IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

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

CRIMINAL APPEAL NO. 290 OF 2021

BAKARI YUSUPH HARID @ MKOKO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Mtwara at Mtwara)

(Msumi, SRM – Ext. Juris.)

dated the 3rd day of November, 2020
in
Criminal Sessions Case No. 13 of 2019

JUDGMENT OF THE COURT

22nd & 28th March, 2022

KEREFU, J.A.:

In the Resident Magistrate's Court sitting at Mtwara (Msumi, SRM – Extended Jurisdiction) in Criminal Sessions Case No. 13 of 2019, the appellant, Bakari Yusuph Harid @ Mkoko was arraigned for murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2019 (the Penal Code). The information laid before the trial court alleged that, on 25th November, 2017 at Bomba la Bure, Magomeni area within the Municipality and Region of Mtwara, the appellant murdered one Mbaraka Ibrahimu Mpende (the deceased). The appellant denied the charge laid against him.

At the end of the trial, he was found guilty, convicted and handed down the mandatory death sentence.

To establish its case, the prosecution relied on the evidence of eight witnesses and two documentary evidence, to wit, the postmortem examination report (exhibit P1) and the sketch map of the scene of the crime (exhibit P2). 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 indicates that, on 25th November, 2017 between 02:00 and 03:00 hours, Twaha Omari Kanjonjo (PW1) who was living in the appellant's house but in different rooms woke up and heard people arguing in the appellant's room. The said people argued for about five minutes and thereafter, he heard an unusual snoring of a person and, after a little while, there was a moment of silence. PW1 woke up his brother one Azizi Kaisi Mzee and told him about the matter. They both went to wake up their uncle, Issa Bakari Chengula (PW3) who was living nearby their house. PW3 came with them and knocked the appellant's door and the appellant opened. PW3 put questions to the appellant on the arguments and the snoring which were heard earlier from his room, but he did not give direct

answers, as he simply responded that they were all okay and his friend (the deceased) was asleep. That, if they wanted to see his friend, he would leave his door room open in the morning when heading to his farm. Upon hearing that response, they became suspicious and went to call the street chairperson, Ally Said Chaka (PW2) who came and when he entered inside the appellant's room, he saw blood splattered everywhere and he called the police right away. In describing the appellant's house where the incident occurred, PW1 said that, the house had no ceiling board so, one could easily hear whatever was happening in the other rooms.

PW1's account was supported by PW2 and PW3. PW2 added that, having entered the appellant's room he found the deceased's body on the mattress down on the floor covered by a bed sheet to his chest. PW2 flashed his torch on the deceased's body and noticed that his left eye was swollen and that there was blood clot on his chin. When he asked the appellant what happened, the appellant told him that his friend (the deceased) came back home around 01:00 hours injured. PW2 called Police who came and went on to conduct investigation. The appellant was arrested and the deceased's body was taken to Ligula Hospital Mtwara for medical examination.

PF 19994 Assistant Inspector Tuntufye (PW5), stated that on 25th November, 2017 around 03:00 hours he received a call from PW2 informing him about the incident. That he went to the scene of the crime with other Police Officers where they found PW1, PW2 and other people. They entered the appellant's room and found a human body lying on the floor surrounded with blood and covered with a bedsheet. The body had an injury under the chin and left eye and there were also clothes with blood and a knife under the table. PW5 interrogated the appellant who named the deceased to be Hashim Mpende, a resident of Likonde who was his friend who used to sleep in his room regularly. That, the deceased arrived at his place three days before the incident. PW5 went on to state that the appellant informed him that the deceased on that day came with an injury and he was bleeding and he told him that he fell into a terrace.

PW5 interrogated other people around and formed an opinion that the incident occurred inside the appellant's room as there was no traces of blood outside. G.4193 Detective Corporal Buyiki (PW6), drew a sketch map of the scene of the crime which was admitted in evidence as exhibit P2. G.4722 Detective Corporal Joseph (PW7) who investigated on the matter stated that while reading the case file, he noted that there were some

exhibits related with the incident, which included four pieces of broken stool and one coat tainted with blood. PW6 was directed to take the appellant to the hospital to establish his sanity and the medical examination report revealed that the appellant was sane.

