

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

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

CRIMINAL APPEAL NO. 442 OF 2015

**1.SIMON CLEOPHACE BANGILANA }
2.THEREZA CLEOPHACE } APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court
of Tanzania at Bukoba)**

(Khaday, J.)

**Dated the 30th day of September, 2015
in
Criminal Session No. 66 of 2014**

JUDGMENT OF THE COURT

23rd & 26th February, 2016

Mjasiri, J. A.:

The appellants, Simon Cleophas Bangilana and Theresa Cleophus were charged with the offence of murder contrary to section 196 of the Penal Code, [Cap 16, R.E. 2002] (the Penal Code). They were convicted as charged and were sentenced to suffer death by hanging. Aggrieved by the decision of the High Court, the appellants have now filed their appeal before this Court. The appellants are mother and son. It was the

prosecution's case that on or about 9th June 2009 at Kibale/Kalenge Village within Biharamulo District in Kagera Region, the appellants murdered one Cleoplace Mwarabu. The deceased was the father of the 1st appellant and the husband of the 2nd appellant. This sad incident occurred at the deceased's house.

Briefly the facts of this case are as follows. The deceased had two wives. The 2nd appellant was the second wife. It was alleged by the prosecution that there were squabbles between the two co-wives. The cause of the misunderstanding and the disharmony was that the second appellant was angered by the fact that the deceased was spending more time with the first wife, PW1. Each wife had her own place, and the distance separating the two places was about 35 metres.

On the day of the incident the 2nd appellant went to the house of PW1. She started quarreling with her and began to attack her. The deceased intervened. She then directed her anger at the deceased. She picked up a stick and began to assault the deceased. In the midst of the scuffle, the 1st appellant arrived at his father's house. He joined hands with his mother and began to hit and kick his father. The deceased was seriously injured, and he died later. PW1 sought for help and the two

appellants were arrested and charged with causing the death of the deceased. The prosecution case relied on five witnesses to prove its case. One of the witnesses was a medical doctor who testified that the death of the deceased was due to ***severe bleeding due to multiple cut wounds on the head.*** The appellants denied the charge. The 2nd appellant testified that it was PW1 who hit the deceased. The 1st appellant stated that it was the 2nd appellant who assaulted the deceased.

At the hearing of the appeal, the appellants were represented by Mr. Aaron Kabunga, learned advocate while the respondent Republic had the services of Mr. Athumani Matuma, learned Senior State Attorney. Mr. Kabunga presented a four – point memorandum of appeal. It is reproduced as under:-

- 1. That, the Honourable Trial Judge of the High Court erred in law to rely on the testimony of PW1, the would be suspect and whose evidence was inconsistent and unreliable to ground a conviction.*
- 2. That, the Honourable Trial Judge of the High Court erred in law for non direction of assessors on vital points including non-direction on the deceased's DYING DECLARATION.*

3. *That the Honourable Trial Judge of the High Court erred in law to rely on circumstantial evidence which did not irresistibly point only to the appellant as required by law.*
4. *That, the Honourable Trial Judge of the High Court erred in law and on facts to believe the prosecution's unreliable and incredible witnesses that they had proved the case on the standards required by law.*

The appellant had also filed seven (7) grounds of appeal. However Mr. Kabunga opted to proceed with the grounds of appeal filed by him. He also sought leave of the Court to abandon ground No. 3.

Mr. Kabunga argued grounds No1. And 4 together. He challenged the credibility of PW1 who was the only eye witness. He contended that PW1's evidence was doubtful and could not be relied upon. She did not give a clear account of what actually transpired. PW1 testified that it was the 2nd appellant who repeatedly hit the deceased on the head. She gave no information as to where the 2nd appellant got hold of the stick. She stated that the stick belonged to the deceased. It is on record that the second appellant and PW1 were co-wives. He submitted that PW1

implicated the 1st appellant simply because he was the son of the 2nd appellant.

Mr. Kabunga submitted further that PW1's evidence was marred with contradictions and discrepancies. He made reference to page 14 of the record where PW1 stated that Melchior PW4 took the deceased to the police station on his motor-bike. However PW4 in his evidence testified that he found the deceased in a bad state and he could not do anything. He said that he owned an avon bicycle. PW1 began her testimony by saying that, the 2nd appellant immediately upon arrival at her house, started hitting the deceased with a stick, however she later stated that the second appellant started to attack her first. She then went inside. According to Mr. Kabunga, these contradictions do not end there. In PW1's statement which was recorded by the police, she stated that the second appellant hit the deceased using a pestle. A pestle is so different from a stick and it is not the same thing. In her statement to the police she also stated that her neighbour Ndandowele passed her house and requested for tobacco (locally known as *ugoro*) and she gave her the tobacco. In her testimony in court she said she did not have the tobacco which the neighbor wanted.

Mr. Kabunga also pointed out further contradictions in her testimony. PW1 testified that there was peace between the two households until the second appellant began complaining that the deceased was getting old. She however gave another reason that the 2nd appellant started to quarrel with her husband because the deceased was spending more time with PW1. She also testified that PW4 was the first person to arrive at the scene which was not the case.

Mr. Kabunga also submitted that both the 1st and 2nd appellant came to PW1 unarmed. This factor was also acknowledged by PW1. The house of PW1 was only thirty five (35) paces away from that of the second appellant, and it was on the way to her house. The 2nd appellant was on the way to her house, when she stopped at PW1's place.

He stated further that the evidence of PW2 should not be relied upon. He was biased as he was the son of PW1. According to PW2's testimony Melchior, PW4 found the appellants at the scene. However Melchior's testimony indicated that he did not find the appellants at the scene.

Mr. Kabunga raised concerns that PW1 asked to be believed on what has been stated in her testimony in Court six (6) years after she made her

statement to the police. She was supposed to have a better recollection of the facts when she made her statement to the police.

Mr. Kabunga lamented that despite these major contradictions the High Court wrongly relied on the evidence of PW1. He relied on the case of **Michael Haishi v. Republic** (1992) TLR 92.

Mr. Kabunga also submitted that there were contradictions and discrepancies between other prosecution witnesses, for example PW2 and PW4. Whereas PW2 stated that he found PW4 at the scene, PW4 stated that he found PW2 was already there.

Mr. Kabunga brought to the attention of the Court that PW2 in her testimony on page 21-22 of the record stated that the 2nd appellant confessed to him that she had beaten the deceased. However on page 23 of the record he refuted that he stated that the 2nd appellant confessed to him to have murdered the deceased.

Mr. Kabunga contended that common intention was not established. Mr. Kabunga concluded by stating that the trial court Judge failed to address herself on the contradictions. The contradictions were not minor as down played by the High Court Judge. He contended that the

contradictions were major contradictions which went to the root of the matter.

Mr. Matuma on his part strongly argued that PW1 was a credible witness. According to him, the evidence of PW1 who was an eye witness was also supported by the evidence of PW2 and PW3. She named the 1st and 2nd appellant as the culprits. He made reference to **Marwa Wangiti Mwita v. Republic** (2002) TLR 39. He argued that the fact that PW1 named the suspects at the earliest possible time made the witness credible.

Mr. Matuma submitted further that the defence case also supported the prosecution case. The 1st defendant stated in his defence that she was told by PW1 that her mother the 2nd defendant had murdered the deceased.

Mr. Matuma also vehemently argued that the conduct of both appellants was outrageous. Being a wife and son, their act of leaving the deceased in such a bad state left questions un answered.

Mr. Matuma submitted further that the totality of the evidence has to be weighed. It is on record that the 2nd appellant chased away her husband who was living with PW1 therefore PW1 would have no cause to hurt the deceased. Mr. Matuma told the Court that PW1 should therefore

be believed, when she stated that the second appellant attacked her husband and beat him with a stick on his head several times.

Mr. Matuma also complained that Exhibit D1 was wrongly admitted as a defence Exhibit when PW1 a prosecution witness was being impeached. He stated that the proper procedure was not followed.

Mr. Kabunga on his part contended that the procedure used in admitting Exhibit D1 was proper so that PW1 could be cross examined on the conflicting statements about a material issue in the case.

In relation to the argument raised by the learned advocate for the appellant that common intention was not established. Mr. Matuma submitted that common intention was proved. According to him the court needs to look at the act of each appellant. He made reference to section 22 (1) (b) and (c) of the Penal Code.

On ground No. 2, on the Dying Declaration. Mr. Kabunga submitted that the trial Judge did not direct the assessors on this aspect nor did she make reference to it in her judgment.

On the Dying Declaration Mr. Matuma contended that there is no prosecution evidence on the Dying Declaration. The 1st appellant stated that his father told him that "it was his moms who killed me" in order to exonerate himself.

Mr. Matuma argued that it was the appellants who caused the death of the deceased and they were guilty as charged. Their appeal, therefore has no basis.

Mr. Matuma submitted that there could be a remote possibility that the appellants could be guilty of a lesser offence of manslaughter given the possibility that there was a fight.

Mr. Kabunga on his part firmly stated that there is no evidence on record to establish that the appellants are guilty of the offence of manslaughter. He asked the Court to allow the appeal in respect of both appellants.

We have carefully gone through the evidence on record, the judgment of the High Court the memorandum of appeal and the submissions by counsel. We hereby commend both counsel for their industry.

In looking at the background of this case and the parties involved, it is evident that there were conflicts, grudges, misunderstandings, mistrust, competition and worse of all jealousy. This reminds us of Shakespeare's Othello, on Iago's speech on jealousy. It was stated thus:-

"O beware, my lord, of jealousy! It is a green-eyed monster which doth mock the meat it feeds on."

As a result of the fracas which took place, the deceased is now dead. This case stands or falls on the evidence of PW1. She was the only eyewitness to the murder. Given the nature of her testimony and the contradictions and discrepancies in her evidence which are apparent on the record we are compelled to agree with Mr. Kabunga that her evidence cannot be relied upon.

There were not only major contradictions in her own testimony in court, there were also discrepancies and contradictions between her evidence and that of other prosecution witnesses. This is just a tip of the iceberg. This same witness was impeached through the use of her prior inconsistent statement which she gave to the police. She made conflicting statements about a very material issue in the case. Whereas in her statement to the police she stated that the 2nd appellant used a pestle to

hit the deceased, she stated that 2nd appellant hit the deceased with a stick in her testimony in court. This is a material difference. This gets worse. According to the post-mortem report, the death of the deceased was due to severe bleeding due to multiple cut wounds on the head. There were also other discrepancies and conflicting positions between the statement she made to the police and her testimony in court. This casts doubt on the truthfulness of her trial testimony. Then, because the witness told two stories, one of which is untrue, it suggests that the witness has a general tendency to lie. We are of the considered view that the trial Judge correctly admitted PW1's statement to the police as Exhibit D1.

In **Mohamed Said Matula v. Republic** (1995) TLR 3 it was stated thus:-

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the contradictions are only minor, or whether they go to the root of the matter,"

We are of the considered view that the contradictions went to the root of the matter.

In **D. Hussein v. Republic** [1975] LRT Parts III & IV No. 56, Lugakingira J. (as he then was) had this to say:-

" The presence of inconsistencies in witnesses' evidence may make it unsafe to convict thereon, especially if there is no other evidence tending to corroborate the same."

We note that the statement of PW1, (Exh. D1) was taken two years after the incident. This was rather strange as normally witnesses statements are taken as soon as possible after an offence has been committed. All the same, a witness's memory two years after the incident would be more fresh compared to 6 years after the incident which is the time PW1 gave her evidence. The inconsistencies should have been resolved in favour of the appellants. See- **Aburaham Daniel v. Republic**, Criminal Appeal No. 6 of 2007 CAT (unreported).

We are alive to trial courts' monopoly on the assessment of credibility of witnesses in so far as their demeanour is concerned unless there are circumstances which call for- re-assessment of their credibility by the Court. See for instance **Omari Ahamed v. Republic** (1983) TLR 52 and **Salum Mhando v. Republic** (1993) TLR 170.

This a first appeal and it is therefore by way of re-hearing. We are of the considered view that the circumstances of this case calls for reassessment.

The circumstances of this case are very different from that of the case of **Goodluck Kyando v. Republic** (2006) TLR 363 relied upon by the learned Senior State Attorney.

In the instant case even though PW1 was quick to name the 1st and 2nd appellants as the culprits, the case of **Marwa Wangiti Mwita v. Republic** (2002) TLR 39, does not help the learned Senior State Attorney. As rightly pointed out by Mr. Kabunga, the crucial issue here is not naming the suspects at the earliest possible time, but that of the credibility and reliability of the evidence of PW1.

We would also like to mention in passing our concerns on how this case was investigated. First of all no investigating officer or any police officer gave evidence on this matter. While section 143 of the Evidence Act is clear that there is no requirement for a particular number of witnesses, what is important is the credibility and the reliability of the witness. See **Yohanis Msigwa v. Republic (1990)** TLR 148. In this case according to the record, the deceased was killed on June 9, 2009.

PW1's statement to the police (Exhibit D1) was made on June 15, 2011 that is two years after the incident. It is not on record as to what took place in the said period of two years, *something is definitely not right*. We would however leave the matter at that and we will not speculate as to what had transpired.

In relation to Mr. Kabunga's complaint regarding the **DYING DECLARATION**, that the assessors were not directed on this aspect during summing up by the trial Judge. This issue needs not detain us. It is evident from the record that neither the prosecution nor the defence side led evidence regarding **DYING DECLARATION**. This issue merely came up when the 1st appellant was being cross-examined while giving his defence. We entirely agree with Mr. Matuma, that this ground has no basis.

In a criminal case the burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts. (Section) 3(2)(a) of the Evidence Act (supra). See **Woolmington v. the DPP** (1935) AC 462. The conviction of the appellants cannot be based on the weakness of their defence.

The conviction of the appellant is based on the evidence of a single witness PW1. Whereas under the law no particular number of witnesses shall be required for the proof of an act, (Section 143 of the Evidence Act. Cap 6, R.E. 2002), it is now settled law that in a case entirely depending on the evidence of a single identifying witness, such evidence must be absolutely water tight to justify a conviction. See for instance, **Yohanis Msigwa v. Republic** (supra).

It is settled law that a conviction can be based on the testimony of a single eye witness and there is no rule of law or evidence which says to the contrary provided that the sole eyewitness passed the test of reliability in basing a conviction on his/her testimony alone. In the instant case we are of the firm view that PW1 has not passed the reliability test given the contradictions and discrepancies in her evidence.

In **Hassan Juma Kanenyera v. Republic** (1992) TLR 100, the Court stated thus:-

"A conviction based on the evidence of a single witness cannot be precluded when the court is satisfied that the witness is telling the truth."

the conviction of the appellants and set aside the death sentence. Both appellants (1st and 2nd) are to be released forthwith from prison unless otherwise lawfully held. Order accordingly.

DATED at **BUKOBA** this 26th day of February, 2016.

E. A. KILEO
JUSTICE OF APPEAL

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