IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL CASE NO. 241 OF 2015

1. **GRAYSON ZAKARIA MKUMBI**
   @ MAPENDO
2. **STEPHEN ZAKARIA MKUMBI** ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mlay, J.)

dated the 12th day of March, 2004
in
Criminal Session Case No. 107 of 2001

.....

JUDGMENT OF THE COURT

18th May & 9th June, 2016

MASSATI, J.A.:

The appellants were arraigned before the High Court sitting at Morogoro, on an information for the murder of one Sophia d/o Juma, contrary to section 196 of the Penal Code. It was alleged that between the 27th and 28th day of December, 1998, at Iyogwe village, Gairo Division, Kilosa District, in Morogoro Region, they murdered the said Sophia d/o Juma. They pleaded not guilty.

Briefly, the prosecution case was that, the deceased SOPHIA JUMA, was the wife of the first appellant. They lived in Iyogwe village in Gairo division which was then part of Kilosa District, Morogoro Region. Sometime between 27/12/1998 and 28/12/1998, the first appellant sent out messages to several persons that his wife was missing. Some visited his house on the night of 27/12/1998, while others visited him in the morning. Those who visited him at night, saw the two appellants and a body of a dead person lying on the floor of the first appellant's house. These include PW3 AYUBU MKUMBI, and PW4 MATHAYO MKUMBI. Others went there in the morning and did not see what PW3 and PW4 saw. This included the appellants' father, DW3, who was also charged with the offence but was acquitted by the trial court.

On the morning of 29/12/1998 a report was made to the ward executive officer SAIDI ABDALA MAKILA (PW1) who raised an alarm, and a search of the missing person began. Eventually, the dead body of the deceased was found dumped near Igongwe hills, some two kilometres away from her residence. The police and the doctor were called in to perform the necessary investigations, and as a result of those investigations, the appellants and their father were arrested and charged.

In their defences, the appellants denied any involvement in the murder.

Nevertheless, the trial court convicted the present appellants and sentenced them to death and acquitted the third accused. The appellants are now aggrieved by the trial court's findings and have lodged an appeal to this Court to impugn those findings.

At the hearing of the appeal, Mr. Richard Rweyongeza, learned counsel appeared for the appellants to argue his four grounds of appeal as follows:-

1. ***That**, the learned Trial Judge grossly misdirected himself in law and in fact in taking and relying on the evidence of JUDITH STEPHEN MKUMBI, the wife of the 2nd appellant without complying with provisions of the law of Evidence governing the evidence of spouses.*
2. ***That**, having regard to the fact that the credibility of PW2 AYUBU MKUMBI and PW2 (sic) MATHAYO MKUMBI had been impeached by the evidence, the learned trial Judge grossly misdirected himself in fact and law in relying on such evidence to convict the appellants.*
3. ***That**, having regard to the evidence on record and the circumstances of the case the learned trial Judge grossly misdirected himself in law and in fact in failing to hold that there was a possibility that the*

offence might have been committed by somebody else other than the appellants.

4. ***That**, having regard to the evidence on record and the circumstances of the case the learned Trial Judge grossly misdirected himself in law and in fact in convicting the appellants against the weight of evidence.*

Arguing the first ground, Mr. Rweyongeza submitted that as PW5, JUDITH STEPHEN MKUMBI, was the second appellant's wife, and her evidence was taken without complying with section 130 (3) of the Law of Evidence Act, Cap 6 R.E. 2002 (the Evidence Act) her evidence was inadmissible, and should be expunged from the record.

Mr. Nassoro Katuga, learned Senior State Attorney, assisted by Ms. Esther Martin, learned State Attorney who represented the respondent/Republic, first attempted to resist this ground by arguing that much as section 130 (3) of the Evidence Act was relevant only in so far as the second appellant was concerned, her testimony could still be considered against the first appellant, but on a serious reflection, they, conceded that it could not be so considered if it was not illegally admitted in the first place.

Next, Mr. Rweyongeza argued the remaining grounds together. He submitted that apart from the evidence of PW5, which is valueless, the remaining evidence on record was not sufficient to sustain the appellants' convictions. Considering the testimonies of PW3 and PW4, who, in his opinion, gave evidence that may have directly touched the appellants, he submitted that their evidence was self-contradicting and inconsistent and so had to be treated with some care, if possible it should have been supported by some corroborative evidence, which was lacking. Finally, he submitted that from the evidence on record, there was a real possibility that someone else may have been involved in killing the deceased, and especially so, if the trial court had given a deserving analysis of the defence case. It was therefore his opinion that, as the prosecution case raised some reasonable doubts, these should be resolved in favour of the appellants by allowing their appeal.

In response, Mr. Katuga, who supported the convictions and sentence, submitted that the prosecution had fielded an unbroken overwhelming circumstantial chain of evidence to prove its case. Apart from PW3 and PW4, the prosecution produced PW2 who identified the second appellant at the place where the deceased's body was finally found. Both PW3 and PW4 were consistent that when they visited the first

appellant's house they found the body of the deceased in the house. Although they did not report to the authorities, this was considered by the trial judge, as due to fear to harm their blood relationship. The learned counsel also submitted that although PW3 and PW4 admitted that what they recorded in their police statements was different from what they testified in court, the police statements were not tendered in court as defence evidence to show the extent of those inconsistencies and their materiality. It was thus his opinion that the convictions of the appellants were sound and unassailable. He thus asked the Court to dismiss the appeal.

In his rejoinder submission, Mr. Rweyongeza remarked that the trial judge's observation on the reasons for PW3 and PW4's failure to report to the authorities was not supported by the evidence on record. So, he urged us to find that the trial judge's remarks were unwarranted. He also observed that the evidence of PW2, was not credible enough; that is why even the trial court did not take it into consideration. On the circumstantial evidence, the learned counsel submitted that there was hardly any chain, let alone, an unbroken one, of circumstantial evidence that could irresistibly lead to the conviction of the appellants. He thus reiterated his prayer that the appeal be allowed.

This is a first appeal. As a matter of law, the Court is entitled to reappraise the evidence and draw its own inferences of fact or order the taking of additional evidence if it deems it fit to do so. (See Rule 36 (1) of the Court of Appeal Rules, 2009, as well as case law in **WILLIAMSON DIAMONDS LTD vs BROWN** (1970) EA. 1; **AHMAD HASSAN MARWA vs R.**, Criminal Appeal No. 264 of 2005 (unreported).

What this means is that such an appeal is by way of a retrial, and as such, the Court is empowered to reconsider the evidence adduced at the trial without being bound to follow the trial judge's findings of fact, except where such findings are based on credibility. (See **SELLE vs ASSOCIATED MOTOR BOAT CO**. (1968) E.A. 123. However, a distinction must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but only that of the proper inference to be drawn from the specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge and form its own independent opinion while giving due weight to that of the trial judge. (See **BENMARK vs AUSTIN MOTOR CO. LTD** (1955) 1 A11 ER 326 (HL).

The conviction of the appellants is based on the evidence of seven prosecution witnesses and two documentary exhibits.

The two documentary exhibits P1, (the Post Mortem Examination Report, and P2 (the Sketch Plan) were tendered without objection at the preliminary hearing. Exhibit P1 shows that the cause of death was due to spinal injury. Exhibit P2 shows the sketch plan of the first appellant's residence and where the deceased's body was found. It shows that the body of the deceased was found at the foot of Mkuyuni hill some 2 kilometres away from her usual abode at Iyogwe village.

Of the witnesses, PW1 was just a ward executive officer. His evidence was formal. He received the report of the crime, participated in searching of the deceased, and reported it to the police. PW2 Daniel Kamote said that he was at his farm at Mkuyuni in Iyogwe village, guarding his crops against wild pigs. On the morning of 28/12/1998, when he was going home from his farm he heard some people talking. When he flashed his torch, he was able to identify the second appellant. He did not run away. He also saw something like a body of a person lying some 30 paces from where he saw the second appellant standing. Later on, he participated in the search of the body of the deceased, and it was found at the exact place where the second appellant was standing. The evidence of PW3 and PW4 is to the same effect, that, on 27/12/1998 they were informed of the deceased's disappearance and when they both visited the

first appellant's house they saw the deceased's body lying on the floor. They were both threatened not to reveal what they saw in the house. They both distinctly identified the voice of the second appellant issuing the said threats. However, they both admit to have never reported the matter to the authorities. PW5 JUDITH STEPHEN MKUMBI, was the wife of the second appellant. For reasons that will be clear shortly, we need not say more about her. PW7 D/CPL HAMIS investigated the case, drew the sketch plan, and arrested the appellants. PW7 DR. SIMON MKWERA did the autopsy and prepared Exhibit P1.

As indicated above both appellants denied the commission of the offence.

From the above summary of the evidence, and as the learned trial judge properly directed himself and the assessors, and as submitted by learned counsel in this appeal, the case against the appellants rested not on direct, but on circumstantial evidence. The issue therefore is whether there is sufficient circumstantial evidence to sustain the convictions? It is now time to look into the grounds of appeal.

The first ground of appeal should not detain us. As both counsel have conceded, the evidence of PW5, who was the wife of the second appellant was irregularly received.

Section 130 of the Evidence Act provides:-

130 (1) Where a person charged with an offence is the husband or the wife of another person that other persons shall be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section.

(2) Any wife or husband, whether or not of a monogamous marriage, shall be a competent and compellable witness for the prosecution:-

a) in any case where the person charged is charged with an offence under Chapter XV of the Penal Code or under the Law of Marriage Act, 1971;

b) in any case where the person charged is charged is charged in respect of an act or omission affecting the person or property of the wife or husband, or any of the wives of a polygamous marriage, of that person or the children of either or any of them.

(3) Where a person whom the court has reason to believe is the husband or wife, or, in a polygamous marriage, one of the wives of a person charged with an offence is called as a witness for the prosecution, the court shall, except in the case specified in subsection (2), ensure that the person is made aware, before giving evidence, of the provisions of

subsection (1), and the evidence of that person shall not be admissible unless the court has recorded in the proceedings that this subsection has been compiled with.

In the present case, there was already information on the record of the preliminary hearing that JUDITH was the wife of the second appellant. So, the trial court should have been on alert, and taken the necessary precautions before taking her evidence. As this was not done the evidence of PW5 was inadmissible. This is what this Court said in **MATEI JOSEPH vs R**. (1993) TLR. 152.

> *"The evidence of a spouse who has been compelled to testify against another spouse in a criminal case contrary to the provisions of S. 130 of the Evidence Act, 1967, is inadmissible and of no effect."*

In that case, the evidence of the spouse that was illegally admitted was not considered on appeal. Similarly, in the present case we shall expunge the evidence of PW5 from the record and so it shall not be considered.

After the expungement of the evidence of PW5, the only substantive evidence on record, is that of PW2, PW3 and PW4.

It is trite law that circumstantial evidence can ground a conviction of, however, serious an offence. It has been said that circumstantial evidence is very often the best evidence. Sir Udo Udoma (the then Hon. CJ of Uganda) in **R vs SADRUDIN MERALL**, HC Criminal Appeal No. 220 of 1963 (unreported) is reported to have remarked that:-

> *"It is no derogation to say that it was so far it has been said that circumstantial evidence... is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics."*

Similar remarks were made later by the defunct East African Court of Appeal in **TUMUHERE vs UGANDA** (1967) EACA 328.

The erstwhile East African Court of Appeal set out the principles of law applicable to circumstantial evidence, in **SIMON MUSOKE vs R.** (1958) EA. 715 at 718 to the effect that:-

> *"...in a case depending exclusively upon circumstantial evidence, the court must before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the*

accused and incapable of explanation upon any other reasonable hypothesis than that of guilty."

In **HAMIDU MUSSA TIMETHEO AND MAJID MUSSA TIMETHEO vs R.** (1993) TLR. 125 this Court held that the chain of circumstantial evidence linking the appellants to the death of their father, was unbroken and led to no other conclusion but that the appellants were responsible for the death of their father. (See also **HASSANI FADHILI vs R.** (1994) TLR. 99.

It is also established law that the facts from which an inference of guilt is drawn must be proved beyond reasonable doubt (See **ALLY BAKARI AND ANOTHER vs R**. (1992) TLR. 10. And that where two views are possible, one pointing to the guilt, and another pointing to the innocence of an accused, the court is to adopt the one favourable to the accused. (See **GABRIEL SIMON MNYELE vs R.**, Criminal Appeal No. 437 of 2007 (unreported).

In the present case, Mr. Rweyongeza tried to argue in the second ground of appeal, that, the evidence of PW3 and PW4 was discrepant and unreliable, because it was self-contradictory and inconsistent in themselves.

We would however agree with Mr. Katuga, learned Senior State Attorney that in the absence of the police statements of the witnesses in the record, we are not able to fathom and evaluate the nature of the alleged contradictions and inconsistences in the evidence of these witnesses. As far as the prosecution case is concerned, we find as a fact as did the trial court, that both PW3 and PW4 were consistent in their evidence that when they visited the first appellant's house, they found the deceased's body lying on the floor. This, in our view, was a material piece of evidence which was proved beyond any reasonable doubt.

As for the third ground of appeal Mr. Rweyongeza has submitted that there was a possibility of a third person having committed the offence. Unfortunately the learned counsel did not elaborate much on this ground. But we think that he intended to link this possibility with the possible mistaken identity by PW2 when he told the trial court that, in the morning of 28/12/1998, he saw someone like the second appellant standing near the dead body at the hill, and therefore it is possible that, the mistakenly identified person, was the one who may have killed the deceased.

We think this theory is farfetched. Having found as a fact that PW3 and PW4 had found the deceased's body in the first appellant's house the previous night, it could only be inferred that by then, she was already

dead. If PW2 did not possibly see and identify the second appellant on his way from his farm at the place where the deceased's body was eventually found, whoever killed her, could not have killed her there. Irresistibly, the inference is that the deceased was killed before PW3 and PW4 were invited at the 1st appellant's house. If she was killed by some other third person, it was a person who one or both appellants knew. We find it a strange but undesigned coincidence for PW3 and PW4 to have seen the deceased's body lying at the first appellant's house a night before where the second appellant was present, and for PW2 to also have identified him standing near where the dead body lay and finally found at the foot of Mkuyuni hill the next morning. But, as we said, all these are not only remote, but also unreasonable possibilities. We thus also reject the third ground of appeal.

In the last ground, the appellants have submitted that their convictions are against the weight of evidence. This is the time that we should turn to examine the chain of circumstantial evidence available against each of the appellants.

As against the first appellant, there are several circumstances that could link him with the commission of the offence. **Firstly,** the deceased was his wife. He is on record to have reported to several persons including his father, DW3, that she went missing. But according to his own account

on 27/12/1998 the deceased was with him until 9:00 p.m. when they retired to bed, before she suddenly "disappeared" from her bed at around 4:00 a.m. This means that he was the last person to be with the deceased when she was alive. It also means that he had an opportunity. But strangely, that same night, at around 2:00 to 2:30 a.m. PW3 and PW4 visited the first appellant's house only to find the appellants in the sitting room and the body of the deceased lying on the floor. That was the smoking gun, which not only disproved the myth of the deceased's disappearance, but also proved that she was killed in the house before he "discovered" her "disappearance" at 4:00 a.m. **Secondly**, when PW3 and PW4 visited his house on that night and saw the body of the deceased, it is on record that he and the second appellant threatened them into silence, at the pain of injuring them if they revealed what they saw. **Thirdly**, he did not participate in the search of the body of his wife or her burial. Although in his defence he said that he was sick, he did not even go to the hospital. So there was no other evidence to suggest that the sickness was so serious as to disable him from witnessing even where his beloved dead wife was found and buried. **Fourthly**, in our own reevaluation of the appellant's account, we, like the assessors, are unable to accept that if the deceased was lying in the same bed with him, she could have spirited away without him noticing her absence until early in the morning. **Fifthly**, in his

defence, he told the court that he first reported his wife's disappearance to Benet Samwel Mhando, and Jane @ Shida Mkumbi, who were sleeping in the same house, but it is surprising that he did not call them to support his defence. In our evaluation, all those were lies and evasions. Such lies and conduct shows that he was hiding something, which corroborated the prosecution evidence against him that he knew and that he killed the deceased SOPHIA JUMA, with malice aforethought. (**MASUMBUKO S/O MATATA @ MADATA AND TWO OTHERS vs R.**, Criminal Appeal No. 318, 319 and 320 of 2009 (unreported). So, we are satisfied that the case against him was proved beyond reasonable doubt. We therefore affirm his conviction for murder and sentence of death, and accordingly dismiss his appeal.

But for the second appellant, we think, the chains are not well linked. According to the evidence on record the second appellant does not live in the same house with the first appellant. According to his defence, he had travelled to another village, and when he came back, he visited the first appellant, but did not see his wife (the deceased). Then after supper he retired to sleep in a different house before he was awakened by Bennet only to be informed that, the deceased was missing. This was not seriously challenged by the prosecution.

The only incriminating pieces of evidence is that from PW2 who alleged to have seen him at the place where the deceased's body was found; and that from PW3 and PW4 who said that when they visited the first appellant's house, he was also present and even threatened them not to divulge what they saw. But, unlike the first appellant, the second appellant participated in the search and burial of the deceased. While, it could reasonably be inferred that the first appellant must have known when the deceased met her demise as she was his wife, it was difficult to make such an inference in respect of the second appellant because he had fully accounted for his time up to the time of his arrival at the homestead especially so as it had not been established when exactly did the deceased meet her death. In our view, mere presence at the first appellant's house, does not necessarily make the second appellant privy to the murder of the deceased. Under the present situation it is both possible that he may either have participated in killing the deceased, or he may have been invited by the first appellant after the killing, to assist him in disposing of the body. In the circumstances, he is entitled to the benefit of that inference which is more favourable to him.

Thus, for the above reasons, we do not accept that the circumstantial evidence available on record irresistibly points to the second appellant's

guilt. For that reason, we think that the case against him was not proved beyond reasonable doubt. We thus allow his appeal.

Finally then, we allow the appeal by the second appellant. We quash his conviction and set aside the sentence. He is to be released forthwith from prison, unless he is held there for some other lawful cause. But the appeal by the first appellant is dismissed in its entirety.

DATED at **DAR ES SALAAM** this 23rd day of May, 2016.

S. MJASIRI
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.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL