IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 42 OF 2011

JUMA S/O LULUBA ....APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

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

(Nyerere, J.)

dated the 12th day of May, 2010
in
HC. CR. Session Case No. 62 of 2008

JUDGMENT OF THE COURT

16th August, & 30th October, 2017

MUSSA, J.A.:

In the High Court of Tanzania, Dar es Salaam Registry, the appellant was arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. The particulars were that on or about the 13th January 2005 at Namawala area, within Kilombero District, the appellant murdered a certain Bahati Kiswamba.

The appellant refuted the accusation, whereupon the prosecution featured four witnesses and three documentary exhibits to establish its

case. On his part, the appellant countered the prosecution case with affirmed testimony and, in addition, he tendered into evidence two police statements (exhibit D1) which were previously made by Maisha Liuka (PW1) with the view to impeach her testimony. At the conclusion of the trial, the three assessors who sat with the presiding Judge unanimously returned a verdict of guilty as against the appellant. Likewise, the learned presiding Judge (Nyerere, J.) concurred and, in the result, the appellant was found guilty, convicted and handed down the mandatory death sentence. He is presently aggrieved upon a variety of complaints but, before we reflect on the points of contention, it is necessary to briefly unveil the factual background.

It was not in dispute that the appellant and PW1 were living in concubinage at the referred Namawala Village. Equally undisputed, was the fact that the deceased, an infant aged 2 ½ years, was PW1's daughter born out of her relationship with a certain Hassan Kiswamba. The prosecution evidence was to the effect that on the fateful day, around 1:00 p.m. or so, the deceased passed feces on the bed whilst asleep. Upon being seized of the apparent mishap, the appellant bitterly complained to PW1 that the infant was in the habit of excreting on the bed. Despite

PW1's assurance that she will clear the dirt, the appellant was still unamused, following which he picked a stick with which he repeatedly beat both PW1 and the deceased. As the beatings continued unabated, PW1 could not endure any further, whereupon she ran out of the house to seek assistance from a neighbour.

As she departed from the house, PW1 recalled to have left a pot in the fire place which was full of boiling water. Her next stop was at the residence of Anyandwile Chalanda (PW2) to whom she disclosed the despicable happening. In response, PW2 in the company of PW1 walked over to the latter's residence and, upon reaching there, the deceased welcomed PW2 with a hug. PW1 noticed that the deceased had additional burn wounds on her back. As the pot of boiling water was no longer at the fire place, she had a hunch that the appellant had poured its contents on the deceased. To appreciate what exactly transpired at the residence it is best if we let PW2 speak in his own words:-

> *"I asked if the accused beat the child he admitted and cautioned me that I must be careful because the child is dirty. She is going to sheet (sic) on you. I told him to stop beating the child and he promised he will not beat it again. The child was*

bare chest (sic) with a short (sic) and its hand had blood stains, and her back had blisters and dehydrated. The child was wet and the condition was very pathetic. I went back home leaving them preparing to take the child to the Hospital."

According to PW1, the appellant was infuriated by her act of seeking assistance from PW2. In the result, he threatened to kill her and pointedly prevented her from taking the deceased to hospital. Soon after, the appellant left the residence but only after he had locked the entrance door from outside. As it were, PW1 and the sickly deceased were left with no other option than to stay indoors. The appellant arrived back home much later, around 9:00 p.m. or so, and proceeded straight to bed without a word. On the following day, PW1 continued to stay indoors amidst threats from the appellant that he will kill her should she dare shout or raise an alarm. In the meantime, the deceased's condition worsened and, around 9:00p.m., she was no more. That was when PW1 raised an alarm to which neighbours attended within a while. The appellant was apprehended there and then.

A post-mortem examination was conducted on the deceased body by Dr. Woiufoo Munisi (PW4) and, in his opinion, the deceased's demise

resulted from multiple injuries as well as severe burn wounds. According to him, the burn wounds were grossly severe to the extent that the infant had minimal chances of survival even if she was timely submitted to hospital for treatment. With this detail, so much for the prosecution version as unveiled during the trial.

In reply, the appellant was upbeat in his complete disassociation from the prosecution accusation. To begin with, he insistently told the trial court that there was no occurrence on the alleged date, i.e. the 13th January, 2005. If anything, he said, the events involving the deceased occurred on the 12th January, 2005. On that day, the deceased was vomiting yellowish stuff from which the appellant figured that the infant had malaria fever. According to him, PW1 then administered to her one Panadol tablet and asked the appellant to seek more tablets. The appellant bought six Panadol tablets and thereafter departed to his farm. He returned back home around 7:00 p.m. but a good deal later, around 11:00 pm the deceased condition worsened and passed away as he and PW1 were ferrying her to hospital. Thus, to cull from his version, the deceased's demise resulted from malaria fever.

As hinted upon, on the whole of the evidence the learned trial Judge was fully satisfied that the appellant randomly and severally beat both the deceased and PW1 by the use of a stick and that such act forced the latter to seek assistance from PW2. The trial court further found that, despite the absence of an eyewitness, it is circumstantially inferable that the appellant additionally poured hot water on the deceased which caused on her the severe burn wounds. The appellant's defence was considered but rejected and, in the upshot, the appellant was found guilty, convicted and sentenced to the extent we have already indicated.

The appellant is aggrieved upon a memorandum of appeal which was initially comprised of eleven points of grievance. At the hearing before us, he was represented by Mr. Aloyce Sekule, learned Advocate, whereas the respondent Republic had the services of Ms. Honarina Munishi, learned Senior State Attorney. For a start, Mr. Sekule abandoned the entire grounds of appeal save for grounds No. 10 which complains thus:-

> *"10. The trial court erred in law and in fact in convicting the appellant against the weight of evidence and despite contradictions in the prosecutions case".*

The learned counsel for the appellant commenced his submission with a complaint that the date of the incident as posted on the information is at variance with the evidence adduced during the trial. Elaborating, Mr. Sekule submitted that, whereas it is alleged on the information that the offence was committed **"on or about the 13th day of January, 2005"** the evidence of PW1, PW2 and PW3 clearly points to the fact that the deceased's demise happened around 9:00 p.m. on the 14th day of January, 2005. The learned counsel for the appellant contended that such variance materially vitiated the information.

Mr. Sekule's next attack was on the prosecution evidence which he said, was fraught by contradictions. For one, the learned counsel submitted that PW1's claim to the effect that: *"We came back with Mzee Chalanda and we found the child sleeping down"* is contradicted by PW2 who said: *"I went to their residence and I found the child comes (sic) from inside and when it (sic) saw me she rushed to me and I got hold of her and cuddle (sic) her".* For another, counsel submitted that PW1's testimony is additionally, self-contradicted by portions of her own previous police stations (exhibit D1).

Mr. Sekule's final attack was on the evidence of the medical officer (PW4) which he contended, was just as self-contradictory. The learned counsel had in mind the detail comprised in the post-mortem examination report to the effect that the deceased body was *"found in the bush..."* which is contradicted by his own testimonial account that *"the deceased's body was at home".* In sum, Mr. Sekule contended that on account of the enlisted contradictions the case for the prosecution was not founded on credible evidence and, that being so, he urged us to allow the appeal.

In reply, the learned Senior State Attorney just as strenuously resisted the appeal. To begin with Ms. Munishi countered that the alleged variance on the dates of the incident is, if at all, not material and, in any event, did not prejudice the appellant in any way. To buttress her contention, the learned Senior State Attorney referred us to section 234(3) of the Criminal Procedure Act, Chapter 20 of the Revised Law (CPA) which stipulates:-

> *"Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings*

were in fact instituted within the time, if any limited by law for the institution thereof".

As regards the alleged contradictions apparent in the testimonies of the prosecution witnesses, Ms. Munishi contended that the same were appropriately addressed by the trial Judge and that her finding that the contradictions were minor is unassailable. The learned Senior State Attorney wound up her submission with a prayer for the dismissal of the appeal in its entirety:

Addressing the points of contention, we propose to first deal with the complaint about the variance between the information and the evidence adduced with respect to the time at which the alleged offence was committed. If we may express at once, section 234(3) and, indeed, the whole of part VII of the CPA, which was referred to us by Ms. Munishi, relates to procedure in trials before subordinate courts as, distinguished with the procedure in trials before the High Court which is governed by part VIII of the CPA. To that extent, the provision is in applicable to the situation under our consideration. Nonetheless, we should haste the remark that, where appropriate, the superior courts may

just as well, wish to draw inspiration from the broad and sound principle embodied in the provision.

Quite aside, we are of the settled view that the situation at hand is a distant different, much as we cannot glean any variance between the information and the adduced evidence with respect to the time at which the alleged offence was committed. Granted that the 14th day of January, 2005 was the date when the deceased died but, as was clearly stated by PW1 and PW2, the 13th day of January, 2005 was the date when the injuries giving rise to her death were inflicted on her body. With respect to Mr. Sekule, as was held in the old case of **Rex vs Lujo S/o Mgombe** (1946) 13 EACA 156, the date on the information should be that of the unlawful act and not that of the death. This pronouncement was followed in **Mwita Nyamhanga vs The Republic** [1992] TLR 118.

Coming now to the alleged inconsistencies and self-contradictions by the prosecution witnesses, we note that the learned trial Judge addressed the issues with sufficient details. We cannot agree more. True, there were inconsistencies but, as correctly remarked by the trial Judge, the same did not detract from the material story that it was the appellant who inflicted the fatal injuries upon the deceased. It should also be noted that, whereas

the incident occurred in January 2005, the witnesses were called to testimony in April 2010, which was more than five years post the occurrence. As was remarked by the medical officer (PW4) in response to cross examination:-

> *"The body of the child was at home it is now five years I can't tell if there was a bush."*

To this end, we are satisfied, as was the learned Judge, that the prosecution established its case to the hilt. In the result, the conviction and sentence are unassailable and, accordingly, this appeal fails and is dismissed in its entirety.

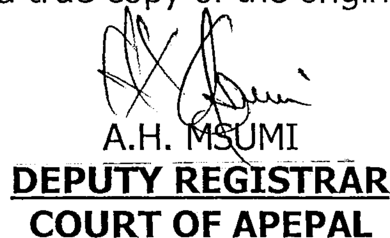
DATED at **DAR ES SALAAM** this 26th day of October, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APEPAL