IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 159 'B' OF 2017

JIMMY RUNANGAZA .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Kairo, J.)

dated the 29th day of May, 2017

in

Criminal Session No. 22 of 2016

JUDGMENT OF THE COURT

20th & 27th August, 2018

MKUYE J.A.:

The appellant Jimmy Runangaza and two others (not subject to this appeal) were charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 (the Code). He was convicted of the offence he was charged by the High Court of Tanzania sitting at Biharamulo and sentenced to suffer death by hanging. His two co-accused were acquitted. He has now brought this appeal against both conviction and sentence.

Before the High Court it was alleged that the appellant together with two others on 10/2/2010 during night hours at Mavota Village within the District of Biharamulo and the Region of Kagera murdered one Emmanuel Petro.

The prosecution case was that Emmanuel Petro (deceased) was staying with Kabingi (PW1) at Mavota Village in Runzewe. They were both motorcyclists (bodaboda) riders, whereby the deceased had a motorcycle with Reg. No. T. 732 BCY. It was alleged that on 10/2/2010 at around 6:00 p.m. the deceased was hired by passengers who requested to be taken to Mavota mines. The deceased agreed. However, from that day he never showed up together with his motorcycle. PW1 informed the deceased's brother and uncle about his disappearance who then reported the matter at Runzewe Police Station on 12/2/2010 and were issued with introductory letter to that effect.

On 24/2/2010, PWI received a phone call informing him that the motorcycle with Reg. No. T.732 BCY was found and impounded at Burundi with people who were crossing the border from Tanzania to Burundi. He conveyed the message to the police who liaised with their counter parts in Burundi and confirmed it. The police from Tanzania made

arrangements to pick those people and the motorcycle from Burundi. PW1, PW3 and PW4 were among the persons who went to Burundi.

At Burundi, they were handed over one Jimmy Runangaza (then 3rd accused and now the appellant) and the motorcycle. PW1 identified the motorcycle to be the one which was ridden by the late Emmanuel Petro on the date he went missing. The appellant and the motorcycle were taken to Kakonko Police Station. F 1568 D/Cpl Erick's (PW5) was instructed and he went to Kakonko Police Station to bring the appellant and the stolen motorcycle. He interrogated the appellant on 2/3/2010 and he admitted stealing the motorcycle, killing its rider and dumping his body.

On 8/3/2010, PW1 testified that , he was called at Ushirombo Police Station and was informed about the appellant's confession to have grabbed the motorcycle and killed the deceased. The appellant together with his co-accused led the search party including Rev. Amos Gwajekale (PW2), PW5 and other relatives to the bush they had dumped the body of the deceased and saw the human bones, a jacket and T-shirt worn by the deceased on the last day.

PW5 said, they gathered the bones and took together with the T-shirt and jacket to Runzewe then to Ushirombo police station. PW6, one E.3489 D/Cpl Nakembetwa, recorded the appellant's statement in

which he admitted to kill the deceased. However, he said, the statement was not admitted in evidence. The deceased's bones and the T-shirt were taken to the Government Chemist. PW7, Fidelis Segumba, a Government Chemist expert, who conducted forensic DNA profiling test, testified to the effect that the DNA profiling test of sample A (blood of deceased's father in liquid form) had DNA profiling relationship with sample C and D which were the deceased's bones and T-shirt belonging to the deceased thus confirming that the deceased was Emmanuel Petro. Then, the murder charge was preferred against the suspects.

In his defence, the appellant generally denied involvement in killing the deceased or stealing the motorcycle. He equally denied to have gone to Mavota bush to show the police where the murder incident took place.

As alluded earlier on, following a full trial the appellant was convicted while his two co-accused were acquitted.

When the appeal was called on for hearing, the appellant was advocated by Mr. Josephat Rweyemamu, learned counsel; whereas the respondent Republic was represented by Ms. Chema Maswi, learned State Attorney.

From the outset, Mr. Rweyemamu informed the Court of his wish to rely on the memorandum of appeal filed by the appellant on 3/5/2018.

However, he sought leave to abandon grounds No. 4, 5, 8 and 9 and argue grounds No. 1, 2, 3, 7 and 10 together and the remaining ground No. 6 and 11 separately. We granted him the leave as sought.

The remaining grounds of appeal read as hereunder:

"*1.) That there was no concrete evidence to show that the appellant was the one who murdered Emmanuel Petro.*

2.) That the appellate (sic) judge erred both in law and in fact to convict the appellant based on circumstantial evidence which was not proved as the law required.

3.) That, the appellate (sic) judge erred both in law and in fact for failure to note that it is not easy to the appellant who set at the back of the vehicle to lead the way to Mavota bush (scene of crime).

6.) That, the act of Kibiringi Damian (PW1) to point another accused that it was the appellant is a sufficient reason to show that PW1 was not credible witness and his evidence was of no weight against the appellant and also the appellant was not

identified as the one who hired the deceased to Mgodini.

7.) *That, the appellate (sic) judge erred both in law and fact for failure to note that amongst of appellant of Tanzania and the suspect of Burundi who was arrested with the said motorcycle as per the statement of OCS of Burundi 8(9).*

10.) *That, the appellate (sic) judge did err for failure to take into consideration of the appellant's evidence while the whole evidence of prosecution plus all exhibits was/were not (sic) implicate the appellant in the murder of the deceased.*

11.) *That, the appellate (sic) judge erred both in law and in fact to convict the appellant basing on the weak evidence of prosecution who failed to prove the case beyond reasonable doubt in the legal eye against the appellant".*

Submitting in support of the appeal, Mr. Rweyemamu argued that the circumstantial evidence which was relied upon to ground a conviction against the appellant was not credible. While relying on the case **of Ali Bakari & Pili Bakari Vs Republic,** [1991] TLR 10, he contended that

the said evidence was not proved beyond reasonable doubt. In elaboration, he said, the evidence that the appellant led the search party to the place where the deceased's remains were found was doubted by the trial judge as shown at page 170 of the record as it was not clear as to whom among the accused led the search party and it amounted to the acquittal of the other two accused. He wondered as to why the same evidence was used to convict the appellant. He lamented that the trial court applied double standards on the same evidence.

Regarding the evidence that the appellant was arrested at Burundi, Mr. Rweyemamu contended that, though PW1, PW3, PW4 and PW5 were handed over the appellant together with the stolen motorcycle, none of the witnesses testified that the appellant was arrested with a motorcycle given the fact there was another suspect as well. He added that it was not proved that the appellant was carried by the deceased on the fateful date; or that the motorcycle with Reg. No. T. 732 BCY was the one which crossed the border from Tanzania to Burundi with the appellant. For those reasons, he said, the chain of events was not coherent to link the appellant with the offence.

As regards to ground No. 6, Mr. Rweyemamu argued that, though the trial judge relied on the evidence of PW1, his credibility was

questionable on account of his failure to identify the appellant in Court. He clarified that at first he pointed at a person who was not the appellant and corrected it later during cross examination.

Mr. Rweyemamu concluded with ground No. 11 in that the case was not proved beyond reasonable doubt and prayed to the Court to allow the appeal, quash the conviction, set aside the sentence and release the appellant from custody.

In reply, Ms. Maswi initially resisted the appeal. However, upon being prompted by the Court, she changed her stance and supported the appeal. She joined hands with Mr. Rweyemamu that the trial court applied double standards in acquitting the 1st and 2nd accused on account of a doubtful evidence and convicting the appellant on the same evidence. She added that, since there was no evidence as to who was arrested with the stolen motorcycle and how PW1, PW3 and PW4 were handed over the appellant and the motorcycle from Burundi, it raises doubt. Like Mr. Rweyemamu she implored the Court to allow the appeal and release the appellant from custody.

In rejoinder, Mr. Rweyemamu reiterated what he had submitted earlier on and stressed that PW1 was not credible.

It is without question that the trial court convicted the appellant on the basis of circumstantial evidence as none among the witnesses saw the appellant killing the deceased. But before embarking on the determination of the matter, we find it appropriate to discuss briefly on the position of the law regarding circumstantial evidence and other principles of law.

In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilty. (See **Simon Musoke v. Republic**, (1958) EA 715). **Sarkar on Evidence**, 15th Ed 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

> *"1) The circumstances from which an inference of guilty is sought to be drawn, must be congently and firmly established;*
>
> *2) Those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused; and*
>
> *3) The circumstances taken cumulatively should form a chain so compete that there is no escape from the conclusion that within all*

human probability the crime was committed by the accused and no one else."

See also **Julius Justine and Others v. Republic,** Criminal Appeal No 155 of 2005; and **Obedi s/o Andrea v. Republic,** Criminal Appeal No. 231 of 2005 (both unreported).

We wish also to comment on the issue of corroboration. It is worthy note that it is either a matter of law or of practice. In case of a matter of law, no conviction can be sustained without corroboration if it is based on evidence that requires corroboration. In case of a matter of practice, a conviction would not necessarily be illegal or be quashed if it stands on uncorroborated evidence. But even if it is a matter of practice, the trial court would be required to warn itself, and if the matter is triable with the aid of assessors, to direct the assessors on the danger of mounting a conviction without corroboration. (**See Ndalahwa Shilanga & Another v. Republic,** Criminal Appeal No. 247 of 2008 (unreported).

Likewise, it is worthy to note that the purpose of corroboration is not to give validity or credence to evidence which is insufficient or suspect or incredible but it is intended to confirm or support the other evidence which is sufficient, satisfactory and credible. (See **Azizi Abdallah v. Republic**, [1991] TLR 71 which cited with approval the case of **DPP v.**

Hester, (1973) AC 290. Further to that, it is a settle law that the evidence which itself requires corroboration cannot be used to corroborate another evidence. (See **Swelu Maramoja v. Republic**, Criminal Appeal No. 43 of 1991 (unreported).

In this case as alluded earlier on, the trial court convicted the appellant on the basis of circumstantial evidence. The said circumstantial evidence is in three limbs. **One,** the evidence relating to the appellant together with the motorcycle with Reg. No. T. 732 BCY being handed over by Burundi authority to Tanzania authority. **Two,** the evidence that the appellant together with his co-accused persons having led the search party to the place where the deceased's remains were found. **Three,** the evidence relating to forensic profiling report.

With regard to the first limb as shown at page 171 of the record, the trial court took into account that the appellant was apprehended in Burundi in connection with the motorcycle as testified by PW1, PW3 and PW4; that, the motorcycle was lastly ridden by the deceased who also went missing after being hired by passengers who wanted to be taken to Mavota; and that, the motorcycle with Registration No. T 732 BCY was the one crossing the border from Tanzania to Burundi with the 3rd accused (appellant) and later identified by PW1.

As to the second limb of circumstantial evidence the trial court had taken into account that the appellant upon interrogation by PW5 admitted to grab the motorcycle and kill its rider; that appellant agreed to take the police and led PW1, PW2 and PW5 and other people to Mavota bush where the deceased was dumped and saw the human bones, a T-Shirt and jacket which were identified by PW1 and PW2 to belong to the late Emmanuel Petro. The third limb is the evidence relating to the DNA profiling test by the Government Chemist which revealed that the deceased's father's blood had forensic DNA profile relations with the bones and T-shirt of the deceased which proved that the person killed was Emmanuel Petro.

After taking the circumstances cumulatively the trial court came to the conclusion that the crime was committed by the appellant. At the end at page 175 of the record, the trial court found **the circumstantial evidence pointed an accusing finger at the appellant** who murdered Emmanuel Petro and convicted him accordingly.

However, as was alluded earlier on and was correctly argued by Mr. Rweyemamu, the circumstantial evidence must be proved beyond reasonable doubt. This was stated in the case of **Ali Bakari and Pili Bakari** (supra) thus:

"Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be informed."

In this case, though the appellant together with the motorcycle was indeed, handed over to Tanzania from Burundi, no evidence was adduced in trial court that he was among the persons who hired the deceased's motorcycle on the fateful date. There was no evidence which proved that the appellant was the one seen crossing the border with the motorcycle from Tanzania to Burundi and that he was apprehended while possessing it. The evidence by PW1 was that he was informed that the motorcycle was found with people who were crossing the border from Tanzania to Burundi without their names being mentioned. The situation becomes more worse considering the fact that at Burundi, apart from the appellant there was another person who was a Burundian apprehended in connection with the same motorcycle but for reasons of international setbacks relating to exchange of suspects was not handed over to Tanzania authority. Under the circumstances, could it be said with

certainty that it was the appellant who was found with the said motorcycle? Certainly no. In our considered view, it cannot be certain that the appellant was arrested with the said motorcycle under those circumstances. But again, according to the evidence of witnesses who went to Burundi, the appellant was just handed over to Tanzania authority without more. There was no handing over note which could have shown exactly who handed over the same and the particulars regarding who was found with the motorcycle in question. In the absence of such crucial evidence, we agree with Mr. Rweyemamu that there is no cogent link or connection of the appellant with the motorcycle in question.

With regard to the second limb of circumstantial evidence, the trial court considered that the evidence of the appellant having led the search party to the place where the decease's remains were found corroborated the above evidence. However, such evidence was found by the trial court to be doubtful for failure to prove as to who among the 1st, 2nd accused and the appellant led the search party to that place and in fact, it amounted to the acquittal of the 1st and 2nd accused. On this, we take the liberty to quote what was stated by trial judge as hereunder:

"... ***lack of concrete evidence as to who led***

the way to Mavota bush (scene of crime)

has raised doubts which have to be in favour of the 1st and 2nd accused. *In this regard, therefore, the court is constrained to find that the prosecution has not proved its case beyond reasonable doubt against the 1st and 2nd accused. I am thus acquitting them forthwith unless held for other lawful reasons."*

[Emphasis added]

Having considered the submissions by both learned counsel we share their sentiments and wonder how the evidence which was found doubtful and resolved in favour of the 1st and 2nd accused was found sufficient to corroborate other evidence against the appellant. We think this was a double standard.

In the case of **Aziz Abdallah's case** (supra), however, it was categorically stated that it is the sufficient or satisfactory or credible evidence which is worth corroboration. Indeed, the evidence which itself requires corroboration cannot corroborate. (See **Swelu Maramoja's case** (supra). In our view, the doubtful evidence is even more worse as it is no evidence at all. It cannot be used to corroborate another evidence. It is settled law that, in criminal cases where it is found that there are

doubts, then those doubts have to be resolved in favour of the accused person. (See **Juma Andrea @ Mchichi Vs Republic**, Criminal Appeal No. 539 of 2016; and **Yohana Chibwingu Vs Republic,** Criminal Appeal No 117 of 2015 (both unreported).

Even in this case, since the evidence leading the scene of crime was found to be doubtful, we think, it ought to be resolved in favour of appellant as it was taken in favour of the other accused. But again, since the evidence of the appellant's apprehension at Burundi was not sufficient or credible it was not worthy to be corroborated. (See **Swelu Maramoja** (supra).

As regards to ground No. 6 relating PW1's failure to point at the appellant at first and pointed at him at a later stage, we think, it shaked PW1's credibility. We say so because, PW1 was among those who went to Burundi to be handed over the appellant to Tanzanian authority. He was also among those who together with PW2 and PW5 were alleged to have been led by the appellant to the scene of crime. It means PW1 must have had ample time to familiarize with the appellant's features. By his failure to point at him during trial showed that he was not a credible witness.

With all said, we agree with both learned counsel that the case was not proved beyond reasonable doubt against the appellant as required by the law.

In the event, we allow the appeal, quash the conviction and set aside the sentence. We order that the appellant be released forthwith from prison unless he is otherwise held for other lawful reason.

DATED at **BUKOBA** this 27th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL