

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

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

CRIMINAL APPEAL NO. 274 OF 2017

MOHAMED ALLY @ SUDI SUDI APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 30th day of May, 2017

in

Criminal Appeal No. 36 of 2015

JUDGMENT OF THE COURT

26th February & 1st March, 2019

MZIRAY, J.A:

The appellant, Mohamed Ally @ Sudi Sudi, is contesting the judgment of the High Court of Tanzania at Mtwara before which he was charged with and convicted of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on 1.10.2014 at Kipara - Mnento Village within Nachingwea district in Lindi Region, he murdered his mother one Binasa Saidi Omary. Upon conviction, he was sentenced to the mandatory death sentence. Dissatisfied, he has appealed to this Court.

When the appeal came before us for hearing on 26.02.2019, Mr. Rainery Songea, learned advocate, appeared for the appellant who was also present in Court, while the respondent Republic enjoyed the services of Mr Abdulrahman Mohamed, learned Senior State Attorney who was assisted by Mr Yahya Gumbo, learned State Attorney.

The brief background facts of the case were that the appellant and the deceased were son and mother respectively. On the fateful date, that is on 1.10. 2014, during daytime, the appellant and his mother (deceased) were at an initiation ceremony commonly known as unyago. The appellant gave the deceased twenty thousand shillings (Tshs. 20,000/=) for the purpose of buying building materials for her house. The deceased took the said money and surrendered them to her sister ATHUMIN JUMA UNI (PW2) for safe keeping. Later on, without disclosing the reasons, the appellant demanded back his money from the deceased. And for no apparent cause, the appellant took a heavy stick and started assaulting the deceased thoroughly on her ribs and head. The deceased while running shouted for help saying *"Nakufa, Sudi ananipiga, ananiua, ananipiga mbavuni na kichwani"*, literally meaning, *"I am dying, Sudi is beating me, he is killing me, he is beating me in the ribs and head"*. The appellant persued her and

continued assaulting her despite being intervened by his relatives who gathered at the scene. PW2, who was among the relatives who came out to rescue her returned back the appellant's money but the appellant did not stop assaulting the deceased. He continued assaulting her until she fell down unconscious.

Having been satisfied to what he did, the appellant took to his heels but luckily he was apprehended before reaching far and conveyed to Nachingwea Police Station. The deceased was also taken to Mnero Mission Hospital for treatment but unfortunately, she passed away on the same day. The deceased's body was medically examined and the autopsy report revealed that the cause of death was due to "*SEVERE HEAD INJURY*".

In his defence, the appellant under oath denied any involvement in the alleged murder. He refuted the prosecution evidence implicating him that he murdered his deceased mother.

At the commencement of the hearing, Mr Songea, learned advocate, abandoned the memorandum of appeal which was earlier filed by the appellant in person on 15.1.2018 and opted to proceed with the supplementary memorandum of appeal he filed on 24.1.2019. The said

memorandum of appeal raised two grounds; **one** that the trial court erred in law and fact by denying the appellant the right to a fair trial as he was convicted before he gave his defence; and **two** that the trial court erred in law and fact by convicting and sentencing the appellant while the case was not proved beyond reasonable doubt.

Submitting on the first ground of appeal, Mr Songea pointed out that the learned trial judge at page 32 of the record exhibited bias against the appellant when he concluded, in his Ruling on whether there was a case to answer which he stated that **there was evidence that the appellant committed the offence.** He argued that the remarks denied the appellant the right to a fair trial as it had the effect of convicting the appellant before he gave his defence. Relying on the cases of **Kabula Luhende v. Republic**, Criminal Appeal No. 281 of 2014, **Joseph Lushika @ Kusanya and Another v. Republic**, Criminal Appeal No. 18 of 2014 and **Njile Mpemba v. Republic**, Criminal Appeal No 419 "B" of 2013, (all unreported), Mr. Songea urged the Court to find and hold that the proceedings were a nullity in the eyes of the law. For that reason, he requested the Court to invoke its power under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (the AJA)

to quash those proceedings, set aside the sentence which was imposed and order a retrial.

Arguing the second ground of appeal in the alternative, he submitted that, the trial judge failed to appreciate that at the time of the commission of the offence the appellant was under the influence of alcohol to the extent that he did not understand what he was doing, hence he could not form the intention to kill the deceased. He contended that the appellant was unable to appreciate the nature of the offence he was committing. He argued that had the trial judge properly directed himself on the evidence adduced, he would have found that the appellant was drunk at the time of the incident and that by reason of intoxication he could not form the intention to kill the deceased. The learned advocate was of the view that on the basis of the evidence on the record, the defence of intoxication was available to the appellant in terms of the provisions of section 14 of the Penal Code.

In response to the first ground of appeal, Mr Mohamed, learned Senior State Attorney submitted that the words which the trial judge he used in his Ruling of no case to answer at page 32 were in compliance with the provisions of section 293 (2) of the Criminal Procedure Act, Cap 20 R.E

2002, (the CPA). He added that since the appellant was given his right to defend himself and his defence was considered in the decision of the trial judge, then, the appellant was not prejudiced as alleged.

Submitting on the alternative ground of appeal, Mr Mohamed, learned Senior State Attorney, vehemently countered the submissions. He maintained that the appellant's intention to commit the offence can be inferred from his conduct prior to and after the commission of the offence. In this regard, he said the conduct of the appellant when the offence was committed shows that he knew what he was doing. He submitted that the words he uttered before "***wewe lazima nikumalize***", and the weapon he used in assaulting his deceased mother indicate that his motive was to terminate her life and nothing else. Taking all that into account and considering the conduct of the appellant after the incident on which he attempted to run, Mr. Mohamed stressed, was not the conduct of an intoxicated person within the meaning of the provisions of section 14 of the Code. He urged that the defence of intoxication was properly rejected.

In determining the first ground of appeal, we seek guidance in section 293(2) of the CPA, which provides:

*"293(2) when the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that **there is evidence that the accused person committed the offence** or any other offence of which, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused person of his right-*

- (a) to give evidence on his own behalf; and*
- (b) to call witnesses in his defence,*

*and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter on **his defence** save where he does not wish to exercise either of those rights". (Emphasis supplied).*

In **Chrizant John v. R**, Criminal Appeal No. 313 of 2015(unreported) we explained that:

"the broad purpose of [s.293 (2)] is essentially to let the accused know that he has the right to defend himself. That includes the manner in which to do so, as well as the right to call witnesses, if any".

We agree with Mr. Mohamed that at the close of the prosecution case, on 25/5/2017, the words the trial judge used in his Ruling to the effect that "***there is evidence that the accused committed the offence***" were in compliance with the provisions of section 293 (2) of the CPA. Further to that, since the appellant was permitted to defend himself, given his right to call witnesses and his defence considered in the decision of the trial judge, then, the issue of unfair trial cannot arise. That said, the first ground is of no merit, the same is dismissed.

As to the issue whether the defence of intoxication was available to the appellant or not, we make reference to the views expressed by the trial judge in his judgment:-

"...the accused reacted saying "mimi nataka nimmalize" meaning that "I want to finish her". He then picked a heavy stick which was with him and hit the deceased on the head. PW2 was also assaulted on his hand in the process.

PW2 further said that there was a bright moonlight and she could see him beating her on the head with the heavy stick clearly. Other people came. Among those who came and met the deceased on the ground and accused at the

scene were PW4, Turabi Abdallah and PW3, Issa Issa Pengo.

It was evidence of PW3 and PW4 that they heard the deceased crying and rushed at the house of PW2. They met the deceased on the ground crying. PW3 said that he met the accused at the scene holding a heavy stick (gongo). PW4 said he saw the deceased on the ground with blood. The accused attempted to run away. He ordered people to arrest him. He could not reach far, he could run only for 100 footsteps. He was arrested by PW3 and another boy”.

All the foregoing considered, it is clear that when committing the offence, the appellant was in his right senses. He had not been impaired by the alcohol he had consumed.

The law on that subject matter is well settled. Section 14 of the Penal Code provides the way forward. In general, in terms of section 14 (1), intoxication does not constitute a defence to any criminal charge save in circumstances elaborated under that provision of the said section. Relevant to the appeal at hand are the provisions of Section 14 (2) (a) and (b) of the Penal Code. They state thus:-

"intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act.... complained of did not understand what he was doing and –

- (a) The state of intoxication was caused without his consent by the malicious or negligent act of another person; or*
- (b) The person charged was by reason of intoxication, insane temporarily or otherwise at the time of such act or omission..."*

(Emphasis provided).

The evidence as properly analyzed by the trial judge leaves no doubt that the alleged state of intoxication on the part of the appellant was voluntary thus section 14 (2) (a) is inapplicable in the circumstances of the case. In so far as Section 14(2) (b) is concerned, having considered the points raised by the trial judge, this provision does not avail reasonable defence to the appellant either.

The trial judge did as well consider the issue of malice aforethought, a necessary ingredient in establishing criminal liability in an offence of this kind. We have, nevertheless, considered the trial judge's analysis as to whether malice aforethought was established. We came to the conclusion

that the trial judge properly directed himself on this subject. It is worth noting that according to the evidence on record, before committing the offence, the appellant had stated that "**wewe lazima nikumalize**". He executed that intention by killing the deceased. Taking into consideration the uttered words and the weapon he used to assault his mother, all that is a clear proof of malice aforethought.

In conclusion therefore, having considered the above, we are satisfied that this appeal has no merit. It is dismissed in its entirety.

DATED at MTWARA this 28th day of February, 2019.



I.H. JUMA
CHIEF JUSTICE

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A handwritten signature in blue ink, appearing to read "A.H. Msumi", is written over the printed name.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL