IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBALI, J.A)

CRIMINAL APPEAL NO.487 OF 2016

KATONA RASHID @ MITANO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Songea)

(Chikoyo, J.)

Dated the 11th November, 2016
In
Criminal Session Case No. 8 of 2014

JUDGMENT OF THE COURT

8th & 15th May , 2019

WAMBALI, J.A.:

The appellant, Katona Rashid @ Mitano appeared before the High Court of Tanzania at Songea where he was charged of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 (the Code). It was the prosecution case that on 5th March, 2013 at Likweso village, Tunduru District in Ruvuma Region, the appellant murdered Kusala Katona. It is noteworthy that there was no dispute that the deceased was his son who they lived together before he died.

To support its case the prosecution fronted two witnesses, namely Juma Saidi Waiti (PW1), the acting Likweso Village Executive Officer(VEO) and Ukweli Katona (PW2), the son of the appellant. The prosecution also tendered two exhibits that comprised of the Post Mortem Report (PMR) and sketch map.

The evidence of PW1 was essentially based on information concerning the death of the deceased. He testified that on 5/3/2013 he got information from Rashid Mitano Mtula, the father of the appellant, Kajanja Kusunga Kajanja, Swedi Mtila Mitano and Swalehe Athumani that the appellant had lost his son and buried the deceased alone without informing his relatives. PW1 thus sent a trainee militia to arrest the appellant and after he was brought to him he was not satisfied with his explanation concerning the death and reported the incident to the police. The police went to the grave and exhumed the body of the deceased which had started to decompose. Medical examination was conducted by the doctor who prepared the Report (PMR) which indicated that the cause of death was unknown.

The evidence of PW2 who testified to have witnessed the incident was to the effect that on 5/3/2013 during the night the appellant assaulted

the deceased person by holding tight his neck and stepping on it and as a result the deceased did not wake up as he had died. PW2 testified further that after the death of the deceased, the appellant took the body and buried it alone as his relatives, including his father, refused to assist him during the burial.

The prosecution therefore, maintained that death of the deceased was caused by the beating which was inflicted by the appellant. In his defence, the appellant denied to have caused the death of the deceased and claimed that he died of witchcraft. He testified that one day he went to the river for fishing and when he returned he was told by PW2 that the deceased was still asleep with no sign of breathing and upon examining him he confirmed that he had passed away. The appellant strongly discredited that evidence of PW2 as being total lies which was based on instruction of his mother. The appellant denied to have beaten the deceased on the fateful day.

It is on record that after the learned trial judge summed up the case to the assessors, all of them returned a verdict of not guilty to the charge of murder. Nevertheless, the learned trial judge was fully satisfied with the evidence of PW2 and found that the deceased died because of the beating

inflicted by the appellant and concluded that the prosecution proved the case beyond reasonable doubt. She convicted the appellant of the offence of murder and sentenced him to suffer death by hanging.

It is from the finding of the trial court that the appellant has appealed to this Court challenging both conviction and sentence. Earlier on the appellant lodged a Memorandum of Appeal comprising eight grounds of appeal. However, the learned counsel Mr. Jackson Abraham Chaula who was assigned to represent him lodged a supplementary memorandum of appeal comprising three grounds in substitution of the one lodged by the appellant.

It is also important to note that the respondent Republic on 3/5/2019 lodged a notice of preliminary objection on the competence of the appeal, but upon prayer of the learned Senior State Attorney it was withdrawn with the leave of the Court before the hearing commenced.

We wish also to remark that although Mr. Chaula lodged three grounds of appeal, at the hearing it was agreed that there are essentially only two grounds. These are:

1. That the learned trial judge erred in law and fact in convicting the appellant on the evidence of PW2 which was suspicious.

2. That the learned trial judge erred in law and facts in convicting the appellant while the prosecution did not prove its case beyond reasonable doubt.

At the hearing of the appeal, Mr. Jackson Abraham Chaula learned advocate appeared for the appellant, while Mr. Hamimu Nkoleye, learned State Attorney, appeared for the respondent Republic.

Submitting in respect of ground one, Mr. Chaula stated that the trial court wrongly convicted the appellant as the evidence of PW2 did not conclusively establish the cause of death and that it is the appellant who caused the deceased's death. He argued that while PW2 testified that the cause of death of the deceased was due the beatings inflicted by the appellant and the eating of suspicious mushrooms prepared by the appellant, the learned trial judge found that the cause of death was due to the beatings. The learned advocate for the appellant submitted therefore that PW2 did not sufficiently prove the cause of death as even the PMR which was admitted during the preliminary hearing as exhibit P1 indicated

that the cause of death was not established. He argued further that as the medical evidence did not establish the cause of death, the prosecution was duty bound to prove the cause of death based on the circumstances. Unfortunately, he submitted, PW2 had two reasons for the death. One, due to the assault of the deceased by the appellant and two, the suspicious mushrooms which was prepared by the appellant and eaten by the deceased.

Mr. Chaula emphasized that the evidence of PW2 on the cause of death did not establish beyond reasonable doubt the circumstances which lead to the death of the deceased between the assault and the suspicious mushrooms eaten by him. He concluded that PW2 similarly, failed to establish the person who caused the death of the deceased. He thus prayed that the findings of the learned trial judge on the cause of death be reversed.

With regard to ground two, Mr. Chaula submitted that the evidence of the prosecution did not prove sufficiently that it is the appellant who killed the deceased. He argued that it is unfortunate that the evidence of PW1 was purely hearsay on the cause of death as it was based on the information from informers who were not summoned to testify at the trial,

including those who were alleged to have been requested by the appellant to assist him to bury the deceased. In this regard, he submitted that the trial court was supposed to draw adverse inference on the failure of the prosecution to summon some important witnesses.

Moreover, Mr. Chaula submitted that the evidence of PW2 was not consistence on how death was caused and the actual date of the incident. He maintained that while during examination in chief PW2 testified that he saw the appellant assaulting the deceased on the material date at night, during cross-examination, he stated that the incident occurred at day time. Mr. Chaula submitted further that the evidence of the prosecution is weakened by the contradiction in the evidence of PW2 concerning the assault and the eating of suspicious mushrooms. He argued that while during examination in chief PW2 testified that the deceased was assaulted in his neck by the appellant while lying down on the fateful day, and did not say anything concerning the eating of suspicious mushrooms by the deceased, during cross-examination, PW2 testified that the deceased was tortured by the appellant for three days, and this included the preparation and eating of suspicious mushrooms.

Mr. Chaula pointed out another inconsistence in the testimony of PW1 and PW2 concerning the person who went to show the police the place where the deceased's body was buried. He stated that while PW1 testified that it was PW2 who sent them to the grave, PW2 testified that it was the appellant who led the police to the grave.

In the circumstance, Mr. Chaula submitted that the indicated inconsistencies and contradictions in the evidence of the prosecution left some doubts as they went to the root of the trial concerning the cause of death and the responsible person. He argued, therefore, that the doubt could have been resolved by the trial court in favour of the appellant. He concluded his submission by urging us to allow the appeal and quash conviction and sentence imposed by the trial court and set the appellant at liberty.

On behalf of the respondent Republic, Mr. Nkoleye did not support the appeal, but entirely agreed with the findings of the trial court that resulted in the conviction and sentence of the appellant. Mr. Nkoleye strongly submitted that although PW2 associated the death of the deceased with the assault of the appellant and the eating of suspicious mushrooms, the learned trial judge properly found that death was caused

by the assault. He maintained that although the medical report did not establish the cause of death, the circumstances explained by PW2 left no doubt that it was the appellant's assault on the deceased that caused his death. He thus urged us to find the evidence of PW2 to be credible and reliable as found by the trial judge on the cause of death.

On the other hand, Mr. Nkoleye argued that the prosecution did not summon other persons who were mentioned by PW1 as witnesses because they did not witness the incident which led to the death of the deceased. Their evidences could have been purely hearsay as they were also informed after the incident like PW1, he emphasized. In his view, the trial court could not have rightly drawn adverse inference on the prosecution as PW2 sufficiently proved the case.

Responding to the inconsistencies and contradictions in the prosecution evidence as argued by Mr. Chaula, the learned State Attorney stated that the learned trial judge thoroughly dealt with the issues that were raised and resolved that the same were minor and did not go to the root of the case. He similarly, urged us to find so and disregard the submission of Mr. Chaula. To support his contention he referred us to the

decision of this Court in **Chukwadi Denis Okechukwu and 3 Others v. The Republic,** Criminal Appeal No. 507 of 2015 (unreported).

Mr. Nkoleye however, agreed that although the learned trial judge differed with the unanimous findings of facts by assessors, she did not give tangible reasons. Nevertheless, he left upon the Court to decide on the consequences of the said failure of the trial judge.

Finally, Mr. Nkoleye maintained that the prosecution proved its case beyond reasonable doubt and prayed that the appeal be dismissed in its entirety.

Having heard the submissions of the counsel for the parties, we wish to observe that as the first appellate court, we are entitled to re-evaluate the evidence in the record and come to our own conclusion where necessary. (See **Reuben Mhangwa and Kija Reuben v. The Republic**, Criminal Appeal No. 99 of 2007 (unreported).

We have no doubt that Kusala Katona is dead and that he died of unnatural death. The issue for determination is the cause of death and who caused the deceased's death. As submitted by the counsel for the parties, the trial court found that the deceased died because of the assault

of the appellant. This finding is not supported by the appellant as argued by his counsel. We have no hesitation to state, as found by the learned trial judge, that the medical evidence contained in exhibit P1 did not establish the cause of death. The learned trial judge however, found that the circumstances described by PW2 in his testimony, left no doubt that death was caused by the assault inflicted on the deceased by the appellant on the fateful day.

On our part, we think, with respect, that this finding is not backed by cogent evidence from the prosecution side. We say so because, although PW2 testified to have been present when the appellant allegedly assaulted the deceased, his testimony on this issue left some doubts which could have been resolved in favour of the appellant. First, as submitted by Mr. Chaula, PW2 was not firm on how death was caused by the appellant. While he was firm during examination in chief that the deceased was assaulted on the fateful day in the night, during cross – examination, he stated that the deceased was tortured by the appellant three days consecutively. PW2 narrated, in this respect, that on the first day the appellant tied the hands of the deceased on the neck and on the second day the deceased ate suspicious mushrooms which were prepared by the

appellant and he was assaulted again on the third day at night. Yet, when he was re-examined, PW2 maintained the story he told the trial court during cross-examination which was different from what he stated during examination in chief. Indeed, when PW2 answered the question which was posed by Mr. Leornard, the assessor, he maintained that the deceased died because of the beating and eating suspicious mushrooms. In this regard, as the prosecution depended entirely on the evidence of PW2 in convincing the trial court as to the cause of death, at the end of the trial, it remained with two causes of death which were not sufficiently proved, taking into consideration that even the medical evidence did not prove the cause of death. Certainly, even the mushrooms which were alleged to have been eaten by the deceased were not proved to be suspicious.

We also observe that, PW2 was also not consistent on the time when the incident occurred. While during examination in chief he stated that it was in the night and maintained the same when he was cross- examined by the counsel for the appellant, when he was re-examination by Mr. Ndunguru learned State Attorney, he stated that the incident occurred during the day as the sun still shined. Yet, when PW2 responded to the question from Mr. Mandimu, the assessor, he stated that the deceased died

in the evening. On his part, PW1 testified that he was informed about the death of the deceased on 5/3/2013 at 21.00 hours.

In the light of the evidence of the prosecution we have analysed, it is not possible, in our view, to conclude that the deceased died because of either the assault or the eating of suspicious mushrooms. It is also not safe to conclude that it is the appellant who caused the death of the deceased.

It follows that, although Mr. Nkoleye did not see the importance of the prosecution to have summoned other witnesses to testify, we think, in the circumstances of this case, it was important to summon some of the witnesses who were allegedly firstly made aware of the incident, more so, as it is not known how the crime was investigated as no investigator appeared to testify at the trial.

We are however, alive to the requirement under section 143 of the Evidence Act, Cap 6 R.E. 2002 that the prosecution is not required to bring any number of witnesses to support its case (See **Seperatus Theonest @ Alex v. Republic,** Criminal Appeal No 135 of 2003- unreported). Nevertheless, in the circumstances of this case some important witnesses

who were allegedly requested by the appellant to assist in the burial of the deceased but refused were supposed to be summoned to testify. Thus, where a witness who is in a better position to explain some missing links in the evidence is not called, without any sufficient reason being shown, adverse inference may be drawn. (See **Aziz Abdallah v. Republic** [1991] TLR 71). We are settled that the prosecution did not prove the cause of death and the person who caused the deceased's death. In the event, ground one is allowed.

On the issue of insufficiency of evidence to prove the offence of murder, we are also settled that the prosecution did not prove sufficiently the necessary element of malice aforethought as required by law. We are of the view that the inconsistencies and contradictions which have been explained above went to the root of the case as they left the prosecution without sufficient proof on how the incident occurred, the cause of death and who caused it and the motive behind the killing. We do not, therefore, with respect, agree with the learned State Attorney, who supported the finding of the trial court that the inconsistencies and contradictions did not go to the root of the case.

We are of the settled view that the lady and gentlemen assessors properly returned anonymously a verdict of not guilty to the charge of murder against the appellant. In this regard, since the assessors gave a detailed opinion, the learned trial judge, with respect, was supposed to give valid reasons for differing with them before she came to a different conclusion. We are aware that under section 298(2) of the Criminal Procedure Act, Cap 20 R.E. 2002, (the CPA) the trial judge is not bound by the opinions of assessors, but in case of difference she must give reasons. In **Baland Singh v. The Republic,** (1954) 21 EACA 209 the erstwhile East African Court of Appeal stated that:

> *"In all cases where a trial judge comes to a contrary finding on facts to the unanimous opinion of the assessors it is a good practice for the judge to state in his judgment reasons for his disagreement... particularly, if the assessors have given grounds of their opinion."*

See also **Charles Segesela v. Republic,** Criminal Appeal No. 13 of 1973 E.A.C.A which was referred by the Court with approval in **Abdallah Bazamiye and Others v.The Republic** [1990] TLR 42.

In the present case, we note, with respect, that the learned trial judge simply expressed at the end of the judgment that she disagreed with the opinions of assessors without assigning sufficient reasons. That, with respect, was not proper.

Overall, we are of the firm view that PW2 who, the prosecution depended to prove its case was not credible and reliable and that he could not be believed to ground conviction and sentence of the appellant by the trial court. We are settled that there were good reasons in view of the evidence we have evaluated, not to believe the testimony of PW2 to support the trial court's verdict. In this regard, we feel inclined to refer to the decision of **Mathias Bundala v. The Republic**, Criminal Appeal No. 62 of 2004 (unreported) in which the Court stated that;

> *"Good reasons for not believing a witness include the fact that the witness has given improbable evidence, or the evidence has been materially contradicted by another witness or witnesses."*

We associate ourselves with the observation of the Court, as apart from the fact that PW2's evidence was contradicted by PW1 on the time when the incident occurred and the person who sent the police to the

place of burial to exhume the body of the deceased, we are settled that his own evidence is contradictory on the cause of death and who caused it. In the event, ground two of appeal is allowed as the prosecution did not prove the case beyond reasonable doubt.

In the end, we allow the appeal, quash conviction and set aside the sentence of death that was imposed on the appellant by the trial court. We order that the appellant be released from prison unless otherwise held lawfully by other causes. We so order.

DATED at **IRINGA** this 15th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL