

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

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

CRIMINAL APPEAL NO. 479 OF 2019

HERMAN FAIDA APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Bukoba)**

(Mansoor, J.)

**dated the 11th day of September, 2019
in
Criminal Sessions Case No. 92 of 2016**

JUDGMENT OF THE COURT

17th & 24th August, 2021

KEREFU, J.A.:

The appellant, HERMAN FAIDA was charged with the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2002] (the Penal Code) in the High Court of Tanzania at Bukoba (Mansoor, J.) in Criminal Sessions Case No. 92 of 2016. It was alleged that, on 5th November, 2013 during evening hours at Kyaitoko area in Kiziramuyaga Village within Muleba District in Kagera Region, the appellant murdered one Beatus Theonest, the deceased. The appellant pleaded not guilty

to the charge. However, after a full trial, he was convicted and sentenced to suffer death by hanging.

To establish its case, the prosecution paraded a total of five witnesses and tendered the sketch map of a scene of crime (exhibit P1). The appellant relied on his own evidence as he did not call any witness.

In essence, the substance of the prosecution case as obtained from the record of appeal indicate that, the deceased and Grace Nzerayaro (PW1) were husband and wife living at Kiziramuyaga Village with their four children. The deceased was a farmer as well as a business man trading in timber and charcoal. The deceased had a farm located about 30 minutes' walk from his house. According to PW1, the appellant was living at Biharamulo and he went to Kiziramuyaga Village for casual works. PW1 stated that, initially, the appellant was working for her brother-in-law where he was chased and the deceased welcomed him to live with them in their house. That, the deceased and the appellant were good friends.

PW1 went on to state that, on 30th October, 2013, the deceased, the appellant and herself went to work in the farm. PW1 was cultivating while the deceased and the appellant were felling trees for timber. Then, at around 11:00 hours PW1 went home to prepare lunch. At home she found one of her children sick. She stated that, she prepared the food and asked her 9-year-old daughter, one Antia Beatus (PW5) to take the food to the farm, while she took the sick child to the hospital. At the farm, PW5 found the appellant alone and when she asked him on the whereabouts of her father, the appellant told her that he had travelled to buy goats. PW1 stated further that, at around 16:00 hours she went to the farm and did not find her husband, when she asked the appellant, he also told her that the deceased had travelled to buy goats.

On 4th November, 2013 when PW1 went to the farm to get cassava, she came across a hump of soil and she sensed a foul smell. When she asked the appellant about the said hump, the appellant told her that it was for the purpose of preventing cows from entering the farm. And, about the foul smell, the appellant told her that the neighbours had slaughtered a cow and buried a calf in the farm. Again,

on 5th November, 2013 when PW1 went to the farm for cassava, she saw the dead body of her husband on the hump having been exhumed partly. She reported the matter to her father-in-law, one Theonest Kyebisha (PW2) who was with the Chairperson of the Village. The Chairperson apprehended PW1 and the appellant and reported the matter to the police. However, PW1 was released as the prosecution entered a *nolle prosequi* in her favour. PW5's testimony, in many aspects, dovetailed with that of PW1 and PW5 confirmed that, on 30th October, 2013, she was sent by PW1 to take the food to the farm to her father but she found only the appellant who ate all the food.

In his testimony, PW2 supported what was narrated by PW1 and he added that, he last saw the deceased on 30th October, 2013 when he was going to the farm with the appellant. PW2 said that, after two days when his wife asked PW1 on the whereabouts of the deceased, PW1 responded that he had gone to buy goats. PW2 stated further that after being informed by PW1 about the death, they met the appellant and when they asked him on the death of his friend, the appellant told them that PW1 gave him poisoned food. PW2 said that, since they were

not convinced with the appellant's and PW1's responses, they decided to apprehend them.

Francisco Sebastian (PW3), who was doing timber business with the deceased testified that he last saw the deceased on 27th October, 2013. That, on 30th October, 2013 when he went to look for him in his house to pay his money TZS 15,000.00, PW1 and the appellant told him that the deceased had travelled. PW3 stated further that on the next day, the appellant went to his house and told him that he was sent by the deceased to collect the money. PW3 said that he gave the appellant the said money and asked him to tell Beatus to call him. Since, Beatus did not call him, the next day PW3 went to his house and found PW1 and the appellant. When he asked the appellant why he told him lies that Beatus had returned, the appellant responded that he was sent by PW1 to get the money.

Kamugisha Fidel (PW4) was doing charcoal business with the deceased. He testified that, on 30th October, 2013 he met PW1 and the appellant and when he asked them on the whereabouts of Beatus, the appellant told him that he went with Rugemalila Wilbert to Rwazi island

in Ikuza for fishing. PW4 stated that he saw the appellant with the deceased phone and when he asked him why Beatus left his phone, the appellant told him that Beatus gave him the phone because he owed him TZS 30,000.00. PW4 testified further that when he asked Rugemalila as whether he went with Beatus to the said Island for fishing, Rugemalila denied. PW4 also stated that the appellant wanted to sell timber to him for TZS 30,000.00 but he refused as he knew that the timber belonged to Beatus. That, when he met PW1 and asked her as to whether they were selling timber, PW1 told him that they sell the charcoal and not timber. PW4 added that he saw the deceased's body and he attended the burial.

In his defence, although he admitted to be friend of the deceased and that he lived in his house, the appellant denied to have committed the offence. He also admitted that on 30th October, 2013 in the morning, he, Beatus and PW1 left the house, but he went to PW3's house, while Beatus and PW1 went to their farm. That, at around 19:00 hours when he returned home, he did not find Beatus and PW1. A moments later, PW1 arrived and informed him that Beatus had travelled to buy goats. On 5th November, 2013 when he was again at

PW3's place, he received a call from one Celestine Theonest, a brother of the deceased who asked him to go to PW2's house. He said that, he went and found many people who asked him on the whereabouts of the deceased and he told them to ask PW1. The said people apprehended him and PW1 took them to police. The appellant added that the deceased and PW1 had constant quarrels.

When the respective cases on both sides were closed, the presiding learned trial Judge summed up the case to the assessors who sat with her at the trial. In response, the assessors unanimously returned a verdict of not guilty. They were of the opinion that since nobody saw the appellant committing the offence and the cause of death was not established, the prosecution had failed to prove the case to the required standard. Nevertheless, the learned trial Judge, found the appellant guilty and convicted him as charged based on the circumstantial evidence adduced by PW1, PW2, PW3, PW4 and PW5 which she was satisfied that it gave a full account on how the appellant participated in the death of the deceased. Thus, the appellant was convicted and sentenced as indicated above.

Aggrieved, the appellant has come to this Court. In his substantive memorandum of appeal lodged on 17th January, 2020, the appellant lodged a memorandum of appeal comprising four grounds of appeal. However, on 13th August, 2021, Mr. Peter Joseph Matete, learned counsel who was assigned to represent the appellant lodged a supplementary memorandum of appeal under Rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) comprising three grounds.

At the hearing of the appeal, the appellant was represented by Mr. Peter Joseph Matete, learned counsel whereas the respondent Republic was represented by Ms. Veronica Mushi, learned Senior State Attorney.

Upon taking the stage to amplify on the grounds of appeal, Mr. Matete prayed to abandon all the grounds of appeal in the two memoranda save for the second ground in the supplementary memorandum of appeal which is to the effect that: -

"That, the learned trial Judge after properly holding that "no reliance can be placed on the testimonies of the prosecution witnesses with regard to the cause of

the deceased death," erred in law and facts to turn and hold that, "it is not in dispute that the deceased Beatus Theonest met homicidal death." "

Submitting in support of that ground, Mr. Matete argued that the trial court wrongly convicted the appellant as the prosecution did not conclusively establish the cause of death and prove that it is the appellant who killed the deceased. Mr. Matete argued further that, among the prosecution witnesses who testified before the trial court, no one proved that the deceased died an unnatural death. He said that, even PW1 and PW2 who claimed to have identified the deceased's body, all stated that the deceased's body was with no any cut wounds. So, according to him, it cannot be said with certainty that the deceased died an unnatural death. As such, he challenged the prosecution for failure to subject the deceased body for medical examination to detect the cause of death. He lamented that the nurse who accompanied the police to the scene of crime, did not examined the deceased's body as she was told by the police to write that the deceased's body had already decayed. Therefore, Mr. Matete faulted the learned trial Judge

to make a finding that the deceased died an unnatural death, while, he said, there was no sufficient evidence to establish that fact.

It was the further argument of Mr. Matete that it was wrong for the learned trial Judge to convict the appellant by only relying on his conduct after the death of the deceased. To bolster his proposition, Mr. Matete cited the cases of **Ally Bakari and Another Republic** [1992] T.L.R. 10 and **Nathaniel Alphonse Mapunda and Another v. Republic** [2006] T.L.R. 395.

Mr. Matete contended further that the fact that the appellant was the last person to be seen with the deceased cannot be a sufficient evidence to conclude that he was the one who murdered the deceased, because there was also a possibility that they parted at some point. He also challenged the credibility of PW1 by arguing that, since she was also charged and implicated by PW2 and the appellant, she was an unreliable witness as she had an interest to serve. He as such urged us to disregard her evidence. He then argued that, after discounting the evidence of PW1, the remaining evidence on record would not be sufficient to ground the appellant's conviction. Based on his submission,

Mr. Matete urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and set him free.

In response, Ms. Moshi expressed her stance at the outset that she opposed the appeal. Starting with the issue of cause of death, Ms. Moshi readily conceded that there was no autopsy conducted on the deceased's body to establish the cause of death and no postmortem report tendered to that effect. However, Ms. Moshi was quick to argue that, it is not the requirement of the law that the cause of death must be established, in every case, by the production of a postmortem report. She said that, in other cases, like this one, death may be only established by circumstantial evidence. It was therefore, her contention that the oral account of PW1, PW2, PW3, PW4 and PW5 sufficiently established that the deceased died an unnatural death. To buttress her proposition, she cited the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported).

The learned State Attorney submitted further that the evidence of PW1 and PW2 proved that the appellant was the last person to be seen with the deceased on 30th October, 2013 when they were going to the farm. That, the evidence of PW1 and PW2 was substantiated by the

fact that the deceased's body was found buried in the hump of soil at the said farm. It was her contention that, since the appellant was the last person to be seen with the deceased and he failed to give a plausible explanation leading to his death, he was responsible with the death of his friend. To bolster her stance, Ms. Moshi referred us to **Mathias Bundala** (supra).

On the credibility of PW1, Ms. Moshi argued that PW1 was a credible and reliable witness as she clearly narrated on how the appellant was the last person to be seen with the deceased and how he participated in the death of the deceased. She said that the evidence of PW1 was corroborated by PW2, PW3 and PW4 hence sufficient to prove the charge against the appellants to the required standard. She therefore challenged Mr. Matete by raising these issues at this stage. She spiritedly argued that the same, having not been raised during the trial when the said witness testified, is purely an afterthought. On this point, the learned Senior State Attorney cited the case of **Goodluck Kyando v. Republic** [2006] T.L.R 363 and argued that it is trite law that every witness is entitled to credence and must be believed. She then argued that, although PW1 was implicated by the appellant and

PW2 as an accomplice in this case, she was a competent and credible witness. To bolster her argument, she cited **Godfrey James Ihunya and Another v. Republic** [1980] T.L.R 197 and, argued that, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice. She thus urged us to find that PW1 was a credible witness and her evidence was corroborated by the evidence of PW2, PW3 and PW4. Finally, Ms. Moshi urged us to dismiss the appeal for lack of merit.

In a brief rejoinder, Mr. Matete distinguished the case of **Mathias Bundala** (supra) relied upon by Ms. Moshi by arguing that the facts in that case are not relevant to the circumstances of this appeal, as in that case the doctor went to the scene to examine the body of the deceased but failed to conduct a postmortem, while in this case there was no doctor involved and the deceased's body was not examined to ascertain the cause of death. He concluded by insisting that the appellant was not involved in the death of the deceased and the entire prosecution evidence is built up on suspicion, which alone, is not capable of proving a criminal case beyond reasonable doubt.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we think, the burning issue for our consideration is whether the prosecution proved its case beyond reasonable doubt.

We wish to start by stating that, this being a first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted, to arrive at its own conclusion of fact. See the cases of **D.R. Pandya v. Republic** [1957] EA 336 and **Reuben Mhangwa and Another v. Republic**, Criminal Appeal No. 99 of 2007 (unreported).

There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed the appellant committing the offence. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017 when this Court remarked that: -

"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See Simon Musoke v. Republic, [1958] EA 715). Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

- 1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*
- 2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
- 3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."*

In determining this appeal therefore, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellant.

It is on record that the evidence which tend to implicate the appellant heavily, and which apparently was used by the trial court to convict the appellant is the oral account of PW1, PW2, PW3, PW4 and PW5. We have however, observed that though at page 27 of the record of appeal the learned trial Judge indicated that PW5 was couched, she proceeded to apply the said evidence in her judgment. It is our considered view that, since there was doubt in that evidence, the learned trial Judge was required to disregard it. In the event, and since that was not done, we will disregard the evidence of PW5 in this appeal.

We are mindful of the fact that in his submission, Mr. Matete argued that the prosecution did not conclusively prove that the death of the deceased was unnatural as there was no postmortem report tendered to establish the cause of death. With respect, we are unable to agree with Mr. Matete on this point because, as correctly argued by Ms. Moshi, the cause of death can be proved by other factors apart from medical reports. There are various decisions of this Court which have dealt with this aspect. In the case of **Ghati Mwita v. Republic**,

Criminal Appeal No. 240 of 2011 (unreported), when faced with an akin situation, the Court observed that: -

*"In the absence of the autopsy report, three main issues arise, all of which are necessary for the determination of this appeal. The **first** is whether or not there is sufficient material to establish the fact of death of the deceased to the required degree of certainty. If so, the **second** issue would be whether or not such material leads to the conclusion that the death was unnatural and; if positively found, the **last** question would be whether or not the evidence sufficiently implicates the appellant as the causer of death..."*

In the case at hand, we need not detain ourselves much on the issue of the proof of death and its cause, much as, we think, there are sufficient pointers on the evidence to establish beyond doubt that, Beatus Theonest, the alleged deceased, is indeed dead and his death was unnatural. It is on record that the issue, on whether the death was unnatural or not, was not disputed by the appellant before the trial court, we even find the submission of Mr. Matete on this aspect to be

misconceived. We are therefore of the considered view that the act of Mr. Matete raising these matters at this level is only an afterthought.

As regards the credibility of PW1, we hasten to remark that we are in agreement with the submission of Ms. Moshi that, it is a principle of law that, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice. The said principle has been stated in various decisions of this Court. For instance, in the case of **Miraji Idd Waziri @ Simwana and Another v. Republic**, Criminal Appeal No. 14 of 2016 the Court when considering the evidence of an accomplice referred to the case of **Godfrey James Ihuya and Another** (supra), cited to us by Ms. Moshi, and observed that: -

*"...we agree in principle that the evidence of an accomplice needs corroboration for it to be acted upon against an accused. However, a conviction is not necessarily illegal for being based on an uncorroborated evidence of an accomplice. We have said so in many occasions but one case shall surface to illustrate. This is the case of **Godfrey James Ihuya and Another v. Republic**, [1980] T.L.R. 197."*

(See also the case of **Pascal Kitigwa v. Republic** [1994] T.L.R. 65).

In the case at hand the thrust of the evidence of PW1 was to reveal the incident and narrate on how the appellant was the last person to be seen with the deceased and his participation in the death of the deceased. As argued by Ms. Moshi, the evidence of PW1 was ably corroborated by PW2, PW3 and PW4. It is therefore our considered view that the learned trial Judge correctly found that PW1 was a credible and reliable witness.

As regards the involvement of the appellant in the commission of the offence, the learned trial Judge relied much on the appellant's conduct after the death of his friend. Specifically, the evidence on record which tend to implicate him heavily and which apparently was used by the trial court to convict him is, **first**, the appellant was the last person to be seen with the deceased by PW1 and PW2 on 30th October, 2013 when they were going to the farm. It is not in dispute that the murder had been committed in the said farm, as on 5th November, 2013 the body of the deceased was found hidden in the hump of soil on the said farm. **Second**, after that date, the appellant when asked on the whereabouts of the deceased kept lying by telling different stories. He told lies to PW1 and PW3 that the deceased had

travelled and went to buy goats. He also told PW4 that the deceased went with one Rugemalila Wilbert to Rwazi island in Ikuza for fishing. When PW4 asked Rugemalila about the said trip, Rugemalila disputed that fact.

Third, on 4th November, 2013 when PW1 went to the farm she found a hump of soil and felt a foul smell. When she asked the appellant about the said hump the appellant told her that it was for the purpose of preventing cows from entering the farm. And, about the foul smell, the appellant told PW1 that the neighbours had slaughtered a cow and buried a calf in the farm. However, later the body of the deceased was found buried in the said hump. **Fourth**, the appellant went to the deceased friends, PW3 and PW4 to take money and sought to sell the logs which he knew belonged to the deceased in a pretext that he was sent by the deceased; and **lastly**, he was found with the deceased's phone and when asked, he said it was the deceased himself who gave him the phone because he owed him TZS 30,000.00.

It is our considered view, and as rightly found by the trial court, all these facts provide overwhelming evidence of the appellant's

participation in the commission of the offence. The incriminating circumstances are irresistible inference that the appellant killed the deceased.

In addition, and taking into account that the appellant was the last person to be seen with the deceased on 30th October, 2013 and he failed to give a plausible explanation when asked on his whereabouts, he cannot exonerate himself on this matter. In the case of **Mathayo Mwalimu and Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported), this Court held 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 the circumstances leading to the death, he or she will be presumed to be the killer..."
[Emphasis added].

Following the principle stated in the above cited case and considering the oral account of PW1, PW2, PW3 and PW4, the reasonable inference to be drawn is that the appellant murdered the deceased.

In the light of the foregoing, and looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the trial court properly held that the case against the appellant was proved beyond reasonable doubt. Consequently, we find no merit in the appeal and we hereby dismiss it in its entirety.

DATED at BUKOBA this 20th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of Mr. Mulukozi Advocate who is holding brief for Mr. Peter Matete, 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