IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MMILLA , J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 434 OF 2018

ABDALLAH ATHUMAN @ DULLA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Kairo, J.)

dated the 23rd day of October, 2018

in

Criminal Session Case No. 22 of 2015

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JUDGMENT OF THE COURT

10th & 13th December, 2019

MZIRAY, J.A.:

The appellant was aggrieved by the decision of the High Court of Tanzania at Bukoba dated 23/10/2018, which convicted him of a lesser offence of manslaughter and sentenced him to seven years imprisonment.

Originally, the appellant and one Chovya Said (who was acquitted by the trial court) were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002 (the Penal Code) on an

information which alleged that on 22/7/2014 at about night hours at Ngazi Saba area, Sido street within Biharamulo township, Biharamulo District, in Kagera Region, they murdered one Method s/o Buzaire @ Mulokozi.

The appellant and this other person pleaded not guilty. To prove the charge, the prosecution side called five witnesses and tendered two documentary exhibits which were the autopsy report (exhibit P1) and the sketch plan of the scene (exhibit P2); while the appellant and the other person were the only witnesses for the defence side.

The facts of the case can be placed in this outline. On 21/7/2014 in the evening, the appellant and PW1 Albina Anaclet were selling local brew commonly known as wanzuki in a pombe club owned by one Alistidia who is the mother of PW1. There were several people drinking the liquor, including Chovya Said and PW3 Medard Buzaire, who is the younger brother of the deceased. While in the club, PW3 raised a complaint that the appellant snatched his wallet and took cash amounting Tshs.110,000/=. There was a scuffle and in the fight which ensured PW3 lost three teeth instantly. The two were separated and PW3 decided to go home and reported the incident to his mother one Agness Buzaire who

advised him to report the incident to police. He acceded to the advice and went to the Police station where he was issued with a PF3 for medical examination. He did not go to hospital, instead he confronted the appellant so as to return his money and when he refused, PW3 decided to go home to sleep.

Later on, PW3 narrated the incident to the deceased, his brother, and the two decided to go and face the appellant at the pombe club. That was around 11:00pm. When they arrived there, the club had already been closed but there were few people still inside, including the appellant, Alistidia and three youths whom PW3 did not identify them. According to PW3 he stood by the road side watching while the deceased went and knocked the door of the club. The appellant opened the door. While all these incidents were happening, PW1 Albina Anaclet who had already gone to sleep heard the bang of the door by the stone and decided to peep through the window and saw PW3 standing by the road side and the deceased confronting the appellant after he had opened the door. She heard the deceased asking the appellant why he took the money of PW3 and appellant responded by hitting the deceased with his fist on the face, then he fell down. She also saw the appellant dragging

the deceased inside and then closed the door. Similar version was given by PW3 who upon seeing the deceased locked inside, he decided to knock hard the door with a stone but the door did not open. Upon hearing the knock people gathered at the scene but did not harm anyone there. Like PW1, he saw the appellant taking the deceased outside while in a pathetic condition.

After some time, the appellant and his accomplice took the deceased outside and he appeared weak and unable to walk. He was taken to Police where a PF3 was issued and then conveyed to hospital. By that time the deceased was not talking and still was unable to walk. He just closed his eyes. PW4 Dioniz Leonidas visited the deceased in hospital and found him in a critical condition. He observed that he was bleeding from both ears and mouth and there were bruises on the neck and one side of the head was forced inward. While arrangements were being made to transfer him to Bugando Referral Hospital, he passed away on 23/7/2014.

It was PW2 Dr. Tumpale Rafael who conducted the post-mortem examination on the body of the deceased on 24/7/2014. She found that the deceased had severe head injuries to the brain tissue causing severe

bleeding to the brain which came out through both ears. She opined that death was due to injured brain (severe head injury).

The investigation of the case was done by PW5 Detective Constable Salum. He attended the scene and drew the sketch map of the scene (exhibit P2). In the course of the investigation he netted the appellant and one Chovya Said as suspects and brought them to justice where they were charged of murder.

After a full trial at the High Court, the appellant was found guilty, convicted for a lesser offence of manslaughter and sentenced to serve seven years imprisonment; while his co-accused Chovya Said was acquitted based on the defence of alibi. The appellant was aggrieved with the conviction and sentence, hence this appeal.

On 26/2/2019 the appellant lodged a memorandum of appeal with eight grounds and later on filed a supplementary memorandum of appeal containing one ground which had an alternative count. Through his learned advocate Mr. Brighton Ngaywa Mugisha, he opted to pursue the supplementary memorandum of appeal and abandoned the main one which he had filed earlier, save for the prayers therein.

The supplementary memorandum of appeal reads as follows:-

1. *The learned trial judge arred in law and fact in convicting the appellant, as there was no sufficient evidence throughout the trial to establish the guilty of the appellant, beyond all reasonable doubt.*

   And in the alternative;

2. *That the learned trial judge erred in fact, in sentencing the appellant to an excessive term of seven years imprisonment for manslaughter, taking into consideration the evidence on the fateful day.*

At the hearing of the appeal, the appellant was present and represented by Mr. Brighton Nyaywa Mugisha, learned advocate, wheres the respondent Republic had the services of Mr. Shomari Haruna, learned State Attorney.

In his submission, Mr. Mugisha argued that the offence of manslaughter was not established against the appellant on account of the fact that there was no any witness who testified before the trial court that he saw the appellant killing he deceased. He asserted that even PW1 and PW3 who are alleged to have been at the scene of the incident did not see him killing the deceased but they only saw the deceased being taken

out from the room which apparently had other people inside, apart from the appellant. He went on to submit that apart from the evidence of PW1 who was discredited by the trial court, the remaining evidence of PW3 which the trial court relied upon to ground the conviction had no any evidentiary value because this witness was a person of unsound mind as reflected at page 11 of the record of appeal. He asked this Court not to accord any weight to the evidence of PW3. The learned advocate also showed his concern why one Alistidia was not called as a witness for the prosecution while she was present all the time when the alleged incident occurred. It is his view that failure to call this material witness had adverse effect on the case for the prosecution. The learned advocate went on to submit that the conduct of PW3 prior to the incident leaves alot to be desired because in the first fight after he lost three teeth, instead of going to hospital for treatment, he came back to the scene and continued to bother the appellant with the alleged stolen money. It is his view that PW3 and the deceased instigated the scuffle and there was no point to blame the appellant.

In concluding to this ground of appeal, the learned advocate submitted that, it is a settled principle of criminal justice that in a criminal

charge, where the prosecution case is based on suspicion, that itself, however strong it may be, is not enough to ground a conviction. He borrowed this principle in the case of **Shaban Mpunzu @ Elisha Mpunzu V.R.**, Criminal Appeal No. 12 of 2002 (unreported). He stated that the general conduct of PW3 was such that he could not safely be said to have been credible enough to be relied upon in grounding a conviction of manslaughter. To strengthen his proposition he referred us to the case of **Casbert Hyera V.R.**, Criminal Appeal No. 57 of 2003 (unreported).

Mr. Mugisha was brief in the alternative count. He submitted that considering the circumstances under which the offence was committed, the sentence of seven years imprisonment imposed to the appellant was harsh and on the higher side. He pleaded with us to consider the fact that the appellant has served a term of five years now which is sufficient, hence we should set him at liberty. When responding to the question posed by the Court, he answered that the maximum punishment for the offence of this nature is life imprisonment but as the circumstances do not suggest that the appellant committed the offence, then the Court should consider a lesser punishment than the one imposed.

In opposing the appeal, Mr. Haruna fully supported the conviction and sentence. He submitted that the offence of manslaughter was proved and the evidence was clear that the appellant was the one who committed the offence. It was his contention that the death of the deceased was unnatural as shown in the evidence of PW2, PW3, PW4, PW5 and exhibit P1, the post-mortem report. He submitted that the evidence of PW1 was also relevant but since it was declared unreliable by the trial court, then he will not refer to it.

The learned State Attorney started with the evidence of PW3. He argued that the evidence of PW3 from page 25 – 29 of the record of appeal clearly shows the participation of the appellant in the commission of the offence. It is his contention that this evidence seriously implicated the appellant with the manslaughter. Reacting on the complaint that PW3 was of unsound mind, he seriously disputed this assertion. He argued that PW3 was medically treated and by the time he was testifying he was of sound mind. He referred us to section 127(1) of the Evidence Act [Cap 6 R.E.2002] (the Evidence Act) and stated that the trial judge assessed him and received his evidence. He argued that when this witness was testifying he gave rational answers and his evidence was not

shaken during cross-examination as he was consistent to what he was telling the trial Court, hence a competent and credible witness. He cited **Goodluck Kyando V.R.** [2006] TLR 367. He stated further that the assessment of credibility of witnesses, in so far as demeanour is concerned is the monopoly of the trial court and also that credibility can be assessed by a second appellate court by looking at the coherence of the testimony of the witness. He strengthened his position by citing to us the case of **Sokoine Range @ Chacha and Another V.R.**, Criminal Appeal No. 198 of 2010 (unreported).

On the allegation that Alistidia was supposed to be called as a witness, Mr. Haruna submitted by referring to section 143 of the Tanzania Evidence Act and argued that it is not the number of witnesses which counts to prove a fact but the quality of their evidence on which, even the evidence of a single witness is sufficient to prove a fact. He cited **Yohanis Msigwa V.R. [1990]** TLR 148 as authority. In his view Alistidia was not an important witness as there was no evidence which suggested that she saw the appellant when assaulting the deceased, hence she was not a necessary witness in the circumstances of the case. That was the position in the case of **Nkanga Daudi Nkanga V.R.**,

Criminal Appeal No. 316 of 2013 (unreported), he argued. Regarding the assertion that PW3 was the relative of the deceased, the learned State Attorney argued that, evidence of a relative if found to be credible is sufficient to sustain a conviction as per the case of **Geofrey Mahenge V.R., Criminal** Appeal No. 248 of 2011 (unreported).

Commenting on the evidence of the appellant at page 46 – 52 of the record of appeal when he exonerated himself with the offence by shifting it to other people who had gathered at the scene, the learned State Attorney submitted that such evidence was not strong and did not raise any reasonable doubt to the prosecution case on reason that there was no evidence to show that the gathered crowd at any point in time assaulted the deceased.

Submitting on the alternative count, the learned State Attorney defended the sentence imposed to be fair. He cautioned that the maximum punishment for the offence of that nature is life imprisonment so the sentence of 7 years imprisonment cannot be considered to be on a higher side. He said that in arriving at the sentence, the trial judge considered all the mitigating factors raised before sentencing the appellant. He considered the antecedents like the age of the appellant,

his past record, his participation in the offence and the prevalence of the offence. In his view, the sentence imposed was neither harsh nor excessive in the circumstances of the case. He reminded us that an appellate court cannot interfere with the discretion of the judge when it comes to sentence unless it is found that the trial judge acted on wrong principle or imposed a sentence which was inadequate or excessive. He referred to the cases of **Bernadeta Paul V.R.** [1992] TLR 97 and **Yasin Maulid Kipanta V.R.** [1987] TLR 183. He rested his submission by praying to this Court not to interfere with the sentence imposed.

In rejoinder, Mr. Mugisha reiterated that PW3 was of unsound mind and did not eye witness the incident so his evidence should not be accorded any weight. Also his evidence should be treated with caution, he being a relative of the deceased, had an interest to serve.

Having considered the rival arguments from either side, the burning issues for determination are; **One**, whether the prosecution has proved the offence of manslaughter beyond all reasonable doubt and **Two**, whether the sentence imposed by the trial court was excessive.

The way we see it, the entire prosecution case rested to a greater extent on the evidence of PW3. The major complaint of the defence is that, PW3 was a person not mentally stable hence his evidence should not be acted upon. We agree with the argument of the learned State Attorney that considering section 127 (1) of the Evidence Act, PW3 was a competent and credible witness and we entirely endorse the findings of the trial court in this aspect. As per the decision of **Sokoine Range** (supra), the assessment of credibility of witnesses in so far as demeanour is concerned is the monopoly of the trial court. However, as a first appellant court we can also look at the consistency of the witness in his testimony and make our own findings. In the instant matter, after having closely followed the testimony of PW3, we have come in the same conclusion reached by the trial court that he was a credible and reliable witness. His evidence was free of contradictions and straight forward, therefore he was a credible witness. We therefore dismiss the assertion by Mr. Mugisha that his evidence should be treated with caution because he was of unsound mind at the material time and also had interest to serve being a close relative of the deceased. That assertion, with

respect, is not true. We don't find reason therefore to alter the finding of the trial court.

Apart from PW3, there was another eye witness one Albina Anaclet (PW1) who was discredited by the trial court as the record of appeal reveals at page 125. We have meticulously gone through the substance of the evidence of PW1. We did not see the logic behind discrediting this witness. To our minds, PW1 gave a very credible evidence which in some material aspects tallies with the evidence of PW3. In law, as a first appellate court we have all rights to re-evaluate her evidence and make our own findings. (See **Christina d/o Damiano V. R**, Criminal Appeal No. 178 of 2012 (unreported). It is common knowledge that where there is a misdirection or non-direction of the evidence or if the lower court has misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact. (See **Peters V. Sunday Post Ltd** (1958) E.A. 424.

In the evidence of PW1, she stated that while peeping through the window, she saw the appellant taking the deceased inside the house and when he came out he was weak and unable to speak. This evidence tallies to that of PW3 who was also at the scene of the crime. We

therefore find that the evidence of PW1 materially corroborates the evidence of PW3. It was therefore not proper to discredit and invalidate the evidence of PW1 for no apparent reason. That was an error on the part of the trial court.

Identification was not an issue but we think that we should discuss it, albeit briefly. All necessary elements for identification of the appellant was established by PW1 and PW3 who knew the appellant prior to the incident. He was a co-worker of PW1 and on the part of PW3 he was a regular customer at the pombe club. Also, prior to the incident, PW3 had a quarrel with the appellant. The source and intensity of the light was mentioned to be from a coiled electric energy server bulb. The issue of identification was not disputed by the appellant because he did not deny that the deceased went to his home where he took him inside.

Another factor to discuss is whether there was justification to reduce the offence charged to a lesser offence of manslaughter. The trial judge at page 131 of the record found that there was no preparation in the incident of hitting the deceased with a fist and the appellant did not even know that the deceased and PW3 will come at his home to inquire about the alleged stolen money so as to form an intention to eliminate

the deceased. The trial court then entertained doubt on the existence of an intention to kill on the part of the appellant and found him guilty of a lesser offence of manslaughter. Due to the circumstances of the case, we think that the trial judge rightly acquitted the appellant of murder and substituted the offence to manslaughter. We therefore agree with the learned State Attorney in his entire submission that the case was proved beyond reasonable doubt.

Mr. Mugisha cited to us the cases of **Shabani Mpunzu** and **Casbert Hyera** (supra) and referred to the principle outlined there. The cited cases are distinguishable with the instant case as in those cases the entire evidence was circumstantial and the prosecution witnesses were not credible, while in the case at hand there were two eye witnesses who saw the appellant taking the deceased into his room and when he took him outside he was weak and unable to speak. The circumstances pertaining to the two cited cases was quite distinct from this cases. That said, we find no merit to this ground. We dismiss it.

We now shift to discuss the issue of sentence, whether it was excessive. It is a general rule that the Court in most cases is not willing to interfere with a sentence imposed by the trial court unless satisfied

that the sentence was manifestly excessive, or that the sentencing court failed to consider a material circumstances, or that it otherwise erred in principle. (See **Yohana Balicheko V.R.** [1994] TLR 5 and **Rajabu Daudi V.R.**, Criminal Appeal No. 106 of 2012 (unreported).

From the record, we think that the trial judge acted leniently after considering all the mitigating factors, advanced by the appellant before imposing the 7 years prison sentence. We should not lose sight that under the provisions of section 198 of the Penal Code, manslaughter attracts a maximum life imprisonment sentence. For the sentence imposed, one cannot claim that it was excessive or harsh in the circumstances of the case. In **Kakuru Oswald @ Mulongo V. R.**, Criminal Appeal No. 433 of 2018 (unreported) this Court held that:-

> *"In view of the above, we think that the trial judge rightly struck a balance of all the factors that obtained in the case, hence that he violated no principles which requires to be considered by a court at the time of passing a sentence. Consequently, we have no justification to interfere with the discretion which was exercised by the court."*

We think that this is exactly what the trial judge did in this case.

We find that in the circumstances of his cases, the trial judge considered all the factors hence there is no point to interfere with the sentence imposed.

From the above reasoning, we find no merit in this appeal. It is accordingly dismissed in its entirety.

DATED at **BUKOBA** this 13th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2019 in the presence of Mr. Brighton Mugisha, leanred Counsel for the appellant and Mr. Shomari Haruna, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL