

**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. 131 OF 2018

AMANI JUSTINE @ MPARE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwandambo, J.)

**dated the 4th day of April, 2018
in**

HC Criminal Session Case No. 109 of 2015

.....

JUDGMENT OF THE COURT

6th May, & 24th July, 2020

SEHEL, J.A.:

The appellant Amani Justine @ Mpare was charged with murder contrary to section 196 of the Penal Code, Cap 16, R.E. 2002 in the High Court of Tanzania sitting at Dar es Salaam (hereinafter referred to as "the trial court"). It was alleged that the appellant on 23rd May, 2012 at Mwajasi Village within Mkuranga District in Coast Region did murder one Gaudensia d/o Leonce Mabuli (hereinafter referred to as "the deceased").

The appellant denied the charge and as a result the case proceeded to a full trial. The prosecution paraded a total of six witnesses and

tendered two documentary exhibits to prove its case. At the end of the trial, the appellant was convicted as charged and sentenced to death by hanging. Dissatisfied with the conviction and sentence, he has appealed to this Court.

The background facts of the case which gave rise to this appeal can briefly be stated as follows: The deceased before she met her death was cohabiting with the appellant at Malela Mkuranga area within Mkuranga District in Coast Region. They lived together for almost three years such that some people referred them as husband and wife. On 23rd May 2012 the appellant was seen by Ali Athumani Kinonge (PW1) with the deceased at Malela area at about 08:00 hours walking towards Vikiindu, Mkuranga. The following day PW1 heard about a murder incident involving the deceased.

Malesi Yohana (PW2), a fellow villager and a businessman told the trial court that he was familiar with the appellant and the deceased because they used to go to the same Church. He used to know the deceased as Mama Jane and she was a secretary to the Church. He recalled that in the morning of the 24th May 2012 he was on his motorcycle going to his business place at Mbagala. Upon reaching at Vianze area he saw two people riding bicycles carrying charcoal. A few paces further he

saw the appellant but they did not greet each other. He only switched on his motorcycle lights. At/about 11:00 am while at home, he heard the news of the death of Mama Jane.

Another prosecution witness who saw the deceased for the last time with the appellant on 23rd May 2012 was William Lagita Jeremia (PW3), a neighbour. His house was about 300 meters away from the appellant's house. He recalled that on 23rd May 2012 at 06:30 he saw the appellant and the deceased passing by his home going to Vikundi. The following day at/about 11:00 am, he heard that a woman was found dead at Maduka Mawili but he did not take that news very seriously because he believed that the deceased was at Vikindu as he was told so by the deceased that the appellant had asked her to accompany him to his relatives at Vikindu for paying bride price in Tabora. But later, in the evening, on that day, when he went at the deceased's house, he saw the door was locked and the chickens were outside the house. He tried to call her through her mobile phone but the call could not be connected. On 25th May, 2012 he agreed with neighbours to report about the disappearance of the deceased. They reported the matter at Vikindu Police Station where they were told that the deceased's body was at Temeke Hospital. They went to

Temeke Hospital and they managed to identify the body that belongs to the deceased. The body had cut wounds on the forehead and hands.

PW3 then called the appellant to inform him about the sad news only to be told that the two had a fight such that they parted ways whereby the deceased went to Malela and the appellant went to Kigamboni. He was promised by the appellant that he would return on Saturday. PW3 went to report to the police that the appellant promised to return on Saturday in order to facilitate his arrest.

As promised the appellant returned on Saturday. It was the evidence of PW3 that the appellant was arrested with the deceased's mobile and a plastic bag that had in it a black T-shirt stained with a lot of blood.

Vicent Leons Mabuli (PW4) a brother of the late Gaudensia @ Mama Jane (the deceased) recalled that on 25th May 2012 he received a call from the deceased's neighbour telling him that the deceased who went missing for three days had been found dead with cut wounds. He called the OCD - Mkuranga who confirmed to him that her late sister was found dead and her body was taken to Temeke Hospital. He went to identify the body and found that it had cut wounds on the face, chest and hands. He then took the body for burial at Chang'ombe.

The investigative officer, F. 3949 DCPL Innocent recalled that on 24th May, 2012 he was at work and received information that a woman whose identity was not known had been killed and her body was lying at Mwajasi on the side of the road heading to Vianzi. He went to the scene with OCS Insp. Gabinus and found a group of people and the body was lying on the side of the road covered with a Kitenge. The body had a huge cut wound on the left side of the shoulder, forehead and a palm which seemed to be cut by a panga.

F. 3774 D/Sgt Raphael (PW6), a police officer who was involved in arresting the appellant, told the trial court that on 24th May 2012 at around 05:00 am he saw a body of the deceased lying at the side of the road at Maduka Mawili area and it was him who covered it with a cloth.

On how he came to arrest the appellant, PW6 said, on 26th May, 2012 he received a phone call from Good Samaritan informing him that the appellant was seen at his house. He went with other police officers to arrest the appellant. He was holding a black T-shirt stained with blood. They arrested and took him to Mkuranga police station.

The prosecution case was further built upon two documentary evidences, namely postmortem examination report (Exhibit P1) and sketch

map (Exhibit P2) which were tendered and admitted during the Preliminary Hearing.

The appellant in his sworn defence and when he was examined in chief, he told the trial court that on 23rd May, 2012 he was at his business and later on he retired home. While at home, the deceased told him that she was going to collect her money from Keko Machungwa. But then she did not return home. The appellant tried to contact her through her mobile phone with no avail. On Saturday, he said, he went to look for her at his sister's place in Kigamboni but she was not there. They then decided to go to Kiburugwa, at the deceased's relatives to see if she was there but she was also not there. As it was late, the appellant spent a night at Kigamboni and the next day he returned home. While he was at home, four neighbours arrived and they asked him about the deceased's whereabouts. He replied to them that she went missing since Wednesday. But after few minutes, the police officers arrived and arrested him.

On being cross-examined, he was recorded to say the following words:

*"I went to the bus stand at 08:00 pm on 23/05/2012.
On the same day the deceased left. The deceased left
in a car. I used a motorcycle. I went to the stand at*

10:10 pm on that date. What transpired on that day was a devil's job. I pray for forgiveness for having caused the death of the deceased. Yes I was arrested in a house we used to cohabit with the deceased. I returned home at 00:00 hours on the material date. I went to my sister's home on Saturday. The incident occurred on Wednesday. It is not true I was found in possession of the deceased's mobile phone. I was arrested at 10:10 am on Sunday."

When he was further asked by the Court, the appellant said:

"Yes the devil pushed me because I suspected the deceased was cheating me. I found the deceased at the scene of crime – Vikiindu area with another man in the bush where after I took a knife and stabbed her on the neck. After a while I went to Magengeni and later returned and found her dead."

Suffice to state here that there was no questions coming from assessors. That apart, the lady and gentleman assessors returned a verdict of guilty. They were of the opinion that the appellant admitted in his own evidence to have killed the deceased intentionally by stabbing her with a knife.

The trial court concurred with the assessors that the appellant killed the deceased in the bush, dragged the deceased's body along the roadside as testified by PW6 and dumped it at Mwanjasi area. Relying on the principle propounded in **Mohamed Haruna Mtupeni and Another v. The Republic**, Criminal Appeal No. 259 of 2007, **Edward Joseph v. The Republic**, Criminal Appeal No. 44 of 2011 and **Lameck Gamaliel & Another v. The Republic**, Criminal Appeal No. 210 of 2012 (all unreported) that the very best of witnesses in any criminal trial is an accused person who freely confesses his guilty, the trial court found the appellant guilty as charged. Nonetheless, it did not buy the principle of the last person to be seen with the deceased as propounded by the prosecution through the evidence of PW1 and PW3. Hence, it discarded their evidence. The appellant was therefore convicted on his admission of guilt and sentenced to death by hanging.

Dissatisfied with that finding, the appellant initially filed a memorandum of appeal comprising of three grounds and it was followed by a two point supplementary memorandum of appeal.

At the hearing of the appeal, Mr. Paschal Kamala, learned counsel who appeared to represent the appellant abandoned the two sets of memoranda of appeal lodged by the appellant and instead he argued a

memorandum of appeal filed by him on 30th April 2020. That memorandum of appeal contained the following three grounds:-

- 1. That, the learned trial judge erred in law and in fact by convicting the appellant on the offence of murder without properly considering the defence of provocation raised by the appellant.*
- 2. That, the learned trial judge erred and improperly evaluated the evidence in the record forming basis of convicting the appellant.*
- 3. That, the learned trial judge erred in law and in fact by convicting the appellant basing on prosecution evidence which was not proved beyond reasonable doubt.*

The appellant followed the proceedings through a video link facility. On the other side, Mr. Credo Rugaju, learned Senior State Attorney appeared for the respondent Republic.

In his submission, Mr. Kamala combined the first and second grounds of appeal. He contended that in the trial court, the appellant raised a defence of provocation as found at page 101 of the record of appeal but the trial court did not consider it. He argued further that for the defence of provocation to be triggered, three things must be established which were fully fulfilled by the appellant.

First, it must be shown that there was a relationship. He argued that there was enough evidence to prove that the appellant was in a committed relationship with the deceased such that they were considered as husband and wife. He referred us to the record of appeal at page 81 where PW1 said that he knew the deceased as the appellant's wife; Page 83 where PW2 said that the appellant and the deceased used to live together but he could not tell whether they were married; and page 83 where PW3 said that the relationship was at an advanced stage as the appellant was about to pay bride price to the deceased's parents. Given that evidence on record, Mr. Kamala argued that the relationship between the appellant and the deceased was at the advanced stage to an extent that the appellant had shown interest to other people to marry the deceased.

Second, the accused must have admitted to the killing, Mr. Kamala submitted that the appellant admitted to have killed the deceased by stabbing her on the neck with a knife and this is found at page 100 and 101 of the record of appeal. When probed by the Court whether there was a true admission, Mr. Kamala was positive that the way the appellant admitted could not be taken as a true admission.

Lastly, he said that the killing must have been due to a sudden loss of control or under a heat of passion. On this, Mr. Kamala referred us to

page 101 of the record of appeal where the appellant told the trial court that he suspected the deceased was cheating. So when the deceased told him that she was going to Keko Machungwa, the appellant decided to follow her behind and he found out that the deceased was with another man. With that scenario, Mr. Kamala forcefully submitted that the appellant's action of stabbing the deceased with a knife on her neck was under the heat of the passion. It was the view of Mr. Kamala that the manifestation of the heat of passion differs from one person to another. To him, the uttering of the words that it was a devil's act shows that the appellant was acting under rage, fury and anger.

With that submission, Mr. Kamala prayed for the substitution of the conviction of murder to a lesser offence of manslaughter. He also beseeched us to set free the appellant since the period he has served in custody from the date of his arraignment was sufficient.

When probed by the Court as to whether there was an admission of killing the deceased, he replied that given the way the appellant was responding to the cross-examination and the questions put to him by the trial court, it cannot be taken that the appellant admitted to each and every element of the offence. He therefore left it to the Court to decide.

Mr. Rugaju, on his part, kicked off by strongly opposing the appeal but when adverted by the Court as to whether the prosecution proved its case to the hilt, he changed his stance and supported the appeal on the basis that the appellant's conviction was based on his admission thus he ought to have been sentenced to a lesser offence of manslaughter. In sentencing the appellant, he urged us to consider the circumstances to which the deceased met her death, the relationship which existed between the appellant and the deceased, the reaction which the appellant took, the force used by the appellant, the place of stabbing and the five years period spent in jail by the appellant.

Regarding the question as to whether there was an admission, Mr. Rugaju replied that the appellant's admission was made in the middle of the proceedings after the prosecution had closed its case and he had finished his evidence in chief. He added that looking at the way he was responding to the questions put to him by the learned State Attorney and the trial court there was no admission.

There was no rejoinder on the part of Mr. Kamala.

Having carefully considered the submissions before us from both sides and reviewed the evidence on record, we wish to point out that the

case for the prosecution against the appellant was principally based on "*the doctrine of the last seen person with the deceased*". In dealing with it, the learned trial Judge in his judgment at page 126 reasoned as follows:

"..two of the prosecution witnesses (PW1 and PW3) testified to have seen the accused in the company of Gaudencia d/o Leonce Mabuli @ Mama Jane on the evening of 23rd May, 2012 at different times heading to Vikindu. The two witnesses testified also that the Accused exchanged greetings with each of them and bid them farewell going to Vikindu. PW3 in particular was a neighbor to the deceased and the Accused. In effect, the evidence of the two witnesses was aimed at supporting the principle that the last person to be seen with the deceased is taken to be the killer. However, the accused had a different version of what transpired on 23rd May, 2012. The accused is on record that the deceased left alone earlier using public transport heading to Keko Machungwa and that since he suspected her of cheating, he decided to follow her using a bodaboda. That evidence sharply contradicts the evidence of PW1 and PW3 who stated to have seen the accused in the company of the deceased on the evening of the material date. That being the case, the evidence of PW1 and PW3 becomes irrelevant and in consequence I accept the accused's version of

evidence to be the correct account of what transpired on 23^d May 2012.”

Indeed, it is an elementary principle of law that if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer (See the case of **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported)).

In the present appeal, the trial court did not give credence to the evidence of PW1 and PW3. Hence, it discarded their evidence for being untrustworthy. Going by a settled law that the credibility of any given witness is the monopoly of the trial court and it is always in a better position to assess it than this Court, we find no justifiable cause to fault that finding of the trial court. (See **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Shaban Daud v. The Republic**, Criminal Appeal no. 28 of 2000; and **Benedict Buyobe v. The Republic**, Criminal Appeal No. 354 of 2016 (both unreported)).

On our part, we have subjected the evidence of PW1 and PW3 to a very objective scrutiny and we have found nothing in their evidence, like the trial court did, to lead us to the invocation of the doctrine of the last

person to be seen with the deceased. The evidence of PW1 and PW3 is wanting for such a finding.

Nonetheless, as we have alluded earlier, the trial court convicted the appellant on his alleged admission of guilt made in his cross-examination and on further questioning by the trial court. The finding of the trial court was based on the principle which we have stated without numbers that in the criminal trial, the very best of witnesses is an accused person who confesses to his guilt (See the cases of **Selemani Hassan v. The Republic**, Criminal Appeal No. 364 of 2008, **Mohamed Haruna @ Mtupeni v. The Republic**, Criminal Appeal No. 259 of 2007, and **Pauli Joseph v. The Republic**, Criminal Appeal No. 63 of 2010 (all unreported)).

In the case of **Mohamed Haruna @ Mtupeni v. The Republic** (supra) we said:

".....if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his quit. After all, the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt." [Emphasis added]

In trying to squarely fit the facts of the case with the above position of the law, the trial judge reasoned as follows:

"...Taking into account the accused's own confession that he killed the deceased, I accept that it is the Accused who dumped the body of his lover at Mwajasi area after killing her in a bush. The circumstances under which PW2 saw the Accused walking in the morning on 24th May 2012 and the discovery of the deceased's body by PW6 at/about 05:00 am at a place not far from where PW2 met the Accused lead to only one irresistible inference that the Accused was indeed responsible for the killing of the deceased and after doing so he dragged the deceased's body along the road as testified by PW6."

With due respect to the inferences made by the trial judge, the evidence of PW2 which he used in trying to establish a true admission on part of the appellant has nothing more than showing that PW2 met the appellant on 24th May 2012 at Vianze area. For better appreciation of PW2's evidence, we take the liberty to reproduce part of his evidence as hereunder:

"...On 24/5/2012 I was at home. As I was riding my motorcycle in the morning from home to my place of

business I met two people with bicycles around Vianze carrying charcoal. Vianze is not far from Vikindu. Later I met Amani. I switched on my motorcycle lights but we did not greet each other. Amani was walking. I continued with my duties and later at/about 11:00 am I went back home. I then heard news that Mama Jane was dead. A day or so later I heard that Amani was arrested by police."

From the above extract, we find it hard to go along with the trial judge's analogy that since PW2 saw the appellant at Vianze on 24th May 2012 then it was the appellant who killed and dragged the body to Maduka Mawili, Vikindu area where PW6 found the body. The evidence of PW2 has nothing and/or no peculiar circumstances that would have entitled the trial court to arrive to a conclusion of guilty verdict on the alleged appellant's own admission. To the contrary, the prosecution case was lacking on material evidence for the trial court to believe that there was a connection between the alleged admission by the appellant and the prosecution evidence. It be noted that PW2 did not tell the trial court the direction to which the appellant was heading on that day. He did not explain as to whether the appellant was coming from or going towards Maduka Mawili, Vikindu area. Perhaps that explanation might have helped in drawing adverse inferences but it is lacking from PW2's testimony.

More so, the distance between Vianze, the place where PW2 saw the appellant and Maduka Mawili, Vikindu area where the body of the deceased was found was not established.

Furthermore, even the alleged admission of the appellant, reproduced herein, cannot be taken as a true admission on part of the appellant. As correctly submitted by the counsel for both parties, legally speaking the evidence of the appellant could not lead to someone's guilt. There is no scintilla of evidence from the prosecution side to suggest that the appellant's evidence carried the prosecution case further for the trial court to arrive at a conclusion that there was a true admission by the appellant. It be recalled that the case for prosecution was based on the doctrine of the last person to be seen with the deceased as testified by PW1 and PW3. However, that doctrine was rightly discarded by the trial court.

All in all, we find that there is a missing link between the alleged guilty admission by the appellant and the prosecution case. We, therefore, failed to find any connection between the alleged admission by the appellant that he killed the deceased in the bush with a knife with the evidence of PW2. Consequently, it was wrong for the trial court to assume

that there was such circumstances on the evidence of PW2 leading to the conclusion that it was the appellant who killed the deceased.

In the end, we find the appeal has merit. We, accordingly, quash the appellants' conviction for murder and set aside the sentence of death by hanging. We order for the immediate release of the appellant, **Amani Justine @ Mpare**, from custody unless otherwise held for other lawful reasons.

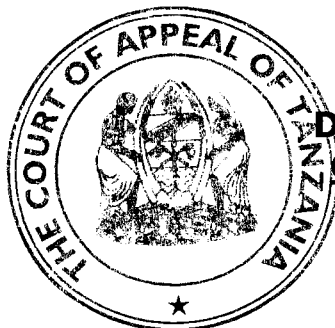
DATED at DAR ES SALAAM this 24th day of July, 2020.

S. A. LILA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 24th day of July, 2020 in the presence of the appellant linked through Video Conference from Ukonga Prison and Ms. Estazia Wilson, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to read "S. J. Kainda", is written over the printed name and title.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL