IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 39 OF 2017

MARK s/o KASIMIRI ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwaimu, J.)

dated the 18th day of February, 2016
in
Criminal Sessions Case No. 68 of 2013

JUDGMENT OF THE COURT

16th & 24th March, 2020

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. It was alleged by prosecution that, on 19th December, 2011 at Magugu village within Babati District in Manyara region, the appellant did murder one Mwamvua d/o Mussa, the deceased. After a full trial he was convicted and sentenced to suffer death by hanging.

In order to appreciate, the gist underlying the apprehension, arraignment and conviction of the appellant it is crucial to briefly state the background as follows: From a total of five witnesses, the prosecution case was to the effect that, on 19/12/2011 the appellant using a handle of the hoe did strike the deceased on the head and the left arm and she severely sustained injuries. She was rushed to the Mrara hospital where she succumbed to death before being taken to KCMC hospital as a referral case. It was the prosecution account that, the deceased was appellant's aunt and they both resided in the same house at Magugu village within Babati District in Manyara. On the fateful day, Hawa Ismail (PW3) and Tabu Amiri (PW4) who happened to be playing nearby the deceased's residence heard a heavy sound blow from the direction of the deceased's residence, indicating that something had fallen down. Having attempted to rush to the scene of crime, they met the appellant who told them that there was nothing wrong and they resumed to play.

Later, they still heard an alarm and rushed at the scene of crime only to find the deceased injured lying down outside her kitchen while the appellant who held a hoe handle stood beside her. On seeing them, the appellant ran to hide in an unfinished structure. Then, PW3 and PW4 raised

alarm which was responded to by Amina Omari Sefu (PW5) who was one of the deceased's neighbour. According to PW5 while rushing at the scene of crime she met the appellant leaving the scene of crime in all smiles on being asked as to why he was leaving. PW5 went further to describe his attire at the scene of crime, testifying that the appellant wore a black hat *barghashia,* short pants and held red sandles in his hands.

Dr. Cornel Huyaa (PW2) who conducted a postmortem examination and in his oral account, established cause of death to be head injury due to depressed fracture of the skull and fracture of the left radial ulna and a wound on the left hand. According to E.7152 D/Cpl Masanja (PW1) the investigator, the appellant was apprehended by a group of people before being taken to the Police Station.

In his defence, the appellant denied to have killed the deceased. He raised the defence of *alibi* to the affect that on the fateful day, he was in Gichameda village. Apart from denying to have known the deceased and PW5, he claimed to have been arrested on 20/12/2011 at Miweseni area by the Police whereas the deceased resided at Mbugani area. However, during cross-examination, he testified to know the deceased who used to visit Gichameda because there were plenty of vegetables.

Believing the prosecution account to be true, as earlier stated, the trial court convicted the appellant having concluded that the circumstantial evidence linked him with the killing incident.

Undaunted, the appellant has appealed to the Court. In the Memorandum of Appeal, he has raised nine grounds of complaint as follows:

1. That, the trial court erred in law and fact to base the conviction of the appellant on strong suspicion.
2. That, the trial court erred to act on the evidence of PW3 and PW4, witnesses of tender age without having initially complied with section 127 (2) of the Evidence Act **[CAP 6 RE.2002].**
3. That, the trial court erred in law and fact to convict the appellant in the absence of direct evidence.
4. That the trial court wrongly convicted the appellant whereas the evidence misapprehended as the charge was not proved beyond reasonable doubt.
5. That, the trial court erred in law and fact to convict the appellant having relied on the Post-mortem Examination report which was not read out at the trial which was vitiated.

6. That, the trial court erred in law and fact to convict the appellant acting on uncorroborated prosecution evidence on account those who arrested the appellant were not paraded as witnesses.

7. That, the trial court erred in law and fact having wrongly admitted the handle of the hoe alleged to have been used to commit the offence while there was no chain of custody indicating its custody from the date it was picked at the scene of crime up to being tendered before the court.

8. That, the trial court erred in law and fact to convict the appellant basing on evidence of illegal search and un-procedural search report.

9. That, the trial court erred in law and fact to convict the appellant basing on extraneous matters and not on the evidence on the record.

At the hearing, the appellant was represented by Mr. Michael Lugaiya, learned counsel whereas the respondent Republic had the services of Ms. Rose Sule and Ms. Adellaide Kasala, both learned Senior State Attorneys.

Before proceeding to argue the appeal, Mr. Lugaiya abandoned the 2nd and 8th grounds. He opted to argue together the 1st, 3rd, 4th and 9th

grounds, the 5th ground separately and lastly the 6th and 7th grounds together.

In arguing the 1st,3rd, 4th and 9th grounds of appeal which constitute the initial cluster Mr. Lugaiya faulted the trial court to have relied on the evidence of PW1, PW2 and PW5 who had availed varying dates on the occurrence of death of the deceased. He viewed this to be a contradiction which clouded the prosecution case with a shadow of doubt. To back up this proposition he cited the case **MOHAMED SAID MATULA VS REPUBLIC,** [1995] TLR 3. Moreover, Mr. Lugaiya submitted on what he considered to be uncertainty surrounding the manner in which the alarm was raised and responded to. He contended that, while PW3 and PW4 testified to have rushed to the scene responding to alarm raised, PW5 recalled to have rushed thereto responding to alarm raised by PW3 and PW4. As such, he argued that it is not known who raised and who responded to the alarm. He added that, since according to the sketch map PW5 was within the vicinity of the scene of crime and could see what actually transpired, it is doubtful that she had rushed to the scene of crime following the alarm raised.

In relation to the 5th ground of appeal constituting the second cluster, Mr. Lugaiya faulted the trial court for not having read out the PostMortem Examination report (Exhibit P3) following its admission in the evidence. He contended that, the omission adversely affected the appellant who was not made aware of the contents of Exhibit P3. He thus argued that, the Postmortem Examination report was wrongly acted upon by the trial court to convict the appellant and thus urged us to expunge it from the record.

As for the 6th and 7th grounds, the appellant's counsel faulted the manner of storage and custody of the handle of hoe (Exhibit P2) the offensive weapon. On this he argued that, while it is not known as to who did PW5 entrust the handle at the Police, to make matters worse, PW1 testified to have seen it before Judge Massengi during the initial trial which was nullified. In this regard, Mr. Lugaiya contended that such prosecution account cast doubt on the prosecution case. To back up this proposition he cited to us the case of **GABRIEL SIMON MNYELE VS REPUBLIC**, Criminal Appeal No. 437 of 2007 (unreported). Ultimately, Mr. Lugaiya urged us to allow the appeal, quash the conviction, set aside the sentence and order the immediate release of the appellant.

On the other hand, Ms. Kasala opposed the appeal arguing that the circumstantial evidence availed by PW3, PW4 and PW5 irresistibly points to the guilt of the appellant substantiating that he was the last person to be seen with the deceased which conclusively tells that, he is the one who struck her and caused death. She referred us to the case of **HAMIDU MUSSA TIMOTHEO AND MAJID MUSSA TIMOTHEO** [1993] TLR 125. Responding to the argument by the appellant's counsel who faulted the evidence of PW5 on having rushed to the scene of crime following an alarm raised, challenged the same as baseless contending that, PW5 heeded to the call by PW3 and PW4 after they saw what had befallen the deceased. In addition, she urged us to expunge the sketch map of the scene of crime due to its irregular admission as it was not read out at the trial.

She submitted on the complaint on the varying on the dates of occurrence of the incident as minor as it did not go to the root of the matter. She referred us to the case of **ARMAND GUEHI VS REPUBLIC**, Criminal Appeal No. 242 of 2010 (unreported). Besides, she added that though the prosecution witnesses mentioned the date when the deceased succumbed to death, the 19/12/2011 as correctly reflected in the charge is the date when the deceased was assaulted and subsequently died.

The learned Senior State Attorney conceded to the 5th ground of complaint on the impropriety of the Post Mortem Examination report that it deserves to be expunged because it was not read out at the trial. However, she pointed out that, the oral account of PW2 a medical doctor suffices to prove the occurrence of the death of the deceased. On the alleged impropriety of the storage and custody of the handle of the hoe used to strike the deceased, she argued that it did not prejudice the appellant because the handle was tendered by PW1 as an exhibit at the trial.

Regarding the appellant's defence, Ms. Kassala contended that it leaves a lot to be desired. On this she submitted that, although initially the appellant denied to know the deceased, when cross-examined he shifted the goal post stating to have known the deceased. She concluded her submission by urging the Court to dismiss the appeal and uphold the conviction of the appellant because the charge was proved against him.

In rejoinder, Mr. Lugaiya reiterated what he submitted earlier on.

As earlier intimated, the learned trial Judge, believed the evidence of PW3, PW4 and PW5 to be credible and concluded what is reflected at page 85 to 86 of the record of appeal as follows:

"Could the circumstantial evidence adduced by the prosecution held to have proved the offence against the accused? I would say yes. Firstly, there is evidence of PW2, PW4 and PW5. PW3 and PW4, who were the first persons to respond to the scene, saw the accused holding the hoe handle and when they raised alarm, the accused dropped it near the deceased and ran away. Secondly, when PW5 responded to the alarm raised by PW3 and PW4, she met, on her way to the scene of crime with the accused who was rushing away therefrom. The evidence points irresistibly to the guilt of the accused. The accused was the only person who was seen at the place where the deceased was assaulted".

Moreover, the learned trial Judge attended to the defence of *alibi* raised by the appellant as follows:

"Nevertheless, his defence taken into consideration, I could not believe it. There was ample evidence that the accused was well known by PW3, PW4 and PW5 who were neighbours of the late Mwamvua and that the accused lived there and called the deceased aunt. Further, although the accused in the first place denied to have known the deceased,

during cross-examination he admitted that he knew her."

We have carefully considered the rival arguments and the record before us and the issues for determination are whether the trial was flawed by the procedural irregularities and whether the charge was proved against the appellant.

We opt to initially attend to the complaint on the alleged variance of the date of death of the deceased person as both learned counsel locked horns on the matter. This was attributed to the evidence of PW1 who stated that the deceased died on 21/12/2011 while being taken to KCMC Hospital while PW5 stated the date to be 22/12/2011. This need not detain us because it is settled law that the date on which the unlawful act was committed, is the date to be stated in the charge of homicide and not the date on which death occurred. See – **REPUBLIC VS LAIJO s/o MGOMBA** [1946] E.A.C.A 156 and **MILIARA s/o MIYEKA VS REPUBLIC** [1951] 18 E.A.C.A. In the case under scrutiny, the evidence of PW3, PW4 and PW5 show that, the deceased was struck by the appellant on 19/12/2011 as stated in the charge sheet which cures the alleged variation in the testimonial account of PW1 and PW5. As such, the perceived contradiction

is a *non stata and* the appellant was not prejudiced. The case of **MATULA MOHAMED SAID VS REPUBLIC** (supra) cited to us by the appellant's counsel is distinguishable from the case at hand. We say so because apart from the Court holding that it is incumbent for the trial court to consider the contradictions and inconsistencies, the issue on variance of dates on the occurrence of death in the prosecution evidence in homicide cases neither arose nor was it discussed by the Court.

Furthermore, the complaint on the custody and storage of the handle hoe (Exhibit P2) is in our considered view baseless. We say so because, according to the evidence of PW3 and PW4, they both at pages 59 and 64 of the record saw the appellant holding the handle which they recognized. Similarly, PW5 who saw and picked the handle from the scene of crime testified on its graphics having stated that it was rough and not smoothened. In addition, it is PW5 who took the handle to the Police Station and it was later tendered as exhibit P2 at the trial by PW1 as reflected at page 52 of the record of appeal. Therefore, PW1's account to have seen the handle in the trial before Massengi, J which was nullified, did not in any way vitiate the trial. It would have been a different position if the handle was not exhibited in the evidence in the trial which is a subject

of this appeal. In this regard, the case of **GABRIEL MNYELE VS REPUBLIC** (supra) relied upon by the appellant's counsel has been with respect, cited out of context because the Court did not address any issue on the storage and custody of the offensive weapon used to commit the offence. Hence it is distinguishable.

Regarding the Post Mortem Examination report (Exhibit P3). Indeed, both learned counsel were at one about the anomaly surrounding it because it was not read out following its admission in the evidence. We agree with the learned counsel proposition and expunge Exhibit P3 because it is settled law, that failure to read out documentary exhibits is irregular as it denies an accused person an opportunity of knowing and understanding the contents of the exhibit. See – **NKOLOZI SAWA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 574 of 2016 and **JUMANNE MOHAMED AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 534 of 2015 (both unreported). Notwithstanding the aforesaid, the occurrence of death was proved by the oral account of PW2 the medical doctor as reflected at page 55 of the record of appeal as follows:

> " *On 22/12/2011 I conducted a Postmortem at Mapeya Village. It was a female body. On top of the*

head I found a wound. There was also a wound on her left hand...."

Moreover, at pages 59 and 64 of the record of appeal, the evidence of PW3 and PW4 was positive to the effect that, the deceased who was lying down injured had a wound on the head and her hand was broken. Such evidence is cemented by testimonial account of PW5 as reflected at page 67 to 68 of the record as follows:

"When I arrived I found Mwanamvua lying down his face down. The left hand was broken and he had a swelling on the top of her head."

Also, the identity of the deceased's body is well covered in the evidence of PW3, PW4 and PW5, the deceased's neighbours who mentioned her by the name of Mwamvua or Bibi Mwamvua.

Therefore, the procedural flaws at the trial did not vitiate the trial which takes us to the determination of the second issue on the sufficiency or otherwise of the prosecution evidence against the appellant.

Since it is settled that the deceased died because of unnatural cause the follow up question is who is responsible with the killing. It is not in dispute that none of the prosecution witness saw the appellant hitting the

deceased and as such, there is no direct evidence. As to the circumstantial evidence, while Mr. Lugaiya argued that the chain link of the circumstantial evidence was broken and it is not reliable, Ms. Kasala placed heavy reliance on such evidence contending that it sufficiently points to the guilt of the appellant. In resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of the circumstantial evidence to convict which include: -

i. That the circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established, and that those circumstances should be of a definite tendency unerringly pointing towards the guilty of the accused, and that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and non-else (See **JUSTINE JULIUS AND OTHERS VS REPUBLIC,** Criminal Appeal No. 155 of 2005 (unreported)).

ii. That the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt; and that before drawing

inference of guilt from circumstantial evidence, it is necessary to be sure that there are no ex-existing circumstances which would weaken or destroy the inference [See, **SIMON MSOKE VS REPUBLIC,** (1958) EA 715A and **JOHN MAGULA NDONGO VS REPUBLIC,** Criminal Appeal No. 18 of 2004 (unreported)].

iii. That the accused person is alleged to have been the last person to be seen with the deceased in absence of a plausible explanation to explain away the circumstances leading to death, he or she will be presumed to be the killer. [See - **MATHAYO MWALIMU AND MASAI RENGWA VS REPUBLIC** (supra).]

iv. That each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. [see **SAMSON DANIEL VS REPUBLIC,** (1934) E.A.C.A. 154].

v. That the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. [See **SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC,** Criminal Appeal No 12 of 2002(unreported)].

vi. That the facts from which an adverse inference to accused is sought must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. (See **ALLY BAKARI VS REPUBLIC** (1992) TLR, 10 and **ANETH KAPAZYA VS REPUBLIC,** Criminal Appeal No. 69 of 2012 (unreported).

We shall be guided by the said principles to establish whether or not the available circumstantial evidence irresistibly points to the guilt of the appellant.

It is glaring that; the fateful incident was committed during day time. Also according to the testimonial account of PW5 the deceased's neighbour from pages 67 to 68 of the record of appeal, the deceased was the appellant's aunt and resided in the deceased's house which tells that he was not a stranger to the identifying witness who knew the appellant before the fateful incident and she managed to describe him at the scene of crime. Moreover, on the fateful day, PW5 who had rushed to the scene of crime heeding to alarm raised PW3 and PW4, saw the appellant at the corner running away from the crime scene. This corroborates the account of PW3 and PW4 who were the first persons to arrive at the scene and saw what had befallen the deceased who was lying down injured on the head

and hand while appellant stood beside her holding the handle of the hoe. Besides, the oral account by PW2 the doctor to the effect that the deceased had a wound on the head and the left hand, further confirms that the deceased was struck by the appellant who used handle of the hoe he was found holding at the scene of crime. The cumulative circumstances of the prosecution evidence form a chain so complete which irresistibly point to the guilt in the absence of plausible explanation by the appellant to exculpate himself from the death of Mwamvua due to: **One,** on 19/12/2011 it is the appellant who was last seen with the deceased person and **two,** the appellant killed the deceased having struck her on the head which caused death.

We wish to add that, in the present matter the conduct of the appellant leaves a lot to be desired. It really taxed our minds why the appellant initially told PW3 and PW4 that nothing was wrong when they first heard a heavy blow sound from the direction of the deceased's house. In our considered view, such conduct was indeed the appellant's calculated move to have the perpetrator of the crime unnoticed. This corroborates the prosecution account that the appellant is the culprit and that is why he

took all the pain to prevent PW3 and PW4 from initially accessing the scene of crime to see the heinous act.

Since it is settled that it is the appellant who killed the deceased, the next question for consideration is whether or not the appellant killed the deceased with malice aforethought. In the case of **ENOCK KIPERA VS REPUBLIC,** Criminal Appeal No. 150 of 1994 (unreported) the Court among other things held:

> *" ...usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained by various factors including the following:*
>
> *The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing."*

In the light of the cited decision, in our considered view, the answer as to whether the appellant killed the deceased with malice aforethought can be discerned from the blows afflicted on the deceased on the head

which was a volatile area and his conduct as he had planned and proceeded to accomplish his evil killing mission without being noticed. Thus, like the trial court we find that the appellant was justifiably convicted to have murdered the deceased.

In view of what we have endeavoured to demonstrate we find the appeal not merited and proceed to dismiss it.

DATED at **ARUSHA** this 23rd day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2020 in the presence of Mr. Michael Rugaiya counsel for the Appellant and Ms. Adelaide Kasala, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T)