IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA J.A., MKUYE J.A., And MWANGESI J.A.)

CRIMINAL APPEAL NO. 188 OF 2017

NASSORO S/O KHAMIS NGWELE ------------------------------------ APPELLANT

VERSU//S

THE REPUBLIC -- RESPONDENT

(Appeal from the decision of the Resident Magistrates Court of Dar es Salaam at Kisutu with extended jurisdiction)

(Siyani SRM)

dated the 11th day of May, 2017

in

Extended Criminal Sessions Case No. 54 of 2015

JUDGMENT OF THE COURT

19th February & 12th March, 2020

MWANGESI J.A.:

According to the information which was read over to the appellant before the trial court on the 13th day of May, 2015, he stood charged with the offence of murder contrary to the provisions of section 196 of the Penal Code Cap. 16 R.E. 2002 (**the Code**). It was the case for the prosecution that on the 10th day of October, 2013 at Tuangoma area within Temeke District in the Region of Dar es Salaam, the appellant did murder one Anna Joseph Mbago. When the information was read over to the appellant, he pleaded not guilty.

In its endeavor to establish the commission of the offence by the appellant, the prosecution paraded eight (8) witnesses whose oral testimonies were supplemented by three (3) exhibits. The prosecution witnesses included, Martin Lewis (PW1), Abdul Rahman (PW2), Assistant Superintendent of Police (ASP) Thobias Walelo (PW3), E. 5733 Detective Corporal Zakayo (PW4), Joseph Mbago (PW5), E. 1141 Detective Sergeant Mkombozi (PW6), Brighter Alfred Pilla (PW7) and Modesta Lassana (PW8), while the exhibits which were tendered, included a cautioned statement of the appellant (P1), an extra-judicial statement of the appellant (P2), and a post mortem examination report (P3).

On his part in defence, the appellant relied on his own affirmed testimony and never called any additional witness to supplement his defence. Upon evaluation of the evidence from either side by the learned trial Senior Resident Magistrate with Extended Jurisdiction, and the gentle assessors who sat to assist him, they were of the unanimous view that the guilt of the appellant, had been established to the hilt. As a result, the appellant was convicted as charged and sentenced to the mandatory sentence of death by hanging. Such conviction and the sentence meted out against him by the trial court, are the basis of the appeal by the appellant

to the Court, wherein he listed nine grounds of complaint which read *verbatim* that: -

(1) *That, your lordships, the Esq. SRM erred in law and fact by convicting the appellant relied on exh. P1 (cautioned statement) which was un-procedurally admitted in evidence as the trial court erroneously failure to ask the appellant whether he object the tendering of exh. P1 or not as the learned defence counsel failed to object the tendering of exh. P1 AT PAGE 33 LINE 10-20 contrary to the procedure of law.*

(2) *That, your lordships the learned trial Esq. SRM erred in law and fact by convicting the appellant relied on exh. P2 (extra-judicial statement) which was un-procedurally recorded by PW7 on the 15. 11. 2013 at page 36 line 16-23 after the lapse of five (5) days as the appellant was arrested on 10. 10. 2013 contrary to the procedure of law.*

(3) *That, your lordships the learned trial Esq. SRM erred in law and fact by convicting the appellant relied on exh. P2 (extra-judicial statement) which was erroneously admitted in evidence by the trial court as it failed to ask the appellant whether he object*

tendering of exh. P2 or not as the learned defence counsel failed to object the tendering of exh. P2 at page 37 line 7-17 contrary to the procedure of law.

(4) *That, your lordships the learned trial Esq. SRM erred in law and fact by convicting the appellant relied on the weakness of the defence testimony at page 49-52 contrary to procedure of law as the burden of proof never shifted.*

(5) *That, your lordships the learned trial Esq. SRM erred in law and fact by convicting the appellant relied on the discredited testimony of PW3 who stated to have found the body of Anna w/o Mbago (deceased) lying on the floor while still breathing at page 25 line 17-19, page 18 line 2-3 to page 19 line 13-14 by PW2.*

(6) *That, your lordships the learned trial Esq. SRM erred in law and fact by convicting the appellant relied on the contradicted testimony of PW3 and PW4 as PW3 tells the court that the deceased had some bruises in her neck at page 22 line 17-18 contrary to PW4 who tells the court that, the woman had no any sign of bruises at page 26 line 7-8.*

(7) *That, your lordships, the learned trial Esq. SRM erred in law and fact by convicting the appellant while disregarding the final submission made by the defence counsel at page 54-57 line 1-2 and assessors' opinions at page 72-73 while the trial court erroneously found the appellant to have killed the deceased (Anna w/o Mbago) intentionally in ansentia of a malice aforethought.*

(8) *That, your lordships, the learned trial Esq. SRM erred in law and fact by convicting the appellant while the trial was un-procedurally transferred from Hon. Esq. S. H. Shahidi PRM who was assigned to preside the trial at page 3-8 to Hon. Esq. M. M. Siyani SRM without any justified reasonable cause contrary to the procedure of law.*

(9) *That, your lordships, the learned Esq. SRM erred in law and fact by convicting the appellant and imposing a sentence of death while erroneously he failed to warn himself at the beginning and at the end of the judgment contrary to the procedure of law.*

In order to be in a better perspective of appreciating the grounds of appeal by the appellant, we think it is pertinent albeit in brief, to give the facts of the case leading to the decision being challenged, as could be discerned from the record. It is on record that the appellant is a resident of Mbagala kwa Mangaya area, while the deceased was residing at Tuangoma area. Both areas are situated within the same locality of Temeke District in the Region of Dar es Salaam. On the fateful date that is, the 10th October, 2013 at about 22:30 hours, while the appellant was passing nearby the house of the deceased, he peeped through the window and saw her counting some money inside.

Upon seeing the money, the appellant was tempted to get it. He therefore, resolved to climb through the ceiling board of the house to the room where the deceased was counting the money and demanded it from her. On her part, on seeing the appellant inside her room, the deceased was shocked and shouted for help, a thing that moved the appellant to strangle her to death in the course of silencing her. Neighbours responded to the shout which was raised by the deceased and on arriving at the scene of the incident, the noise faded away. They rounded the house and conveyed information to the Police Station and waited for their arrival.

When the policemen arrived, they broke into the house of the deceased as there was no one to open the door for them, only to find the victim inside deeply unconscious. Further search inside the deceased's house disclosed the whereabouts of the appellant, who had been hiding in the wash room. The unconscious victim was taken to the hospital where she was later pronounced dead. The appellant on his part, was taken to the Police Station where he was later associated with the death of the deceased and charged with the offence of murder.

In defending himself to the charge of murder, the appellant told the trial court that he was not resisting to the fact that, he caused death to the deceased. He however argued that, the incident of death occurred inadvertently because his intention was just to get the money which was in the possession of the deceased, and not to kill her. He argued further that the aim of strangling her, was a mere means of silencing her from making noise which was attracting neighbours. It was thus his plea before the trial court that, he deserved to be convicted of the offence of manslaughter. His plea was however, not accommodated by the trial court which as hinted earlier, convicted him of the offence of murder and sentenced him to death by hanging.

When the appeal was called on for hearing, Mr. Mashaka Mfala, learned counsel, entered appearance to represent the appellant, whereas the respondent/Republic had the services of Ms. Clara Charwe, learned State Attorney. On taking the floor to argue the grounds of appeal, Mr. Mfala, abandoned grounds No. 1, 2, 3, 8 and 9, and thereby remaining with four grounds of appeal that is, grounds number 4, 5, 6 and 7.

In arguing the grounds of appeal, the learned counsel for the appellant, argued together grounds No. 4, 5 and 6, while ground No. 7 was argued separately. Expounding the combined grounds of appeal, Mr. Mfala submitted that they all concern the evidence that was tendered to establish the commission of the offence by the appellant. He submitted that the said evidence was seriously contradictory. He gave an example of the testimony of PW3, who told the court that the deceased had some bruises around the neck, while the testimony of PW 4 was to the effect that, there was no any sign of bruises around the neck of the deceased.

The learned counsel argued further that, while PW3's testimony was to the effect that, he found the deceased's body

lying on the floor still breathing, the testimonies of PW1 and PW4 was to the contrary in that, they testified to the effect that the deceased was already dead while being taken to the hospital.

In the view of the learned counsel for the appellant, the contradictions of the prosecution witnesses pointed out above, were fatal regard being had to the nature of the offence under which the appellant stood charged with that is, the offence of murder. Since the offence is capital and it carries the capital sentence of death by hanging, its standard of proof has to be strictly beyond reasonable doubt. He urged us to resolve the pointed out contradictions in favour of the appellant, and hold that he was guilty of the offence of manslaughter. In reliance to his submission, Mr. Mfala, referred us to the decisions in **Leonard Mwanashoka Vs Republi**c, [2016] TLSLR 41 as well as **Nathaniel Alphonce Mapunda Vs Republic** [2006] TLR 395.

As regards the seventh ground, the learned counsel for the appellant, submitted that for a conviction on the offence of murder to stand, the prosecution has to prove beyond reasonable doubt against the appellant, the existence of two major components of the offence of murder that is,

actus reus which is the act of killing the deceased, and *mens rea* which is the guilt mind of the appellant.

While in the instant matter the appellant was conceding to have indeed caused death to the deceased, it was the submission of Mr. Mfala, that he did not intent to kill the deceased and thereby, meaning that there was no guilty mind (malice aforethought). According to him, he would have expected to find the appellant being convicted of the offence of manslaughter and not murder. He therefore, strongly implored us to hold so by substituting the conviction of the appellant from that of murder to manslaughter, and sentence him accordingly.

Responding to what was submitted by her learned friend, Ms. Charwe on behalf of the respondent/Republic, from the outset declared her interest, that she was supporting the conviction of the appellant, and the sentence which was meted against him by the trial learned Senior Resident Magistrate. While she readily conceded to the contradictions which were pointed out by her learned friend in regard to some testimonies of the prosecution witnesses, it was however her submission that the said contradictions, had nothing to do with the concession of the appellant to the offence under which he stood arraigned with whereby, he pegged his

defence on the absence of malice aforethought. She went on to submit, that such defence did not stand to the appellant for the reason that, malice aforethought can be established in different ways.

The learned State Attorney, submitted that the fact that the appellant caused death to the deceased in the course of committing another offence of robbery against the deceased, in terms of the stipulation under section 200 (c) of **the Code,** malice aforethought was deemed to have been established. The Court was also referred to the decisions in **Bomboo Amme and Another Vs Republic,** Criminal Appeal No. 320 of 2016 (unreported), as well as **Fadhili Gumbo and Another Vs Republic** [2006] TLR 50.

Ms. Charwe, concluded her submission by urging us to find that the appeal by the appellant was bereft of merit and as such, it be dismissed in its entirety.

What stands for our deliberation and determination in the light of the submissions from either side above, is whether the appeal by the appellant is founded. We are going to deal with the grounds of appeal by the appellant, in the format which was used by the learned counsel of either

side. We will therefore start with the first group of grounds of appeal, which comprises of grounds 4, 5 and 6. The common complaint in these grounds of appeal is that, the testimonies from PW1, PW3 and PW4 was contradictory and therefore, did not justify conviction to the offence of murder.

After having dispassionately considered the evidence on record and the submissions from both sides, we are inclined to side with the learned State Attorney that, the alleged contradictions had nothing to do with the commission of the offence by the appellant. It was common ground that, the appellant was not resisting the fact that he killed the deceased as reflected by his own sworn testimony at pages 66-67 of the record of appeal, where he stated in part thus: -

> "--- *When I reached the deceased's house, I saw a woman through the window which was still open. There was light inside so I clearly saw a woman counting money. I did not know how much. I did not know if the woman was with any other person. I decided to enter the house to steal the money which I saw the woman counting and not otherwise. To enter the house, I had to climb the roof and then through the ceiling board I managed to enter --- I couldn't get the*

money as the woman inside raised a lot of noises which led her neighbours to surround the house. To prevent her from making noise, I used my hands to strangle her neck and shut her mouth. I had no weapon."

In view of the testimony of the appellant as shown above, as corroborated by the report of the Doctor (PW8), which was contained in the post mortem examination report (exhibit P3), wherein at page 102 of the record of appeal it has been indicated that, the cause of death to the deceased was due to asphyxia following neck strangulation, there is no doubt that, the appellant was the one who killed the deceased and that the only dispute is as to whether he intended so to do. Under the circumstances, the grounds as to the contradictions of the testimonies of the prosecution witnesses, has nothing to do with the appeal by the appellant and that, the authorities which were relied upon by Mr. Mfala in his submission, are of no assistance. That said, we dismiss the fourth, fifth and sixth grounds of appeal.

Our next consideration goes to the seventh ground of appeal which centers on the issue of malice aforethought. It was the contention of the learned counsel for the appellant that, even though the appellant was

conceding to have killed the deceased, there was no intention to do so. On the other hand, the view of Ms. Charwe was that, because the appellant killed the deceased in the course of committing an offence, then malice aforethought is deemed to have been established in terms of section 200 of **the Code.**

To begin with, we will reproduce the provision of section 200 of **the Code**, which states the circumstances under which malice aforethought can be deemed to be established. It reads:

> "*Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances: -*
>
> *(a)an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;*
>
> *(b)knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by a wish that it may not be caused;*

*(c)**an intent to commit an offence punishable with a penalty which is greater than imprisonment for three years;***

(d)an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit an offence".

[Emphasis supplied]

We have intentionally bolded paragraph (c) above to show that, it was the circumstance under which the offence which was committed by appellant fell. It was submitted on behalf of the appellant that, the aim of the appellant on the date he caused death to the deceased was just to rob money from her and that he had no weapon. Since the intention of the appellant on the fateful date was to commit the offence of robbery which is punishable by a sentence of more than three years in terms of the provision of section 285 of **the Code**, then malice aforethought on the part of the appellant before he caused death to the deceased in the instant appeal, is deemed to have been established.

In the case of **Enock Kipala Vs Republic**, Criminal Appeal No. 150 of 1994 (unreported), the Court had an occasion to consider a situation like

the one at hand, where the appellant also pleaded not to have caused death to the deceased intentionally, when it stated that:

> "--- *usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not had that intention must be ascertained from various factors, including the following:*
>
> *(i) The type and size of the weapon, if any used in the attack;*
>
> ***(ii) The amount of force applied in the assault;***
>
> ***(iii) The part or parts of body the blows were directed at or inflicted on;***
>
> *(iv) The number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose;*
>
> *(v) The kind of injuries inflicted;*
>
> *(vi) The attacker's utterances, if any, made before, during or after the killing; and*
>
> (vii) ***The conduct of the attacker before or after the killing.***
>
> [Emphasis supplied]

It was established in the appeal at hand that, the appellant strangled the neck of the deceased, while attempting to silence her from making

noise which could attract her neighbours. Such act by the appellant, falls under factors number (ii) and (iii), which have been bolded in the decision quoted above in that, the appellant used much force on a very vulnerable and sensitive part of the deceased's body, that is the neck.

Furthermore, it was established from the conduct of the appellant through his own testimony that, what led him to strangle the deceased's neck, was the intention to accomplish his mission of robbing money from her. Under the circumstances, the appellant was committing an offence and therefore, falls within factor number seven mentioned in **Enock Kapela's** case (supra). See also: **Elias Paul Vs Republic,** Criminal Appeal No. 7 of 2004, **Said Ally Matola @ Chumila Vs Republic,** Criminal Appeal No. 129 of 2005 and **Bomboo Amma and Another Vs Republic,** Criminal Appeal No. 320 of 2016 (all unreported).

Basing on what has been discussed above, we are fully satisfied and in no uncertain terms, agree with the learned Senior Resident Magistrate, who held that, malice aforethought on the part of the appellant, in causing death to the deceased, was sufficiently established. To that end, the conviction of the appellant to the offence of murder and the subsequent

sentence of death by hanging, are hereby upheld. The appeal by the appellant therefore, stands dismissed in its entirety.

Order accordingly.

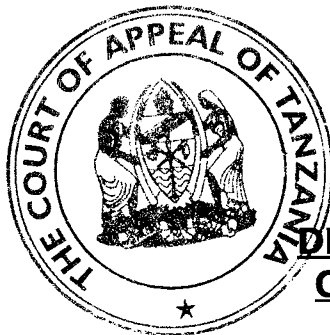
DATED at **DAR ES SALAAM** this 10th day of March, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

The Judgment delivered this 12th day of March, 2020 in the presence of the appellant in person and Mr. Benson Mwaitenda learned State Attorney for the respondent is hereby certified as a true copy of the original.



G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL