IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 211 OF 2011

SAMWEL HENRY JUMA ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Juma, J.)

dated the 25th day of May, 2011
in
Criminal Session Case No. 12 of 2010

.....

JUDGMENT OF THE COURT

18th April & 5th May, 2016

LUANDA, J.A.:

On 25/5/2011, the above named appellant was convicted by the High Court of Tanzania sitting at Dar es Salaam with murder and sentenced to suffer death by hanging. Aggrieved by the finding of the High Court, he has filed an appeal in this Court.

The evidence which form the basis of conviction and which the trial High Court found credible was to the following effect. The appellant and

Elizabeth d/o Martin (the deceased) stayed together for two years as lovers before the deceased met her death. Prior to their staying together, the deceased was employed by one Zawange to take care of his shamba.

In order to carry out her duties effectively, the deceased was staying in a small house within the said shamba. It was in that house where the deceased invited the appellant to stay with her. However, their relationship was not good; the two used to quarrel and sometimes fought. It is further the prosecution case that at one occasion the appellant assaulted the deceased whereby the incident was reported to police. The appellant was arrested, charged in a court of law, convicted and sentenced to pay a fine of Tshs 20,000/= or to go to jail for a year in default. The appellant could not pay the fine; he was sent to prison to serve the aforestated sentence. Though it was the deceased who put the appellant behind bars, just for the love of the appellant, she paid the fine after the appellant had spent two weeks in prison and returned to live with the deceased.

However, a day before the deceased met her death ie. 22/11/2008 the two were at loggerheads again. The deceased could not stomach any more, she called the village elders with a view to parting company. The elders

blessed her request so to speak; the two parted company and division of properties was carried out. But the deceased did not go to the house in which she was residing with the appellant, she went to stay with her son Lucas Simon (PW1) and grand children who were at a stone throw distance.

On the fateful day according to Lucas Simon (PW1) around 5.00 am, the deceased took a bucket and a torch and went to the shamba, she was looking after, with a view to collecting mangoes. PW1 saw the deceased when going to collect mangoes. But hardly after five minutes when the deceased had left, PW1 heard a voice of his mother lamenting in agony that she was dying. PW1 rushed to the place only to find out the deceased swaying. PW1 managed to get hold of the deceased. In the meantime PW1 said he saw the appellant running away from the scene. His mother (the deceased) passed away. The matter was reported to police. The body of the deceased was examined by Harrison Peter Mjema (PW2), a Senior Assistant Medical Officer on the same day at the scene of the crime and post mortem report was prepared (Exht P1).

On 8/1/2009 the appellant was arrested. The appellant gave a cautioned statement (Exht P5) taken by Asst. Inspector of Police Mathias

(PW6) on 9/1/09. He is also reported to have given an extra Judicial Statement before a Justice of Peace one Aidan Mussa (PW3) (Exht.P3).

In his defence, the appellant did not dispute to have killed the deceased but he said it was accidental. He said on the day the elders had resolved the two to part company, he spent the night at the village. At night time when he went out to relieve himself he met with the deceased.

The appellant greeted the deceased which the deceased responded. Then the appellant told the deceased that he still loved her, presumably to revive their relationship. The deceased was reported to have refused and begun abusing him. She then slapped him and eventually bit his finger. He slapped her as a result she fell on a tree stamp which he said had a sharp edge, hence her death. He did not deny to have given an extra Judicial Statement before PW3 and he gave it voluntarily. He disputed the cautioned statement to have not given voluntarily. He said he was beaten and forced to give.

In this appeal the appellant was represented by Mr. Peter Kibatala, learned advocate. Mr. Faraja Nchimbi learned Principal State Attorney represented the respondent Republic.

Mr. Kibatala adopted the grounds of appeal raised by the appellant. The appellant has raised five grounds in his memorandum of appeal. Having read the grounds carefully, we are of the settled new that the five grounds can be condensed to four grounds. One, that taking the prevailing conditions existing on the fateful day, the appellant was not identified. Two, that the cautioned statement of appellant which the learned judge relied on to convict was taken beyond the prescribed time as provided under S. 50 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) and further that the one who took it did not certify under his hand as provided under S. 57(4) of the CPA. Three, that the extra judicial statement was taken beyond the prescribed time. Four, that the prosecution did not prove its case beyond reasonable doubt.

Arguing the first ground, Mr. Kibatala said that death occured around 5.00. am - it was night time. PW1 merely said he saw the appellant running. But there is no evidence on record to indicate how PW1 managed to have identified the appellant taking into consideration the fact that nothing had

been said about the source of light. It is his submission that under those circumstances, PW1 could not have identified the appellant. Responding to this ground, Mr. Nchimbi said that the issue of identification in this case does not arise. This is because the appellant did not dispute his presence at the scene of crime in his defence. We entirely agree with Mr. Nchimbi. The appellant himself admitted to have killed the deceased. But he said it was bad luck. The question of visual identification under those conditions therefore is not an issue in this case. This ground is devoid of merit.

Next Mr. Kibatala argued in respect of a cautioned statement in that it was not taken within four hours from the date of arrest. He said the appellant was arrested on 8/1/2009 but his cautioned statement was taken on 13/1/2009. Turning to the issue of certification, he said the Police officer who took it did not certify. That goes contrary to S. 57 (4) (e) of the CPA. He however, did not touch the evidence of extra Judicial statement.

Be that as it may, when replying Mr. Nchimbi informed the Court that the evidence in the cautioned statement is wanting. This is because the evidence contained therein differs very much with that of the extra Judicial

statement. By necessary implication Mr. Nchimbi invited the Court to discount that evidence contained in the cautioned statement as well as the extra judicial statement. In his judgment, the learned trial judge appears to have relied heavily on the extra judicial statement to convict. Unfortunately, he made two conflicting findings in respect of the extra judicial statement vis-a-vis the appellant's evidence. In one incident, he said the two are similar. But in another he said they differ. Page 104 of the record reads:-

> *"According to the accused, it was that fall on tree stump which was the source of her fatal injuries. This version of evidence is also contained in the cautioned statement the accused made to the justice of the peace. It was admitted as Exhibit P2 without any objection from the accused."*

Here the judge opined that the extra judicial statement and the appellant's defence are at one. But page 106 of the record, the learned judge said they differ! It reads:-

> *"Yet, his testimony as DW1 and what he told Adinan Musa (PW3) the justice of the peace (in Exhibit P2), are conflicting at some important areas. For example, whereas he testified that he was alone with the*

deceased when he pushed her to fall on a tree stump, the accused told the Justice of the Peace that around 6 a.m. on the day the deceased died, the son of the deceased had threatened him with a bush knife. The accused told the justice of the peace that the deceased died when she joined the fight on the side of her son and she fell down injured when the accused fought back. These conflicting accounts confirm my opinion that the accused was not a witness of truth."

On careful reading the second passage quoted supra, it sounds the learned trial judge appears to have shifted the burden of proof to the appellant. We wish to point out clearly that in criminal cases the burden of proof is always on the shoulders of the prosecution side and never shifts to an accused person.

That said, we now proceed to discuss first about the cautioned statement and then the extra judicial statement.

The evidence on record shows that the appellant was arrested on 8/1/2009 around 19.00 hours (7.00 pm). His cautioned statement was taken on 9/1/2009 around 7.00 hours and not 13/1/2009 as said Mr. Kibatala. In

terms of S. 50 (1) (a) and (b) of the CPA, unless extended, a cautioned statement of a suspect is required to be taken within a period of fours commencing at the time when he was taken under restraint. The cautioned statement in this case therefore was taken beyond the prescribed time of four hours and no extension was sought and granted. But the same was tendered without objection. Indeed, the right place to raise such an objection would have been during the trial. Assuming that the statement was taken in time, was it properly tendered in court? It was not properly tendered. This is because it was first read out to the appellant before the same was first cleared for admission in line with a well established practice. In **Robinson Mwanjisi & others V R** [2003] TLR 218 this Court had the occasion to emphasis the need to follow that procedure. It said:-

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out. Reading out document before they are admitted in evidence is wrong and prejudicial."*

The same therefore is expunged from the record.

We now turn to the extra judicial statement. PW3 the Justice of the peace is the one who took the statement. But the Court in the course of hearing the appeal on its own found out that the extra judicial statement was neither read out to the appellant during the conduct of the committal proceedings vide murder case No. 1/2009 R V Samwel Henry Juma of the District Court of Mkuranga nor the notice to have been given as to the name and substance of a witness whose statement was not read out during the committal proceedings to enable him give his evidence as is mandated by S. 289 of the CPA. Both counsel associated with the observation made by the Court. The section reads:

289 (1). No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.

(2). The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.

(3). The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called.

In **Hamisi Meure V R** [1993] TLR 213 this Court observed inter alia, that it is wrong to allow a witness to give evidence at the trial while his statement had neither been read at the committal proceedings nor reasonable notice to have been given to the appellant or his advocate before such witness is allowed to give evidence. The evidence taken in contravention of this section is liable to be expunged. The evidence of PW3

along with the extra judicial statement (Exht P3) therefore are also expunged from the record.

After we have expunged the cautioned and extra judicial statements which the prosecution relied upon so much, the question now is whether the remaining evidence supports the charge of murder. Mr. Nchimbi said the appellant is the one who caused the death of the deceased. It is the evidence of the appellant himself. He went on, whether a knife was used or otherwise the issue of malice aforethought was not established. Taking the circumstances of the case, the appellant is guilty of a lesser offence to murder, he submitted.

Unfortunately Mr. Kibatala did not address us on this issue. Be that as it may, the evidence on record shows that there was no eyewitness who witnessed the incident. PW1 arrived at the scene when already the deceased had been injured. Upon arrival the deceased neither did she name the person who injured her nor explained how she was injured. Further, PW1 did not say to have seen the appellant holding a knife when running from the scene of the incident. Probably in naming the person who injured the deceased

and / or the appellant being seen holding a knife might have carried the prosecution case further. The evidence of PW6 who said he saw a knife (Exht P4) at about 30 meters away from the scene at a scrub which had no blood is at best raised strong suspicion. Suspicion, however, strong is not the basis of conviction. In this case the prosecution had the duty to establish in evidence that the knife recovered should have been in possession or property of the appellant and should be connected with the death of the deceased. The finding of the trial learned Judge that the weapon used was the same knife found a few meters away from the scene of crime is not supported by evidence at all. It is an assumption. There is no evidence to support the charge of murder.

In his defence the appellant did not deny to have caused the death of the deceased. But he said it was back luck. Without further ado, since the appellant admitted to have killed the deceased by pushing her and fell on a sharp tree stump, which might be true, we find him guilty of a lesser offence of manslaughter. The conviction of murder is quashed and the sentence of death by hanging is set aside. We convict him with the offence of manslaughter. Taking into account the period he has been in

prison, we sentence him to 15 years imprisonment from the date of delivery of this judgment.

Order accordingly.

DATED at **DAR ES SALAAM** this 28th day of April, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL