IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MJASIRI, J.A., And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 271 OF 2013

AMIRI HASSAN KUDURA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Utamwa, J.)

Dated 14th day of June, 2013
In
Criminal Session Case No. 82 of 2008

JUDGMENT OF THE COURT

8th April & 20th June, 2016

MJASIRI, J.A.:

In the High Court of Tanzania at Dar es Salaam, (Utamwa, J.), the appellant, Amiri Hassan @ Kudura was charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). He was found guilty as charged and was sentenced to death.

Aggrieved with the decision of the High Court, he has filed an appeal before this Court against both conviction and sentence.

The background to this case is as follows. The appellant was the son of the deceased. The appellant readily admitted to have caused the death of his mother, but stated that he did so un-intentionally. Earlier on he testified to have received information that his sister had passed away. On his way home he bought a knife, which he intended to use on the way. Upon reaching his sister's house, he was informed that it was his mother who caused the death of his sister. The death was attributed to witchcraft. He was very furious and he confronted his mother. The other members of the family were present. In the cause of such a fracas he ended up stabbing his mother with the knife which he was carrying, causing her death. The prosecution called five witnesses to prove its case. The witnesses called were three police officers PW1, PW4 and PW5, a doctor (PW2) and the appellant's cousin (PW3). The unfortunate incident took place on the 2nd day of September, 2007 at Viziwaziwa Village within Kibamba District in Coast Region.

At the hearing of the appeal, the appellant was represented by Mr. Christian Rutagatina, learned advocate, while the respondent Republic had the services of Ms Monica Mbogo, learned Principal State Attorney.

The appellant presented a five (5) point memorandum of appeal which is reproduced as under:-

1. *That the Honourable learned trial Judge erred in law by convicting the appellant in the absence of malice aforethought.*
2. *That the Honourable learned trial judge failed to appreciate the prevalence of other important witnesses who were present at the scene of crime when death occurred.*
3. *That the learned presiding Judge erred in fact for failure to point out facts showing that the appellant purchased the knife (weapon) used to stab the deceased before he was informed of his mother's involvement in witchcraft.*
4. *That the learned presiding Judge failed to consider the appellant's conduct on the fateful date preceding and after the incident.*
5. *That generally, the sentence for murder remains harsh in the circumstances of this case.*

In relation to ground No. 1, Mr. Rutagatina strongly opposed the conviction of the appellant. He stated that the charge of murder against the appellant was not proved beyond reasonable doubt. According to him,

there was no direct evidence against the appellant. None of the prosecution witnesses saw the incident. He stated that the trial Judge reached a wrong conclusion.

On ground No. 2, Mr. Rutagatina submitted that the prosecution failed to call important witnesses such as Siwajibu and Mwanaisha, the appellant's sisters who witnessed the killing of the deceased. The serious omission denied the appellant a fair trial.

With regard to ground Nos. 3 and 4, Mr. Rutagatina submitted that the appellant's conduct did not show that he intended to kill or cause grievous bodily harm to the deceased. He gave himself up after the incident. The knife purchased by him was not intended to be used for any unlawful purpose.

In relation to ground No. 5, Mr. Rutagatina argued that the killing of the deceased was accidental, hence the conviction of murder and the sentence meted out were unjustified in the circumstances.

Mr. Rutagatina acknowledged the existence of the appellant's Extra Judicial Statement which stated that he purchased the knife in order to

threaten his mother. However, he complained that the Justice of the peace was not called as a witness. He submitted that the prosecution failed to call essential witnesses and therefore it is not known what really transpired.

Ms Mbogo on her part, vehemently supported the conviction and sentence. She contended that the evidence on record is sufficient to prove the charge against the appellant. On grounds No. 1, 4 and 5 she contended that malice aforethought was established. She made reference to the appellant's Extra Judicial Statement. She argued that the appellant's act of approaching the victim from behind, taking her by surprise showed bad intention. She submitted that by using a knife, a lethal weapon, to stab his mother, malice aforethought was established. She relied on the case of **Said Ali Matola v Republic**; Criminal Appeal No. 129 of 2005, CAT (unreported).

On ground No. 2, she submitted that this ground has no basis. She contended that the prosecution has discretion extending to all aspects of the trial which involves the choice of which witness to call. However upon further consideration she conceded that ground No 2 has merit. She stated

that the Court can draw an adverse inference on the failure by the prosecution to give reasons for not calling an essential witness.

On ground No. 3, the learned Principal State Attorney readily conceded that there was no evidence linking the purchase of the knife by the appellant and the killing of the deceased.

After carefully going through the record and the submissions by counsel, we are of the considered view that the crucial question for determination and decision is whether or not the evidence on record is sufficient to ground a conviction of murder. There is no direct evidence, against the appellant. The appellant's cautioned statement having been expunged from the record, the only evidence available is that of the appellant. PW3, Jumanne Ndoto did not witness the incident. However the most important witnesses named by PW3 and the appellant were never called to testify, the appellant's sisters Siwajibu and Mwanaisha. They were present when the deceased was stabbed and were therefore in a good position to narrate what actually transpired.

It is settled law that the burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts. In **Mohamed Said Matula v Republic** (1995) TLR 3, it was held as under:-

> *"Upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also the link between the said death and the accused, the onus never shifts away from the prosecution and no duty is cast on the appellant to establish his innocence."*

The appellant is facing a serious charge of murder carrying an equally heavy penalty, that is a death sentence upon conviction. Is the evidence on record sufficient to prove a conviction.? The eye witnesses were never called to testify. No reasons were provided for their absence. These most important witnesses were never called to testify. This is a serious omission.

We are fully aware that no particular number of witnesses is required for the proof of any fact. In **Yohanis Msigwa v Republic** (1990) TLR 148, it was stated that:-

> *"As provided under section 143 of the Evidence Act 1967, no particular number of witnesses is required for the proof of any fact. What is important is the witness's opportunity to see what he/she claimed to have seen and his/her credibility."*

In **Mashimba Dotto @ Lukubanija V Republic**, Criminal Appeal No. 317 of 2013, CAT (unreported) it was stated thus:-

> *"We get the impression that the case was poorly investigated and prosecuted. We say so because* ***in absence of any other evidence, the prosecution case was to stand or fall on the word of the appellant regarding the alleged events of the day****. We think, in this case prudence deserved that the deceased's parents and investigating officer ought to have been summoned*

with the aim of hearing their version of the day..... perhaps, if summoned the evidence of these people would have helped lending credence to the appellant's story contained in the extrajudicial statement as it were. In the absence of the evidence of the above people it is not sage to believe whole heartedly that the conviction is sound."

[Emphasis provided].

Similarly in this case, failure by the prosecution to call the appellant's sisters has left a gap in the evidence as to what actually happened. It follows therefore that the account given by the appellant has to be considered in the absence of any other evidence.

At issue here is whether or not the prosecution has a mandatory duty to call certain witnesses as part of its case. In **R v Cook** (1997) 1SCR 1113 it was stated thus:-

"While the principle of prosecutorial discretion is an important precept in our criminal law and exists for

good reason, it is by no means absolute in its operation."

The law provides that adverse inference may be drawn when the persons omitted to be called as witnesses are within reach and no sufficient reason is shown by the prosecution. See – **Aziz Abdallah v Republic** (1991) TLR 71 and **Yohana Chibwingu v Republic**, Criminal Appeal No. 117 of 2015, CAT (unreported). In the instant case, no reason has been provided for not calling the sisters of the appellant. We are of the considered view that they are an important link in the sequence of events.

For the foregoing reasons, we are inclined to agree with Mr. Rutagatina that the charge of murder was not proved beyond reasonable doubt. The appellant should therefore be given the benefit of the doubt. The appellant has testified that he is the one who caused the death of his mother. However he denied that he intended to cause her death and that the stabbing was accidental as he never intended to kill her or to cause her grievous bodily harm.

In view of what we have stated hereinabove, we are of the considered view that the appellant is guilty of the offence of manslaughter.

Given the circumstances we allow the appeal against the conviction of murder, quash the conviction and set aside the death sentence. We find the appellant guilty of the offence of manslaughter. After hearing the parties, we hereby sentence the appellant to six years imprisonment.

DATED at **DAR ES SALAAM** this 14th day of June, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL