IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWAMBEGELE, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 288 OF 2019

HILDA INNOCENT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba Siting Karagwe)

(Mkasimongwa, J.)

dated the 7th day of June, 2019
in
Criminal Sessions Case No. 69 of 2014

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JUDGMENT OF THE COURT

11th & 19th August, 2021

MWAMBEGELE, J.A.:

The High Court of Tanzania (Bukoba District Registry) sitting at Karagwe, convicted the appellant Hilda Innocent for murdering her husband Innocent Kiiza on 28.01.2014 and awarded her the mandatory death sentence. Aggrieved, she has preferred this appeal to the Court protesting her innocence.

The facts that led to the arraignment of the appellant are fairly simple and not difficult to comprehend. They are narrated by Avia Innocent (PW1) and Aviet Innocent (PW2) who are daughters of the deceased and appellant. They go thus: on the night of the fateful day, at about 20:00 hours, the deceased and the appellant as well as their children had just finished their supper when the deceased retired to bed leaving his wife (the appellant) and children (PW1, PW2 and Faraja; an infant) in the living room. The living room was illuminated by light from a wick lamp. After a while, the door was knocked. The appellant opened it and three men in black attire and face masks entered. As soon as the three men entered the house, the appellant put off the wick lamp and took the children with her out and proceeded to the residence of her mother-in-law; the deceased's mother which was about one hundred metres away. According to PW1, the appellant told her and PW2 that they should not tell anyone about the three men left behind and that she promised to buy them new clothes if they obeyed what she told them. Otherwise, by the carrot-and-stick approach, if they told anyone, so PW1 testified, she would kill them.

The appellant and children stayed at the house of the deceased's for about an hour. Beata Kiiza (PW3), the appellant's sister-in-law and Linus Kiiza (PW4), her brother-in-aw were also there. Thereafter, they returned at their home. Immediately when they stepped into their house, the appellant went straight to the bedroom where they had left the deceased sleeping. After a short while, she called PW1 and PW2 telling them "njooni mumwangalie baba yenu wameshamuua"; that is, "come and see, your father has been killed". PW1 and PW2 went thither only to find their father slaughtered and lying dead in a pool of blood.

The appellant and children went back to the house of the mother of the deceased. When they approached her mother-in-law's house, she started screaming uttering in the process "mume wangu wamemuua, mume wangu wamemuua"; that is, "they have killed my husband, they have killed my husband". On arrival there, the appellant told her mother-in-law, sister-in-law (PW3) and her brother-in-law (PW4) that when they went back to their house, they found the appellant killed.

After that, the appellant, PW1 and PW2 as well as the deceased's mother, PW3 and PW4, went to the scene of crime where they found the deceased lying dead in a pool of blood with a big cut wound on his head

and had been slaughtered. The matter was reported to the police and later, the deceased body was buried.

About three days thereafter, PW1 and PW2 let the cat out of the bag. They told their aunt (PW3) and uncle (PW4) what exactly transpired on that material night. They told them about the three men in black attire and masked faces and their mother's conduct that night. This episode alarmed PW3 as she also recalled a few days prior to the incident, the appellant told her that she had better kill her brother (the deceased) as he had intentions to marry another wife. That she would never allow her brother to marry another woman.

Upon that disclosure by PW1 and PW2, PW4 reported the matter to the police and the appellant was arrested and subsequently arraigned for the murder of her husband. She pleaded not guilty to the information. The case proceeded to full trial wherein the prosecution featured a total of four witnesses; PW1, PW2, PW3 and PW4. In defence, the appellant testified as the only witness.

The appellant's defence was that they were invaded by three people who started assaulting the deceased, demanding to be given money in the

process. Among the three people, the appellant stated, was one Respicius Byamungu who was her paramour and deceased's relative. The appellant also testified that the said Respicius Byamungu had once proposed to her that they kill the deceased so that he married her but that she refused and decided to mute their illicit relationship.

After the full trial, the High Court (Mkasimongwa, J.) was satisfied that the prosecution had proved the case against the appellant to the hilt and sentenced her accordingly as shown hereinabove. Her appeal to the Court is comprised in seven grounds. However, at the hearing of the appeal, Ms. Theresia Bujiku, the learned counsel who represented the appellant, sought to abandon all the grounds, save for the seventh which sought to challenge the High Court that it convicted the appellant on weak prosecution evidence which did not prove the case against the appellant beyond reasonable doubt.

In buttressing the point that the case against the appellant was not proved beyond reasonable doubt, the learned counsel brought to the fore five reasons. **First**, she submitted that PW1 and PW2 who were the prosecution's star witnesses, were not credible. She contended that PW1 and PW2 contradicted with PW3 and PW4 on the time the incident took

place. While PW1 and PW2 testified that it was between 08:00 hours and 09:00 hours, PW3 and PW4 testified that it was between 09:00 hours and 10:00 hours. This contradiction, she submitted watered down the case for the prosecution.

Secondly, Ms. Bujiku submitted that the star witnesses PW1 and PW2 contradicted in material particulars on the identity of the assailants who entered their house. While PW1 testified that the three assailants were armed with machetes, sticks and knives, PW2 did not testify anything with regard to the three men in black attire and face masks being armed with anything.

In addition, Ms. Bujiku submitted that all the witnesses who testified were relatives of the deceased. Prefacing her argument with her awareness that relatives are competent witnesses to testify, she argued that the circumstances of the case required that an independent witness was brought to testify. That independent witness, she argued, would have testified whether the door was broken into as argued by the appellant or was not broken as agued by PW1 and PW2.

Thirdly, Ms. Bujiku submitted that the appellant mentioned in her statement made at the police as well as in her defence that Respicius Byamungu was one of the assailants who invaded them and killed her husband. However, the learned counsel submitted, the said Byamungu was not called by the prosecution to testify for the prosecution. That omission, was pregnant with meaning; the prosecution feared that if they called him to testify, he would have testified against them. For the prosecution's failure to call Byamungu, she argued, the trial court should have drawn an adverse inference against the prosecution. To buttress this proposition, the learned counsel cited to us our previous decision in **Aziz Abdallah v. Republic** [1991] T.L.R. 2 in which we underscored the duty of the prosecution to feature important witnesses, short of which an inference adverse to the prosecution case may be drawn.

Fourthly, Ms. Bujiku submitted, the testimony of PW1 differed in material particulars with what she stated at the police through her statement (Exh. D1) appearing at pp. 87 - 88 of the record of appeal. She contended that while, at p. 40 of the record of appeal, PW1 stated that when they went back at their home, the appellant went straight to their bed room and called them to go and see their father who had been killed,

no such statement was made in the statement made at the police. This is clear evidence that the witness was not credible.

Fifthly, the learned counsel submitted that PW1 and PW2 did not say anything to PW3 and PW4 who were at the residence of the appellant's mother-in-law and where they alleged to have stayed for about an hour. The fact that they did not say anything before PW3 and PW4 makes it doubtful if at all they left the three men in black attire and face masks at their home.

In sum, Ms. Bujiku submitted that the discrepancies in the evidence by the prosecution coupled with the unreliability of the prosecution witnesses make the prosecution's case weak. The same could not be used to found a conviction against the appellant, she argued. The learned counsel thus implored us to allow the appeal and release the appellant from prison.

Rebutting, Mr. Kahigi expressed his stance at the very outset that the respondent Republic did not support the appeal. He submitted that the discrepancy in evidence referred to by counsel for the appellant were minor such that they could not destroy the prosecution's case. The contradictions

under reference were, mainly, with regard to time and whether the three men were armed. These contradictions, did not go to the root of the case. They can be glossed over, he argued.

With regard to PW1 and PW2 being not witnessed of truth, the learned State Attorney submitted that, on the contrary, they were credible. He added that they could not say anything at the residence of the appellant's mother-in-law because they obeyed what the appellant told them and feared her threats; that they should not say anything about the three men left behind and that she would buy them new clothes or kill them if they defied.

Regarding calling a witness who was not a relative to testify for the prosecution, Mr. Kahigi submitted that the witness would not have added any value to the prosecution case as the evidence of PW1 and PW2 was quite sufficient to prove what transpired. Buttressing his submission with the provisions of section 143 of the Evidence Act, Cap. 6 of the Revised Edition, 2019, Mr. Kahigi submitted that PW1 and PW2 were credible witnesses, they needed no other witness to lend credence to their evidence. The learned State Attorney also cited **Goodluck Kyando v. Republic** [2006] T.L.R. 363 to reinforce this argument.

Mr. Kahigi submitted that circumstantial evidence in the case at hand pointed to the guilt of the appellant with no other reasonable hypothesis such that the appellant was a party to the killing of her deceased husband in terms of section 22 (1) (b) of the Penal Code, Cap. 16 of the Revised Edition, 2019 (the Penal Code). He thus urged us to uphold the conviction and sentence of the High Court and dismiss this appeal in its entirety.

In a short rejoinder, Ms. Bujiku did not have much to say. She simply submitted that the appellant is also entitled to credence. That her version of what transpired on the material night should be taken into consideration and believed. She reiterated her prayer to allow the appeal and release the appellant.

Having summarized the submissions of the parties, we should now be in a position to delve into the sole ground of appeal which culminates in the issue whether the prosecution proved the case against the appellant beyond reasonable doubt. We wish to stress at the very outset of our determination of the appeal that this being a first appeal, we are enjoined to re-evaluate the evidence and arrive at our own conclusions. That this is the law in our jurisdiction has been stated in a number of our decisions – see: **Dinkerrai Ramkrishan Pandya v. Republic** [1957] 1 EA 336,

Juma Kilimo v. Republic, Criminal Appeal No. 70 of 2012 (unreported) and **Slahi Maulid Jumanne v. Republic**, Criminal Appeal No. 292 of 2016 (also unreported), to mention but a few.

In view of the submissions of the learned counsel for the appellant on the one hand and learned State Attorney for the respondent Republic on the other, we think this appeal stands or falls on the evidence of PW1 and PW2. These are the star witnesses for the prosecution who narrated the story as to what actually transpired on the material night. The trial Judge was satisfied that no witness saw the appellant killing the deceased. The case based entirely on circumstantial evidence and section 22 (1) (b) of the Penal Code. At pp. 108 – 109 the trial Judge deduced the following circumstantial evidence that was apparent in evidence:

> *"1. That on a certain day the accused was heard by PW3 saying to the latter that "wifi nimesikia kaka yako anataka kuoa. Sitamruhusu kaka yako aoe. Kaka yako hawezi kuoa bora nimuue."*
>
> *2. That on the material night and time the accused person let Inside their house three people who were in black clothes and hiding their faces and that immediately after they had entered inside, the accused person did put off*

the hurricane lamp which was lightening the sittlng room.

3. *That after she had put off the lamp; without saying or asking anything to the strangers or even notifying the deceased about the presence of the strangers in the house the accused did collect her children and left the home to her mother-in -law's which visit according to PW3 was a surprise because the accused was not used to do so.*

4. *That the accused warned PW1 and PW2 that they should not tell anybody what they had just seen at home. She promised to buy them new clothes and even threatened to kill them if they disclosed to anybody what they saw at home, in an effort to ensure that it is not known to other people that she allowed in unknown persons who can reasonably be held to be the ones who killed the deceased.*

5. *That when they came back home the accused entered into the room the father was sleeping, lit the lamp and called PW1 and PW2 saying "Avia na Aviet njooni mumwangalie baba yenu wameshamuua"."*

Having deduced as above, the trial Judge proceeded to consider the appellant's defence and concluded that the appellant colluded with

Respicius Byamungu to murder the deceased. It was his view that the circumstantial evidence led to no other reasonable hypothesis than the guilt of the appellant.

The law relating to circumstantial evidence has long been settled in this jurisdiction. An accused person may be convicted on the strength of circumstantial without any other type of evidence to corroborate it. Circumstantial evidence has been described as the best evidence. As was aptly articulated by Sir Udo Udoma, the then Chief Justice of Uganda, to which we subscribe as depicting the correct position of the law in this jurisdiction as well, in **Republic v. Sabudin Merali & Umedali Merali**, Uganda High Court Criminal Appeal No. 220 of 1963 (unreported):

> *"... it is no derogation to say that it was so; it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics".*
>
> [Quoted in **Julius s/o Justine & Four Others v. Republic** Criminal Appeal No. 155 of 2005 (unreported)].

Likewise, in **Georgina Masala v. Republic**, Criminal Appeal No. 128 of 2014 (unreported), we relied on **Samson Daniel v. Republic** (1934) 1 EACA 46 to state that circumstantial evidence may be conclusive than the evidence of an eye witness. We observed:

> *"Circumstantial evidence may be not only as conclusive but even more conclusive than eye-witness."*

Similarly, in **Simon Musoke v. Republic** [1958] 1 EA 715, the Court of Appeal for East Africa, quoting from the third headnote, held:

> *"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."*

The defunct Court of Appeal also imported to East Africa the holding of the decision of the Privy Council in **Lezjor Teper v. Reginam** [1952] A.C 480 in which it was stated at p. 489:

> *"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence*

to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

The erstwhile Court of Appeal also quoted the following excerpt from **Taylor on Evidence** (11th Edn.) at p. 74:

"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."

The question we are enjoined to answer, at this juncture, is whether the circumstantial evidence in the matter before us was sufficient to prove the case against the appellant to the hilt. Put differently, can we say circumstantial evidence in the present case was such that it irresistibly pointed to the guilt of the appellant? We have serious doubts. We now proceed to demonstrate why we have such doubts.

The learned trial Judge pegged five reasons why he had the view that the appellant was a party to the killing. This is that she opened the door to allow the assailants and that she told PW1 and PW2 not to "tell anybody what they had just seen at home. She promised to buy them new clothes and even threatened to kill them if they disclosed to anybody what

they saw at home". With utmost respect to the trial Judge, we do not think this statement is wholly true. We say so because from the testimony of the two star witnesses for the prosecution, PW1 and PW2, it cannot be said with certainty that the appellant uttered such words. If anything, this was the testimony of only PW1. PW2 did not state anything to that effect. We have doubts because if at all the appellant told them such words, PW2 could not have forgotten to testify on such a glaring aspect. And, as if to clinch the matter, PW1's testimony seems to be contradictory on this aspect. At p. 39 of the record of appeal, when cross-examined, she admitted to have not told the police that the appellant that she promised to buy them new clothes if they never said anything about that occurrence and threatened them that she would kill them in case they told anybody about the incident. Indeed, in her statement she made at the police which was tendered in terms of section 164 (c) of the Evidence Act to impeach her credibility as Exh. D1, appearing at pp. 87 – 88 of the record of appeal, she did not state anything to that effect.

It is on the foregoing premise that the credibility as well as reliability of PW1 are put to serious question. Moreover, considering the fact that PW2 never said anything about the promise of new clothes or the threat,

sends a signal to the Court that PW1's testimony should be treated with great care.

Another piece of circumstantial evidence which the trial Judge had the view that it pointed to the appellant's involvement in the commission of the offence is the fact that it was testified by PW3 that the appellant had previously uttered to her the following words:

> *"Wifi, nimesikia kaka yako anataka kuoa. Sitomruhusu kaka yako aoe. Kaka yako hawezi kuoa, bora nimuue"*

Our literal translation is:

> *"my sister-in-law, I hear your brother is intending to marry another wife. I will not allow your brother to marry another wife. He will not marry. I better kill him."*

We have considered this piece of evidence. With profound respect to the trial Judge, we do not think it is without doubt. We are of that view because, PW3 kept that serious statement to herself without telling anybody under the pretext that she thought the appellant was just kidding. She did not even tell her mother who more often than not reconciled the

appellant and deceased who, apparently, were in constant squabbles. This omission raises doubt insofar as the truthfulness of that allegation is concerned.

There is yet another piece of evidence which discredits the evidence of PW3. When testifying in court, at p. 47 of the record of appeal, she said it was PW1 who told her about the appellant opening the door for the three men in black attire and masked faces. However, in her statement before the police (Exh. D2), appearing at pp. 93 – 94 of the record of appeal, she stated that it was PW2 who told her so. This discrepant evidence also creates doubts as to the reliability of the evidence of PW3.

Ms. Bujiku also raised an alarm why the prosecution did not call important witnesses like the investigating officer of the case who would have cleared doubts on whether the door was broken into or not. We agree. The reasons why, in the circumstances of this case, the investigating officer of the case was not called to testify for the prosecution's case leaves a lot to be desired. This was a very important witness who should have filled in the important gaps in the prosecution's case. As we held in **Aziz Abdallah** (supra), we quote the third holding, that:

> *"The general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the case at hand, as already alluded to above, failure to field the investigating officer of the case leaves a lot to be desired. In the premises, we draw an inference adverse to the prosecution that, had it done so, the witnesses might have destroyed the prosecution's case.

The foregoing discussion culminates into our conclusion that having directed our minds to the circumstantial evidence in the instant case in the light of the decided cases on the point, we have serious doubts if the inculpatory facts were incompatible with the innocence of the accused. We also doubt if those inculpatory facts were capable of no other explanation other than the guilt of the appellant. If anything, there were doubts here and there which, as our criminal jurisprudence directs, must, at the end of the day, be resolved in favour of the appellant.

The above said, we are of the considered view that the appellant was wrongly convicted. We therefore allow this appeal, quash the appellant's conviction and set aside the sentence meted out to her. We order that the appellant, Hilda Innocent, be released from prison forthwith unless she is held there for some other lawful cause.

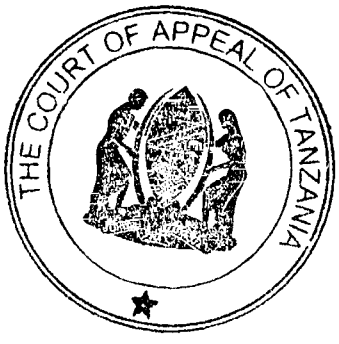
DATED at **BUKOBA** this 18th day of August, 2021.

J. C. M. MWAMBEGELE
JUTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2021, in the Presence of appellant in person, represented by Ms. Theresia Bujiku, learned Counsel for the Appellant and Mr. Amani Kilua, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL