IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: JUMA, C.J., MWARIJA, J.A. And MZIRAY,J.A.)

CRIMINAL APPEAL NO 63 OF 2017

SELEMANI JUMA KARANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the two Rulings of the High Court of Tanzania at Dodoma)

(Hon. Awadh Mohamed, J.)

Dated the 14th day of December, 2016
in
Criminal "Sessions Case No 92 of 2010

JUDGMENT OF THE COURT

26th & 28th June, 2018

JUMA, C.J.:

The appellant SELEMANI JUMA @ KARANI appeals against his conviction for the offence of murder contrary to section 196 of the Penal Code [Cap. 16]. The particulars of the offence were that on the 10th day of February, 2009 at Ighuka village, within Singida Region, he murdered KHADIJA D/O SWALEHE ('the deceased') who happened to be his aunt.

The brief facts giving rise to the charge of murder were that Fatuma Ally Mohamed (PW1) was doing her laundry while the deceased was about ten paces away, preparing vegetables for the family dinner. The appellant suddenly appeared. He pushed the deceased down to the ground and pierced an arrow into her head. When PW1 cried loudly out for help, the appellant warned her to be quiet, and he continued to pin down the deceased onto the ground and used a stone to hammer the arrow into the deceased's head. PW1 managed to escape to the village office to report, but the village leader was not in. It was while PW1 was heading to a nearby police station to report when she met up the appellant again. He pounced on her, and pierced the right side of her neck with an arrow. Though seriously injured and bleeding profusely, PW1 continued to scream out for help. A group of people who included the village leader, Mohamed Shabani (PW3) and some pupils, who were heading home from school, arrived at the scene.

PW3 testified how, as he was passing near the deceased's house at around 15:00 hours saw the appellant, with whom he is related, running towards his direction. After a hurriedly exchange of greetings, the appellant

assured PW3 that all was well. All was in fact not well because five minutes after that exchange of pleasantries, PW3 heard loud cries for help from the direction of the deceased's neighbourhood. PW3 found the deceased in agony with an arrow pierced onto her skull in the company of her grandsons and granddaughters. PW3 testified that before she died from her injuries, the deceased managed to inform him that it was the appellant who was trying to kill her for no apparent reason.

PW3 also testified how he escorted by then the injured deceased to a nearby house where mourners were just dispersing after a period of mourning of one of the villagers. They urged PW3 to take the injured deceased on his bicycle to the nearby Ikungi Health Centre. Because she was so weak, PW3 recalled how along the way the deceased fell down because she could not hold onto the bicycle. PW3 had to look for a rickshaw, which finally conveyed the deceased to the health centre. PW3 further testified that before the deceased was loaded into an ambulance for transfer to Singida Regional Hospital; a seriously injured PW1 was brought, complaining that the appellant had injured her by an arrow pierced on her neck. Both patients, that is the deceased and PW1 were

loaded onto an ambulance and transferred to the Regional Hospital in Singida. PW3, who spent considerable time with the injured, testified that despite her injuries, the deceased had named the appellant to be her assailant.

Rehema Abdallah (PW2) was inside her house bathing her baby when she heard cries for help. Upon opening her window she saw the deceased who asked for help following the injury she had sustained. PW2's attempted to extract the arrow from the deceased's skull which had pierced through her right ear, but failed. PW2 testified that she was part of the team which escorted the deceased first to village Chairman's office, then to a house where people had gone to offer their condolences. Later PW3 was asked to take the deceased to the nearby Health Centre.

Mahamoudu Ally (PW5) and Omari Saidi (PW6) were grazing their cattle when they heard cries for help. Moments later PW3 passed by carrying the deceased on his bicycle to the nearby health centre. According to these two herdsmen, PW3 mentioned the appellant as the person who had earlier attacked the deceased. Moments later, another victim of the appellant's attack, PW1, also passed by the grazing field where PW5 and

PW6 were. PW1 mentioned to PW5 and PW6 that it was the appellant who had attacked her.

Dr. Aubrey Elinusu Mushi (PW4) testified on how he conducted post-mortem examination of the body of the deceased and compiled a report (exhibit P1). The post-mortem examination report showed that it was an arrow which had pierced the deceased's skull leading to haemorrhage that ultimately caused her death.

In his defence, the appellant gave a sworn testimony, basically contending that there was no way he could have attacked both the deceased and PW1 because early at 6 hours on the same day the deceased died (10/02/2009), he had left for Makyungu Hospital to seek treatment for his long standing chest ailment he had been suffering from since 1983. He remained at that hospital till 15:00 hours. He had to walk back home because there was no transport that afternoon. It was when he arrived at his house around 21:00 hrs when he for the first time learnt about the deceased's death. The appellant tendered documents which he had tendered in another case, Criminal Case No. 84 of 2009 at Dodoma District Court [Exhibit D2].

In its judgment, after finding that the appellant had malice aforethought when he attacked the deceased, the trial High Court convicted the appellant of the offence of murder and sentenced him to suffer death by hanging. Aggrieved by his conviction and sentence, the appellant lodged a Notice of Appeal and later this instant appeal before us.

When the appeal was called on for hearing, Ms. Rosemary Shio, learned Principal State Attorney, appeared for the respondent Republic. Mr. Godfrey Wasonga learned counsel, appeared for the appellant. In the Memorandum of Appeal which Mr. Wasonga filed on 21/06/2018, the appellant preferred the following grounds, namely:

> *1.- That, judgment of the trial court not proper as it does not state punishment contrary to section 312(2) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
>
> *2.-That, the Hon. Judge erred in law by not complying with section 323 which states that the Accused must be informed the period in which he is supposed to file an appeal.*
>
> *3.- That, Hon. Judge erred in law by convicting the Appellant in the proceedings instead of judgment.*

4.- That, Hon. Judge erred in law by convicting the Appellant basing on an unsworn testimony/statement of PW1 one Fatuma Ally Mohamed.

5.- That, Hon. Judge erred in law and fact by convicting the Appellant without considering the fact that the prosecution failed to prove their case beyond reasonable doubt.

6.-That, the whole proceedings marred by procedural irregularities which caused failure of justice.

Mr. Wasonga prefaced his submission with an invitation to us, that the disposal of the first ground of appeal should be sufficient for this Court to allow the appeal and return back the record so that the trial Judge may rectify the irregularity of sentencing was in the proceedings instead of coming after conviction of the appellant. He urged us to make a finding that it is a fundamental error appearing on pages 149 and 150 of the record of appeal, for the learned trial Judge to make a sentence of death by hanging as part of the proceedings before convicting the appellant. To that extent, he surmised, this appeal before us is untenable in so far as the judgment of the trial court is not in compliance with section 312(2) of the

Criminal Procedure Act, Cap 20 R.E. 2002 (CPA) where a sentence forms part of the proceedings before conviction.

Regarding the second ground of appeal, Mr. Wasonga reiterated that the learned trial Judge did not abide with the compulsive language of section 323 of the CPA, which means that after the trial Judge had sentenced the appellant to suffer death by hanging, he should have immediately informed him of the period within which, if he wished to appeal, should lodge his appeal. He submitted that the learned trial Judge did not comply with this requirement under section 323 of the CPA. In so far as the learned counsel is concerned, the statement appearing on page 178 of the record of appeal where the learned trial Judge recorded that—*"The right of appeal to the Court of Appeal of Tanzania explained"* does not satisfy the mandatory requirements of section 323 of the CPA.

In the sixth ground of appeal, Mr. Wasonga submitted why he thought that the summing up by the learned trial Judge was improper because it mentioned to the assessors several provisions of statutes and case law. In so far as the learned counsel is concerned, in summing up the assessors were supposed to be addressed only on matters of fact but not of law. He

referred to pages 127, 130, 140 and 142 of the record where the learned trial Judge mentioned not only sections 298 of the CPA, 164 (1)(c) and 61 of the Evidence Act, but also case law, **Aziz V. R.** [1991] TLR 71. For this irregularity of summing up matters of law to assessors, he urged us to return the record of appeal back to the trial Judge to enable him to make a fresh summing up to assessors on matters of fact only.

After abandoning the third and fourth grounds of appeal, the appellant took some time to submit on the fifth ground of appeal, where he concentrated his energy to question the probity of the evidence of PW1 who witnessed when the appellant attacked the deceased. He urged us to find that the evidence of this eye-witness is not sufficient to sustain the appellant's conviction. He submitted that the ten paces which PW1 claimed to have separated where she was in relation to where the deceased was attacked, is not sufficient to make her evidence believable. He questioned the way PW1 contradicted herself on how the appellant used a stone to hammer an arrow into the deceased's head. Mr. Wasonga went further by questioning how the appellant could still use an arrow to attack PW1. The

learned counsel urged us to disregard the evidence of PW1 because it is full of contradictions.

After playing down the weight which should be attached to the evidence of PW1, Mr. Wasonga urged us to dismiss off the evidence of other prosecution witnesses on ground that they did not witness the attack and their testimonies were mere hearsay by late comers who were told by others.

Mr. Wasonga also poked holes in the evidence of Post-Mortem examination report (exhibit PI) wondering why the body of the deceased was identified to the medical officer, Dr. Mushi (PW4) by OC-CID F.L. Masaka but not by any family member of the deceased.

With all the shortcomings he has highlighted to us, Mr. Wasonga urged us to allow the appeal and either acquit the appellant unconditionally, or send him back to the High Court for a fresh trial.

When her time came to submit in reply, Ms Shio the learned Principal State Attorney out rightly opposed the appeal, and submitted that the appellant was properly convicted. While on one hand conceding that

indeed the learned trial Judge did not comply with section 323 of the CPA as submitted by Mr. Wasonga, Ms. Shio was quick to point out that the appellant was not prejudiced at all, and was able to lodge his notice of appeal within time leading up to the hearing of this Appeal.

Ms. Shio saw nothing wrong about the way the trial judge occasionally referred to provisions of the law and case law when he summed up to the assessors. She referred us to pages 127-128 of the record of appeal where the learned trial Judge took the trouble of reminding the assessors that they were judges of facts on behalf of the society at large. She assured us that the value of summation to the assessors was not diminished at all to warrant any fresh summing up.

The learned Principal State Attorney next came out very strongly in support of the probity of the evidence of the eye-witness (PW1) whose evidence was corroborated by the evidence of other prosecution witnesses. The offence, she submitted, was committed during a broad daylight and there is no need to define what the ten paces testified on by PW1 amounted to. She submitted that the failure by the prosecution to tender the arrow which was used to kill the deceased did not water down the

evidence of prosecution witnesses who actually saw the arrow stuck in the head of the deceased and their evidence irresistibly point at the appellant as the assailant of the deceased. The learned Principal State Attorney did not think that the way the OC-CID identified the body of the deceased to the medical officer who conducted post-mortem examination diminished the probity of the evidence proving the unnatural death of the deceased.

Now, from the submissions of the two learned counsel, it is appropriate to reiterate that this being the first appeal from the decision of the trial High Court, this Court inevitably had to take its own fresh look at the entire evidence in order to arrive at the Court's own findings and conclusions: see **DEMERITUS JOHN @ KAJULI AND THREE OTHERS VS. R.**, Criminal Appeal No. 155 of 2013 (unreported).

Regarding the first ground of appeal which Mr. Wasonga preferred, where the sentence appears in the proceedings instead of coming after conviction, we think this anomaly was caused, to the best of our perusal of the record, by the mixing up of pages during the word-processing of the hand-written record of proceedings. The record of appeal shows the Judgment of the trial court containing the conviction was delivered on

14/12/2016 the same date the sentence was pronounced. We see no need to belabour this ground. We make a finding that the mixing up of pages was inadvertent and the appellant was convicted and duly sentenced in full compliance with section 312 (2) of the CPA.

Mr. Wasonga has made much issue about the failure of the learned trial Judge to literally show in the record proceedings that, after sentencing the appellant to suffer death by hanging, he literally informed the appellant of the period within which, if he wished to appeal, should have lodged his appeal to this Court. We think, although the record clearly shows that the appellant was not informed about the specific statutory period within which was expected to lodge his appeal if he desired to, the phrase—"*The right of appeal to the Court of Appeal of Tanzania explained*" appearing on page 178 of the record of appeal shows that the appellant was at very least informed about his right to appeal to this Court. Therefore, we agree with Ms. Shio that the appellant was not prejudiced at all for he filed his Notice of Appeal within time, which initiated this appeal.

In fairness to the learned trial Judge, it must be mentioned that, although the learned trial Judge made few references to provisions of

statutes and case law while summing up to the assessors, we do not agree with Mr. Wasonga that we should send back the record of appeal for what he describes as a proper summing up to assessors. As Ms Shio correctly observed, the learned trial Judge took ample time to remind the assessors on their important role as judges of facts, and spend most portions of his summing up to direct them on matters of fact.

Mr. Wasonga has in the fifth ground of appeal, not only cast aspersion on the evidence of PW1, the single eye-witness; but also by dismissing off as hearsay, the evidence of other prosecution witnesses. While we agree with what this Court said in **AHMAD OMARI V R**, CRIMINAL APPEAL NO. 154 OF 2005 (unreported), that there is a need to take greatest care when dealing with the evidence of a single witness, we must point out that upon our own re-evaluation of the evidence on record of this appeal, we are satisfied with the probity of the testimony of PW1. PW1's evidence was corroborated in material terms by the evidence of other prosecution witnesses like PW2, PW3, PW5, PW6 and PW7. These prosecution witnesses gave detailed accounts of how they saw and talked to the injured deceased and PW1. PW3 actually carried the deceased on his

bicycle to the Health Centre. We do not hesitate to conclude that PW1's eye-witness evidence was fully corroborated.

Therefore, we see no reason to fault the finding of the learned trial Judge who had dispelled the appellant's attempt through his defence of alibi, to place himself far away from the village of Ighuka and the scene of crime. The learned trial Judge had rightly in our view, accepted the eye-witness evidence of PW1 who spent about ten minutes when the appellant attacked the deceased. She repeatedly identified the appellant to several prosecution witnesses as the person who appeared suddenly and attacked the deceased and later attacked her as well. There was no room for mistaken identity; PW1 informed the trial court that the Appellant is not only well known to her, he is her son-in-law.

Like the learned trial Judge, we think the act of the appellant using an arrow to attack the deceased and PW1, by directing this lethal weapon to attack vulnerable parts of his victims, the appellant had sufficiently manifested his intention to cause the death of the deceased and grievous harm to PW1.

Accordingly, we find that the appellant was rightly convicted with the offence of murder. As a result, we uphold his conviction and sentence for murder and dismiss this appeal in its entirety.

DATED at **DODOMA** this 27th day of June, 2018.

I. H. JUMA
CHIEF JUSTICE

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL