IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA
(CORAM: OTHMAN, CJ., MJASIRI, J.A., And MMILLA, J.A)
CRIMINAL APPEAL NO. 240 OF 2014
RAJABU MOHAMED MKUPA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mzuna, J.)

dated the 23rd day of May, 2014

in

Criminal Session Case No. 32 of 2013

.....

JUDGMENT OF THE COURT

MMILLA, J. A.:

On 17.11.2011 at about 2.00 pm, Ahmad Hussein (the deceased) headed to the house of Shaibu Ally (PW1) who was a dealer in a local brew commonly known as "ulaka". On arrival there he bought a jug full of the said local brew and began drinking. Shortly thereafter the appellant, Rajabu Mohamed Mkupa went to that place on a bicycle looking for the deceased. He found him in the company of their host, Shaibu Ally. He hurried to ask the deceased: "***Toka juzi, mpaka jana, mpaka leo umesikia nini kwangu?"*** Literally translated it means "In the last three or so days until today, did you hear anything from me?" The deceased

replied that he heard nothing. The appellant then accused him for having had an affair with his wife. Again, to quote him he said: ***"Ninyi watu wabaya sana. Nikitoka humu kwenda kibaruani nyuma huku mnamzini mke wangu mimi?"*** Literally translated it means ***"You people are not good, whenever I leave home for work you fornicate my wife."*** Suddenly, he kicked the deceased sending him down, trampled on him and repeatedly hit him with fists in the stomach at the umbilical cord region and several other parts of the body. On being asked by PW1 why he was doing all that to the deceased; he replied angrily that the deceased was having an affair with his wife. PW1 appealed to him to stop the assault, but he ignored the advice. Instead, the appellant confronted yet the deceased who was then helplessly lying down, tightly tied his hands and legs with a long rubber he collected at his bicycle's carrier, after which he firmly tied the rubber on the back of his bicycle and began pulling him as he rode away towards the home of PW2 Zuhura Daima, who was the street chairperson.

On arrival at the home of PW2, the appellant repeated his accusation that the deceased was having an affair with his wife. At that time, the deceased was lying down with his hands and legs tied as it were at the

time they left PW1's home. On realizing that the complaint was thorny, PW2 took them to PW3 Hamisi Masudi Chilumba who was the Village Executive Officer (VEO). She handed them over to him and left.

On the other hand, on comprehending that the deceased was wrecked and in poor shape, PW3 wrote a letter to the police introducing the deceased's problem to them and gave it to the victim, called a motor cycle driver, paid him the requisite fare, and instructed him to send the deceased to Police Station and subsequently to Hospital. However, as PW3 was taking those measures, the appellant sneaked away and escaped to Mtunguru village within Newala District as he came to learn later.

Unfortunately however, the deceased passed away at the hospital on 24.11.2011. On that same day, PW6 Dr. Ismail Hamisi Ogha performed a medical examination and subsequently prepared a report constituted in exhibit P2 which was to the effect that death was due to intestinal obstruction.

Since the deceased's attacker was known, the militia men of Mchangani village traced him at Mtunguru village, arrested and surrendered him to the police. The appellant was consequently charged

with the offence of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002.

The story of the appellant was that he did not kill the deceased. He however, asserted that on seeing him at the home of PW1 on the said day he arrested him for having had an affair with his wife and stealing from their house some money and a radio. He purported that after a brief scuffle he tied the deceased's hands and legs, then tied him on his bicycle's carrier, after which he rode away towards the home of PW2. He claimed that the deceased was injured after he accidentally fell from the bicycle. He admitted however, that PW2 referred them to PW3, and that on arrival at the home of the latter, he excused himself and went away leaving the deceased in the hands of the VEO. He further stated that he was arrested on 20.11.2011, and on 24.11.2011 he was charged with murder contrary to section 196 of the Penal Code as afore said.

After a full trial, the High Court found the appellant guilty as charged, convicted and sentenced him to suffer death by hanging, hence the present appeal which is against both, conviction and sentence.

Before us, the appellant who was also present in person was represented by Mr. Moses Mkapa, learned advocate. They filed and argued two grounds of appeal; **one** that, the trial judge erred in law and in fact by deciding that the deceased's death was a direct result of the assault that the appellant committed against him without considering that the evidence was not enough to prove the case beyond reasonable doubt; and **two** that, the trial judge erred in law and in fact by his failure to find that the contradictions in the testimonies of PW1, PW4 and PW5 were fundamental and raised material doubts.

Mr. Mkapa's submission in support of these grounds was very brief. While he acknowledged that death was due to intestinal obstruction as per exhibit P2, the thrust of his submission in respect of the first ground was that the deceased's cause of death was not conclusively determined. He contended that since PW6 said intestinal obstruction could be caused by external force or disease, PW6 ought to have gone a step further by pointing out which of the two possibilities caused the intestinal obstruction in the circumstances of this case. He relied on the case of **Elias Kigadye & Another v. Republic** [1981] T. L. R. 355. He concluded that had the

trial High Court considered this aspect, its decision could not have been the same.

Coming to the second ground, Mr. Mkapa submitted that there were two fundamental contradictions; **one** that, while PW1 was recorded to have at first said that the appellant assaulted the deceased, the same witness testified at a later stage that the appellant and the deceased fought; **two** that, while PW1 gave evidence that the appellant kicked the deceased down, trampled on and hit him with fists at the umbilical cord region, PW4 testified that the deceased told her that the appellant slapped him. Whilst stressing that the cited contradictions were material, Mr. Mkapa argued that had the trial High Court considered them, its decision could not have been the same. He urged us to find that the appellant was not guilty of murder, and that at most we find him guilty of the lesser offence of manslaughter contrary to section 195 of the Penal Code.

On the question of malice, Mr. Mkapa admitted that the nature of brutality which was alleged to have been perpetuated by the appellant could be inferred when the trial court considers the question of malice. He was quick to add however, that because all what happened was preceded

by a fight, it was not proper for that court to have said the deceased's death was pre-meditated.

The respondent Republic was represented by Mr. Paul Kimweri, learned Senior State Attorney. He resisted the appeal. He was firm that the trial High Court properly found the appellant guilty of murder and correctly convicted him of that offence.

To begin with, Mr. Kimweri observed that there was strong evidence from PW1 to establish that the appellant assaulted the deceased by kicking him and hitting him with fists in the stomach before he subsequently tied him with rubber, appended him to his bicycle and dragged him away. He submitted that the evidence of PW1 was corroborated by that of PW6 who told the trial court that the deceased's body had bruises, so also exhibit P2 in which it was shown that death was due to intestinal obstruction which, according to PW6 was caused by external force. He submitted that his learned friend's assertion that the report was not conclusive on what caused the death was unfounded. At any rate, Mr. Kimweri went on to submit, so long as the evidence of PW6 was that death was due to intestinal obstruction, the appellant could still be held responsible for

accelerating deceased's death in terms of section 203 (d) of the Penal Code. He pressed the Court to dismiss the first ground of appeal.

As regards the second ground which alleged existence of contradictions in some of the witnesses' evidence, Mr. Kimweri challenged that there were no contradictions, adding that even where the Court may say they existed, it should regard them as minor and inconsequential. The hub of his argument was that PW1 was consistent that the appellant was the one who was kicking and hitting the deceased with fists, and that the deceased did not hit back, therefore that there was no question of fighting or that the appellant merely slapped the deceased as testified by PW4 WP 8209 PC Subira. Even, he went on to submit, PW4 could have said so because a long time had elapsed from the time she gave the PF3 to the deceased to the time she appeared in court to testify. He relied on the case of **January Kizitogama Ndunguru v. Republic**, Criminal Appeal No. 55 of 2003 CAT (unreported). He invited us to dismiss this ground too.

With regard to the question of malice, Mr. Kimweri was emphatic that the deceased's death was pre-meditated for four reasons; **one** that, the appellant had gone to the house of PW1 looking for the deceased; **two** that, in the course of the assault, he did not heed to the advice of PW1 to

abstain from mauling his victim; **three** that, after kicking the deceased down and hitting him with fists, he tied his hands and legs with a long rubber and dragged him for a distance of 120 metres from the home of PW1 to that of PW2; and **four** that, when they were at the house of PW3, and having known that the deceased was in bad shape, he sneaked away. In the circumstances, Mr. Kimweri requested the Court to uphold the finding of the trial court that malice aforethought was established. Over all, he asked the Court to dismiss the appeal in its entirety.

We begin by re-affirming the obvious that generally, in all criminal trials, the burden of proof lies squarely on the shoulders of prosecution unless some other law otherwise directs, and that the standard required is beyond reasonable doubt – See **Nkanga Daudi Nkanga v. Republic,** Criminal Appeal No. 316 of 2013 CAT (unreported), so also that the accused has no duty of proving his innocence – See **Haruna Bernado & Another v. Republic**, Criminal Appeal No. 13 of 2013 CAT (unreported).

The first complaint in the present appeal is that the learned judge erred in law and in fact by deciding that the deceased's death was a direct result of the assault that the appellant committed against him without

considering that the evidence was not enough to prove the case beyond reasonable doubt.

The crucial evidence on the point came from PW6 and the report he made (exhibit P2). The relevant part in exhibit P2 is paragraph 8 under which it is stated that death was due to **"intestinal obstruction due to twisting of small intestines (volvolus)."** In his oral testimony, PW6 added that intestinal obstruction may possibly be caused by **external force** or **diseases.** This is the basis of Mr. Mkapa's complaint that the evidence of that witness was not exhaustive as he ought to have come clear what exactly caused the intestinal obstruction in this case; was it external force or disease?

To start with, while we agree with Mr. Mkapa that it was the duty of the prosecution to exclude the possibility of death by natural causes, we rush to point out however, that he did not consider the evidence of PW6 in its totality. We are saying so because apart from his testimony that the deceased's body had bruises in certain parts - notably on the ribs, face and the palms which suggested that he was dragged, PW6 was recorded at page 34 of the Court Record to have said that intestinal obstruction could have been caused by beating and dragging the deceased while lying on his

stomach. He repeated this statement when he was responding to a question by the second lady assessor one Adina Kalsi, whereby this witness said that **"the cause for the twisting of small intestines is force. It can be either by the pulling *"kuburuzwa"* or being beaten."**

In view of the above, while we agree with Mr. Mkapa that paragraph 8 of the autopsy report ought to have been more elaborate, we hasten to say that the contents of that paragraph were complimented by PW6's oral evidence that intestinal obstruction was due to external force, and that his evidence was consistent with that of PW1 who, as we have already pointed out above, said that the appellant mercilessly assaulted the deceased by kicking him sending him down, trampling on him, and repeatedly hitting him with fists in the stomach at the umbilical cord region and several other parts of the body, and ultimately tying his victim's hands and legs with a rubber, appending him to his bicycle and pulling him for a distance of 120 metres from his house (PW1) to that of PW2. On account of the above, we are of the firm view that PW6 cannot be validly faulted that the said assault was the cause of death.

We also considered the case of **Elias Kigadye & Another v. Republic** (supra) Mr. Mkapa referred us to; particularly the Court's

observation that it was for the prosecution to exclude the possibility of death by natural causes, on the basis of which he submitted that it was a serious doubt which was not addressed by the trial court, and invited us to resolve that doubt in favour of the appellant.

On his part, while stressing that PW6 was coherent that death was due to external force, Mr. Kimweri submitted that the case of **Elias Kigadye & Another v. Republic** (supra) cannot bail out the appellant in as much as it pinned down the responsibility on the appellants for having accelerated the deaths of the deceased persons, which is what section 203 (d) of the Penal Code is all about.

In the case of **Elias Kigadye & Another v. Republic** (supra), the appellants were accused of causing the deaths of two persons, Twiga Nindwa and Kangombe Kaliji. The evidence was adduced to the effect that the deceased persons were beaten by the appellants and that they passed away 16 hours later. They were found guilty and convicted. On appeal to this Court, the counsel for the appellants argued that because there was evidence that the deceased persons were suffering from tuberculosis and that the post-mortem report was not clear on the cause of their deaths, they both could have died from bleeding due to tuberculosis and not

necessarily due to the beatings. While agreeing with the defence counsel that it was for the prosecution to exclude the possibility of death by natural causes, the Court held that:-

> *"We, like the judge, think that the evidence adduced at the trial clearly established that the beating certainly contributed to and /or accelerated the death of Twiga and Kangombe even if they were suffering from T.B. Like the judge, we are satisfied that the deaths were a direct result of the beatings. We do not think that the medical evidence adduced in this case which was on the whole unsatisfactory, can in any way raise a doubt that the deaths could have been caused otherwise than by the severe physical beatings administered to both Twiga and Kangombe."*

As is clear from the above passage, the Court's expression in that case was not as narrow as Mr. Mkapa convinces us to believe. The Court's expression was clear that the evidence adduced at the trial clearly established that certainly, the beating contributed to and /or accelerated the deaths of Twiga Nindwa and Kangombe Kaliji even if they were suffering from tuberculosis. In our firm view, the above expression strengthens the submission of Mr. Kimweri and we agree with him, that

since there is strong evidence that the appellant in our present case assaulted the deceased, he must be held to have contributed to and /or accelerated the deceased's death as envisaged by section 203 (d) of the Penal Code. That section provides that:-

> *"A person is deemed to have caused the death of another person, although his act is not the immediate or sole cause of death, in any of the following cases –*
>
> > *(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."*

Having demonstrated the nature of brutality which was carried out by the appellant against the deceased in this case, we find and hold that the first ground is devoid of merit and we dismiss it.

The second ground refers to contradictions. As already observed, Mr. Mkapa has pointed out two scenarios; **one** that, while PW1 was recorded to have at first said that the appellant assaulted the deceased, the same witness testified at a later stage that the appellant and the deceased

fought; **two** that, while PW1 gave evidence that the appellant kicked the deceased down, trampled on and hit him with fists at the umbilical cord region, PW4 testified that the deceased told her that the appellant slapped him. As afore-stated, Mr. Kimweri asserts that there were no serious contradictions in the testimony of the cited witnesses.

We would like to begin by expressing the general view that contradictions by any particular witness or among witnesses cannot be escaped or avoided in any particular case - See **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, CAT, (unreported). In fact, in considering the nature, number and impact of contradictions, it must always be remembered that witnesses do not always make a blow by blow mental recording of an incident. In many instances witnesses do not even realize that they would be called upon to testify and be subjected to cross-examination about an incident. It is important when assessing the impact of a contradiction to weigh it up against the other evidence tendered in the particular case. Contradictions should not be evaluated without placing them in their proper context in an endeavour to determine their gravity, meaning whether or not they go to the root of the matter or rather corrode the credibility of a party's case. In

Illa Nsamba Shapwata & another v. Republic (supra), the
I that:-

evaluating discrepancies, contradictions and omissions, it is
esirable for a court to pick out sentences and consider them in
tion from the rest of the statements. The court has to decide
ther the discrepancies and contradictions are only minor or
ther they go to the root of the matter".

he present case, we are of the settled mind that the
ns cited by Mr. Mkapa were not material. As correctly submitted
weri, PW1 was clear that it was the appellant who was kicking
the deceased with fists. This witness did not testify that the
as hitting back. Worse more, after kicking his victim down and
n with fists in the stomach and other parts of the body, the
t tied his victim's hands and legs with a long rubber and pulled him
distance of 120 metres from his house (PW1) to that of PW2. In our
, the endurance to which the deceased was subjected shows that the
ppellant was running the show, therefore that we are convinced there
was no question of fighting or that the appellant merely slapped the
deceased as testified by PW4 WP 8209 PC Subira. We similarly agree with

Mr. Kimweri that PW4 could have said so because a long time had elapsed from the time she gave the PF3 to the deceased on 17. 11. 2011 to the time she appeared in court to testify on 5.5.2014, therefore that as this Court had occasion to state in **January Kizitogama Ndunguru v. Republic**, (supra), it was quite possible that PW4 said so out of confusion. In the circumstances, this ground too lack merit and is hereby dismissed.

Lastly is the issue whether or not the appellant had malice aforethought in killing the deceased. The starting point is section 200 of the Penal Code which provides what may constitute malice in any given case. Under that section, malice aforethought is deemed to be established by evidence proving, among others, an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not, or the knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person. The demands of that section have been insisted in several cases, including that of **Abisai Chalangwa v. Republic**, Criminal Appeal No. 6 of 2014 CAT (both unreported). In the case of **Enock Kipela v. Republic** Criminal Appeal No. 150 of 1994, CAT (unreported) the Court expounded that:-

. . . usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) ***the type*** *and size of the weapon, if any used in the attack; (2) the amount of force applied in the assault; (3)* ***the part or parts of the body the blow were directed at or inflicted on;*** *(4) the number of blows, although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5)* ***the kind of injuries inflicted;*** *(6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."* [Emphasis supplied].

Applying this principle to our present case, we agree with Mr. Kimweri that the deceased's death was pre-meditated because relying on the evidence of PW1, the appellant went to his house (PW1) looking for the deceased, and that on seeing him there he launched an assault against him (deceased) and did not heed to the advice of PW1 to abstain from attacking his victim. Also, it is important to underscore that the kicks and

Fists landed in the stomach at the umbilical cord region, which is incontrovertible that it is a vulnerable part of the body. Similarly, after the said assault the appellant tied the deceased's hands and legs, appended him to his bicycle after which he dragged him for a distance of 120 metres from the home of PW1 to that of PW2, a fact which is consistent with intention to cause the death of or to do grievous harm to any person. Further, while they were at the house of PW3, and having known that the deceased was in bad shape, he sneaked away. This refers to appellants conduct after the incident. Thus we find and hold that malice to cause the deceased's death was perfectly established.

In the event, this appeal has no merit. We hereby dismiss it.

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