IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CRIMINAL APPEAL NO. 162 OF 2017

(CORAM: MUSSA, J.A., MWARIJA, J.A. And MZIRAY, J.A.)

MASHAKA MBEZI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Appeal from the Judgment of the High Court of Tanzania

at Dodoma

(Kwariko, J.)

Dated of 30th day of May, 2017
in
Criminal Sessions No. 3 of 2013

JUDGMENT OF THE COURT

11th & 19th July, 2018

MUSSA, J.A.:

In the High Court of Tanzania, at the Dodoma Registry, the appellant stood arraigned for Murder, contrary to sections 196 and 197 of the Penal Code, Chapter 16 of the Revised Laws (the Penal Code). The particulars of the offence were that on or about the 17th March 2012, at Mgunga Village, within Dodoma District and Region, the appellant murdered a certain Simon Muhamali.

The appellant refuted the accusation, whereupon the prosecution featured four witnesses and three documentary exhibits in support of its claim. On his part, the appellant gave sworn evidence and sought the support of two witnesses. At the height of the trial, the High Court (Kwariko, J., as she then was), found the appellant guilty as charged, convicted and handed him the mandatory death sentence. He is aggrieved upon four grounds of grievance but we propose to first reflect on the factual background. From the totality of its evidence, the prosecution version may be recapitulated thus:-

On the fateful day, around 11:00 a.m or so, the deceased and several others were consuming local brew at the residence of Levson Manyika (PW2). Amongst those present, aside from PW2, were the deceased's brother, namely, Christopher Muhamali (PW1), Maloda Chalinze and Joseph Liale. A little later, the appellant arrived at the scene holding a machete with which he immediately hacked the deceased on the forehead. Soon after, the appellant clicked his heels and disappeared from the scene. In their respective testimonial accounts, both PW1 and PW2 were emphatic that the deceased had not uttered a word to the appellant before being attacked.

In the meantime, the deceased who was seriously injured passed away as he was being ferried to hospital. Upon a post-mortem examination, which was conducted five hours later, the deceased was found with a deep cut wound which penetrated the frontal part of the skull. Death was attributed to haemorhagic shock and brain injury. The report on post-mortem examination (exhibit P1) was adduced into evidence at the preliminary hearing stage without demur from the appellant and his Advocate.

There was some further prosecution evidence in the nature of a Police statement made by Rehema Muhamali (exhibit P3) who happens to be the deceased's wife. The statement was adduced into evidence by No. D6382 detective corporal Said (PW3) who was recalled for that specific purpose. With this detail, so much for the prosecution version which was unveiled during the trial.

In his reply testimony, the appellant told the trial court that around 7:30 a.m. on the fateful day, her sister in law, namely, Fumbo Mbezi informed him that the deceased called at his residence (appellant's) the previous day and told her (Fumbo) that he (deceased) was looking for the

appellant and that he will deal with him wherever he found him. Fumbo further informed the appellant that the deceased was assertedly annoyed by the appellant's act of discontinuing the intimate relationship which was going on between him (the deceased) and the appellant's wife, namely, Shukran Mbezi (DW3). As he was destined for his farm, the appellant then picked a machete and departed from his home. On the way, he visited the residence of PW2 so as to consume some alcohol. Soon after, he was confronted with the deceased who insulted him thus:-

"Kuma mama yako, ole wako jana sijakupata"

The deceased, allegedly, further expounded that he will continue the love affair with his wife (appellant's) up until he ensures that their marriage was broken. In the wake of the insults, the appellant told the trial court that he was infuriated and, with a single blow, he hacked the deceased with the machete. To support his version and, as we have hinted upon, the appellant featured two witnesses: The first being Simon Muhumha (DW2) who confirmed being at PW 2's residence at the material time but did not witness the actual assault as he came out of the house in the aftermath of the incidence. The other witness was the already mentioned

appellant's wife (DW3) who, incidentally, confirmed the detail about having a love affair with the deceased. Thus, in a nutshel, the appellant did not quite refute having killed the deceased, but, his defence was that he was provocked into the act by the deceased.

At the close of the respective cases from either side, the learned presiding Judge summed up the case to the two gentlemen and lady assessors who sat with her throughout the trial. The two gentlemen assessors unanimously rejected the appellant's defence of provocation and returned a verdict of guilty as charged. But, the lady assessor was minded of a different view to the effect that the appellant acted under provocation and thus, to her, the killing was without malice aforethought.

On the whole of the evidence, the learned trial Judge upheld the prosecution version with respect to what transpired at the scene and, accordingly, found as an established fact that no utterances or exchange of words were made between the deceased and the appellant at the scene of the incident. As regards the other evidence tending towards the fact that the deceased was having a love affair with the appellant's wife, the learned Judge was of the view that, if he was so informed, the appellant did not kill

the deceased at the spur of the moment so as to benefit from the defence of provocation. In the upshot, the defence of provocation was rejected and the appellant was found guilty, convicted and sentenced to the extent we have already indicated. The four grounds upon which the appellant seeks to impugn the decision of the High Court are couched thus:-

1. ***THAT,*** *your honor Justice of appeal the trial court erred in law and fact for basing conviction on illegally obtained evidence.*

   (i) The statement of one REHEMA Muhali was wrongly admitted as per the requirement of section 34(1)(2)(e) of the Evidence Act, [Cap 6 .R.E.2002] since the prosecution did not serves a notice on the party proposing or objecting to the statement being so tendered in evidence within ten days.

2. ***THAT,*** *your honor Justice of Appeal the trial court erred in law and fact when accepted that the evidence adduced by the prosecution case proved the intention to commit the offense of murder while in the reality the intention to commit the offense of murder was not proved.*

3. ***THAT,*** *your honor of appeal the trial Court erred in law and fact when did act on the evidence adduced by PW4 since the said witness did not tender and documents which indicating the appellant admitted the alleged allegations before him.*

4. ***THAT,*** *your honor Justice of appeal the trial court erred in law and fact when did not consider that the appellant killed the deceased due to provocation made by the deceased on the material time."*

At the hearing before us, the appellant was represented by Mr. Godfrey Wasonga, learned Advocate, whereas the respondent Republic had the services of Ms. Beatrice Nsana, learned State Attorney. As he was adopting the memorandum of appeal, Mr. Wasonga abandoned the first ground of appeal whilst he approached the rest of the grounds generally and, as it were, arguing, in the main, that the trial Court erred in its rejection of the defence of provocation.

Expounding the issue of contention, Mr. Wasonga submitted that, upon two occasions, that is, in the morning of the fateful day and at the scene of the incident the appellant was informed of the unlawful love affair between his wife and the deceased. The learned counsel for the appellant

urged that these two incidents sparked off the appellants anger whereby he was provoked beyond control and caused the death of the deceased. The actions of the appellant, he concluded, passed the objective test of what is expected of an ordinary person of the community to which the appellant belongs. In the premises, Mr. Wasonga advised us to quash the conviction for murder and substitute for it the lesser offence of manslaughter.

On her part, Ms. Nsana strenuously contented that there are no elements of provocation in this case because the appellant did not kill at the spur of the moment and in the heat of passion to come to terms with sections 201 and 202 of the Penal Code. To begin with, she argued, the appellant's contention that he was insulted by the deceased at the scene of the assault was rejected by the trial court and, properly so, much as DW2 did not confirm the detail. Assuming, she further argued, that the appellant was seized of the unlawful love affair at 7:30 a.m. when he was informed of it by her sister-in-law (Fumbo); then he had a three and a half hours' interval for cooling down his temper. The learned State Attorney was finally of the view that, from the totality of the evidence, the killing in

this case was pre-meditated. Reasons wherefore, Ms. Nsana advised us to dismiss the appeal in its entirety.

On our part, we have dispassionately weighed the learned rival contentions in the light of the evidence on record. For a start, despite the fact that Mr. Wasonga abandoned the first ground of appeal, we, nevertheless, invited counsel from either side to express whether or not the statement under reference (exhibit P3) was properly adduced into evidence. We were minded as such, the more so as the document was seemingly read in Court ahead of its formal admission. Granted that during the trial, counsel for the appellant did not object to the statement be so read ahead of its admission but, that does not make right the shortcoming. In the unreported Criminal Appeal No. 154 of 1995 – **Robinson Mwanjisi and Three Others vs. The Republic,** this Court observed thus:-

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial."*

Corresponding remarks were made in another unreported Criminal Appeal No. 402 of 2015 between **Lack Kilingani vs. The Republic.**

Quite apart, it is noteworthy that PW3, who was recalled specifically to adduce the statement, was not reminded by the trial court, as is the usual practice, that he was still on oath before adducing his evidence. Thus, in effect, he was not examined upon oath contrary to the provisions of section 198(1) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (CPA).

Both Ms. Nsana and Mr. Wasonga were of the view that the two shortcomings were fatal and advised us to expunge exhibit P3 from the record of the evidence. We entirely subscribe and, accordingly, exhibit P3 is expunged from the record of the evidence. But, the learned State Attorney quickly rejoined that, aside from the impugned exhibit P3, the remaining evidence sufficiently implicates the appellant for the charged offence. That will be determined in due course.

As we have observed earlier, the appellant does not dispute killing the deceased. What he is disputing is the accusation that he killed him with malice aforethought. For the moment, we are enjoined to consider

and determine the issue whether or not, at the time of killing, the appellant had been provoked within the meaning provided under the law. Our starting point will be a consideration of the relevant provisions of the Penal Code. Section 201 stipulates:-

> *"When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only. "*

Section 202 of the Penal Code defines the term "provocation". It reads as follows:-

> *" The term "provocation" means and includes, except as herein after stated, any wrongful act or assault of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate case, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self control and to induce him to commit an assault of the kind which the person charged*

committed upon the person by whom the act or insult is done or offered."

In the instant case, in determining whether or not the appellant's defence of provocation could properly be entertained, the learned trial court carefully evaluated the evidence on record, together with the circumstances surrounding the case. As we have already intimated, speaking of what transpired at the scene of the incident, the learned Judge accepted the prosecution version that the deceased did not utter a word to the appellant at the time of the attack.

Upon our own re-evaluation, we find no cause to fault the finding of the learned Judge much as the same is fully founded on the testimonies of PW1 and PW2. Incidentally, the insults allegedly uttered by the deceased were not put to the witnesses in the course of cross-examination and only came much later in the appellant's defence.

As regards the incident which occurred earlier at 7:30 a.m., the learned Judge accepted the appellant's version as to what she was told by his sister in-law Fumbo. But even as she so accepted the appellant's version, the learned Judge was of the view that the appellant had ample time, from 7:30 a.m to 11:00 a.m. to cool his temper. We entirely

subscribe to her finding and, perhaps, we need only reiterate what we observed in the unreported Criminal Appeal No. 281 of 2009 between **Saidi Kigodi @ Side vs. The Republic:-**

> *"We are of the firm view that the defence of provocation is available to a suspect who kills at a spur of the moment, in the heat of passion before he has time to cool down."*

In sum, for reasons which we have endevoured to elaborate, we are of the firm view that the defence of provocation was properly rejected by the trial court. But the rejection of the defence of provocation would not conclude the matter much as there is a complaint which is comprised in ground No. 3 of the memorandum of appeal which was, unfortunately, barely canvassed by counsel from either side in their submissions.

In that ground, the appellant complains that the trial court erred in acting on the evidence of PW4 who allegedly recorded the appellant's statement but did not go further to tender it in the course of his testimony. In actual fact, the trial court did not quite act on the evidence of PW4 but, being a first appellate Court we are dutifully enjoined to consider and determine the impact of the evidence of PW4 on this case.

In this regard, it is noteworthy that during the preliminary hearing, the prosecution clearly indicated that it intended to rely upon both a cautioned and extra-judicial statements of the appellant. During the trial, Inspector Deus Ibrahim (PW4) who, seemingly, interviewed the appellant was featured as a prosecution witness, whereupon he informed the trial court in his in-chief:-

> *"The accused in the dock is the one we arrested. I interrogated him who (sic) admitted the allegation."*

Further down in the course of cross-examination, the witness said:-

> *"I took accused's statement. I can tender it if I am asked to. I do not remember what the accused said was the motive for the murder."*

And yet, for some obscure cause, the prosecution did not pick the cue and did not venture to produce the cautioned statement which, obviously, was within its reach. And, neither was the extra-judicial statement sought and produced as earlier promised by the prosecution. If eventually, upon second thoughts, the prosecution did not wish to rely on the documents, the appropriate option was for it to offer the documents for the use of the defence, if required, that is, at the close of the

prosecution case. The prosecution did not take that option and, as it now turns out those documents were withheld by the prosecution for no cause at all.

Whilst we are mindful that it is not expected of the prosecution to call a superfluity of witnesses, the general and well-known rule is as was expressed in **Aziz Abdallah vs. The Republic** [1991] T.L.R 71:-

> *"...the prosecution is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

Accordingly, we are constrained, under section 122 of the Evidence Act, to adversely infer that the contents of the withheld cautioned and extra-judicial statements would have tended against the case for the prosecution. As we have been denied knowledge of the contents of the documents we cannot tell their impact on the case and neither can we say with certainty that the killing in the case at hand was with malice aforethought.

Given the lingering doubts, we would, without hesitation, accord the appellant the benefit of doubt and decline to uphold the conviction for murder which is quashed and substituted with a conviction for manslaughter contrary to section 195 of the Penal Court. Having taken into account the period spent by the appellant in custody, we think a prison sentence of five (5) years from the date hereof will meet the justice of the case. Order accordingly.

DATED at **DODOMA** this 18th day of July, 2018

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL