IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 63 OF 2015

1. MWITA KIGUMBE MWITA
2. MAGIGE NYAKIHA MARWA .....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Musoma)

(Mwangesi, J.)

dated the 03rd day of October, 2014
in
HC. Criminal Sessions No. 145 of 2010

JUDGMENT OF THE COURT

12th & 18th October, 2016

MASSATI, J.A.:

In a judgment dated the 3rd October, 2014, the High Court of Tanzania, (Mwangesi, J.) sitting at Musoma, convicted the appellants of the offence of murder contrary to section 196 of the Penal Code Cap. 16 R.E. 2002, and sentenced them to death. Aggrieved, they have come to this Court to protest their innocence.

Earlier on, it was alleged before the trial court that on the 20th October, 2009 at Nyamburi village, Serengeti District in Mara Region these appellants murdered one NYAMHANGA s/o MWITA @ NYAMBABE. As the appellants pleaded not guilty, the prosecution had to prove its case.

In very simple terms, the prosecution case was that on the forenoon of the 20th October, 2009, some villagers followed and collected the deceased from his home to do some work: A few hours later, he was found dead at the second appellant's house. His body was found to have been severely burnt and exhibiting several cut wounds.

In order to prove how and who committed the offence, the prosecution relied on the testimonial evidence of one witness (PW1), one piece of demonstrative evidence, (namely a sketch map of the scene of crime) (Exhibit P1) and a Post Mortem Examination Report (Exhibit P2) which were both tendered during the preliminary hearing.

PW1, **Agnes Nyamhanga**, happened to be the deceased's wife, and occupies the position of an only eye witness to the commission of the offence. During the trial, she was led to show that; she was there in

the morning when the deceased was collected from home; that it was the appellants who came to collect him; and she stalked them; that, on reaching the second appellant's home, she witnessed how the deceased was assaulted with a machete and immobilized by tying him and later set ablaze, which burned him severely. She was also led to show that several villagers participated in lynching the deceased and that, the motive was for the second appellant to exact revenge on the deceased for bullying him in the past and that for that reason, she had even overheard the second appellant **swearing** to kill the deceased, the previous day. Time and again, and throughout her testimony, she consistently maintained that these appellants were not only present at the scene of crime, but also fully participated in assaulting the deceased to death.

On the other hand, if not for our findings below, the sketch plan (Exhibit P1) shows that the deceased was first tied some 25 metres away from the second appellant's house and was torched and died some 34 metres away. Exhibit P2 establishes that the cause of death was due to severe burns, multiple cut wounds and haemorrhage.

But the appellants kept their distance from everything that had to do with the crime. Before hearing, they both gave notices of their intentions to raise defences of *alibi*. Indeed they took and maintained those defences at the trial.

The first appellant (DW1), told the trial court that on 19/10/2009, he left for Matire village to visit a brother in law where he also attended wedding ceremonies. He came back on 21/10/2009 only to be arrested for the murder. He refuted everything that PW1 said. On his part, DW2, the second appellant, testified that he left the village on 18/10/2009 for Rung'abuse village, Serengeti District, to take his sick child to a local medicineman, one Teta Nyantori. He came back on 20/10/2010 only to find some villagers at his house, and the body of the deceased which seemed to have been hit by a heavy object. He did not view the body as burnt as alleged by PW1, and that according to his wife, who testified as his witness, DW3, the deceased was killed by a mob of angry people who had caught him as he was about to steal cattle. Likewise, DW2 refuted what PW1 had testified against him.

With that body of evidence, the trial court was satisfied that the prosecution case had been proved beyond reasonable doubt, hence the conviction. But the appellants are now intent on assailing the trial court's conviction and sentence.

To advocate for their causes, the first appellant engaged the services of Mr. Deya Paul Outa, learned counsel. The second appellant was represented by Mr. Diocles Rutahindurwa, learned counsel. The learned counsel have both filed new memoranda of appeal to replace the ones earlier on lodged by the appellants themselves.

On the other hand, the respondent/Republic, was represented by Mr. Castus Ndamugoba, learned Senior State Attorney.

The first appellant's memorandum of appeal comprises two grounds; namely: -

> *"1. That, the Learned High Court Trial Judge erred in fact and law in holding that the PW, AGNES NYAMHANGA was a credible witness.*

2. *That, the learned High Court Trial Judge erred in fact and law in holding that the case against the 1st Appellant was proved beyond reasonable.*

The second appellant's memorandum of appeal consisted of three grounds namely: -

"1. *THAT, Honourable Learned trial Judge erred in law by holding that the sole prosecution witness summoned to testify was credible warranting the conviction and sentencing the 2nd Appellant.*

2. *THAT, Honourable Learned trial Judge misdirected his mind by convicting and sentencing the 2nd Appellant on the weakest piece of evidence by the Prosecution, in which case, the burden of proving the case beyond reasonable doubts*

had not been discharged by the prosecution.

3. *THAT, Honourable Learned trial Judge erred in law and in fact by not according the due weight to the defence of alibi put forward by the 2nd Appellant."*

Arguing the first ground of appeal, Mr. Outa started with the premise that as the prosecution case rested on the evidence of a single witness (PW1) the conviction could only be sustained if PW1 was a credible witness. It was his submission that, PW1 was not a credible witness and advanced several reasons. **First,** she gave contradictory statements to the police (Exhibit D2) and in Court, about who went to collect the deceased from his home. **Second,** it was highly improbable that after hearing the second appellant the previous day, swearing to kill her husband, PW1 neither informed nor cautioned the deceased about the danger awaiting him when she let him be taken by the appellants. And **third,** if at all what PW1 said was true that a throng of villagers were involved in the killing, it was highly unlikely that a grudge between

the deceased and the second appellant could have drawn all those people into lynching the deceased to death. For those reasons, Mr. Outa submitted that PW1's testimony was successfully impeached, and so could not be relied upon to sustain the conviction of the appellants. He cited two authorities to support his position, namely **MATHIAS BUNDALA v R**, Criminal Appeal No. 62 of 2004, (CAT) and **R. v NDAKI MANYASA**, Criminal Sessions Case No. 38 of 1991 at Geita (both unreported).

Mr. Outa then took us through the second ground of appeal as an alternative to the first one. Briefly, he submitted on this ground that, first, the Post Mortem Examination Report (Exhibit P2) was irregularly admitted as an exhibit during the preliminary hearing, because its contents were not read over to the appellants, and so should be expunged. But, he went on, even if Exhibit P2 was not expunged, its contents shows that the cause of death was attributed to several reasons, such as burns, cut wounds etc., and as such, it was difficult to establish which one was the actual cause and thus difficult to establish common intention. For this argument, he referred us to the decision of **DRACAKU s/o AFIA v R** (1963) EA 363. For these two reasons, Mr.

Outa, prayed that the appeal be allowed, as the prosecution failed to prove its case beyond reasonable doubt.

Mr. Rutahindurwa, fully supported Mr. Outa, in his submissions on the first and second grounds. To add weight to Mr. Outa's submission on PW1's shakable credibility, Mr. Rutahindurwa wondered why PW1 could be believed by the trial court, whom she told that she did not get a chance to caution her husband about what she had heard the previous day, regarding the threat to his life. On whether the prosecution case was proved beyond reasonable doubt, the learned counsel picked several pieces from PW1's testimony regarding who poured kerosene over the deceased. At first she pointed to Mara Nyakiha, then shifted to Ghati Samwel, before naming Bisako as persons who did so. On his third ground of appeal, Mr. Rutahindurwa submitted that although the second appellant raised a defence of *alibi* and produced DW3 to testify to it, the trial court did not consider it and instead, found that the alibi was based on bare assertions. He submitted that this was an error on the part of the trial court. So, for all these reasons, he too, prayed that the appeal be allowed.

On his part, Mr. Ndamugoba fully supported the appeal. In his brief submission, he admitted, and agreed with Mr. Outa and Mr. Rutahindurwa that there were fundamental contradictions and inconsistencies in the testimony of PW1, which made it suspect or improbable. As such, her credibility was totally destroyed, and since she was the only eye witness in the prosecution case, it cannot be said that the prosecution case was proved beyond reasonable doubt. Therefore, for that reason alone he was ready to capitulate to those grounds of the appeal. With regard to the ground faulting the trial court for not considering the second appellant's alibi, he submitted that although the trial court properly directed itself on the legal principles governing the defence of *alibi*, it misapplied them on the facts of the case and so reached a wrong conclusion. But for all what it is worth, the learned counsel supported the appeal and prayed that the same be allowed.

Both Mr. Outa, and Rutahindurwa had nothing to say in rejoinder.

The major issue for determination in this appeal is whether the prosecution case against the appellants had been proved beyond reasonable doubt?. As this is a first appeal, we shall have to reappraise

and reevaluate the evidence on record (See **SALUM MHANDO v R** (1993) TLR 170.

As shown above there are three types of evidence tendered at the trial court. There was the testimonial evidence of PW1, the documentary evidence (Exhibit P2) the medical expert opinion, and there was the demonstrative evidence in the form of a sketch map (Exhibit P1). We shall begin with Exhibits P1 and P2.

Exhibit P1 and P2 were admitted during the preliminary hearing. In the course of hearing the appeal, it was agreed by all counsel that these exhibits were received in contravention of the rules governing preliminary hearings. This is because in terms of rules 4 and 6 of the Accelerated Trial and Disposal of Cases Rules, GN No. 192 of 1988, it is necessary to read and explain to the accused all contents in all documents that are intended to form part of the facts of the case (which was not done in this case) and that it was for the accused and not counsel to admit to the contents thereof (as happened in this case). (See **MT 7479 SGT. BENJAMIN HOLELA v R** (1992) TLR 121, **BAHATI MASEBU v R**, Criminal Appeal No. 135 of 1991 (unreported). The effect

of this non-compliance is that, such documents (that is Exhibits P1 and P2) cannot be deemed to have been duly proved in terms of section 192(4) of the Criminal Procedure Act Cap. 20 R.E. 2002 (the CPA) (See **L. HUBERT v R**, Criminal Appeal No. 28 of 1999 (unreported). So, both Exhibits P1 and P2 are accordingly discounted. But, as this Court has previously held, even without the post mortem examination report, (which was intended to prove the cause of and death of the deceased), a cause of and death may be proved by other evidence, including circumstantial evidence. (See **MATHIAS BUNDALA v R** *(supra)* **JUMA ZUBERI v R** (1984) TLR 249). The question is whether there was any other such other evidence?

After discarding Exhibit P1 and P2, the remaining evidence on record is the testimony of PW1, Agnes Nyamhanga, the only witness, whose substance we summarized above. The issue now is whether her evidence was sufficient to prove the offence beyond reasonable doubt?

We pose that issue not because she was the only eye witness. After all it is now axiomatic that evidence is to be weighed, not counted (See **BLACK'S LAW DICTIONARY –** 8th edition - **LEGAL MAXIMS –**

page 1760). And this principle is embodied in section 143 of the Evidence Act Cap. 6 R.E. 2002, which provides that:

> *"Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact."*

In other words in each case the court looks for quality, not quality of the evidence placed before it. The best test for the quality of any evidence is its credibility.

On the strength of section 143 of the Evidence Act, this Court has occasionally sustained convictions for the offences of murder on the evidence of single witnesses (See **YOHANIS MSIGWA v R** (1990) TLR. 143, **ANANGISYE MASENDO NG'WANG'WA v. R** (1993), TLR 202. However, in **RICHARD MATANGULE AND ANOTHER v R** (1992) TLR 5 the Court observed that it was essential that the court finds that the witness or witnesses are **credible**. In **NG'WANG'WA's** case the Court further cautioned that in such a case a trial judge should warn himself of the danger of relying on the evidence of a single witness before convicting. This is where the present case comes in.

In the present case, the learned trial judge properly directed himself on the principle set down in **NG'WANG'WA's** case and warned himself of the danger of relying on the evidence of PW1 alone, whom he found credible, and thus convicted the appellants. The issue is whether the trial court properly evaluated the evidence and credibility of PW1?

Before we answer that question we must make it clear at the outset that we appreciate that a trial judge is best placed to assess the credibility of a witness, but with respect, only as far as demeanour is concerned. When it comes to coherence and consistency in the testimony of such a witness; an appellate court is just in as good a position. (See **SHABANI DAUDI v R** (Criminal Appeal No. 28 of 2001; **ABDALLAH MUSSA MOLLEL @ BANJOO v R** (Criminal Appeal No. 31 of 2008 (both unreported).

In the present appeal, the credibility of PW1 is under a serious attack from several angles. Essentially the learned counsel complain that the trial court did not properly evaluate and assess the credibility of PW1. In our judgment we shall attempt below to examine two serious discrepancies.

kumwambia kuwa njoo kuna kazi tunataka kufanya njoo tukuoneshe, ndipo mume wangu alitoka na kuondoka huku wakiwa wanazungumza huku mimi nikiwa nawafuata kwa nyuma".

Literally translated the above passage means:

"On 20/10/2009 at 8.28 hrs when I was at home with my husband, a relative and a neighbour of MAGIGE s/o NYAKIHA came and called my husband. They asked him to follow them so that they can show him some work they wanted done. So they left with my husband as they kept on talking while I followed them from behind".

But, before the trial court, she said:

"On 20/10/2009 at about 8.30 hrs., Magige Nyakiha and Mwita Kigumbe did arrive at home".

And after identifying the appellants by touching them physically; she went on:

> *"They did call the deceased and told him that they would to go to show him work. He did get out and followed them. From the words which I had previously heard from Magige Nyakiha I did carry my child and followed them".*

That PW1 mentioned a different set of persons in Exhibit D1 and not the appellants as the appellants who went to collect the deceased from his home is inexcusable and unexplainable. It is a major and material contradiction because it relates to the identification of the persons who went to collect the deceased from his home. We are surprised that the trial court did not notice such a glaring contradiction.

As if the above was not enough, there were also other contradictions to complement the one above. These include, her testimony as to who poured kerosene over the deceased before he was set ablaze. In her examination in chief, she mentioned one Mara Nyakiha, but later charged that it was Ghati Samwel, and finally in cross-

examination, she mentioned Bisako as the one who poured kerosene on the deceased. Since she was the only witness and since she did not say whether kerosene was poured on the deceased more than once, the naming of three different persons as the ones who poured kerosene over his body could only strongly suggest that either PW1 was not there, or if she was, did not see what really happened or she was exaggerating. None of these descriptions fits in well with a credible witness.

The second major discrepancy in PW1's testimony is the improbability of her story. As alluded to above, this relates to her non disclosure to her husband, (the deceased), of the second appellant's intention to kill him.

When cross examined on this strange behaviour, all that she could say was that: -

> *"I did not get a chance of cautioning my husband about what I had heard the previous evening."*

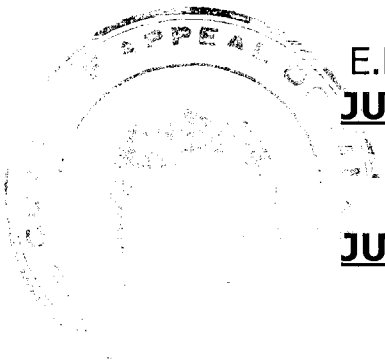
We think that PW1 was attempting to tell a very improbable story badly. It is out of the ordinary for a normal human being who was aware that his/her spouse was to be killed soon by a known person, not to take

preventive measures and instead kept over that life threatening information to herself, instead of at least cautioning the deceased about it, or reporting it to the authorities. (See **MATHIAS BUNDALA v R** *supra*). In our judgment we agree with the learned counsel that this was most improbable.

Contrary to the trial judge's finding, our reevaluation of the evidence on record leads us to the conclusion that PW1 was not a credible and reliable witness. The learned counsel are therefore right in their submission that the High Court erred in law and fact in basing the conviction of the appellants partly on the evidence of PW1. And since the only other pieces of evidence (Exhibit P1 and P2) were discarded, it goes without saying that there is no evidence at all on record on which to sustain the convictions. We are at one with the appellants that the trial court misapprehended the evidence on record and came to a wrong conclusion. So, in answer to the issue posed above, we agree with all the learned counsel and find and hold that the prosecution case was not proved beyond reasonable doubt. This ground alone is sufficient to dispose of this appeal.

Consequently we allow the appeal. We quash the convictions of the appellants and set aside the sentences. We order their immediate release from custody unless they are held therein for some other lawful cause.

DATED at **MWANZA** this 17th day of October, 2016.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL