IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 241 OF 2012

(CORAM: MBAROUK, J.A., MWARIJA, J.A. And LILA, J.A.)

ELINASANI MATIKO NG'ENG'E .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Aboud, J.)

dated the 27th day of July, 2012
in
HC. Criminal Session Case No. 66 of 2010

JUDGMENT OF THE COURT

8th February & 10th March, 2017

MBAROUK, J.A.:

The appellant, Elinazani Matiku Ng'eng'e was arraigned before the High Court of Tanzania sitting at Dar es Salaam for the offence of murder contrary to section 196 of the Penal Code [Cap.16 R.E. 2002]. The High Court (Aboud, J.) convicted and sentenced him to suffer death by hanging. Aggrieved by that decision, the appellant preferred this appeal.

It is the prosecution's case that on or about 17th day of February, 2010 at Ukonga area within Ilala District, Dar es Salaam region, the appellant murdered one Rehema Matiku, hereinafter referred to as the deceased who died a violent and unnatural death.

The facts relied upon by the prosecution at the trial court consisted of the evidence of five (5) witnesses. In essence, the evidence shows that the appellant and the deceased were husband and wife and blessed with five children. Vitus Matiku (PW1) one of their children, testified to the effect that on 17th February, 2010 while sleeping at night at around 03:00 hrs, he heard noises from his parents room and heard his mother (deceased) screaming for help. PW1 with his sisters and young brother approached the room to give help. While there, he saw the appellant, stabbing the deceased with a knife as he had a mobile phone which had a torch light. PW1 then saw the deceased trying to escape, but she was blocked by the appellant. PW1 tried to help the deceased but he was

overpowered by the appellant who pulled her inside and continued to stab her with a knife. Thereafter, PW1 decided to run to the police station and reported the matter. When PW1 and policemen arrived at the scene of crime, they found the deceased at the corridor near her bed room, while the appellant had locked himself inside the bed room. PW1 further testified that, with the help of their neighbor, they managed to get the appellant out of that bed room and later arrested and sent him to the police station.

With the help of their neighbour who was later recognized as Bashiri Juma Masawe (PW3) they took the deceased to hospital. According to PW1, he was of the view that, the source of the quarrel between his parents was because his father wanted to sell the plot while his mother resisted. When cross-examined by Mr. Mdamu, the learned advocate for the appellant, PW1 stated that, he did not know what happened in his parents rooms after he went to sleep. He added that, it was a habit and not

something strange for his father as a Kurya to walk while carrying a knife and on that day he saw his father stabbing his mother twice with a knife on her fore head and back. He also stated that, there was no fight between his parents, but what he saw was that, his father was beating his mother.

On her part, Joyce Matiku, (PW2) as the daughter of the appellant and the deceased, her testimony was not different from that of PW1 (her brother).

PW3 who was earlier on referred to as a neighbour testified to the effect that on 17/2/2010 at night, he was at his home sleeping. He then heard noises from his neighbour's house. He referred his neighbour as Matiku who is the appellant. Initially, he thought there was a robbery incident, but he later found that it was Matiku's children who were screaming for help. PW3 then went at the appellant's house and asked the children as to what has happened. The children told him that their father (the

appellant) had killed their mother inside the house. When they entered the house PW3 found the deceased and sent her to Amana Hospital. On arrival they were told by one of the doctors that she was already dead.

D. 8759 CP Richard (PW4) testified to the effect that on 17/2/2010 at around 03:00hrs, he was at the Mazizini Ukonga, Police Station and received a complaint from a young man that there was a possibility that someone had been injured. PW4 went at the scene of crime and found the deceased seriously injured and hence took her to the hospital. Thereafter, he said, the appellant was arrested and sent to Staki shari Police Station.

In his defence, the appellant in essence admitted to have killed the deceased who was his wife, but he said it was due to the fight. He testified that, the source was that, the deceased was not ready to follow him to their home place Musoma after he retired as an army officer in 2009. On the fateful day, the appellant testified to have

convinced her that they should go back to Musoma, but the deceased refused and went out of the room. He said, when the deceased came back she started uttering insulting words which made him become angry. He further testified that, the deceased insisted to remain in Dar es Salaam as she stayed alone when the appellant was in Zanzibar for many years. He also said, the insulting words were "***ulivyokuwa Zanzibar je ulikuwa unanitomba wewe***" and threw other insulting words to his mother, and that is why the appellant became angry. At that moment, the appellant further testified that, he saw his wife carrying a knife and wanted to stab him, but he jumped to grab the knife and during the struggle the deceased fell on that knife, hence injured on her left hand side. He suddenly fainted and did not know what happened thereafter until he found himself at the Police Station and then sent to Amana Hospital for treatment of the injuries he sustained.

He concluded by contending that he did not intend to kill the deceased but it was due to provocation and that he was defending himself.

At the hearing, the appellant was represented by Mr. Benjamin Mwakagambo, learned advocate and the respondent/Republic was represented by Mr. Mutalemwa Kishenyi, learned Principal State Attorney and Miss Avelina Ombock, learned State Attorney.

All together nine grounds of appeal were preferred by the appellant in the memorandum of appeal filed by Mr. Mwakagamba on 24/6/2016, namely:-

> *"(1) That the trial judge erred in fact by convicting the appellant basing on contradictory evidence of PW1 and PW2.*
>
> *(2) The trial judge erred in law and in fact by convicting the appellant for the offence of murder in absence of*

a knife which was not tendered as exhibit in Court

(3) That the trial judge erred in law and in fact by basing his judgment on visual identification of the accused while the incident occurred at night

(4) The trial judge erred in law and in fact for holding that the charge against the accused person was proved beyond reasonable doubt.

(5) The trial judge erred in law and in fact for disregarding the defence of provocation and self defence raised by the accused person

(6) The trial judge erred in law and in fact for misleading the assessors that ***actus reus*** *of the charge was already established.*

(7) The trial judge erred in law and in fact for failure to conduct preliminary hearing as required by law.

(8) *The trial judge erred in law and in fact by basing its judgment on post mortem report which was admitted to the prejudice of the accused person thus occasioning failure of justice.*

(9) *The learned trial erred in law and in fact for convicting the accused for the charge of murder while the cause of death was a fight between the deceased and the accused.*

In his written submissions, Mr. Mwakagamba added another ground of appeal to the effect that, **the judge erred in law for holding that the use of disproportional force in self defence is a proof of malice afore thought and convicted the accused person for murder.**

Earlier on in his written submissions and later at the hearing, Mr. Mwakagamba prayed to abandon some of the grounds of appeal, which were grounds No. 1,3,6 and 7

and remained with grounds No. 2,4,5,8 and 9 and the additional ground.

Starting with the 8th ground of appeal, Mr. Mwakagamba submitted that the post mortem examination report was wrongly admitted as no notice of intention to produce it was given. He said, that contravenes the requirement under section 291 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA).

Mr. Mwakagamba further submitted that, the requirements under section 291(3) of the CPA were contravened for the failure of the trial court to inform the appellant of his right to call the author of the post mortem examination report. He said, instead, the trial court allowed PW5 who was a police officer to tender it. In support of his argument, he cited to us the case of **Lugori v. Republic** (2014) EA 318. For those reasons, Mr. Mwakagamba urged us to discount that exhibit.

Arguing in favour of his 9th ground, Mr. Mwakagamba simply submitted that as far as the record of appeal at page 19 shows that PW5 testified that according to the circumstances which he found at the scene of crime he was satisfied that there was a fight before the appellant committed murder, therefore the appellant ought to have been convicted of manslaughter and not murder. He then cited to us the case of **Moses Mungasiani Laizer Alias Chichi v. Republic** [1994] TLR 222 and **Jackson Mwakatoko v. Republic** [1990] TLR 17 in support of his submissions.

In his submission to the 2nd and 4th grounds of appeal, Mr. Mwakagamba submitted that, as far as no knife was tendered, that raises doubt as to whether the deceased was stabbed with a knife. He therefore urged us to resolve that doubt in favour of the appellant.

As to the photographs tendered as Exhibit P1, Mr. Mwakagamba submitted that the requirement under

section 202 (1) of the CPA was contravened as the one who tendered them was not appointed by the Attorney General or Gazzeted. Hence, he urged us to find that those photographs were wrongly tendered.

As for the 5th ground, Mr. Mwakagamba submitted that the insulting words uttered by the deceased provoked the appellant and the trial judge wrongly considered the appellant's defence on provocation. He added that, as the appellant was from a "Kuria" tribe the trial judge ought to have considered that defence. Hence, he said the trial judge's findings found at page 79 of the record of appeal are not correct. He then cited the case of **Kateni Ndaki v. Republic** [1992] TLR 297 to support his submissions.

Submitting on the additional ground, Mr. Mwakagamba said, the use of excessive force can not be used as ground to prove malice aforethought but highly establish that the appellant had no intention to kill the deceased which attract manslaughter. He added that

according to section 18B (3) of the Penal Code Cap. 16 R.E. 2002 any person who causes death of another as a result of excessive force used in defence shall be guilty of manslaughter. In support of his submission, he cited to us the case of **Daudi Sabaya v. Republic** [1996] TLR 148.

He therefore urged us that, if the Court allows the appeal and reduces the charge to manslaughter, it should consider the fact that the appellant has been in prison for five years, hence release him from prison.

On his part, Mr. Kishenyi from the out set indicated not to support the appeal. He started by responding to the 8th ground of appeal by submitting that the requirements under section 291 (1) of the CPA were not violated, as the notice was given. However, even if it is to be found that no notice was given, he said, that has not prejudiced the appellant as there was no objection when the post mortem report was tendered in the trial court.

As to the non-compliance with section 291 (3) of the CPA, Mr. Kishenyi submitted that looking at the contents of that provision it seems it has not emphasized that when a post mortem report is tendered in court, it should be tendered by a doctor who wrote it. In support of his contention, he cited to us the decision of this Court in the case of **Juma Masudi @ Defao v. Republic**, Criminal Appeal No. 52 of 2007 (unreported). He added that section 291 (3) of the CPA does not impose any duty to the court to inform a party, and that any witness, not necessarily the medical officer who attended the victim in the prosecution case is permitted to tender the document.

For that reason he urged us to find the 8th ground of appeal devoid of merit.

As for the 9th ground of appeal, Mr. Kishenyi was of the view that there was no fight, hence the trial court was right when it came to a conclusion that the appellant was correctly charged with the offence of murder. Mr. Kishenyi

added that, even if it is true that death in the course of fight leads to manslaughter, in the instant case there is no evidence of a fight between the appellant and the deceased. For example, he said, PW1 and PW2 who were at the scene of crime testified that they only heard noises inside the room of their parents and when they opened the door they found the appellant stabbing the deceased. Mr. Kishenyi then urged us to distinguish the cases cited by his learned friend as they are not relevant to the case and facts at hand. Finally, he prayed for us to find the 9th ground of appeal devoid of merit too.

Answering the 2nd ground of appeal, Mr. Kishenyi submitted that there is no dispute that the deceased was killed by a knife. He said, even the appellant himself does not dispute that fact as he has testified in his defence at page 23 of the record of appeal. Mr. Kishenyi further submitted that PW1 and PW2 who were at the scene of crime saw stab wounds on the body of the deceased. For that reason, he said even if the knife was not tendered as

an exhibit at the trial court, but as the appellant does not dispute that the deceased was killed with a knife and as PW1 and PW2 have seen the stab wounds on the body of the deceased, the learned Principal State Attorney urged us to find that even though the knife was not tendered, the evidence has established that the deceased was killed with a knife. Therefore, he said the 2nd ground of appeal is lacking merit too.

On the other hand, Mr. Kishenyi conceded that the photographs can be expunged as the requirements under section 202 (1) of the CPA were not complied with. He said, the provision requires any photographic print or photographic enlargement to be made by an officer appointed by the Attorney General or Gazetted. However, he said, as there is no proof that PW5 who tendered those photographs has been gazetted, those photographs deserve to be expunged from the record.

Mr. Kishenyi's reply to the 5th and additional ground was to the effect that the appellant's defence of provocation and self defence was extensively considered by the trial judge. In support of his argument, he said, looking at page 79 of the record of appeal, the trial judge extensively dealt with that issue and finally reached a conclusion that the test of provocation did not pass as the appellant was not in the heat of passion as he was cool before stabbing the deceased with a knife. Mr. Kishenyi also submitted that the issue of self defence can not arise as the evidence of PW1 and PW2 has shown that it was the appellant who stabbed the deceased.

All in all, Mr. Kishenyi prayed for the appeal to be dismissed as the case was proved beyond reasonable doubt.

Having examined the rival submissions in this appeal, let us start by examining ground number eight. Basically in this ground of appeal, the appellant claims that sections

291 (1) and 291 (3) of the CPA were contravened. To appreciate the contents of section 291 (1) of the CPA, we have opted to reproduce it and the same reads as follows:-

> *"291. (1) In any trial before the High Court, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter, shall be receivable in evidence save that this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial, together with a copy of the document, has been given to the accused or his advocate."*

In essence as submitted by Mr. Mwakagamba, before tendering the post mortem report, the accused person was required to be supplied with a copy of the said document. We agree with him that the record does not show that he was supplied with it nor was there a reasonable notice as required under section 291 (1) of the CPA.

Basically, we are of the view that the notice should have been given at the preliminary hearing stage, but the records of appeal do not have those proceedings. However, this Court has previously held that the purpose of preliminary hearing is to expedite the proceedings only hence if we fail to locate them that omission may not lead us to find that omission as a fatal irregularity.

Furthermore, we agree with Mr. Mwakagamba that the appellant was not informed of his right to call a doctor who authored the post mortem examination report for cross examination as required under section 291 (3) of the CPA. We find this omission fatal, as the requirement under section 291 (3) of the CPA is mandatorily couched. Section 291 (3) of the CPA provides as follows:

> *"(3) Where the evidence is received by the court, the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make*

available for cross-examination, the person who made the report; and the ***court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.*** *" (Emphasis added).*

This Court in the case of **DAWIDO QUMUNGA v. REPUBLIC** [1993] TLR 120 held as follows:

"(i) The provisions of section 291 Criminal Procedure Code are mandatory and require that an accused must be informed about his right to have the doctor who performed the postmortem called to testify in order to enable him decide whether or not he wants the doctor to be called."

Also see **Ramadhan Mashaka v. Republic**, Criminal Appeal No. 311 of 2015 and **Selemani Kisava @**

Emilo v. Republic Criminal Appeal No. 145 of 2009 (both unreported) to name a few. We do not agree with Mr. Kishenyi that even a police officer (PW5) could have the powers to tender that post mortem report as section 291 (3) of the CPA is couched in mandatory terms. We agree with Mr. Mwakagamba that the case of **Juma Masudi @ Defao** is distinguishable as the facts of the cse are different.

We find merit in the 8th ground of appeal, and for that reason of non-compliance with the requirements under section 291 (3) of the CPA, we expunge the post mortem report (Exh.P.2).

The expunging of Exh. P.2 notwithstanding, we still have to considered the remaining part of evidence to find out whether or not it suffices to prove the offence charged against the appellant as we shall see it in the cause of examining other grounds of appeal.

As for the 9th ground of appeal, we are of the view that the record of appeal and the proceedings at the trial court does not show that there was a fight. The evidence of those who were present at the scene of crime, who were PW1 and PW2 only heard noises of exchange of words concerning the sale of the plot and the issue of the appellant instructing the deceased to go and live with him at Musoma, but the deceased resisted. Thereafter when PW1 and PW2 entered the room of their parents they saw the appellant stabbing the deceased with a knife. PW2 further testified that it was a habit of their father to walk while carrying a knife. PW4 D 8759 CP Richard was recorded to have said that when he visited the scene of crime, the environment on circumstances in that room suggested that there was no peace, as if there was a fight. But we are of the view that, those are his views or opinion only. In essence those who were present, PW1 and PW2 have already testified that there was no fight but exchange of words only.

For that reason we find the 9th ground of appeal devoid of merit.

As on the 2nd ground of appeal, concerning the issue that the knife was not tendered as exhibit, we again agree with Mr. Kishenyi that there is no dispute that the deceased was killed with a knife. Even the appellant in his defence at page 23 of the record of appeal talks about the presence of such a knife at the scene of crime. The record also shows that PW1 and PW2 who were at the scene of crime saw how the appellant stabed their mother (deceased) with a knife.

Therefore, as there is no dispute that the deceased was killed by a knife, even if not tendered, we find it not a fatal omission. We therefore find no merit in the 2nd ground of appeal.

As for the 5th and additional grounds of appeal concerning the issue of provocation and self defence, we fully subscribe to the analysis made by the trial judge on

this issue, where she said as follows at page 79 of the record of appeal:-

> *"It is the accused testimony that the deceased uttered insult or badmouthed him on the fateful day. But his evidence and the whole evidence does show how he acted after such provocation. The only evidence of the defence shows that the deceased was the one who was angry and she wanted to stub the accused. Accused when was insulted by the deceased according to him remained cool, he was not under the heat of passion. It is when he was about to be stubbed according to his evidence he reacted by jumping to grub that knife from the deceased.* ***It does not make sense at all that the one who was provoked remained that cool and the deceased who provoked him went out, taking some time and***

came back with a knife for the purpose of stabbing him.

It is my view that the purported provocation by the accused does not pass the test of provocation as provided and defined above." (Emphasis added).

The Court of Appeal of Uganda in a case of **Kato v. Uganda** [2002] 1 EA 101 interpreted section 202 of the Penal Code to mean that, before a charge of murder can be reduced to manslaughter on ground of provocation, the following conditions must be satisfied:-

"(a) the death must have been caused in the heat of passion before there is time to cool;

(b) The provocation must be sudden;

(c) The provocation must be caused by a wrongful act or insult.

(d) The wrongful act or insult must be of such a nature as would likely to deprive an ordinary person of the class to which

the Appellant belongs the power of self control. It is obvious from this that any individual idiosyncrasy, such as for instance as that the accused is a person who is more readily provoked to passion than the ordinary person, is of no avail; and

(e) Finally, the provocation must be such as to induce the person provoked to assault the person by whom the act or insult was done or offered."

As pointed out above, the evidence shows that on the fateful day as submitted by the appellant in his defence, it was the deceased who uttered insultive words to him. But the evidence does not show how he immediately acted after such provocation. The evidence further shows in his defence that, the appellant remained cool and it was the deceased who became angry and wanted to stab him. That clearly shows as held by the trial judge that the appellant was not in the heat of passion. For that reason, like the trial judge, we are not inclined to

the argument that the appellant was provoked. We therefore are of the view that the defence of provocation and self defence raised by the appellant are not sustainable hence, we find the 5th and additional ground devoid of merit.

In conclusion, answering the 4th ground of appeal, as pointed out above, the charge of murder against the appellant was proved beyond reasonable doubt by the prosecution. We therefore find the 4th ground of appeal and the appeal generally devoid of merit. In the event, we dismiss this appeal.

It is so ordered.

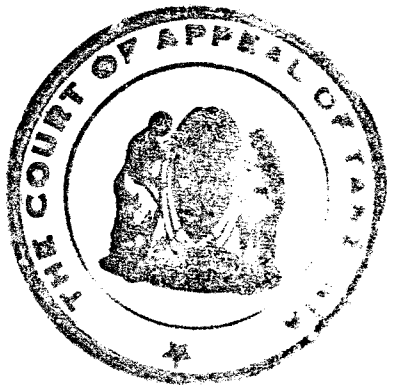
DATED at **DAR ES SALAAM** this 21st day of February, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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



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