At Ligula Hospital, an autopsy to the deceased's body was conducted by Dr. Geofrey Ngomo (PW8) who established the cause of the death to be severe hemorrhage from a penetrating wound inflicted below the deceased's chin. He described the wound to be of 5 centimeters deep and 3 centimeters width. PW8 formed an opinion that the wound was caused by a sharp object. The postmortem examination report was admitted in evidence as exhibit P1.

In his defence, the appellant admitted almost all what was stated by the prosecution witnesses save for the fact that he killed the deceased. He testified that he was living with the deceased, his uncle who used to come to his house regularly. That, the said uncle was nursing him due to his ill health. On the incident, he started by saying that he could not remember what exactly happened on the fateful date but he later testified that, on that date around 7:00 to 7:30 hours he was eating food in his room and the deceased was drinking his local brew (coconut brew). That, at some

point, someone called the deceased from outside. The deceased went out and, a few moments later, he returned, fell on the ground and he never got up. He said that he went out and called two young people who lived in the other room and asked them to report the matter to the street chairperson. He added that PW2 came and reported the matter to police. That, he was then arrested and taken to court.

When the respective cases on both sides were closed, the learned Senior Resident Magistrate summed up the case to the assessors who sat with him at the trial. Save for one assessor, who gave an opinion that there was no enough evidence to prove that it was the appellant who killed the deceased, the remaining two assessors unanimously returned the verdict of guilty of manslaughter against the appellant, though they both maintained that the prosecution failed to prove that he killed with malice aforethought. However, the trial court found the appellant guilty and convicted him as charged based on the circumstantial evidence and specifically the evidence of PW1, PW2 and PW3. It was the further finding of the trial court that the defence of insanity was unprocedurally raised and that it was an afterthought. In totality, the trial court was convinced that the prosecution

had proved the case to the required standard. Thus, the appellant was convicted and sentenced as stated earlier.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court armed with three grounds of appeal, **one**, that the prosecution failed to prove the offence against him beyond reasonable doubt; **two**, the charge was incurably defective and **three**, there were some unprocedural irregularities in summing up notes to the assessors.

At the hearing of the appeal before us, the appellant was represented by Mr. Stephen Lekey, learned State Attorney whereas the respondent Republic was represented by Mr. Abdurahaman Msham, learned Senior State Attorney.

When invited to elaborate on the grounds of appeal, Mr. Lekey sought and obtained leave of the Court for him to abandon the second ground of appeal. He thus argued the appeal only on the first and third grounds.

Submitting in support of the third ground, Mr. Lekey faulted the trial court for failure to direct the assessors on some vital points and specifically that, the death of the deceased occurred as a result of fighting between the deceased and the appellant. It is settled law that once it is established

that death occurred as a result of a fight, the court may not enter conviction for murder but for manslaughter. In establishing that there was a fight the learned counsel picked the evidence of PW1 found at pages 65 to 66 of the record of appeal and argued that in his testimony PW1 stated that he heard *'arguments and/or confrontation'* between the appellant and the deceased which, according to Mr. Lekey presupposes that there was a fight between the appellant and the deceased prior to his death. He contended that, in the summing up notes the trial court did not direct the assessors on that aspect.

When probed by the Court as to whether arguments or confrontation means fighting and whether during the trial the appellant pleaded fighting as his defence, the learned counsel responded that arguments do not imply fighting but confrontation means fighting. He conceded however that during the trial the appellant and the defence counsel did not raise the issue of fighting as a defence.

The learned counsel insisted that, since the element of fighting was raised by PW1, the trial court was duty bound to direct assessors on how such evidence could be applied in this case. To support his proposition, he cited the case of **Malambi Lukwaja v. Director of Public**

Prosecutions, Criminal Appeal No. 71 of 2018 (unreported). He then emphasized that, failure to direct the assessors on the said vital point of law has vitiated the entire trial.

He argued further that, although the pointed-out anomaly would have been remedied in a retrial, in view of the weak evidence tendered by the prosecution side, a retrial is not worthy. To clarify on this point, Mr. Lekey argued that, the circumstantial evidence which was relied upon to ground a conviction against the appellant was not proven to the required standard. That, for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt and not otherwise, he argued.

On that basis, the learned counsel went straight to argue the first ground by referring us to the case of **Nathaniel Alphonce Mapunda & Benjamini Alphonce Mapunda v. Republic** [2006] TLR 395. He contended that, it is a basic principle of law that the burden of proof in criminal cases lies squarely on the prosecution shoulders and the standard is beyond reasonable doubt. That, the appellant was only required to raise a reasonable doubt and could only be convicted on the strength of the prosecution case and not on the weakness of his defence. It was his strong argument that, in the case at hand, the prosecution has failed to discharge

that duty. He added that, since, in the matter at hand, the case against the appellant was based purely on circumstantial evidence, then the prosecution evidence was supposed to irresistibly point to the appellant's guilt and exclude any other person. He contended that there was no prosecution eyewitness who saw the appellant killing the deceased. It was only PW1 who testified that he heard arguments and snoring from the appellant's room. The evidence of PW1 was supposed to be scrutinized along with other prosecution evidence on record as stated in **Sikujua Idd v. Republic,** Criminal Appeal No. 484 of 2019 (unreported). He contended that the prosecution evidence, in this case, was not sufficient to establish that the appellant was the one who killed the deceased. He said, the fact that the deceased's body was found in the appellant's room, that alone could not have been taken to prove that he is the one who killed the deceased. He thus challenged the evidence of PW1, PW2 and PW3 that although they all testified that the deceased's body was found inside the appellant's room, none of them explained the time when the deceased came into the appellant's room and in what condition. To justify his argument, he referred us to pages 89 and 90 of the record of appeal where the appellant testified that, on the fateful date around 7:00 to 7:30 hours

the deceased was drinking his local brew and someone called him outside. That, the deceased went out and when he returned, he fell to the ground and he never got up. It was the argument of Mr. Lekey that, if the trial court had properly analyzed and evaluated the entire evidence on record, it would have found that the deceased might have been killed by someone's else other than the appellant.

He further challenged the evidence of PW7 that although he testified that there were some exhibits related with the case, including the four pieces of broken stool, one coat tainted with blood and a knife, all those items were not tendered in evidence as exhibits to prove the case against the appellant. Finally, and based on his submission, Mr. Lekey invited us, being the first appellate Court, to re-evaluate the evidence on record, allow the appeal, quash and set aside the sentence imposed on the appellant and set him free.

Upon further reflection, the learned counsel prayed that, should the Court find the appeal unmerited, then the appellant should be convicted with a lesser offence of manslaughter, as prior to the death of the deceased there was confrontation and/or fighting between him and the deceased.

In response, Mr. Mshamu, partly conceded to the submissions made by Mr. Lekey to the extent that the summing up to the assessors was not sufficiently done. However, the learned Senior State Attorney took a different argument on the way forward. He took a position that, a retrial should take effect from the stage when the learned Senior Resident Magistrate composed the summing up notes. That is to say, the proceedings of the trial court up to 19th October, 2020 when the trial court scheduled a date for the summing up, should be left intact. To bolster his proposition, he cited **Ekene Paul Ndejiobi v. Republic,** Criminal Appeal No. 360 of 2019 (unreported).

As regards the first ground of appeal, Mr. Mshamu also faulted the trial court for failure to analyze and evaluate the evidence on record. It was also his contention that, if properly evaluated it should have alerted the trial court to have some suspicion on the appellant's mental health at the time of committing the offence. He argued that the appellant's behaviour and conduct after he had committed the offence suggested that he was not a sane person. He specifically referred us to the evidence of PW7 together with the trial court's judgment and argued that, to some extent, the issue of insanity would appear to have attracted the attention of the

trial court as depicted at pages 134 to 137 of the record of appeal, but it failed to take necessary steps to order that the appellant be medically examined under sections 219 and 220 of the CPA. It was his argument that the trial court should have considered the defence of insanity even if the same was not pleaded by the appellant. On that basis, he urged us, being the first appellate court to analyze and re-evaluate the entire evidence on record and find that at the time of commission of the offence the appellant was not a sane person. As such, he urged us to find it appropriately to invoke the provisions of section 220 of the CPA.

In a brief but focused rejoinder, Mr. Lekey conceded with his learned friend that there were elements of insanity on the part of the appellant.

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 our deliberation on the appellant's complaint under the third ground of appeal. It is settled law that involvement of assessors in trials before the High Court gives such trials legality, because it is a requirement under section 265 of the CPA. We thus agree with both

learned counsel for the parties that, where summing up is found to be wanting, as it happened in the cases of **Malambi Lukwaja** (supra) and **Ekene Paul Ndejiobi** (supra) cited to us by the learned counsel, the Court has tended to nullify proceedings, quash the conviction and set aside the resultant sentence. Other cases include **Washington s/o Odindo v. Republic,** (1954) 21 EACA 392; **Charles Lyatii @ Sadala v. Republic,** Criminal Appeal No. 290 of 2011 and **Said Mshangama @ Singa v. Republic**, Criminal Appeal No. 8 of 2014 (both unreported). In **Mshangama** (supra) we clearly stated that: -

> *"It is provided under the law that, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial Judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

We also agree with the learned counsel that the decision as to whether a retrial should be ordered or not would depend on whether in the circumstances of each case, there would be sufficient evidence to support the prosecution case. We are mindful of the fact that both learned counsel

for the parties were at one that, in the instant case, there is no sufficient evidence to prove that it was the appellant who killed the deceased. Having carefully considered the appeal at hand, with respect, we hesitate to go along with them. This is because, the issue of fighting which was the basis of them faulting the summing up notes to the assessors was not a direct issue in this matter. The evidence of PW1 which was the basis of Mr. Lekey to fault the summing up notes to assessors, in our view, did not indicate any element of fighting. In his own words, PW1 at page 66 of the record of appeal, testified that: -

> *"On 25th November, 2017 I was asleep. It was around 02:00 or 03:00 hours after the midnight. I then woke up to hear people arguing. They kept on arguing for 5 minutes then there was unusual sound of a person snoring."*

Then, upon cross-examination, PW1 at page 67 said, *"I heard confrontation, then snoring which was very unusual."*

In his submission, Mr. Lekey interpreted the words '*arguments* and '*confrontation*' to mean fighting. With respect, we are unable to agree with him because the said words '*argument*' and '*confrontation*' are defined in the **Black's Law Dictionary,** 8th Edition to mean: -

(1) *'argument' – a statement that attempts to persuade ...or the act or process of attempting to persuade,' and*

(2) *'confrontation' – a hostile or argumentative situation...'*

Going by the above definitions, it is clear that the two words do not imply fighting but only a hostile or argumentative situation. It is common ground that, the question of there being a fight or not, is a question of fact to be proved by evidence. It is not a question of interpretation, or one requiring verbal acrobatics as Mr. Lekey would have us conclude. In the matter at hand, the question on what exactly happened on the fateful night, was clearly answered by the evidence of PW1, PW2 and PW3. In addition, the appellant himself who was in his room with the deceased, never testified on that aspect. We therefore find the submission by both learned counsel on this aspect to be misplaced, as it was not supported by the record.

We are therefore satisfied that the learned Senior Resident Magistrate properly directed the assessors at the length and breadth of the evidence on record together with all vital points in respect of the offence committed. We therefore find that the summing up notes, in this case offered sufficient directions to the assessors, and we do not think the trial court could have made it anyhow clearer. If anything, it could just be a

matter of style, but we do not see any non-direction that affected the substance of the decision. We are increasingly of the view that, even the cases of **Malambi Lukwaja** (supra) and **Ekene Paul Ndejiobi** (supra) cited to us by the learned counsel, are not applicable to the circumstances of this appeal because the omission and irregularities identified in the summing up notes therein were ably established, which is not the case herein. In the event, we dismiss the third ground of appeal for being devoid of merit and proceed to consider the first ground in relation to the substance of the appeal.

On the first ground, there is no dispute that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed when the offence was committed. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of the 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.

In his submission, Mr. Lekey referred us to the evidence of PW1, PW2 and PW3 and argued that since none of them explained the time when the deceased came into the appellant's room and in what condition, the trial court was supposed to find that they did not establish beyond reasonable doubt that the deceased was killed by the appellant. He faulted the trial court for failure to analyze and evaluate the evidence of PW1

against that of the appellant. That, the appellant himself testified that, the deceased was injured outside by someone else. We wish to state that, in the instant case, the evidence on record which tends to implicate the appellant heavily and which apparently was used by the trial court to convict the appellant includes, **first,** that the deceased's body was found inside the appellant's room; **second,** that there was no logical explanation why there were spill of blood inside the appellant's room and not a single trace outside; **third,** the incriminating conduct especially when the appellant was asked about the arguments and snoring sound heard by PW1 inside his room, he tried to conceal the truth by saying that everything was okay and that the deceased was asleep, **fourth,** the appellant's different versions, that at some point he stated that the deceased was injured outside his room and when he got inside, he fell on the floor and in his defence he also said he did not remember what exactly happened on that particular date because he was sick and **fifth,** the seriousness of the wound inflicted on the deceased body which proved malice aforethought.

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 lead to an irresistible inference that the appellant has committed the murder of the deceased.

On the issue of insanity, it is on record that the same was not raised by the appellant as a defence during the trial. In his evidence in chief, the appellant simply indicated at page 90 of the record of appeal that he could not remember anything regarding the killing of the deceased as he was sick but he also narrated what had happened on the fateful night by giving different versions of the stories as indicated above to conceal the truth of the matter.

We have also noted that, in his evidence PW7 testified that at some point, they subjected the appellant to medical examination to establish his sanity. The medical examination report revealed that the appellant was sane. At any rate, our reading and understanding of the evidence as a whole, we do not get the impression that the appellant might have been insane at some point. He was cross-examined on what happened on the date of incident and it appears, he was composed and responded well to the questions put forward to him. In a similar vein, in his defence he

testified in such manner that it is obvious to us that he knew quite well as to what exactly he was talking about.

It has to be noted that, in law the defence of insanity is available under section 13 (1) of the Penal Code. However, before the court can exercise its power under section 220 (1) of the Criminal Procedure Act to inquire into an accused person's insanity it must first appear to the said court that the said accused person might have been insane at the material time. This was observed by this Court in **Danstan Authony Luambano v R** (1990) TLR 4, that: -

> *"... There must be some material which would make it appear to the court, and reasonably so if we may add, that the accused person might have been insane when he committed the deed..."*

Having scrutinized the evidence on record, it is our settled view that, in the instant case, there were no material facts that would have made the court feel that the appellant might have been insane at the time of committing the offence. There was no suggestion by any of the witnesses that he might have been insane at any one time. In the circumstances, we see no reason to differ with the finding of the learned Senior Resident Magistrate with Extended Jurisdiction on this aspect.

Consequently, 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.

For the foregoing reasons, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

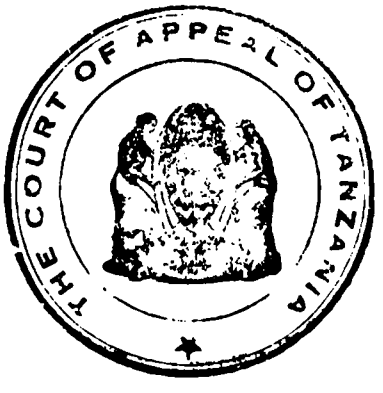
DATED at **MTWARA** this 26th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEA

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 28th day of March, 2022 in the presence of Mr. Bakari Yusuph Harid @ Mkoko, counsel for the appellant and Mr. Wilbroad Ndunguru, Senior State Attorney for the Respondent is hereby certified as a true copy of original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL