IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 75 OF 2013

MISOJI NDEBILE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mruma, J.)

dated the 23rd day of November, 2012
in
Criminal Sessions Case No. 52 of 2008
.....
JUDGMENT OF THE COURT

25th May & 1st June, 2015
RUTAKANGWA, J.A.:

The appellant was convicted by the High Court sitting at Mwanza of the murder of one Makaranga s/o Salu @ Mbogo. He was sentenced to suffer death by hanging. Aggrieved by the conviction and sentence, through Mr. Alex Banturaki, learned advocate, he has lodged this appeal. All the same, the appeal has been vigorously resisted by the respondent Republic, through Ms. Mwamini Fyeregete, learned State Attorney.

The amended memorandum of appeal to this Court lists four grounds of complaint against the judgment of the trial High Court. However, before canvassing the arguments of both counsel in defence of their respective positions, if that will be strictly necessary, we have found it meet to give, first,

the following thumbnail sketch of the prosecution case upon which the conviction was predicated.

From a total of five prosecution witnesses, it was commonplace that Makaranga Salu @ Mbogo (the deceased) was the grandson of PW1 Petro Ntaturu Mbogo with whom he was living. PW1 Mbogo owned a number of goats, whose herdsman was the deceased. The deceased was also herding 18 head of cattle of one Milembe d/o Masanja, the grandmother of the appellant, together with the goats.

On 1st November, 2006, the appellant called at the home of PW1 Mbogo complaining that the deceased had left the cattle to eat some cassava leaves and as a result, one of his cows had died. To this complaint, PW1 Mbogo responded by urging the appellant to assist the deceased as he was a minor.

It appears the response of PW1 Mbogo was not re-assuring enough. On 2nd November, 2006, at lunch hours, he went to the home of PW2 Flano Marugu Ntaturu, a relative of the deceased, with the same complaint. After registering with them his regrets over the loss of his cow which was "producing a lot of milk", he is claimed to have left for the grazing fields to assist the deceased in driving the "herd of cattle to the water." PW2 Ntaturu also left for Nyamigamba village.

By his reckoning, Ndaturu returned home at around 7.00p.m., to find out that the goats had returned safely, but the deceased was yet to return home. Together with one Tabu Masanja, he went to the appellant's home after they had been told by PW2 Ikomambuzi Lushinga Shigela that he had spotted the deceased and the appellant together "in the evening hours" grazing the herd together. The appellant was at home, and was advised to join them the following morning in search of the deceased. Unfortunately, it was claimed, the

appellant never turned up. Undeterred, the search for the deceased began in earnest and the dead body of the deceased was found in the bushes near the homestead of one Mzee Ikomangila Kishinde. A report was made at Nyambiti Police station Ngudu.

PW4 No. C4581 Det. Staff Sgt. Charles, was detailed by his bosses to visit the scene where the body had been spotted. He did so accompanied by PW5 Celina Nehe Malifedha, an Assistant Medical Officer. At the scene, PW4 D/SSgt. Charles interrogated a number of people including the deceased's relatives. The relatives assured him that **"they were not suspecting anybody**." A post-mortem examination of the body was allegedly conducted by PW5 Celina Malifedha. According to her findings which she recorded in the Report on Post-mortem Examination (the R.P.M.E.), exhibit P2, the **cause of death was severe asphyxia (lack of sufficient supply of oxygen).** After the post-mortem examination, PW3 D/SSgt. Charles permitted the body to be buried and he left with PW5 Malifedha. In his evidence PW3 Det. SSgt. Charles twice told the trial High Court that he arrested the appellant on the basis of "circumstantial evidence" as "he was suspected."

In his sworn evidence the appellant told the trial court, while denying killing the deceased, that he was arrested at his home on 6th November, 2006 on suspicion of having killed the deceased. Although he admitted that the deceased was their herdsboy, and took their cattle for grazing on the morning of 2nd November, 2006 and never returned them in the evening, he denied being involved in any way in the death of the deceased. He claimed to have known of the death at his home on 3/11/2006 through his sister, one Ngholo Tabu.

The trial of the appellant was conducted with the aid of three assessors whose verdict was unanimous. We have found it instructive to reproduce in full the opinion of each assessor. They opined thus:-

> ***"Mr. Makungu Mbogoma:***
>
> *"My Lord, in my opinion, although the accused was the last person to be seen with the deceased but he was not found with any exhibit. He was not found with any blood clots. The evidence of PW5 doesn't show that the deceased's death was caused by an assault. Thus, the accused is not guilty.*
>
> *That is all.*
>
> ***Ester Jackson:***
>
> *My Lord, the evidence adduced didn't touch the accused although he was seen accompanying the deceased but no one saw him while he was killing the deceased.* ***The cause of death (asphyxia) has no connection with the assault or signs of assaults found in deceased's body.*** *It is my opinion that he is not guilty.*
>
> ***Ms. Joyce Lung'wecha:***
>
> *My Lord, the deceased died in a mysterious circumstance. No witness saw the accused killing the deceased. He is not guilty."* [Emphasis is ours].

We have found it apt to point out at this early stage, that in response to Ms. Joyce Lung'wecha's question, PW5 Malifedha had unequivocally stated that:-

> *"The cause of death was asphyxia and not the assault."*

The above unanimous verdict notwithstanding, the learned judge was convinced that the deceased was murdered and the murderer was the appellant. He based this stance on his firm conviction that the appellant had personal grudges against the deceased and had an intention to harm him. He went on to hold that:-

> *"This can be grasped from the testimony of Petro Ntaturu (PW1), and Fulano Marugu Ntaturu (PW2) who* ***testified undisputediy that the accused told them that he was angry against the deceased*** *because the deceased left their cattle unattended as a result of which one of their best cows ate cassava leaves and died. This evidence is corroborated by the testimony of Ikomambuzi Kishinje (PW3) who stated that he saw the accused* ***attempting to assault the deceased*** *but he could not get him because the deceased managed to double away from him..."* [Emphasis is ours].

Again, we have found ourselves constrained to mention at this juncture that we have painstakingly scanned the entire evidence of PW1 Mbogo and PW2 Ntaturu. We were unable to come across on iota of evidence showing that the appellant had told them that "he was angry with the deceased."

All that PW1 Mbogo said was:-

"On 1st November, 2006, the accused ... came to my home complaining that my grandson was not careful because he had left the heads of cattle to eat cassava leaves which caused its (sic) death. I asked them to assist my grandson as he was a minor."

We have also found no evidence on record to show that there was any grudge between the two after PW3 Shigela had reportedly reconciled them. In view of these facts, we respectfully hold that the learned trial judge's finding was premised on a misapprehension of the two witnesses' evidence.

The learned trial judge also relied on the so called "last person to be seen with the deceased alive doctrine." The learned judge reasoned thus:-

"In the present case there is evidence establishing that the accused had personal grudges against the deceased. There is also evidence that the deceased was seen in the company of the Makaranga (sic) on the evening of 2nd November, 2006 and actually he was seen by PW3 attempting to assault the said Makaranga and that was the last time Makaranga to be seen alive. The accused ought to have offered some explanation as to what happened to the deceased..."

We shall first proceed on the basis that the evidence of PW3 Shigela is immutably true.

We believe that the jurisprudence on the above stated doctrine is well settled. In **Lukas s/o Njowoka v.R,** Criminal Appeal No. 220 of 2008 (unreported) this Court stated with sufficient lucidity that:-

"This Court authoritatively laid down and in the clearest language in the case of ***Richard Matengula v. R.,*** *Criminal Appeal No. 73 of 1991 (unreported) that:-*

> *'That fact that the appellants were the last known persons to have been with the deceased casts very grave suspicions on them, but it is in itself not conclusive proof that they killed the deceased...'*

Other cogent corroborating evidence is necessary, for a suspicion, however ingenious can never be a substitute for proof beyond reasonable doubt."

The above clear stance of the law notwithstanding, after objectively studying the evidence on record, we are respectfully increasingly of the firm view that this doctrine was not properly applied here. We are saying so deliberately because it was based on the evidence of PW3 Shigela whose credibility is not beyond reproach.

We have already shown that when PW4 Det. S.Sgt. Charles visited the deceased home village on 3rd November, 2006, he was told that no single person was under suspicion. If PW3 Shigela had actually seen the appellant in the company of the deceased and under the circumstances he later testified on, what prevented him from disclosing this information to the deceased's relatives and in particular to PW4 Det. S.Sgt. Charles? That he failed to do so, a factor not consistered at all by the learned trial judge, renders his evidence against the appellant highly suspect and unreliable.

In the case of **Festo Mawata v. R.,** Criminal Appeal No. 229 of 2007 (unreported), this Court said:-

"Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."

More recently, in **Venance Nuba and Tegemeo Paul V.R,** Criminal Appeal No. 425 of 2013 (unreported), the Court said:-

"... this Court has persistently held that failure on the part of the witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable."

See also, **Aziz Athmani @ Buyogera v. R.,** Criminal Appeal No,. 222 of 1999, **Juma Shabani @ Juma v.R.,** Criminal Appeal No. 168 of 2004, **John Balagumwa and Two others v. R.,** Criminal Appeal No. 5 of 2013 (all unreported), among many others.

There is yet another reason, not canvassed by the learned trial judge, which compels us to doubt the credibility of PW2 Ntaturu as well as. We have already shown earlier on in this judgment, that PW5 Malifedha gave only one cause of the deceased death. It was "asphyxia and not the assault", she testified. In so testifying, she belied PW3 Shigela who had the effrontery of telling the trial High Court that:-

"Doctor told us that the cause of death was due (sic) to an assault."

This was an open lie aimed at incriminating the appellant for reasons best known to the witness. This palpable lie should have put the learned trial judge to a

reasonable inquiry on the credibility of the witness [**Mathias Timothy v. R.,** [1984] TLR 86]. As this Court made it clear in **MT.38350 PTE Ledman Maregesi v. R.,** Criminal Appeal No. 93 of 1988 (unreported):-

> *"... where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to be approached with great caution and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence." [See also.* ***Abdallah Musa Mollel @ Banjo v. The D.P.P.,*** *Criminal Appeal No. 31 of 2008,* ***Annes Allen v. R.,*** *Criminal Appeal No. 173 of 2007 (both unreported), etc.*

It goes without saying, therefore, that the evidence of both PW2 Ntaturu and PW3 Shigela needed to be corroborated. We have failed to trace such corroborative evidence in the evidence of PW1 Mbogo, PW4 Det. S.Sgt. Charles and PW5 Malifedha.

In view of the above glaring shortcomings in the prosecution case, it was the contention of Mr. Banturaki that the conviction of the appellant for the murder of the deceased should be quashed as it was premised at best on mere suspicions and at worst on the contrived evidence of PW2 Shigela and PW3 Ntaturu. Of course, Ms. Mwamini vigorously resisted this contention arguing that the conviction firmly rested in the truthful circumstantial evidence of the five prosecution witnesses which proved the guilt of the appellant to the hilt.

On our part, from our re-evaluation of the prosecution evidence, we have no qualms about the credibility of PW4 Det. S.Sgt. Charles and PW5 Malifedha. They testified on what they were told, be it lies or otherwise, and did. PW1

Mbogo's evidence, carried little probative value in proving the guilt of the appellant in our view.

All said, we are settled in our minds that the prosecution proved the death of Makaranga s/o Salu @ Mbogo. But this is far from saying that it proved that the deceased was murdered and if he was, the appellant was the murderer.

It is trite law that to secure a conviction for murder, the prosecution must prove beyond reasonable doubt that the deceased was killed by the accused with malice aforethought. Some murder cases are easily proved, even without establishing the cause of death (**Juma Juma Mohamed v. D.P.P.,** Criminal Appeal No. 243 of 2011 (unreported). However, as we held in **Jeremiah John and Four Others v. R.,** Criminal Appeal No. 416 of 2013, (unreported):-

> *"... we realize that this is an exception rather than the rule. Each case, therefore, must be judged on the basis of its own peculiar facts and circumstances."*

In most deaths, the dividing line between murders on the one hand and unlawful killings or natural deaths on the other, is the cause of death. In less obvious cases, as the one under scrutiny, the best reliable assurance on whether the deceased was murdered or not is the cause of death.

In this case no one witnessed the deceased dying. He was found dead in the grazing fields. According to the evidence of PW1 Mbogo, the deceased met his death "during the dry season." On her part, PW5 Malifedha testified that the deceased died of asphyxia without any further elaboration. We have, with regret, gathered from the record of proceedings that it was neither the learned prosecuting State Attorney, the learned defence counsel, nor the learned trial judge who found it instructive to elicit from the pathologist evidence on what

induces asphyxia generally and in this particular case, what had induced the fatal asphyxia. In short, the entire evidence on record is startingly silent on what caused this asphyxia: **what was the cause of causes?** To all justice seekers and dispensers this question was as pertinent as was its answer in the quest for the truth on whether or not the deceased was murdered in the first instance. We are saying so consciously because as Professor Cedric Keith Simpson, CBE, undoubtedly one of the most eminent Forensic Pathologists of the 20th century (and the first Professor of Forensic Medicine in the University of London) says at page 77 of his treatise, **Simpson's Forensic Medicine**, 11th ed., edited by Benard Knight CBE, himself a Professor of Forensic Pathology:-

> *"The so-called "asphyxia" deaths ... may give rise to considerable difficulties for doctors, and investigators in distinguishing between accident, suicide or homicide."*

It goes without saying, therefore, that not every death from asphyxia is a result of murder.

In ordinary parlance, "asphyxia" means:-

> *"The state of being unable to breathe causing death or loss of consciousness": **Oxford Advanced Learner's Dictionary of Current English,** 6th edn at page 64.*

And in the word of forensic science:-

> *"Asphyxia is a term derived from Greek that literally translates as 'stopping the pulse.' This term refers to a multi-etiological set of conditions in which there is inadequate delivery, uptake and/or utilization of oxygen by the body's tissue/cells, often accompanied by carbon dioxide retention" (e. word.com/idictionary/asphyxia).*

Prof. Simpson (supra) agrees with this explanation and goes further to suggest that "absence of pulse" is often nearer the truth than lack of oxygen, adding that:-

> *"In the forensic context, true asphyxia is usually obstructive in nature, as some barrier exists to prevent access of air to the lungs" at page 87.*

The same impeccable sources establish that the circumstances that can cause asphyxia include, but are not limited to:-

(i) The constrictioin of the airways, such as from asthma, laryingospasm or simple blockage from presence of foreign materials,

(ii) From being in an environment where oxygen is not readily accessible,

(iii) From being in an environment where sufficiently oxygenated air is present but cannot be adequately breathed because of air contamination, such as excessive smoke and even dust,

(iv) Acute respiration syndrome,

(v) Carbon monoxide inhalation,

(vi) Contact with certain chemicals,

(vii) Drug overdose,

(viii) Drowning,

(ix) Hanging,

(x) Respiratory decease ,

(xi) Sleep apnex,

(xii) A seizure which stops breathing activity,

(xiii) Strangling and/or choking, etc.

On **choking**, Prof. Simpson says:-

> *"This has more than one meaning as it can denote manual strangulation, but is usually applied to internal obstruction of the upper air passages. An object or substance impacted in pharynx or larynx can lead to severe respiratory distress, with congestion and cyanosis, or can lead to a rapid, silent death from vaso-vagal cardiac arrest," at page 89.*

He goes on to elaborate that:-

> *"**Much more often, choking is accidental,** due to pharyngeal, glottal or laryngotracheal blockage. The causes include swallowed dentures, inhaled objects..., extracted teeth in dentistry, blood and clot after ENT operations such as tonsillectomy and food material.*
>
> *... Food may enter the larynx during swallowing and can cause gross 'choking symptoms' of coughing, distress and cynanosis, which can be fatal unless rapid treatment is offered.*
>
> ***However, such food entry may be entirely silent and can cause sudden unexpected death, the cause of which may not be determined until autopsy.** The so, called 'cafe coronary' is an example, where a person eating a meal suddenly dies, it being assumed that a primary cardiac lesion is the cause. At post-mortem, a food bolus is found in the larynx. The extreme sensitivity of the pharynx and larynx to sudden stimulation causes a 'vagal inhibition,' a reflex arc...*

Drinking cold water has also been known to cause the sudden catastrophe."

[Emphasis is ours].

We should emphasize here that we have opted for this long quotation from Simpson's Forensic Medicine, for no other reason, but on account of its pedagogical value in forensic evidence. From the above extract, it will be accepted without any rational argument to the contrary that the cause of fatal asphyxia cannot be convincingly established through a casual examination of the external appearances of the body as was the case here. We are confidently so asserting because PW5 Malifedha recorded in the R.P.M.E. (exh. P1) that the chest cavity including the pharynx, aesophagus, larynx, trachea, bronchi, etc, were "not opened". If this was not done, how can we rule out accidental death through choking and/or other non-violent conditions listed above?

It is settled practice that the "determination of the specific type(s) of asphyxia operative in a particular case, the cause death, and the manner of a death, is dependant on information elicited during the **medicolegal investigation, namely, history (circumstances), scene investigation and post-mortern examination** (including appropriate ancilarry radiographic and laboratory studies"), [see emedicine. medscape.com/article/19896999- overview #a.1]. In this case, which involved a sudden death under suspicious circumstances, such investigation was not done, the prosecution being content, as usual, with the scene investigation only and jettisoning other aspects of the crucial medicolegal investigation to the winds. Due to this laxity, the evidence on record does not rule out accidental death, when one takes into account undisputed evidence that death occurred in the grazing fields during a dry

season when air in the environment might have been contaminated by smoke, dust, etc.

All said and done, we are now of the settled minds that the prosecution failed to prove that the deceased was murdered he might have died of natural causes. For this reason, we allow the appeal. The conviction for murder is hereby quashed and set aside as well as the death sentence. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

DATED at MWANZA this 30th day of June, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL