

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

(CORAM: JUMA, C.J., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 484 OF 2019

SIKUJUA IDD.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kilekamajenga, J.)

dated the 02nd day of October, 2019

in

Criminal Session Case No. 11 of 2017

JUDGMENT OF THE COURT

23rd & 27th August, 2021

JUMA, C.J.:

This appeal is from the judgment of the trial High Court at Bukoba where SIKUJUA S/O IDD, the appellant, was charged with murder, contrary to section 196 of the Penal Code [Cap 16 R.E. 2002 now R.E. 2019]. The particulars of the offence are that, around noon of the 23rd day of December 2014 at Nyakariba Village within Ngara District in Kagera Region, he murdered IDD S/O BUTURUMBE (the deceased). Kilekamajenga, J. found the appellant guilty, convicted, and sentenced him to suffer death.

At his trial, the appellant testified that before his arrest, he lived at Kumnazi Village, Kasulo Ward in Ngara District, and Idd s/o Buturumbe (the deceased) was his father. The appellant also told the trial court that his mother, Leonia Idd Buturumbe, had earlier separated from his father. For the prosecution, his father's other wife, Neema Idd Buturumbe (PW1), Juma Idd Buturumbe (PW2), and the appellant's fellow villager, Pius Edward Maganga (PW3), testified on critical events that finally led to the arrest of the appellant.

PW1, the deceased's sixth wife, stated that at around 02:00 hours on 20/12/2014, she was in bed sleeping together with her infant child (Asante) when she heard a hoe she had placed to close her door pushed open the door. Initially, PW1 thought it was her husband. Upon realizing that the intruder was not her husband, after all, she lit up her solar torch, only to see her stepson, the appellant. After remarking that his father had several young wives while he did not have any, the appellant undressed her underwear and raped her. PW1 screamed while mentioning the appellant's name as her rapist. It was PW2 who rushed in to help her. When PW2 asked the appellant what he was doing to his stepmother, he escaped out of the room. The following day, PW1 sent out PW2 to inform

the deceased what the appellant had done to her. The appellant had already disappeared by the time her husband finally arrived at her house.

Recalling the day her husband died, PW1 testified that her husband instructed his other son, Fabian Idd Buturumbe, to take a cow to an auction for sale. PW1 further told the trial court that PW2 took the remaining cattle for grazing, and she went out to her parent's house, leaving her husband at home. By the time she returned, her husband was not at home. PW1 testified how surprised she was when around 14:00 hours PW2 arrived back home to inform her that her husband is deceased. She followed PW2 to the bush where the deceased's body lay.

On the day the deceased died, PW2 testified that he and one Katabazi were out in the grazing field when the appellant walked up to their side of the grazing area. He was clutching a bloodied machete (panga). As the appellant lifted the machete, he warned PW2 that he had just killed their father, and he intends to finish him off as well. PW2 and Katabazi took to their heels, with the appellant in hot pursuit. When they returned to where the two left their livestock, PW2 realized that five cows were missing. It was around noon; PW2 took the animals to drink water; he met up with PW3, who rode his motorcycle home. PW3 asked whether PW2 had seen

a trail of blood along the road. PW3 and PW2 followed up on the path to the bush, where they saw the wounded body of the deceased. Nearby, they saw the deceased's motorcycle.

In his defence, the appellant testified that he was away in Bukoba the night PW1 was raped and the day when the deceased died. He added that he did not visit his family between 1/12/2014 and 10/01/2015. From 1/12/2014, he was at the house of one Teacher Hilda in Katoma (Bukoba Municipality) who had employed him to look after her cows. It was on 10/01/2015, when one of his relatives, Dunia, and a police officer paid him a visit in Bukoba and told him that police wanted to see him. He went to Bukoba Police Station where police arrested him. On 16/01/2015, the police transferred him to Ngara Police Station, where they accused him of the murder of his father. He denied the accusation that he raped PW1 on 20/12/2014.

In convicting the appellant, the trial court (Kilekamajenga, J.) was satisfied that three witnesses, PW1, PW2, and PW3, found the dead body of the deceased lying in the bush. He also found that the evidence of the postmortem examination report showed that the deceased suffered from a cut at the head and right upper arm, which led to severe bleeding and

caused his death. On the next issue as to who caused the deceased's death, the trial judge relied on circumstantial evidence to find that the appellant killed the deceased Idd s/o Buturumbe. Upon conviction, the trial court sentenced the appellant to suffer death by hanging.

The conviction and sentence aggrieved the appellant, and without any assistance from learned counsel, he prepared his memorandum of appeal, where he set out seven grounds of appeal. But at the hearing of this appeal, Mr. Remidius G. Mbekomize, learned advocate, appeared for the appellant. The learned counsel abandoned the original memorandum of appeal and instead filed a supplementary memorandum of appeal on 18/08/2021 which consists of a single ground as follows:

- 1. That, the trial High Court Judge erred both in law and fact by convicting the appellant basing on prosecution's case which did not prove the offence on the standard required by law.*

The appellant was present at the appeal hearing, and Mr. Remidius Mbekomize learned advocate argued his appeal. Mr. Grey Uhagile and Mr. Nehemia Kilimuhana, learned State Attorneys, represented the respondent Republic.

Mr. Mbekomize urged before us a single ground of the supplementary memorandum of appeal, insisting that the prosecution did not, by circumstantial evidence, prove the offence of murder against the appellant beyond reasonable doubt. The learned counsel deprecated the evidence of PW2, who had testified that while grazing his father's livestock, the appellant walked over carrying a machete covered in blood and announced that he had just killed their father, and PW2 was next. He submitted that the evidence of PW2 as a piece of circumstantial evidence does not in any way prove that either he, PW3 or PW1, saw the appellant killing his father. He submitted that Mr. Katabazi, who PW2 claim was present when the appellant arrived to announce that he had killed his father, was not called to testify in support of PW2's version.

Mr. Mbekomize went further and submitted that the circumstantial evidence of PW2 and PW3 suffered from several gaps, making them inconsistent with the appellant's guilt. He pointed out that it was not enough for PW2 to say that the appellant carried a bloodied machete. Similarly, he submitted the evidence of PW3 that while riding his motorcycle and saw stains of blood with some broken bottles, does not link the appellant to the killing of the deceased and no one else.

The appellant's learned counsel concluded his submissions by reiterating that the circumstantial evidence which the prosecution relied on does not link the appellant to the murder of his father. He urged us to allow the appeal and set the appellant free.

Mr. Grey Uhagile, learned State Attorney, opposed the appeal on behalf of the respondent Republic. He submitted that the prosecution successfully discharged its burden of proving the case of murder against the appellant. And, he added that the circumstantial evidence which the prosecution presented irresistibly point at the appellant as the person who killed his father. He highlighted several points of the chain of circumstantial evidence. Firstly, the appellant ran up to PW2 in broad daylight. Secondly, the appellant and PW2 were related and knew each other very well. Thirdly, PW2 saw the appellant carrying a bloodied machete and not only announced that he had just killed his father, but he also threatened PW2 with death. Fourthly, PW3 saw trails of blood and scratches. Fifthly, PW2 and PW3 finally discovered the deceased's body, with injuries indicating trauma from a blunt object.

The learned State Attorney urged us to give weight to the oral confession which the appellant made to PW2 in the presence of one

Katabazi. He relied on the authority of the case of **POSOLO WILSON @ MWALYEGO V. R.**, CRIMINAL APPEAL NO. 613 OF 2015 (unreported), where the Court stated that oral confession made by a suspect before or in the presence of reliable witnesses, be they civilian or not; may be sufficient by itself to found conviction against the suspect. When the Court asked him why Katabazi did not testify to support PW2's claim that the appellant confessed to him orally, learned State Attorney replied that PW2's evidence covered all the prosecution intended to prove. He conceded that the trial judge's conclusion that the prosecution failed to call Katabazi to testify because Katabazi was dead did not come from witnesses.

Mr. Grey Uhagile concluded by urging us to dismiss the appeal because an unbroken chain of circumstantial evidence linked the appellant to the death of his father.

After hearing the submissions of learned counsel for the appellant and respondent, we shall begin from the established judicial practice of the Court guiding the role of the Court sitting on the first appeal. When sitting on first appeal, the judicial approach looks fresh at the entire evidence on record: **DEMERITUS JOHN @ KAJULI & THREE OTHERS V. R.**,

CRIMINAL APPEAL NO. 155 OF 2013 (unreported). Therefore, we shall re-evaluate the chain of circumstantial evidence on record and determine, if we can irresistibly conclude that it was the appellant, and nobody else, who killed the deceased.

The case against the appellant is circumstantial evidence. We have considered the submissions on circumstantial evidence that the prosecution relied on against the appellant, insisting that it irresistibly links the appellant to the deceased's death. We have similarly looked at the submissions made on behalf of the appellant, contending that the prosecution evidence had gaping holes that do not point at the appellant as the person who committed the murder.

This Court has on several occasions restated that in a criminal case based purely on circumstantial evidence, that evidence must irresistibly point to the accused's guilt and exclude any other person: **SHABAN MPUNZU @ ELISHA MPUNZU V. R.**, CRIMINAL APPEAL NO. 12 OF 2002 (unreported).

The charge sheet suggests that Idd s/o Buturumbe died around noon on 23rd December 2014. His wife, PW1, prepared food for him earlier that day because he wanted to visit a livestock market to sell one of his cows. After

taking his meal, the deceased instructed Fabian Idd Buturumbe to take the cow to the market. He planned to go to Kumnazi first to collect his identity card before meeting with Fabian at the cattle auction. PW1 was still at home when Fabian left to go and pick the cow, leaving the deceased at home. Shortly thereafter, PW1 also left home to visit her parents, leaving her husband at home. There is no evidence of when the deceased left home. No witness testified whether he managed to collect his identity card or whether he ultimately sold his cow. There is no evidence to suggest the appellant was the last person the deceased met before PW2 and PW3 later discovered his body in the bush around noon.

Further, PW3 testified how he, and PW2, followed up a trail of blood and found a parked motorcycle. About 12 to 13 metres on, they saw the deceased's body. We think there was a break in the chain of circumstantial evidence. PW3 and PW2 merely followed a trail of blood, found the motorcycle, and later the deceased's body. The chain does not irresistibly point to the appellant as the person who had anything to do with the parked motorcycle or the deceased's death. As a hypothesis, someone else other than the appellant may have been responsible for the deceased's death.

There is a gap in the circumstantial evidence regarding who parked the motorcycle and murdered the deceased. It could be the appellant who committed the murder; it could also be PW3 or any other person from the time the deceased left home to the time PW2 and PW3 discovered his body.

In our considered view, bloodied machete which PW2 allegedly saw the appellant carrying, does not in itself mean the deceased was the donor to link the appellant to the murder. In **FRANCIS ALEX V. R.**, CRIMINAL APPEAL NO. 185 OF 2017 (unreported), the trial court rejected circumstantial evidence, which relied on evidence of trails of blood found at the compound of the appellant. The trial court rejected that evidence because the prosecution did not make any effort to ascertain whether the blood was of a human being and more so of the deceased.

Mr. Grey Uhagile, the respondent's learned counsel, has relied much on an oral confession the appellant made to PW2. We think that verbal confession cannot stand alone to convict the appellant based on circumstantial evidence. Where the prosecution case relies on circumstantial evidence, proof of oral confession is only one of several links in the chain of circumstantial evidence requiring proof beyond reasonable

doubt. It cannot stand alone to sustain a conviction. We made this point very clear in **SAIDI BAKARI V. R.**, CRIMINAL APPEAL NO. 422 OF 2013 (unreported), where we said:

*"It is established law that a charge of murder can be fully proved by circumstantial evidence. **In determining a case centred on circumstantial evidence, the proper approach by a trial court and an appellate court is to critically consider and weigh all the circumstances established by the evidence in their totality, and not to dissect and consider it piecemeal or in cubicles of evidence or circumstances.** [Emphasis added]*

It is unsafe to link the appellant with the final days of Idd s/o Buturumbe. There are so many loose ends for circumstantial evidence to convict the appellant. As we suggested in **MARK S/O KASIMIRI V. R.**, CRIMINAL APPEAL NO. 39 OF 2017 (TANZLII), an accused person before convicting on circumstantial evidence must be the last person to be seen with the deceased. In the absence of a plausible explanation to explain the circumstances leading to death, he will be presumed to be the killer.

In the upshot of what we have said, our inevitable conclusion is that the appellant's conviction by the trial court on the basis of circumstantial evidence cannot stand. In the result, we hereby allow his appeal, quash his conviction for murder and set aside his sentence of death by hanging. The appellant shall immediately be set free, unless he is otherwise lawfully in prison.

DATED at **BUKOBA** this 26th day of August, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. K. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of Mr. Joseph Mwaksege, learned State Attorney for the Respondent/Republic and Mr. Mathias Rweyemamu holding brief for Mr. Remidius Mbekomize, learned Counsel for the Appellant, is hereby certified as a true copy of the original.

