAR
COURT OF APPEAL OF TANZANIA
AT MTWARA