IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 408 OF 2015

1. **HOSEA FRANCIS@NGALA**
2. **MARIA HOSEA @ ULANGA ..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Dodoma at Dodoma)

(Makuru, J.)

dated the 24th day of June, 2015
in
Criminal Sessions Case No. 91 of 2006

5th &11th April, 2016

JUMA, J.A.:

REASONS FOR JUDGMENT OF THE COURT

On 5th April, 2016 when we concluded the hearing of this appeal which was brought by Hosea Francis @ Ngala (the first appellant) and his wife Maria Hosea @ Ulanga (the second appellant); we allowed their appeal, quashed their conviction and set aside the sentences of death by hanging. We said then, that we would later give our reasons for our decision which we now do.

At the very outset, we feel obliged to point out that there was no eye-witness to the offence of murder for which the appellants were convicted and this appeal must inevitably determine whether or not the circumstantial evidence lined up by the prosecution irresistibly point a finger of guilt to the appellants. Apart from statements about what appeared to be bones, which two main prosecution witnesses (PW1 and PW3) claimed to be the remains of the deceased; and also the stains of blood, which these witnesses allegedly found on a big stone weighing around 15 kilogrammes; neither the bones nor the blood-stained stone, were tendered in evidence. This lack of physical remains alleged to be of the deceased (*corpus delicti*) and the failure to forensically examine these evidential items, did not prevent the respondent Republic from presenting the first appellant Hosea Francis @ Ngala, and his wife Maria Hosea @ Ulanga (the second appellant) before the High Court of Tanzania at Dodoma, to be charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002.

The particulars of the offence alleged that on an unknown day in June 2005 at Manda village, Dodoma Rural of Dodoma Region, they jointly

and together murdered ANNA WILLIAM, who happened to be the first appellant's biological mother. Upon their conviction, they were sentenced to suffer death by hanging.

Being dissatisfied with the said conviction and sentence, the appellants preferred this appeal to the Court. At the hearing of the appeal, the two appellants were represented by two learned advocates, Rev. Kuwayawaya Stephen Kuwayawaya and Mr Cheapson Kidumage. The respondent was represented by Mr Marcelino Mwamunyange, learned Senior State Attorney.

Before we consider the grounds of appeal, it is appropriate to point out that the case for the prosecution is built on the evidence of Detective Staff Sergeant Zacharia (PW1) and that of the chairman of the village of Manda, Selemani Yohana (PW3). The police at Chamwino Ikulu Police Station first learnt about the disappearance of Anna William on 5/6/2005. PW1 was busy working on his desk when Inspector Magamba alerted him that a woman resident of Manda village was missing. PW1 directed those who had filed a missing person report to return back to the village and carry out a thorough search within the village and its surroundings.

According to PW1, on 21/07/2005 the members of the village militia and one William Kafaru returned, this time together with the two appellants. William Kafaru identified himself to the police as the complainant, and as the near relative of the missing person. The members of the militia told PW1 that the two appellants had confessed murder to the villagers back home. PW1 interrogated the two the appellants. According to PW1, the first appellant admitted to him that he killed the deceased by hitting her on the head after she had bewitched his son to death. PW1 directed Police Corporal Antonia and two other officers to take the appellants to the Justice of the Peace, Leticia Midelo (PW2).

Two days later on 23/7/2005 PW1 led a team of police investigators to the scene of crime at the village of Manda. Upon their arrival, they were met by the village chairman (PW3), who took them to what PW1 described as the scene of crime. They were shown where the body had initially been buried, and spots where corpse was shifted to. In all the areas PW1 and his team visited, they found remains of burnt bones. Based on the information the visiting police officers were getting from the village chairman, PW1 drew a sketch map which he tendered as exhibit P1.

The village chairman (PW3) testified how he learnt about the death of the deceased. It was the first appellant who on 28/05/2005 reported to PW3 that Anna William had been missing for the previous fifteen days. PW3 instructed three people who he did not identify in his evidence, to make a follow-up at Huzi village. Sometime in July 2005 the chairman of Huzi village (whose name he did not recall) and a Ward Chairman known as Amose Ndinye, brought the two appellants to the village office and informed him that the Anna William Kafaru was deceased and the two appellants were responsible. PW3 directed the Ward Executive Officer, Jonas Malogo and members of the village militia to interrogate the two appellants. PW3 attended the interrogation session when the first appellant allegedly confessed not only to have killed his mother Anna William, but to have moved the deceased body over several areas.

The first appellant in sworn testimony, stated that he did not know where his mother, Anna William was. He was insistent that his mother, who sold local brew from one place to another, was still alive somewhere. He complained that he and his wife were beaten up by the members of the militia, as they were asked where his mother was. Under cross

examination, he stated that at the time of her disappearance, his mother was living in her own household in the same village of Manda.

In sworn evidence, the second appellant also testified on the beatings she received from the village militias and at the Police Station at Chamwino. Like her husband, she testified that her mother in law lived in her own house in the same village.

The two appellants being aggrieved by their conviction and sentence of death by hanging, filed this appeal setting out five (5) grounds of appeal. In the first ground the appellants fault the trial Judge for acting on the evidence of PW1 and PW3 who had claimed that the first appellant had confessed to using a stone to kill his own mother. In the second ground, the appellants attacked the trial judge's finding that it was the first appellant, who had led PW1 and PW3 to the three different spots where the remains of the deceased were moved. In the third ground of appeal the trial judge is faulted for failing to draw an adverse inference against the failure of the prosecution to bring material exhibits and witnesses. In the fourth ground of appeal, it was contended that the case against the appellants had not been proved beyond reasonable doubt. In the fifth

ground of appeal, the appellants raised their concern that the trial judge failed to consider their evidence which they led in their defence.

At the outset of the hearing of the appeal, Mr Marcelino Mwamunyange, the learned Senior State Attorney who appeared for the respondent Republic expressed himself that he did not support the conviction of the appellants, and was supporting their appeal. Two learned advocates, Rev. Kuwayawaya Stephen Kuwayawaya and Mr. Cheapson Kidumage, appeared for the appellants.

Mr. Kidumage compressed the five grounds of appeal and argued them collectively, focusing on the first appellant. He faulted the trial judge for concluding that the evidence of PW1 provided a link in the chain of circumstantial evidence. He poured scorn at the suggestion that the first appellant confessed to PW1. The learned advocate wondered why PW1, as a police officer, failed to record the cautioned statement in the exercise of his power as a police officer. He also faulted the veracity of the evidence of PW1 who despite visiting the scene of crime failed to collect the bones and the stone which the villagers had showed him. He wondered why he failed

to not only exhibit these evidential materials but also failed to send them to the Government Chemist to establish forensic link with the deceased.

Mr. Kidumage also discredited the evidence of PW3, the village chairman. The learned advocate submitted that the trial Judge should have found that the appellants were subjected to torture in the village before they made their so called confession to PW3 and PW1. He referred us to the record of the trial within trial where the first appellant had fresh wounds when he was taken before the justice of the peace (PW2) and the trial court declined to admit the extra judicial statement of the first appellant due to its involuntary background.

After discrediting and removing the evidence of PW1 and PW3 from the equation, Mr. Kidumage urged us to find that there remains no evidence in the chain of circumstantial evidence to irresistibly linking the two appellants with the death of the deceased.

On his part, Rev. Kuwayawaya highlighted several evidential items which the prosecution failed to exhibit to justify reliance on circumstantial evidence. He referred us to the evidence of a blood-stained stone weighing about 15 kilogrammes which PW3 allegedly found about five steps from

the first appellant's house. The learned advocate also referred to the bones, which PW3 had collected and tied them together with a rope. PW3 also alleged that the first appellant showed them blood-stained animal hide, which the appellants had earlier used to carry the body of the deceased.

Rev. Kuwayawaya submitted that because the prosecution failed to exhibit all these evidential items, the chain of circumstantial evidence cannot be regarded to be capable of irresistibly linking the appellants to the death of the deceased.

When his chance came to reply, Mr. Mwamunyange could not agree more with what the appellants' learned counsel had submitted on. He referred us to our decision in **Ally Bakari & Pili Bakari vs. R.** [1992] T.L.R. 10 (CA) to premise three reasons why he also thinks that the evidence of PW1 and PW3 do not meet the threshold for invoking the circumstantial evidence to convict the appellants. Firstly, he contended that it was not established whether the bones assembled by PW3 were human or animal bones. Secondly, he highlighted the evidence that the villagers had arrested the appellants simply because they did not join other villagers

who were searching for the missing Anna William. Thirdly, the Ruling of the trial Judge after the trial within the trial found that the appellants were beaten up in the village before being taken to Chamwino Police Station and to the Justice of the Peace. The learned trial Judge, he observed, should have warned herself about the background of the beatings the two appellants endured before confessing to PW3 and later PW1.

On our part, we think that in order for us to properly appreciate the grounds of appeal, it is helpful to play our role as first appellate court— that is, to re-evaluate the probity of the circumstantial evidence which the learned trial Judge acted upon to convict the two appellants. As we reiterated in **Demeritus John @ Kajuli and Three Others vs. R.**, Criminal Appeal No. 155 of 2013 (unreported), a first court of appeal like we are with regard to the instant appeal, is entitled to have a fresh look at the entire evidence and arrive at its own findings and conclusion.

The trial Judge referred back to the proceedings of the Preliminary Hearing and found that it was undisputed that Anna William was dead. The only issue she reckoned as calling for her determination is whether there was circumstantial evidence on the record of the trial court upon which the

trial Judge could convict the two appellants. The learned trial Judge was clearly convinced that the circumstantial evidence of PW1 and PW3 irresistibly linked the two appellants with the disappearance and subsequent death of the deceased, and the cover up of the crime of murder:

> *"...The evidence adduced by the prosecution in this case is circumstantial. No one witnessed the accused persons killing the deceased, but circumstantial evidence can prove a case if taken together it points irresistibly to the accused persons that they are the ones who caused the death of the deceased."*

After seeking the guidance of the decision of this Court in **Halima Mohamed and Another vs. R.**, Criminal Appeal No. 30 of 2001 (unreported), the learned trial Judge stated:

> *"...In the present case, according to PW1 & PW [3] it was both the accused persons who led to the three different parts the body was buried. They even went further to show the place which they burnt the body. In the*

ashes, bones were retrieved and by the accused persons. The 1st accused person told PW3, among other people, that the bones belonged to the deceased. Both the accused confessed before PW3 to have killed the deceased. They even gave the motive behind the killing, that is, they believed that the deceased killed their son by witchcraft. The accused persons even showed the stone used, and according to PW3, the stone was blood stained. PW1 clearly testified that the stone was big and heavy that was why they could not carry it to the police station.

Considering what has been stated above, I am of the view that no one could have led the prosecution witnesses PW1 & PW3, to the three different places where the deceased was buried unless he/she participated in the commission of the offence. I am of the considered opinion that the circumstantial evidence irresistibly points to the accused persons in this case, to the exclusion of any other person.

This Court has always insisted that circumstantial evidence directed against an accused person must not be capable of more than one interpretation, and must irresistibly lead to an inference that it was the accused person who is responsible for the death of the deceased. The Court restated as much in **Hassani Fadhili V Republic** [1994] T.L.R. 89 and **Zuberi Abdallah & Salimu Seif vs. R.,** Criminal Appeal No 131 of 2005 (unreported).

In so far as inference of their guilt is concerned, we do not think that the confessions the two appellants allegedly made to PW3 and PW1 can on our re-evaluation carry any weight to join the chain of circumstantial evidence linking them to the death of the deceased. PW3 as the village chairman, and the members of the village militia— cannot receive voluntary confessions that are receivable under the provisions of section 27 (1) of the Evidence Act, Cap. 6. This provision envisages confessions voluntarily made to police officers, of the rank of or above the rank of constable:

> ***27.****-(1) A confession voluntarily made to a police officer by a person accused of an*

offence may be proved as against that person.

Similarly, the evidence stating that the first appellant had confessed to PW1, should not be given any probative value in the chain of circumstantial evidence in light of the beatings the appellant suffered at the hands of the members of the village militia. The learned trial Judge made no efforts to test the voluntariness of the appellants when the members of the village militia arrested them in the village, marched them over to the police station and handed them over to PW1. We agree with Mr Kidumage that as a police officer envisaged under section 27 of the Evidence Act, PW1 should at very least have recorded cautioned statements of the appellants.

The environment under which the appellants were arrested in the village by members of people's militia, their initial detention in the village custody before being taken before PW1, disclosed all the trappings of beatings and force which cannot lead to any voluntary confession to PW1. The evidence that the first appellant had been beaten up was still visible when PW1 sent him to the justice of the peace (PW2). Even Shangali, J. who had presided over the trial within the trial before Makuru, J. took over,

had noted that when the first appellant was presented before the justice of the peace, he carried a fresh wound on his forehead with two scars on his right leg.

Like the learned advocates who appeared for the appellants, we are obviously concerned about the falling standards of professionalism in the collection of evidence at scenes of crimes. We are as surprised why, after visiting the alleged scenes where the deceased met her unlawful death, PW1 and other police officers who were in his entourage, failed to collect physical evidence which the police according to PW3 were shown. In his evidence, PW1 clearly stated that the police were indeed shown the place where the body of the deceased had first been temporarily laid, and places where it was later shifted to. On this, PW1 said:

> *"...in all areas **we found remains of burnt bones**. The bones were at the third place. The first one is where she was killed. The second place is where the body was buried first and **the third place is where the bones were found.**"* [Emphasis added].

Under cross examination by Mr Kidumage, PW1 stated that the deceased was first buried under a baobab tree. But when pressed to indicate where in his sketch map (exhibit P1) to find the baobab tree, PW1 conceded that the baobab tree was not in the sketch map he had drawn. The police officers led by PW1 had ample opportunity to collect and forensically process the alleged blood-stained stone and bones from the scene of crime, but failed to.

The police officers led by PW1 clearly missed the evidence collection opportunity to cause the stone and the bones to be analysed for DNA material and establish possible linkage with the appellants. During the Preliminary Hearing, the prosecution had lined up a witness from the Government Chemist (T. Kahatano) and promised to exhibit a Report of the Government Chemist. This witness was not brought into the witness box by the prosecution. The office of the Government Chemist did not tender any forensic report.

There was clearly a misapprehension of evidence for the learned trial judge to still regard the unsubstantiated statements over bones and blood-

stained stone as providing the circumstantial evidence linking the appellants to the death of the deceased.

In light of the foregoing reasons, we allowed the appeal, quashed the conviction of murder and set aside the sentences of death by hanging which the trial High Court at Dodoma had imposed on the first and second appellants. We further ordered for their immediate release from prison unless they were lawfully being held for any other purpose.

DATED at **DODOMA** this 08th day of April, 2016.

E.A.KILEO
JUSTICE OF APEPAL

K.K. ORIYO
JUSTICE OF APEPAL

I.H. JUMA
JUSTICE OF APEPAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL