IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 441 OF 2015

OSCAR JOSIAH ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Judgment of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

Dated the 2nd day of October, 2015
in
Criminal Session No. 16 of 2014

JUDGMENT OF THE COURT

22nd & 26th February, 2016

MMILLA, J. A.:

The appellant, Oscar s/o Josiah was, along with Sophia w/o Oscar charged with murder contrary to section 196 of the Penal Code Cap 16 of the Revised Edition, 2002. It was alleged that the two murdered one Baby d/o Oscar. At the end of the trial the High Court acquitted Sophia w/o Oscar but convicted the appellant and sentenced him to the mandatory death sentence. He was aggrieved and filed the present appeal to this Court.

The facts of the case were that, Oscar s/o Josiah and Sophia w/o Oscar were married in 2011 and were living at Chanika village. At the time

of their marriage, Sophia had pregnancy from another man, but the former had no problem with her then condition.

On 2.7.2012 at about 5.00 pm, Rudovick Anthony (PW2), who was a hamlet chairman of Rweyeja, was at his home when his brother Josiah John called him. On going there he was informed by him that his wife told him that their daughter in-law had given birth to a child, but it slipped in the pit latrine. He moved to the house of his brother and were soon joined by other four persons. They called the appellant's wife and asked her about the incident but she refused. They also asked her the whereabouts of the appellant. She told them that he was at the farm. They sent some people to call him. They went to the farm and returned with the appellant. Upon being asked about the incident, the appellant told them that he knew nothing about that incident. PW2 and his colleagues entered into the couple's house from wherein they found a piece of cloth with some blood on it. That pushed them to once again ask the appellant's wife as to the whereabouts of the child. This time, she told them to ask the appellant because he knew about its whereabouts. Unfortunately the appellant did not cooperate. Since the appellant's wife had previously informed her mother in law that the baby dropped in the pit latrine, they called the village chairman and the ward militia, after which they demolished the

latrine. However, they did not find the said child. They therefore tied the appellant using ropes. At that point in time, the latter's wife told them that the appellant snatched the child from her and threw it in the bush immediately after she had given birth. At that juncture, the appellant decided to cooperate. He and his wife told the villagers that they were going to show them the place at which they threw the baby. Amongst those who opted to go to the bush were PW2, PW3 and PW4.

On the way to the bush however, the appellant's wife got tired and was allowed to wait for them at a hill while the appellant continued to lead the way to bush. On arrival in the bush, the appellant showed them a certain plate which they used to carry the said baby. After a brief search they found the baby at about 7.00 pm. However, she was already dead. They carried the deceased's body back home after which they hired a motor vehicle and reported the incident to police. The deceased's body was subsequently sent to hospital at which PW1 Dr. John Kasenene conducted post mortem examination. It revealed that the baby died because of lack of sugar in the blood which is known as "***hypogracaemia***" and lack of warmth which is known as "***hypothermia.***" After the usual procedures of interrogations, the appellant and his wife were charged of murder.

The appellant's wife defence was that at the time she married the appellant she had pregnancy from another man, but the appellant had no problem with her then condition. On 1.7.2012 she delivered the deceased. The appellant snatched the baby from her and asked her to follow him in the bush where he threw her. She said the appellant did that because the deceased was not his child.

The appellant's defence was that on the material day, he arrived at his home from his normal routines and found his wife in a confused state. On asking her what had happened, she told him that she had given birth but she killed the child. Curiously, he asked her where she kept the said baby, only to be told that she threw her in the bush. He denied to have led PW2 and his colleagues to the bush where the deceased's body was found. He insisted that his wife was the one who killed the deceased.

After the trial, the High Court acquitted the appellant's wife but convicted the appellant and sentenced him to suffer death by hanging as aforesaid.

Before us, the appellant was represented by Mr. Josephat Rweyemamu, learned advocate, while the respondent Republic had the services of Mr. Hashim Ngole, learned Principal State Attorney.

The memorandum of appeal which was filed by the appellant in person but adopted by Mr. Rweyemamu raised five (5) grounds as follows:-

1. *That, the prosecution evidence was not proved beyond reasonable doubt.*
2. *That the evidence for cause of death has contradictions and inconsistent facts.*
3. *That the evidence of DW2 the co-accused of the appellant, was not credible as the witness had confused and contradicted herself.*
4. *That exhibits P2 and P3 were illegally admitted and considered as their recording was done contrary to law.*
5. *That the Court did not comply with section 231(1) (Sic. 293 (2)) of the CPA by failure to explain to the accused (appellant) the rights expressed there under.*

Mr. Rweyemamu tackled first the third ground which he argued together with the second one. He contended that upon discovery that the cautioned statements of the accused persons were exculpatory and could not be used against each other as reflected at page 95 of the Court Record, the trial court erred in using the evidence of the second accused, an accomplice, against the appellant. At page 99, 13th line, that court said that it believed the testimony of the second accused to be true.

At any rate, Mr. Rweyemamu submitted, the trial court ought to have gone a step further to examine whether she was a credible witness, especially so when it is considered that she hesitated for a long time to tell where the child was. Also, she at first said the child slipped into the pit latrine at the time she was attending a call of nature, but that happened to be false. In his submission, the change of story that the appellant killed the child and threw it in the bush came too late. He also submitted that the trial court ought to have not lost sight of the fact that the second accused was beaten by the leaders at the ward level. He said those factors the more strengthens his submission that the trial court ought to have not believed her.

On another point, Mr. Rweyemamu submitted that the evidence of the prosecution witnesses was riddled with serious contradictions, one that PW2 talked about the child having been strangled while no other witness said so. Also, he talked about the plate which no other witness talked about. So also, that PW4 talked about the spear which aspect no any other witness covered. In view of this, Mr. Rweyemamu challenged that the trial court ought to have declared the prosecution witnesses incredible, and desisted from believing them that the appellant threw the child in the bush. This is so, he said, because the appellant was convicted solely on

the basis of the evidence of PW2, PW3 and PW4 that the appellant led them to the bush where the baby's body was recovered.

Coming to ground No. 4, Mr. Rweyemamu submitted that at page 100 of the Court Record, the trial judge admitted that there were short comings in the recording of the cautioned statements of the accused persons despite the fact that they were admitted in Court without any objections. He said that Sophia for example, did not sign all the pages of the Cautioned Statement which was attributed to her. So also that their statements were recorded after a long time had passed from the time of their arrest which was contrary to section 50 (1) of CPA. Of course, he said, those irregularities were disclosed during cross-examination. Relying on the case of **Ahmad Nangwalanya v. Republic**, Criminal Appeal No. 105 of 2010, CAT (unreported), Mr. Rweyemamu urged the Court to expunge those statements.

As regards the 5th ground, Mr. Rweyemamu's complaint is that after the prosecution side had closed their case and a verdict of case to answer pronounced, the trial court did not go further to inform the appellant the rights enacted under section 293 (2) of the CPA, adding that it was a fatal omission. However, after the Court referred him to the case of **Bahati**

Makeja v. Republic, Criminal Appeal No. 11 of 2006, CAT (unreported), Mr. Rweyemamu said he was leaving it to the Court to decide. However, he prayed the Court to allow the appeal.

On his part, Mr. Ngole stated at the outset that he was supporting conviction and sentence. Like his learned brother, he began with ground No. 3.

He stated that the judge used the evidence of the second accused with caution because he expressly stated that it required corroboration [Page 99]. The trial judge, he submitted, relied on the case of **Paskali Kitigwa v. Republic** [1994] T.L.R. 65 (CA) where it was stated that a court may convict on accomplice's evidence without corroboration if it is convinced that the evidence is true, and provided it warns itself of the dangers of convicting on uncorroborated accomplice's evidence. We agree, that is indeed the principle.

Mr. Ngole submitted also that the trial judge was satisfied that there was other evidence which corroborated that of the second accused, that is the evidence of PW2, PW3 and PW4. He added that also the judge considered that the appellant led the villagers to the place in the bush where the deceased's body was found. He concluded therefore that the

evidence of the second accused was properly relied upon. Even, he submitted, where it was to be considered that her evidence was bad, there was other evidence capable of sustaining appellant's conviction without hers because according to PW2, PW3 and PW4, it was the appellant who led them to the bush where the deceased's body was recovered.

On failure to call the appellant's parents as witnesses, Mr. Ngole said the appellant's parents were not crucial witnesses. Under section 143 of the Evidence Act Cap 6 of the Revised Edition, 2002 (the EA), they are expected to call witnesses they believe are necessary in proving their case. On this again, we agree with Mr. Ngole. The appellant's parents were not at all crucial witnesses. This is all we have to say on the point.

Concerning the 4th ground, Mr. Ngole admitted that PW5 and PW6 did not promptly record the cautioned statements of the accused persons as demanded by section 50 (1) of the CPA. He quickly explained that it was so because the police were outside their station as they had gone to the scene of crime together with the accused persons, therefore that the omission was taken care of by section 50 (2) of the CPA which afforded them excuse. However, he yielded that those statements were not good

evidence because they were exculpatory, but reiterated his submission that even where they are discarded, there was other evidence to sustain appellant's conviction.

Coming to the 5th ground, Mr. Ngole stated that non – compliance with section 293 (2) of the CPA was not fatal in the circumstances of this case because the appellant had exercised the rights under that section. He stated that his advocate was recorded to have responded that the appellant was going to give sworn evidence and had a witness to call [See page 35]. He requested the Court to dismiss the appeal in its entirety.

In his brief rejoinder, Mr. Rweyemamu insisted that the contradictions were serious, also that evidence which needed corroboration cannot corroborate. He concluded that once this is accepted, then there is no evidence to sustain appellant's conviction. He repeated his prayer for the Court to allow the appeal.

On our part, we think it is desirable to begin with the 5th ground whose complaint is based on non compliance with section 293 (2) of the CPA. The ruling of the trial court which found that the appellant had a case to answer is found at page 35 of the Court Record. Immediately after that

ruling, Mr. Nathan who advocated for the appellant in that court rose and stated that:-

> *"My lord the first accused will give sworn evidence and we have one witness to call. That is all."*

While we agree with Mr. Rweyemamu that the Court Record does not indicate that the appellant was informed of the rights under that section, it is clear nevertheless that the omission did not occasion any injustice because the appellant exercised his rights after he was so guided by his advocate. As will be appreciated, at the time he entered into the witness box, he swore after which he testified – See page 35 of the Court Record, last paragraph. Also, he called a witness one Nelson Josiah whose evidence begins at page 45 of the record. In a situation like this in the case of **Bahati Makeja** (supra), the Full Bench of this Court stated at page 7 that:-

> *"It is our decided opinion that where an accused person is represented by an advocate then if a judge overlooks to address him/her in accordance with s. 293 of the CPA the paramount factor is whether or not injustice has been occasioned.*

In the current matter there was no injustice occasioned in any way at all. ***It is palpably clear to us that the learned Judge must have addressed the accused person in terms of s. 293 of the CPA and that is why the learned advocate stood up and said that the accused person is going to defend himself on oath.*** *But even if the learned judge had omitted to do so, the accused person had an advocate who is presumed to know the rights of an accused person and that he advised the accused person accordingly and hence his reply."* [Emphasis provided].

In the circumstances, the fifth complaint is not well grounded and we dismiss it.

Next we come to the 4th ground in which it is complained that exhibits P2 and P3 were illegally admitted and considered as their recording was done contrary to law.

First and foremost, it should be noted that exhibits P2 and P3 which were cautioned statements of the appellant's wife and the appellant himself respectively, were each tendered and admitted in court without any objections. As correctly submitted by Mr. Rweyemamu, the irregularities in those documents were revealed during cross examination. At page 26 of

the Court Record, PW5 admitted that the appellant's wife did not sign on the second page of her statement as she ought to have done. This omission was not accounted for, and in our view constituted a serious irregularity and we expunge it from the record – See the case of **Christiana d/o Damiano v. Republic**, Criminal Appeal No. 178 0f 2012, CAT (unreported).

The other irregularity was that both exhibits were recorded after a long time had elapsed from the date they were arrested. The appellant and his wife were arrested on 2.7.2012 but their statements were recorded on 4.7.2012. However, in terms of section 50 (1) (a) of the CPA, they ought to have been interrogated within a period of 4 hours counting from the time they were under restraint unless time was extended under section 51 of that same Act. Mr. Ngole said that no extension was sought and obtained. However, he submitted that the delay to interview the suspects in this case resulted on account that the police were continuing with investigation for which he said, they enjoyed the protection obtaining under subsection (2) (a) of section 50 of the CPA. That section provides that:-

> *"(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned*

as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence–

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation."

Admittedly, Mr. Ngole has a point. The appellants were sent to Kayanga Police station on 2.7.2012 at night, and on the day that followed they had to go back to the village at which the couple were living to inspect the scene of crime and subsequently to go to the bush at which the deceased's body was recovered. That in our firm decision fits squarely under the above quoted provision. Thus, we are not prepared to accept it as having been an unexplained omission. As such, the case of **Ahmad Nangwalanya** (supra) is distinguishable.

On the other hand however, Mr. Rweyemamu submitted and Mr. Ngole admitted that the statements of the appellant and his wife were exculpatory. The appellant was pointing an accusing finger to his wife, while his wife was pointing an accusing finger to the appellant. As such, that was not reliable evidence as against each other as was found by the

trial court. The trial court relied on the case of **Ali Msutu v. Republic** (1980) T.L.R.1 in which it was held that:-

> *"An exculpatory statement made by one accused cannot be used to incriminate another person."*

See also the case of **Vumilia Sanga and another v. Republic**, Criminal Appeal No. 84 of 2014.

The 3rd complaint is that the evidence of DW2 who was the co-accused of the appellant was not credible as she had confused and contradicted herself. The complaint of Mr. Rweyemamu in this regard was that the evidence of DW2 was unreliable because she was not a credible witness. We hurry to say that we agree with him.

As will be recalled, after disclosing that she gave birth, DW2 was the first person to be questioned by PW2 and his colleagues regarding the whereabouts of the child but for a long time she did not respond. At a certain point she told them that the child slipped into the pit latrine at the time she was attending a call of nature. Unfortunately, that happened to be false. Later on however, she changed the story that the appellant snatched the child and threw it in the bush. That is also the nature of her evidence in court. She threw the blame on her husband. Given such a

conduct, it could not be said she was a truthful witness. We similarly agree with Mr. Rweyemamu that even after the trial court decided to use her evidence against the appellant, it ought to have approached it with great caution. Also, the trial court ought to have taken into consideration the fact that she was beaten by the leaders at the ward level, hence that there was a possibility that she lied. In the circumstances, we agree with Mr. Rweyemamu that she was not a credible witness.

However, Mr. Ngole submitted that the appellant's conviction stands even without the evidence of DW2 on the basis of the evidence of the rest of the prosecution witnesses. The immediate issue is whether there is other cogent evidence to sustain appellant's conviction as claimed.

The learned Principal State Attorney indicated that he was banking on the evidence of PW2, PW3 and PW4. We have carefully analyzed the evidence of those witnesses. These witnesses testified in common that at a certain point, DW2 told them that the newly born Baby d/o Oscar was snatched by the appellant who proceeded to the bush and threw it there. The two of them undertook to lead them to that place in the bush and the journey began. At a certain point however, DW2 became tired. It was resolved that she and other villagers were to wait for them at a certain hill. The appellant continued to lead the other villagers to the destination in the

bush. On arrival in the bush, the appellant pin pointed the area at which he had allegedly thrown the baby. Luckily, they found the dead body of Baby d/o Oscar. After that discovery they passed through the place where they had left DW2 and other villagers and returned to the village.

Up to that stage, the fact that PW2, PW3 and PW4 said that it was the appellant who led them to the bush where they found the dead body of Baby d/o Oscar clearly shows that the appellant had a hand in the charged crime. Otherwise how could he have known the actual place where the baby was thrown? It is on this basis that we unhesitatingly find he correctly was adjudged to have committed the charged crime.

Mr. Rweyemamu submitted that the evidence of PW2, PW3 and PW4 was unreliable because it was contradictory. His submission on the point was that while PW2 said the appellant showed them a plate ***(beseni)*** when they were in the bush which he had said was used to carry the deceased baby, the other witnesses did not mention such a thing. So was the aspect of the spear, a point which was brought about by PW4 and none else.

We have considered this line of argument, but we agree with Mr. Ngole that the pointed out contradictions were minor and did not at all

go to the root of the case. As already pointed out, the subject matter of the charge was the murder of Baby d/o Oscar, and that the focus is on who killed her. We wish to underscore the point that in any given case the contradictions, if any, should be evaluated by 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 - See the case of **Dikson Elia Nsamba Shapwata & another v. Republic,** Criminal Appeal No. 92 of 2007, CAT, (unreported) in which the Court said that:-

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

Having said that the pointed out contradictions in the present case did not go to the root of the case, we find and hold that this line of argument does not hold water. Thus, in sum the third ground is dismissed.

Although it was not one of the subjects of challenges raised by the appellant's advocate, we find it in order to point out that the appellant's act

of throwing the newly born baby in the bush is what caused her death as correctly found by PW1 Dr. John Kasenene. PW1 put it that the baby died because of lack of sugar in the blood which is known as "***hypogracaemia***" and lack of warmth which is known as "***hypothermia.***" Since that happened because the deceased lacked the necessary care which resulted from the appellant's act of throwing her in the bush, we are firm that malice aforethought was established.

That said and done, we find that the appeal lacks merit and we dismiss it in its entirety.

Dated at **Bukoba** this 25th Day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL