IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MJASIRI, J.A., MMILLA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 206 OF 2016

ABDALLAH RASHID NAMKOKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Mtwara]
(Gwae, J.)

Dated the 4th day of April, 2016
in
(Criminal Session No. 47 of 2014)

JUDGMENT OF THE COURT

2nd & 9th May, 2018

MJASIRI, J.A.:

In the High Court of Tanzania at Mtwara, the appellant, Abdallah Rashid Namkoka, was charged with the offence of murder contrary to section 196 of the Penal Code, [Cap 16, R.E. 2002] (the Penal Code). He was convicted as charged and was sentenced to death. The appellant denied the charge. Aggrieved by the decision of the High Court he has filed his appeal before this Court.

At the hearing of the appeal the appellant was represented by Mr. Hussein Mtembwa, learned advocate and the respondent Republic had the services of Ms. Mwahija Ahmed, learned Senior State Attorney, assisted by Mr. Juma Maige, learned State Attorney.

When the appeal was called on for hearing, learned counsel sought leave of the Court to file a list of authorities out of time, leave of which was readily granted by the Court due to the reasons assigned for the delay.

Mr. Mtembwa, who did not represent the appellant at the trial also sought leave of the Court to file a supplementary memorandum of appeal, he requested to abandon the memorandum of appeal filed earlier.

The supplementary memorandum of appeal contained six grounds which are reproduced as follows:-

1. *That the Honourable trial Court erred in law and fact by failure to see that, given the circumstances, the appellant was not correctly identified by PW1 at the area of the scene thereby warranting mistaken identity of the wrong doer.*

2. *That the Honourable trial Court erred in law and fact by convicting the appellant basing, among other things, on retracted confessions of Exhibit P3 and Exhibit P4.*
3. *That the Honourable trial Court erred in law and fact by failure to see that, given the testimonies of PW2, PW3 and PW4, the appellant was not conscious, sane, capable of appreciating the facts and free from any threat at the time of taking the confessions, that is, Exhibit P3 and Exhibit P4.*
4. *That the Honourable trial Court erred in law and fact by failure to evaluate and analyse the contradictory evidence as revealed by PW1 on one side and Exhibit P2 on the other.*
5. *That the Honourable trial Court erred in law and fact by failure to know that, although no any number of witnesses is required in order to prove the case, an adverse inference may be drawn of important witnesses or exhibits left out without justification.*
6. *That the Honourable trial Court erred in law and fact by failure to see that the appellant was not properly committed to the Honourable High Court thereby rendering injustice to him.*

It was the prosecution case that on the 27th day of August, 2013 at Narwadi Village within the District and Region of Lindi, the appellant murdered one Fatuma Chibwana @ Liuta. The deceased, while on her way home from fetching water, met the appellant, who attacked her using a matchete. He then tried to pull her away from the scene towards the forest. Upon seeing PW1 and one Abdallah Said, he ran away. PW1 reported the incident to the Village Authority. The appellant was arrested by fellow villagers who gave him a serious beating. He escaped from where he was confined by the Village Authority and surrendered himself to the police.

The appellant admitted committing the offence in both his cautioned statement and in his extra-judicial statement. Both statements were admitted in court at the stage of the preliminary hearing without any objection from the defence as Exhibits P3 and P4. The sketch map was also admitted in court without any objection as Exhibit P1.

The prosecution called a total of four witnesses. The prosecution case was based on the evidence of PW1. He lived in the same village with the appellant and the deceased, and he therefore knew both the appellant

and the deceased very well. According to his testimony he went to his farm with a friend. While returning from the farm together with Abdallah Said who did not testify, he heard an alarm, and heard a scream. Upon nearing the scene, he saw the appellant dragging/pulling a body of a person. Upon coming face to face with him, the appellant ran away. The appellant was carrying a matchete and he had blood stains in his shorts and shirt. PW1 identified the body of the person who was being dragged as being the body of the daughter of Chibwana. She was already dead and the back of her neck was badly severed, and only a small part of the neck held her body. PW1 testified that he was very close to where the appellant was. He was only seven to ten paces away from him.

PW1 reported the incident to PW2 who was the Acting Village Executive Officer. He named the appellant as the person he saw dragging the deceased's body. The matter was then reported to the Village Chairman who directed that the whole village should be informed. The police was involved. A doctor was also called to examine the body. According to the doctor, the cause of death was due to spinal cord injury and severe bleeding.

In relation to ground No. 1, Mr. Mtembwa strongly argued that the appellant was not properly identified. According to him, the circumstances surrounding identification were not conducive. The surrounding area was a forest, the sketch map was not properly explained by the police officer, D/C. Rashid (PW4). He submitted that there was a great possibility of mistaken identity. He relied on **Waziri Amani v. Republic** [1980] TLR 250 and **Raymond Francis v. Republic** [1994] TLR 100. He insisted that no proper description of the appellant was given.

Mr. Juma Maige on his part, submitted that the appellant was properly identified by PW1. The incident occurred during the day and the appellant was well known to PW1. He gave a description of how the appellant was dressed and that his shirt and shorts were covered with blood stains. He also stated that the appellant was carrying a matchete. The issue of mistaken identity did not arise, he argued. He stated further that the circumstances of this case are different from those in **Waziri Amani** (supra). He relied on this Court's decision in **Dickson Elia Shapwata and Another v. Republic**, Criminal Appeal No. 92 of 2007 (unreported).

On ground No. 2, 3 & 4, the learned advocate for the appellant submitted that the High Court erred in upholding the conviction of the appellant which was based on retracted confessions, that is, the cautioned statement and the extra-Judicial statement of the appellant.

He submitted further that the court erred in relying on the evidence of PW1, PW2 and PW3 when the appellant was badly beaten and unconscious.

On his part, Mr. Maige's short answer to the complaint was that the appellant's counsel did not raise any objection when Exhibit P.3, the extra-judicial statement and Exhibit P4, the cautioned statement were tendered in court by PW4. He submitted that these two documents were therefore admitted as exhibits without any objection from the defence. The issue of voluntariness and the objection to the said two exhibits was only raised when the appellant was presenting his defence. He was of the view that this argument was an afterthought.

He reiterated that the trial court was not asked to test the voluntariness of the confessions. The fear factor aspect in respect of the appellant should have been raised before. He made reference to the case

of **Abdalla Rajabu Waziri v. Republic,** Criminal Appeal No. 116 of 2004 (unreported). He also submitted that the fact that the appellant surrendered himself at the police station demonstrated that he was admitting his guilt.

In relation to ground No. 5, Mr. Mtembwa submitted that even though the law does not require a specific number of witnesses to prove a case, an adverse inference can be drawn if the prosecution fails to call a crucial witness. He submitted that in the instant case PW1 was accompanied by another person who was not called as a witness by the prosecution.

According to the testimony of PW4 the appellant was stable and in his right mind, however a psychiatrist was not called to give evidence.

Mr. Maige submitted that the law is settled. No particular number of witnesses is required to prove a case, citing section 143 of the Evidence Act [Cap. 6, R.E. 2002]. He submitted further that the appellant knew what he was doing and was in a good state of mind. He went to Mnazimmoja police station all by himself, and he was very specific in his statements, that he was not assaulted by the police. The appellant was

seen dragging the deceased, and he also confessed to the killing, the first appellate court was right in upholding his conviction.

In relation to ground No. 6, learned advocate for the appellant submitted that the appellant was not properly committed, in terms of section 246 (2) of the Criminal Procedure Act [Cap. 20 R.E. 2002] as the appellant was not provided with a list of the Exhibits.

Ms. Ahmed, learned Senior State Attorney stated that the appellant was not prejudiced in any way. The committal proceedings was properly done. Statements were read to the appellant. The absence of a list of exhibits did not prejudice the appellant. All the exhibits were available during the preliminary hearing and were all tendered and admitted in court without any objection from the defence counsel. There was no element of surprise for the appellants during the trial as far as exhibits were concerned.

In reply, Mr. Mtembwa submitted that the burden of proof is on the prosecution and never shifts. He argued that the distance between the appellant and PW1 was not clearly explained. He also submitted that even

though the appellant did not object to the admission of the cautioned and extra-Judicial statements, the burden still rested on the prosecution.

We on our part, after a careful scrutiny of the record, and the submissions by counsel are of the considered view that the crucial issues for consideration and determination are as follows:

1. *Whether it was the appellant who caused the death of the deceased.*
2. *Whether malice aforethought was established.*

In relation to issue No. 1, there is overwhelming evidence that it was the appellant who caused the death of the deceased. The trial court relied on the evidence of PW1, who witnessed the appellant dragging the deceased. The appellant ran away from PW1 when he got close to him. He was only about seven (7) paces away from the appellant. PW1 came face to face with the appellant. He knew the appellant well as he was a fellow villager. Like the learned State Attorney, we are of the firm view that the question of mistaken identity does not arise, and the decisions of **Waziri Amani** and **Raymond Francis** (supra) are not applicable in the instant case. The surrounding circumstances are so different that they

cannot in anyway apply. The incident occurred during the day, PW1 was at close range with the appellant and the appellant was well known to PW1. PW1 named the appellant at the earliest opportunity. In the case of **Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39, the Court succinctly stated as follows:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."*

In addition to the fact that the appellant was clearly seen by PW1, the appellant confessed to killing the deceased both in his extra-judicial and cautioned statements. He gave a detail account of what he did to the appellant. Despite the fact that the appellant had legal representation both statements were admitted at the stage of the preliminary hearing, that is well before the commencement of the trial. No objection was raised when the two statements were tendered in court. The issue of involuntariness and the fact that the appellant was not in the right state of mind came up

at the defence stage. We are constrained to state that the complaint raised by the appellant was an afterthought.

We are fully aware of the rule of practice requiring corroboration of the evidence of a single witness made under unfavorable conditions – See – **Hassan Juma Kanenyera v. Republic** [1992] TLR 100. However the circumstances of this case were different.

We are also mindful of the fact that it is dangerous to act upon a repudiated or retracted confession unless, it is corroborated in material particulars, or unless the court after full consideration of the circumstance is satisfied of its truth – See **Bombo Tombola v. Republic** [1980] TLR 254.

However in the instant case Exhibits P3 and P4 were not repudiated by the appellant.

In the case of **Abdallah Rajabu Waziri v. Republic**, Criminal Appeal No. 116 of 2004 (unreported) the circumstances were similar to this case. The appellant did not object to the production of the exhibits and the same were admitted during the preliminary hearing. The objection was

raised by the appellant in his defence after the prosecution had closed its case. The Court had this to say:-

> *"it was too late in the day. That was not an appropriate stage for retracting them. The appropriate stage would have been during the preliminary hearing.*
>
> ***The defence should have objected their production whereby a trial–within–a trial would have been conducted to determine their admissibility.***
>
> ***Purporting to retract them in the defence after the prosecution had closed their case is nothing but an afterthought. They were properly admitted by the trial Court*** *and did not require corroboration to be acted upon."*
>
> [Emphasis provided].

The learned defence attorney put up a spirited fight. However, we are of the firm view that there was ample evidence that it was the appellant who caused the death of the deceased. On our part we have no reason to fault the learned trial Judge. A trial court's finding as to

credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for re-assessment of their credibility. See – **Omari Ahmed v. Republic** [1983] TLR 52 and **Dickson Elia Nshamba Shapwata** (supra). We find none in the present case.

Having held that it was the appellant who caused the death of the deceased, we are now left with the next crucial issue of whether or not there is sufficient evidence to prove malice aforethought.

Taking into consideration how the deceased met her death, there is no doubt in our mind that the appellant intended to kill the deceased or cause grievous harm. The nature of the weapon used and the part of the body the appellant inflicted the injury, is a clear demonstration. The neck was almost completely severed from the body. The deceased's death was due to spinal injury and excessive bleeding.

In looking at the nature of the injury inflicted upon the deceased, on his spinal cord, the severe bleeding which resulted from the grave injury and the nature of the weapon used, we are of the firm view that the appellant caused the death of the deceased with malice aforethought.

Again, on the same premises we are satisfied that the trial court was justified in holding that malice aforethought was proved.

Section 200 of the Penal Code provides that malice aforethought shall be deemed to be established by evidence proving any one or more of the four circumstances (a) – (d). For purposes of the present case only (a) – (c) are relevant:-

> *"(a) any intention to cause death of or to do grievous harm to any person whether that person is actually killed or not*
>
> *(b) knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether that person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused it.*
>
> *(c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years.*

See – **Saidi Ally Matola @ Chumila v. Republic**, Criminal Appeal No. 129 of 2005 (unreported).

In **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported) the Court stated thus:

> *". . . usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had the intention must be ascertained from various factors, including the following: the type and size of the weapon, if any used in attack (2) the amount of force applied in assault; (3) the part or parts of the body the blow were directed at or inflicted on; (4) the number of blows although one blow may, depending upon the facts of the particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attacker's utterances, if any, made before, during or after the killing, and (7) the conduct of the attacker before, or after the killing."*

Going by this Court's decision in **Enock Kipela** (supra) malice aforethought may be ascertained from the following factors: **One,** a matchete was used. This was no doubt a lethal weapon which was used in inflicting harm to the deceased's neck which was almost severed from her body according to PW1 and the doctor's observation in the Post-Mortem Examination Report.

Two, the appellant's conduct of running away from the scene. We think the conduct was not consistent with innocence. See - **Abisai Chalangwa v. Republic**, Criminal Appeal No. 32 of 2011.

In view of the prevailing circumstances, we are satisfied that the trial court properly held that malice aforethought was proved beyond reasonable doubt. The conviction for murder and the statutory sentence of death were properly grounded. We accordingly dismiss the appeal.

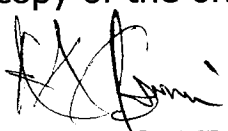
DATED at **MTWARA** this 8th day of May, 2018.

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
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 APPEAL