IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 582 OF 2015

BETWEEN

SILVERY ADRIANO..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Singida)
(Sehel, J.)

dated the 3rd day of December, 2015
in
Criminal Sessions Case No. 68 of 2010

JUDGMENT OF THE COURT

4th & 27th April, 2016

KILEO, J. A:-

The appellant SILVERY s/o ADRIANO was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002 in the High Court of Tanzania, sitting at Singida (Sehel, J.). He was sentenced to death by hanging. He has now appealed to this Court.

It was not disputed that one Adriano s/o Michael was dead and that he died a violent death. In order to establish that it was the appellant who killed the deceased who also happened to be his father, the prosecution called in evidence a total of seven witnesses. PW1, DAUDI SIMON was the

main link and the only eye witness in the case. He was 12 years old when he testified on 6th November, 2015. The incident took place in April 2008 which would place him at seven years of age at the time the crime was committed. After a *voire dire* test, the trial court found that although he did not understand the nature of an oath, he had sufficient intelligence and understood the duty of telling the truth. So his evidence was taken without oath. The essence of his testimony was that he saw the appellant attacking the deceased who was also his grandfather with a stick. After witnessing the incidence, PW1 ran home to inform his grandmother, who instructed him to inform one Mama Theo. Mama Theo did not testify.

(PW2) SILVESTA SALVII, the Chairman of the CCM branch at the area responded to the alarm which was raised, and joined the other villagers at the scene of the crime. After he was informed that the appellant had killed his father he arrested him and had the militia handcuff him. PW3 WILLIAM HENERICO told the court that at around 9:30 a.m, the morning of 24/4/2008, he saw the appellant with a wet shirt and trying to squeeze water from it. He also noticed that his shirt was blood stained and he looked restless.

PW5 JOSEPHINA JOHN testified to the effect that on the material

day as she was on her way to fetch water she heard an alarm for help. She proceeded to fetch the water and when she got back home PW1 arrived and told her that he wanted to show her the spot where the appellant had hit the deceased. At the spot she saw a bucket and blood on the ground. PW6) ELIAS ADRIANO who is the appellant's brother was traced and informed of the occurrence. He said that on that morning he was working in his garden when Paulo came looking for him and informed him that he was required by his mother. His mother allegedly asked him to consult PW1 as to what was amiss. PW1 took him to a place where he claimed he saw the deceased being hit. There they found a bucket of water which had blood stains on it. The search for his father led to the discovery of his body which was found hanging in a nearby tree. He said however that the body appeared to have been dragged from the point where PW1 said he had seen the appellant hit the deceased.

The postmortem examination report was tendered in court by EVANS HAIKAMBE MLAY (PW8) (who had at first appeared as PW4) a doctor at Singida Hospital. The postmortem report (exh.P1) revealed that the deceased sustained a deep wound going into the brain and that the cause of death was severe head injury.

In his sworn testimony, the appellant denied to have killed the deceased and raised the defence of alibi. He told the trial court that on the material date, between 06:00hrs and 09:00hrs he was at his farm cultivating.

The appellant was represented at the hearing of his appeal by Mr. Nyangarika, learned advocate who had filed the following grounds:

1. *That, the Hon. Trial Judge erred in law and in facts in failing to properly evaluate the evidence on record.*
2. *That, the Hon. Trial Judge erred in law and in facts in not holding that there was no corroborative evidence to Daudi Simon' s testimony (PW1) as required by the law.*
3. *That, the Hon. Trial Judge erred in law and in facts in failing to properly direct the assessors on matters of facts and law thereby causing them have wrong opinions on the case.*
4. *That, the Hon. Trial Judge erred in law and in facts in not holding that the prosecution failed to prove their case at the required standard in law.*

The respondent/Republic was represented by M/s. Rosemary Shio, learned Senior State Attorney.

Mr. Nyangarika made presentations on all the four grounds beginning with ground 2, then 4, 1 and 3. The main issue that runs through the case is whether the case for the prosecution was proved beyond reasonable doubt. In order to arrive at a conclusion on this issue we will need to look at whether the trial court properly evaluated the evidence before it.

In our determination of the matter we will be guided by the above subjects.

Mr. Nyangarika forcefully argued that in so far as the only eye witness was a child of tender age and his evidence was given without oath, as a matter of practice and prudence corroboration was necessary in this case of murder which required that the prosecution prove its case beyond reasonable doubt. It was Mr. Nyangarika's contention that there was no corroboration of the evidence of PW1 and further that the case for the prosecution was riddled with contradictions.

He submitted that the evidence of a blood stained shirt which the trial court used to corroborate PW1's evidence was wrongly acted upon as the said blood stained shirt was neither tendered in court nor taken to the Government Chemist to prove that the blood stains were of a human being. The same applied to the blood stained bucket which was said to

have been found at the scene of crime.

Mr. Nyangarika submitted that the trial court failed to properly evaluate the prosecution evidence. He argued that according to the doctor who testified on the postmortem examination report, he was of the view that the object used to hit the deceased was a sharp object while on the other hand PW1 stated that the appellant hit the deceased by a stick which is not a sharp object. Mr. Nyangarika argued that there was need to explain how a stick could cause the kind of wound that was detected upon postmortem examination.

It was also Mr. Nyangarika's argument that adverse inference ought to have been drawn on the failure on part of the prosecution to summon important witnesses to testify. He pointed out that it was rather unusual that in such a grave case as this one, there was no police investigator nor was there any witness from the village authority who testified in court. No sketch map of the scene of crime was tendered either, Mr. Nyangarika argued. Further, PW1's grandmother (deceased's wife) who was the first person to whom the incident was reported and to whom everyone seemed to be going to for consultation, never testified in court. Mr. Nyangarika contended that all these witnesses were crucial.

Mr. Nyangarika further argued that the appellant spent the night with the deceased and in the morning he was the first person to leave for the farm while PW6 left at 7:00 am. How can the appellant then be held liable for the murder while he was the first person to leave home? Mr. Nyangarika argued. He submitted that the possibility that (PW6) ELIAS ADRIANO was responsible for the crime could not be completely ruled out. In any case, it was PW6 who was at home when the incident occurred and his evidence should have been thoroughly scrutinized, Mr. Nyangarika argued. The learned counsel further submitted that as it was, despite PW6's evidence being challenged, and his earlier statement made to the police being tendered in court as exhibit D1 to test his credibility, the assessors were not properly addressed on his evidence. In his view this was a non- direction to the assessors which is fatal.

To elaborate further that the trial court failed to evaluate the evidence, Mr. Nyangarika pointed out that, if as stated by PW1 at page 18 of the record that he saw the appellant and the deceased face to face then how could the appellant have hit the deceased from the back as purported from the evidence?

Ms. Shio learned Senior State Attorney supported the conviction and

the sentence meted out by the trial court. Regarding corroboration, Ms Shio was of the view that the trial Judge warned herself before putting reliance on the evidence of PW1. She stressed that the prosecution case was proved beyond doubt. She contended that failure to tender the blood stained shirt did not water down their case.

Concerning the issue of the trial court's failure to evaluate the evidence, she was of the view that the evidence was properly evaluated. According to the postmortem report which showed that the deceased was wounded at the back, while PW1 claimed that the appellant and the deceased were face to face, Ms Shio was of the view that even if the deceased and the appellant were face to face, the appellant could still hit the deceased at the back.

Regarding the argument that the trial court failed to properly address the assessors, Ms Shio contended that going by the record, the assessors were properly addressed.

In his brief rejoinder Mr. Nyangarika stressed that in the circumstances of the case the key witness (PW1) could not be said to be credible. Also the evidence of PW1 that he saw the appellant hit the deceased with a stick was not consonant with the postmortem examination

report which showed that the deceased had sustained a big deep wound which could have been caused by a sharp object as testified to by PW8, the medical officer who tendered it. In summing up, Mr. Nyangarika contended that failure to call crucial witnesses like the police investigator, the deceased's wife to whom the incident was first reported and failure to tender in court important exhibits like the sketch map and the blood stained shirt which was alleged to have been handed over to the police watered down the case for the prosecution thus entitling the appellant to the benefit of doubt.

We have given due consideration to the circumstances of this case and we are of the settled view that the case revolves around one central issue, which is whether the learned trial judge properly evaluated the evidence that was tendered before her. As a first appellate court we are empowered to revisit and re-evaluate the evidence that was tendered at the trial and come to our own conclusion.

As already indicated, PW1 was the only eye witness to the commission of the crime. At the time he witnessed the crime being committed he was about six years of age and at the time he testified he was aged twelve years. He gave an unsworn testimony after the trial judge

satisfied herself that he did not comprehend the nature of an oath. Corroboration of such evidence is required as a matter of practice. The circumstances of this case, in our view, were such that corroboration was indispensable. The first question to deal with first however, is whether in the circumstances of the case it could be said, without doubt, that PW1 was a reliable witness.

When the evidence of PW1 is taken along with the rest of the other evidence in its totality more questions than answers are raised. To start with, according to PW6, Elias Adriano, the appellant is said to have been the first to leave the house where they were both staying. He claimed that he himself left at around 7.00hrs (thought to the police he said he left at 8.00 hrs). What does not come out clearly from the evidence is why PW1 'just' followed the appellant behind that early in the morning while PW6 was still in the house where they were all staying? PW1 himself said that the deceased had told him to stay behind so why 'just' follow the appellant? Furthermore, looking closely at the evidence of PW1 one will notice that he was emphatic that he saw the appellant hit the deceased 'on the head at right hand side at the back'. One wonders how a six year old could be so specific in the circumstances of the case, as to what part of the

head the deceased was hit. Was this specification designed to match with the postmortem examination report?

The other available evidence is riddled with contradictions particularly relating to the time of the incident. Both PW5 and 6 made contradictory statements to the police and in court as regards the time they left home to go to the well and Mbugani respectively. In her statement to the police PW5 put the time of the incident at 8.00 hours but in court she put the time to between 10.00-11.00 hours. PW6 told the police that he left home for mbugani at 8.00hrs, yet in court he said that he left at around 7.00hrs. Why did these two witnesses each give inconsistent statements with regard to the time the incident occurred? What magic was there with regard to the time? Mr. Nyangarika was of the opinion that PW6 might have lied about the time so as to place himself away from the scene of crime at the time it was committed. The question Mr. Nyangarika posed is why place himself away from the scene of crime if he was in no way responsible for its commission? We think Mr. Nyangarika's observation was a valid one. On the part of PW5 it was her evidence that she was on the way to fetch water when she heard an alarm for help from Daudi. She however did not respond immediately to the alarm, instead she proceeded to the well. The

question that arises is whether, in a village set up, after hearing an alarm one would proceed with their business as if nothing had happened?

The well featured prominently in the case. When PW5 heard the alarm she was on her way to the well. The deceased had also gone to the well. There was however a discrepancy as to the number of wells that were in the village. Whereas PW1 and PW6 indicated that there was more than one wells in the village, PW PW7 was categorical that there was just one well. Apart from the discrepancies in the testimonies of the witnesses the fact that crucial witnesses and exhibits were not tendered in court watered down the case for the prosecution. It will be noted as submitted by Mr. Nyangarika that in this serious case of murder there was no police investigator who testified nor was the blood stained shirt allegedly worn by the appellant as mentioned by the witnesses ever tendered in court while evidence showed that it was handed over to the police. The blood stained shirt and a government chemist's report that the stains were actually of human blood was a very crucial piece of evidence in our view. The deceased's wife to whom the occurrence was first reported and who appears to have set the ball rolling was not called to testify. We agree with Mr.Nyangarika that the deceased's wife was a vital witness in the

circumstances of this case.

While we are mindful of the fact that in terms of section 143 of the Evidence Act, Cap 16 R. E. 2002 no particular number of witnesses will be required for the proof of any fact, we are of the settled mind that in the circumstances of this case it was crucial that the investigator also be called to testify, at least to explain about the blood stained shirt.

In the case of **Azizi Abdalla v. R.** [1991] TLR 71 this Court held:

> *"(iii) the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

We are settled in our minds, given the circumstances of this case, that this is a fit case to draw an adverse inference against the prosecution for their failure to call the police investigator, the deceased's wife and failure to tender in evidence the blood stained shirt which was a crucial exhibit.

In view of our deliberations as above we are satisfied that given the inconsistencies in the testimonies of the prosecution, the failure by the prosecution to call crucial witnesses and to tender vital exhibits the appellant was entitled to a benefit of doubt. In the result we allow the appeal by Silvery Adriano. The conviction entered against him is quashed and the sentence imposed is set aside. The appellant is to be released from custody forthwith unless he is held therein for some lawful cause.

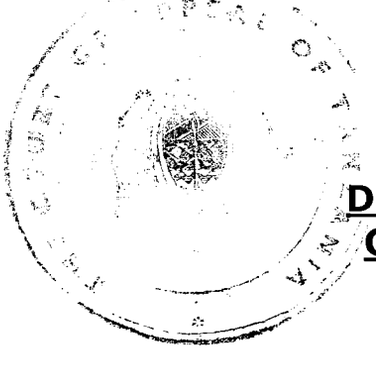
DATED at DODOMA this 23rd day of April, 2016.

E.A. KILEO
JUSTICE OF APPEAL

K.K ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL