IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 418 OF 2018

ZAMIR RAHIMU..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Dar es Salaam District Registry, at Morogoro)

(Kente, J.)

dated the 6th day of November, 2018

in

CRIMINAL SESSIONS CASE NO. 131 of 2015

JUDGMENT OF THE COURT

25th March, & 9th April, 2021

KWARIKO, J.A.:

Zamir Rahimu, the appellant herein was arraigned before the High Court of Tanzania (Kente, J), Dar es Salaam District Registry sitting at Morogoro with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002; now CAP 16 R.E. 2019]. The prosecution alleged that on 2nd December, 2014 at Mkindo area Hembeti Ward within Mvomero District in Morogoro Region the appellant murdered one Abdallahman Khamis. The appellant pleaded not guilty to the charge then his full trial was conducted. In the end, he was convicted and sentenced

to death by hanging. Aggrieved by that decision, the appellant has come before the Court on appeal.

Before we determine the merit or demerit of the appeal, we have found it appropriate to recapitulate the facts of the case which unfolded at the trial as hereunder. The prosecution evidence revealed that the deceased who was aged eighteen months at the material time was a biological child of Rehema Mustafa (PW1) and Khamis Clemens (PW2). The two had divorced and PW1 was re-married to the appellant at the material time. The appellant and PW1 had some misunderstandings some of which involving PW2 but they had been reconciled.

It is revealed further that in the morning hours of 2nd December, 2014, PW1 went to a shop leaving behind the deceased in the care of the appellant. On her return from the shop, she found the appellant around but she alleged that he was restless. Upon inquiry about the baby, the appellant said it was sleeping inside so PW1 proceeded with domestic activities and prepared food for the appellant who unusually ate very little. Thereafter, PW1 went to wake-up the baby for food but she found it unresponsive. When she inquired from the appellant, he did not give satisfactory answers after which she raised alarms to which the

neighbours responded and upon examination of the baby, they found him dead.

Together with the appellant and other people, PW1 took the baby to his father's place. When they reached there, PW2 examined the baby and found the baby's neck rotating. They interrogated the appellant about that state but he pleaded ignorance. Information was sent to police who responded to the scene along with the doctor. The doctor Abdallah Rashid Mbalazi (PW3) conducted an autopsy on the deceased's body and concluded that the cause of death was due to broken neck which was found rotating. His finding was recorded in the post-mortem report, which was admitted in evidence as exhibit P1. Since the appellant was suspected to be responsible with the death of the deceased, he was arrested and taken to police station where upon interrogation, he denied the allegations.

In his defence, the appellant denied the allegations and raised a defence of *alibi* such that he had taken food to his farm workers and on his return, he was informed that the baby was dead.

At the end of the trial, the trial court found that the appellant who was the last person to be seen with the deceased alive, was responsible with his death. He was found guilty of murder, convicted and sentenced as shown earlier.

The appellant has raised a total of twelve grounds in his memorandum of appeal and two sets of supplementary memoranda. We have paraphrased the grounds of appeal and found them raising the following five grounds of complaints:

1. *That, the circumstantial evidence was not proved against the appellant.*
2. *That, the cause of death of the deceased was not proved.*
3. *That, the appellant's defence of alibi was not considered.*
4. *That, the evidence of PW1 and PW2 was contradictory.*
5. *That, the assessors were not shown to have been involved in the trial.*

Moreover, in amplification of his grounds of appeal, the appellant filed written statement of his arguments in terms of Rule 74 (1) of the Tanzania Court of Appeal Rules.

On the day the appeal was called on for hearing, the appellant was linked to the Court via a Video Conference facility from Ukonga Central Prison and was represented by Ms. Samah Salah, learned advocate; whilst Ms. Angelina Nchalla, learned Senior State Attorney and Ms. Chesensi Gavyole, learned State Attorney appeared for the respondent Republic.

When she took the stage to argue the appeal, Ms. Salah adopted the grounds of appeal together with the written arguments and chose to argue the first ground of appeal only. She submitted that the circumstantial evidence against the appellant was not proved to the required standard. She submitted that although the appellant was the last person to be seen with the deceased, it was not proved that he murdered him.

She argued that the cause of death being broken neck could have been caused accidentally, either by the appellant or by any other act of violence. She thus suggested that the appellant could have been convicted of manslaughter. To support her contention in relation to the circumstantial evidence, Ms. Salah cited the case of **Simon Musoke v. R** [1958] EA 715, **Ilanda s/o Kisongo v. R** [1960] EA 780, **Ally Bakari**

Another v. R [1992] T.L.R 10. Others included **Kisonga Ahmad Issa & Another v. R,** Consolidated Criminal Appeal Nos. 171 of 2016 and 362 of 2017 and **Mark s/o Kasimiri VR,** Criminal Appeal No. 39 of 2017 (both unreported).

The learned counsel submitted further that, there was contradiction in the witnesses' account in relation to the state of the deceased's body after death because while PW1 and PW2 said they saw blood from the deceased's nose, PW3 who performed an autopsy did not testify to that effect.

Ms. Salah also attributed the appellant's conduct of remaining at the scene as suggesting his innocence because, she argued, if he was the perpetrator of the murder, he could have run away after the incident.

However, upon being probed by the Court, the learned counsel submitted that there is nothing on record to suggest that the appellant did anything to the deceased to be convicted of the lesser offence of manslaughter.

In response to the foregoing, at first Ms. Nchalla opposed the appeal because the circumstantial evidence by PW1 was conclusive that it was

the appellant who killed the deceased. She argued that he had malice when he killed the deceased since had there been any accident, he ought to have revealed it to PW1.

The learned Senior State Attorney argued further that the appellant's conduct that he was restless when PW1 returned from shopping and his failure to eat well signified that he had committed something wrong. The learned counsel buttressed her argument with the Court's decision in **Akili Chaniva VR**, Criminal Appeal No. 156 of 2017 (unreported). With the foregoing submissions, Ms. Nchalla urged us to dismiss the appeal.

However, upon being probed by the Court as to whether section 130 (1) of the Evidence Act [CAP 6 R.E. 2019] (the Evidence Act) which relates to evidence by spouse was complied with by the trial Court since PW1 was the appellant's wife, Ms. Nchalla submitted that the record of appeal does not show that there was compliance with that provision of the law. She argued that the omission renders PW1's evidence incompetent deserving to be expunged from the record. She submitted further that without the evidence of PW1, the remaining evidence is not sufficient to ground conviction in respect of the appellant. With this

submission, the learned counsel changed her stance and supported the appeal.

In the wake of the respondent's stance, Ms. Salah did not have anything to add in rejoinder.

Having considered the submissions by the counsel for the parties, we shall start our deliberation with the issue that we have raised concerning the legality of the evidence of PW1. It was not disputed that the appellant and PW1 were husband and wife. The law is clear that a person is a competent but not compellable witness in a case involving his/her spouse. This is the requirement of section 130 of the Evidence Act which provides thus:

> *"Where a person charged with an offence is the husband or the wife of another person that other person shall be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section."*

We are thus of the considered view that, before PW1 gave evidence against the appellant who was her husband, the trial court ought to have addressed her in terms of the cited provision of law for her to decide whether she was ready to give such evidence. In the case of **Matei**

Joseph v. R [1993] T.L.R 152, where the Court was faced with a situation similar to the present case, it discussed the cited provision of law and held among other things thus:

> *"The evidence of a spouse who has been compelled to testify against another spouse in a criminal case contrary to the provisions of s. 130 of the Evidence Act 1967, is inadmissible and of no effect."*

Now, since the trial court did not comply with the mandatory provision of law, the evidence of PW1 becomes incompetent which we hereby expunge from the record. Having expunged the evidence of PW1, the question which follows is whether the remaining evidence is sufficient to ground conviction against the appellant.

We have considered the prosecution evidence and we are in all fours with the learned counsel for the parties that, PW1 was the crucial witness as she said she left the deceased in the hands of the appellant and when she found him dead, she suspected the appellant. She reported the incident to neighbours and then to the police. The remaining evidence is that of PW2 which is hearsay having been informed the circumstances of the death by PW1. For his part, PW3 only examined the child after death hence his evidence has nothing to implicate the appellant with the charge.

For what we have discussed, we find that the prosecution evidence is not sufficient to prove the charge against the appellant beyond reasonable doubt.

Consequently, we find the appeal meritorious and allow it. In that regard, we order the appellant's release from prison unless otherwise lawfully held.

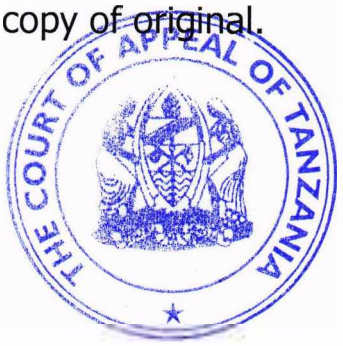
DATED at **DAR ES SALAAM** this 8th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This judgment delivered this 9th day of March, 2021 in the presence of the appellant linked through Video Conference from Ukonga Prison and Mr. Jonathan Wangugo learned counsel for the Appellant and Mr. Adolf Kisima learned counsel for the Respondent, is hereby certified as a true copy of original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL