IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANGESI, J.A. And SEHEL,J.A.)

CRIMINAL APPEAL NO. 94 OF 2018

EMMANUEL ANDREA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)

(Kitusi, J.)

dated the 16th day of March, 2018
in
HC. Criminal Session Case No. 89 of 2015

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JUDGMENT OF THE COURT

4th & 27th May, 2020

SEHEL, J.A.:

The appellant, Emmanuel Andrea, was charged with and convicted of the offence of Murder contrary to Section 196 of the Penal Code. It was alleged that on the 16th day of October 2013 at Mtoni Sabasaba area within Temeke District in Dar es Salaam Region, the appellant murdered one Matrida Mariko. He was sentenced to the mandatory sentence of death by hanging. He is now appealing against both conviction and sentence.

Briefly, the facts of the case were as follows: on that fateful day at around 8:00 pm, Flora Emmanuel Mapunda (PW3) and Tatu Zulu Mapunda (PW4) were at home in the kitchen cooking buns together with their friend and neighbor one Matrida Mariko (the deceased). Thereby came the appellant carrying a bucket that had petrol in it. According to PW3, after the appellant entered, he closed the door and started pouring the petrol under the door, on the mattress, the sofa and all over the clothes. He then fetched a match from his pocket and lit the fire at the doorstep.

PW4 also gave a similar account on how the fire started. She stated that after the appellant entered in the house, he closed the door, poured petrol on the floor, bed and clothes and then fetched a match and set the fire at the doors. Thereafter, he went to sit on the bed and watched the fire grow. They cried for help and that is when Flora Inyasi (PW2) and others came to their rescue.

PW2 who was at her brother's grocery selling drinks, heard the alarm. It was her evidence that the grocery neighbours the appellant's residence and shop wherein the appellant was selling foodstuffs. She said, in that house, the appellant was residing with his wife, Selina John Nkwera (PW1) and three children, PW3, PW4 and Prosper. She recounted the

events that occurred on that fateful day that at around 09:00pm, she heard the appellant arguing with PW1 over their child Prosper. She intervened so as to rescue PW1. But some few minutes later when she was with the mother of the deceased one Jenifer, they saw the appellant carrying a small pail and he told them that he was going to kill the children and himself. PW2 did not bother but suddenly she heard an alarm that there was fire. When they looked at PW1's house, they saw a big fire and smoke coming from there. They also raised an alarm and got assistance from other people. They went to rescue the children. Upon their arrival, they broke the door thus the appellant ran out and disappeared.

PW1 on her part told the trial court on that day she had a fight with the appellant over their son Prosper. The fight ended after the neighbours came to her rescue. She thus went to the police to report the matter. While there, her daughter, PW4 arrived and told her that the appellant had set fire on them. The police helped them with a motorist to take the children to the hospital for treatment. The children were taken to Barrack hospital, later transferred to Temeke hospital and then Muhimbili Hospital where the deceased met her death on 25th October, 2013.

The findings of Dr. Emmanuel Zebadia Moshi (PW5) who performed an autopsy on the deceased body was that a body of an African girl of about 5 to 8 or 9 years had 30% burns over both feet up to the soles and both hands as well as her face and the intensity of that burn was second degree. The cause of death was septicemia which led to shock. The septicemia was caused by the burn wounds being infected. The doctor recognized the postmortem examination report, seemingly that it was tendered during the preliminary hearing as Exhibit P2. We will come back to that issue concerning Exhibit P2.

The investigative officer, E. 1232 D/CPL Israel (PW6) told the trial court on how he conducted the investigation of the case, drew a sketch map, Exhibit P1 and on 6th January 2014 he went to Mlandizi to arrest the appellant. He also said that he interrogated the appellant on 8th January, 2014.

The appellant in his sworn defence completely denied to have been at the scene of the crime. He was at Mlandizi area attending to his other shop. He also insinuated that the fire could have been caused by the children mishandling the stove that was used in making buns.

The lady and gentleman assessors returned a verdict of guilty. They were of the opinion that since PW3 and PW4 saw the appellant pouring petrol in the room and set it on fire and he was seen running from the fire by PW2 then the prosecution proved its case beyond reasonable doubt that the appellant was at the scene of the crime.

The learned trial judge after objectively evaluating the entire evidence before him found that the defence of *alibi* was raised in contravention of section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E 2002. He nevertheless considered it and found that it was an afterthought since none of the prosecution witnesses who testified that the appellant was at the scene of the crime was cross - examined on that fact. Having ruled out the defence of alibi, the learned trial judge concurred with the assessors that it was the appellant who set the room into fire which fire caused the death of the deceased. Hence the appellant was found guilty, convicted of murder and sentenced to death by hanging.

Aggrieved, the appellant initially lodged a five point memorandum of appeal that:

1. *The learned trial judge erred in law and in fact by convicting the appellant relying on the uncorroborated evidence of PW3 and PW4 who are witnesses of their own interests to serve.*

2. *Having regard to the evidence on record and the circumstances of the case, the learned trial judge grossly misdirected himself in law and in fact in failing to hold that there was a possibility that the fire outbreak might have been caused by PW3 and PW4 who without having experience were cooking burns inside the room.*

3. *The learned trial judge erred in law and in fact in convicting the appellant basing on Exhibit P2 (Report on Postmortem Examination) without taking account that at preliminary hearing it was listed in a memorandum of the matters agreed and it was not tendered before the court by PW5 allegedly to have conducted postmortem examination.*

4. *The learned trial judge erroneously disregarded the defence of Alibi raised by the appellant hence led the court to reach the wrong conclusion.*

5. *The learned trial judge erred in fact and in law by finding the appellant guilty by relying on inconsistence*

and contradictory evidence led by prosecution witnesses.

Later on 21st August, 2019 he filed a supplementary memorandum of appeal comprising of six grounds thus:-

1. *The learned trial judge erred in law and in fact by convicting the appellant relied on the untainable testimonies of PW1 and PW2 which differed with their former statements they have recorded at police station the very same day at page 30 lines 3-5 and page 33 lines 11-13 when cross-examined by the defence counsel contrary to the procedure of law.*

2. *The learned trial judge erred in law and in fact by convicting the appellant while the trial was un-procedurally conducted by two different judges without justified reasonable cause before Hon. E. Mkasimongwa, J who was assigned to preside the trial and preliminary hearing at pages 18-24 and another part/the rest of the trial of PW1, PW2, PW3, PW4, PW5, PW6 and DW1/appellant up to the judgment of the court from pages 25-102 was heard/presided before Hon. I.P. Kitusi, J. contrary to the procedure of law which requires the same judge/justice who conducted the preliminary hearing to preside on the trial.*

3. *The learned trial judge erred in law and in fact by convicting the appellant while deprived of an opportunity to mitigate to the appellant and the termed of 16/03/2018 at page 102 does not show the sentence of death which imposed to the appellant contrary to the procedure of law.*

4. *The learned trial judge erred in law and in fact by convicting the appellant relied on merely implication assertions of PW1 and PW2 which were full of inconsistencies and contradictions while the prosecution side failed to summon its crucial witness (the victim's father namely Mr. Kessy) to be attested before the trial court for the balance of probability contrary to the procedure of law.*

5. *The learned trial judge erred in fact and in law by convicting the appellant relied on the un-procedural testimony of PW3, a child of tender year 12 yrs old while the trial court failed to conduct a proper voire dire test as the questions put to her PW3 at page 35 lines 2-5 were not rational to justify that PW3 possesses sufficient intelligence to understand the nature of an oath and the duty of speaking the truth contrary to the procedure of law.*

6. *The learned trial judge erred in law and in fact by convicting the appellant relied on the un-procedural*

testimony of PW4, a child of tender age while the trial court erroneously failed to justify her credibility before the reception of her evidence at page 39 while the trial court wrongly/un-procedurally believed that, PW4 was 15 years old see page 39 lines 3-6 without any purported document i.e birth certificate.

Before us the appellant who was following the proceedings through video conference was represented by Mr. Jacktone Koyugi, learned advocate, whereas the respondent Republic was represented by Ms. Doroth Massawe, learned Senior State Attorney.

Mr. Koyugi prefaced his submission by informing the Court that he drops grounds 1 and 4 in the memorandum of appeal and ground number 1 in the Supplementary memorandum of appeal. He further explained the methodology he was going to adopt in arguing the remaining grounds of appeal. It is apposite to point out that in the course of submitting the remaining grounds, Mr. Koyugi further abandoned ground number three of the memorandum of appeal after noting that although the postmortem report, Exhibit P2 was not admitted as evidence during trial there is independent evidence on the cause of death coming from PW5, the doctor who performed the autopsy over the deceased body.

Admittedly, during the preliminary hearing the prosecution prayed to tender the postmortem examination report. The defence had no objection but the record is silent as to whether it was admitted or not. Further, the document itself is not marked as an Exhibit. Be as it may, and correctly observed by Mr. Koyugi there is independent evidence of PW5 establishing the cause of death of the deceased.

Mr. Koyugi after having been availed with the original court file, he withdrew the third ground on the supplementary memorandum of appeal as he observed that the sentence was imposed to the appellant by the trial court.

The remaining grounds of appeal were clustered into three main issues. One, the prosecution failed to prove that it was the appellant who caused the fire to the standard required. Two, the evidence of PW1 and PW2 was full of contradictions and inconsistencies. Lastly, the *voire dire* was not properly conducted before the reception of the evidence of PW3 and PW4.

Submitting on the cause of fire, Mr. Koyugi forcefully submitted that the accidental cause of fire cannot be ruled out since the two children, PW3 and PW4 were left alone to cook buns. He argued that PW3 was a

child of 8 years and PW4 was only 10 years old and they both said that it was their first time to be left alone to cook buns. Therefore, Mr. Koyugi concluded that the fire was caused by the children and not the appellant.

Regarding contradictions and inconsistencies, he concentrated on the evidence of PW2 alone while abandoning on the evidence of PW1. He argued that PW2 was not a reliable witness. He pointed out that at the first instance, at page 32 lines 1 and 2 of the record of appeal, PW2 said that she witnessed the fight between PW1 and the appellant over the child but later, at page 33 line 14 of the record of appeal, she changed her story that she did not witness the fight. To Mr. Koyugi's view although that evidence does not go to the root of the case but casts doubt on her credibility.

Regarding *voire dire*, the learned counsel argued that the trial court flouted the procedure of conducting *voire dire* test. He contended that PW3 was a child of 12 years old but her evidence was received without conducting a proper *voire dire* test as required by section 127 (1) and (2) of the Evidence Act, Cap. 6 RE 2019 (the Act). Stressing on the point, Mr. Koyugi argued that the trial court ought to have made an inquiry and finding that the child understands the nature of an oath or she is

possessed of sufficient intelligence and understands the duty of speaking the truth which it did not do so. He argued that since the reception of PW3's evidence flouted the *voire dire* procedure then her evidence is of no evidential value and should not have been acted upon by the trial court. He therefore prayed for the same to be expunged from the record.

He then concluded that if the evidence of PW3 is expunged there remained the evidence of PW4 which cannot sustain the conviction because she had her own interest to serve as she was on her mother's side. He thus urged us to allow the appeal, quash the conviction and set aside the sentence.

In response, Ms. Massawe resisted the appeal. She contended that the cause of fire was well established by PW3 and PW4 that the two prosecution witnesses told the trial court on how the fire started. Ms. Massawe submitted that PW3 and PW4 were together in a room, cooking buns with the deceased. These two witnesses told the trial court that they saw the appellant entering the room, holding a container that in it had petrol. The appellant poured the petrol in the room and lit the fire by using a match he fetched from his pocket. It was the learned State Attorney's

submission that going by the evidence of PW3 and PW4, it was the appellant who started the fire.

Regarding contradictions, the learned State Attorney readily conceded that the evidence of PW2 has contradictions. Nonetheless, she argued, the contradiction did not shake the prosecution case against the appellant since the evidence of PW3 and PW4 suffices to find the appellant guilty.

On *voire dire*, she submitted that the *voire dire* appearing at pages 34 to 35 of record of appeal was in compliance with the law as applicable at the time when PW3 was testifying before the trial court on 22nd February, 2018. She referred us to the Written Laws (Miscellaneous Amendments) Act (No. 2) Act, No. 4 of 2016 that requires the child to promise to tell the truth and not lies. She added that the requirement of establishing whether the child of tender age knows the nature of oath or possesses sufficient intelligence was removed by that amendment, which came into force on 8th July, 2016. To the learned State Attorney's stance, the question put to PW3 by the trial court were in compliance with the law.

Having been adverted to the current position of the law, Mr. Koyugi, in his rejoinder, withdrew the complaint regarding *voire dire*.

We have duly considered the grounds of appeal and the submission made by the counsel for both sides. At the outset, we agree with Ms. Massawe that by coming into force of the Written Laws (Miscellaneous Amendments) Act (No. 2) Act, No. 4 of 2016 it is no longer a requirement that the trial judge or magistrate who conducts *voire dire* test to record in the proceedings as to whether a child of tender age understands the nature of an oath, or is of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. The current positions of the law as stipulated under section 127 (2) of the Act provides:

> *"A child of tender age may give evidence without taking an oath or making an affirmation but shall, before giving evidence, promise to tell the truth to the court and not tell any lies."*

The import of the above provision was well explained in the case of **Godfrey Wilson v. The Republic**, Criminal Appeal No. 168 of 2018 (unreported) that:

> *"To our understanding, the above cited provision as amended, provides for two conditions.* ***One****, it allows the child of a tender age to give evidence without*

affirmation. ***Two****, before giving evidence, such child is mandatorily required* ***to promise to tell the truth to the court and not to tell lies.***"

In this appeal, as correctly noted and submitted by the learned State Attorney, the trial court complied with the current position of the law by requiring the witness to promise to tell the truth and not lies. The record shows, at page 34 that PW3 was asked to promise to tell the truth and at page 35 she promised the same. In that regard, Mr. Koyugi rightly withdrew the ground in his rejoinder.

After the withdrawal of the complaint on *voire dire*, we remain with one issue that is whether the fire was caused by the appellant. Here, we wish to state that we are aware of our duty as the first appellate court, to re-evaluate and re-appraise the entire evidence on record by reading it and subjecting it to a critical scrutiny and if need be arrive at our own conclusion since a first appeal is in the form of rehearing. (See **D. R. Pandya v. The Republic** (1957) EA 336 and **1001 Shaban @ Amasi v. The Republic**, Criminal Appeal No. 2006 (unreported).

Having that principle in mind, we revisited the entire evidence and note that the issue as to who caused the fire was raised before the trial

court by the defence and that issue was adequately determined. For the sake of completeness, we shall reproduce part of the trial court's discourse on the issue.

The learned trial judge began his discussion as follows:

> *"I now turn to the issue whether the accused is the one who lit the fatal fire. To this there is the evidence of PW3 and PW4. These two witnesses narrated how the accused, the man they were referring to as their father, walked into the room where they were, and poured petrol in it before setting it on fire."*

Thereafter, he reviewed both sides' arguments including the argument made by the defence counsel that PW3 and PW4 contradicted each other. Relying on the authority of **Magendo Paul & Another v. The Republic** [1993] TLR 220 that proof beyond reasonable doubt does not mean disproving each and every assertion made by the accused as such some remote possibilities in favour of the accused cannot be allowed to benefit him, the learned trial judge found that the inconsistence was minor and did not affect the prosecution case. He said:

"With respect the question as to who set the house on fire must be determined on the basis of the testimonies of PW3 and PW4 who claimed to have been in the room when the same was set ablaze. Therefore if there are inconsistencies or weaknesses in testimonies of PW1 and PW2 regarding that fact, it is neither here nor there."

The trial judge then concluded as follows:

"I think under the circumstances of this case such lapses are understandable and not affect the main point at issue. My finding based on the evidence of PW3 and PW4 is that the accused was in the room with them and he is the one who set the said room on fire after pouring petrol. My conclusion from the testimonies of PW2, PW3 and PW4 is that the accused only got out when the door to the room was broken open. Thus I am satisfied beyond reasonable doubt that the accused is the one who set on fire the room in which the deceased was, causing burns that in turn caused her death."

As we have alluded to earlier, it was the appellant's defence that he was not at the scene of the crime. He alleged that he was at Mlandizi. On our part, having re-appraised the entire evidence, we are of the decided view, as was the finding of the learned trial judge that the appellant's defence was an afterthought because he was perfectly placed at the scene of crime by PW3 and PW4. Both PW3 and PW4 were consistent and clear in their testimonies that while they were cooking buns in company with the deceased, the appellant appeared and poured some petrol and then lit the room into fire. They cried for help and neighbours including PW2 came to their rescue. The appellant was also seen running away from fire by PW2. We are alive that it was the appellant's contention before the trial court that these key witnesses contradicted each other. However, on our appraisal and being mindful that in this appeal, the issue of contradictions on the evidence of PW3 and PW4 was not raised we see no cause for us to hold otherwise than what the trial judge did that PW3 and PW4 were credible and reliable witnesses.

All said, on the strength of the prosecution evidence of PW3 and PW4 we find that the appellant was at the scene of the crime at the material time and date and it was him who started the fire by pouring petrol in the

room and lit it with a match. That fire caused the death of the deceased. We see no merit on this ground of appeal. We hereby dismiss it.

In the end, it is our considered view that the prosecution case was proved beyond reasonable doubt, and that this appeal has been lodged without substance. It is accordingly dismissed in its entirety.

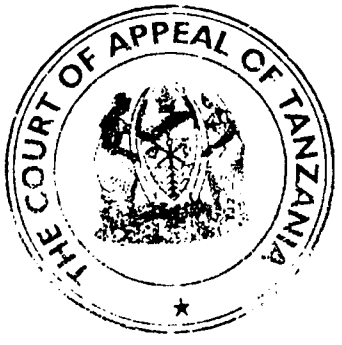
DATED at **DAR ES SALAAM** this 22nd day of May, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 27th day of May, 2020 in the presence of appellant in person via-video conference and Ms Elizabeth Mkunde, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL