IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 292 OF 2021

BAKIRI RAJABU BAKIRI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Hon. Msumi, SRM – Ext. Juris.)

dated the 20th day of November, 2020

in

Criminal Sessions Case No. 16 of 2019

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JUDGMENT OF THE COURT

21st & 31st March, 2022

NDIKA, J.A.:

The appellant, Bakiri Rajabu Bakiri, was charged with murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2019 ("the Penal Code"). The accusation was that, he murdered one Hamisi s/o Musa Lauka on 27th December, 2016 at Makonga village within Newala District in Mtwara Region. He was convicted as charged and was condemned to death. He now appeals against the conviction.

The testimonies of the prosecution witnesses, knitted together, present the following narrative: around 20:00 hours on 27th December, 2016, the deceased was home at Makonga village, Newala with his wife

(Sharifa Mohamed Ally – PW1) and children. The appellant came over and was welcomed by the deceased's daughter to the living room, which was illuminated by solar lights. The deceased went to the living room and met the appellant, who immediately asked him to go to the backyard for a chat. PW1, who knew the appellant very well, saw the two of them walking to the backyard. She did not hear the substance of their conversation but after a few minutes she was surprised seeing the deceased chasing the appellant. She curiously followed them behind. After a short distance, she saw her husband lying on the ground, the appellant having already disappeared. On asking him what happened as he was crying in anguish, he opened his shirt telling her that the appellant had stabbed him with a knife. PW1 saw a stab wound on the deceased's lower right part of the stomach, with a lot of blood oozing. She took her loincloth known as *khanga* and covered the wound while crying out for help. The deceased's younger brother (Juma Mussa Lauka – PW2) and several neighbours came to the scene. The deceased was rushed to Newala District Hospital for treatment and was later referred to Ndanda Hospital on the following day for further treatment. Unfortunately, his condition worsened and he succumbed to death on 29th December, 2016.

PW2 recounted how he rushed to the scene of the crime in the fateful night in response to his sister-in-law's frantic call for help. He found his brother bleeding from his right hand side near the chest. The deceased told him that the appellant had stabbed him with a knife. He also narrated on events leading up to the deceased's death at Ndanda Hospital as well as the appellant's arrest on 30th January, 2017 at Chanika village by Saidi Hashimu Mahiyadi (PW4), a militiaman.

Kalembuka Adam Mbiyau (PW5), Assistant Medical Officer working at Newala District Hospital, examined the deceased's body on 30th December, 2016 at Makonga village. He said that the death was due to a penetrating wound which perforated the stomach causing aspirated vomitus during vomiting leading to aspiration pneumonia. He posted his findings on the post-mortem examination report (Exhibit P2).

The prosecution presented the appellant's ex-wife, Amina Hassan (PW3), to adduce evidence on the probable motive for the murder. According to her, the appellant was her husband for seven years until 2014 when they divorced. The appellant, she said, still wanted her back but she was unwilling because she was engaged to the deceased. About a week before the deceased's killing, the appellant found PW3 and the deceased in a bedroom making love. He just watched them and left.

Police Officer F.7115 Detective Corporal Abbasi (PW6) visited the scene of the crime on 28th December, 2016 in the course of his investigations into the murder. He pencilled a sketch drawing (Exhibit P1) of the scene, showing the distance between where PW1 found the deceased lying on the ground and his home as being about fifty metres.

On the other hand, the appellant, in his defence denied the accusation. However, he admitted going to the deceased's home in the fateful evening around 19:45 hours, at the deceased's invitation, to collect TZS. 450,000.00 which the deceased owed him from their business dealings. Both the deceased and his wife were at home at the time. While outside the deceased's house, the deceased gave him TZS. 150,000.00 instead of TZS. 250,000.00, which had been agreed. A disagreement broke out in the course of which the deceased slapped him leading to a fight between them. Then, the appellant ran away towards a road to a place he named as Chitekete. The deceased pursued him but he failed to jump over a one-foot ditch and fell down. The appellant kept running away. He later learnt with shock that he was being accused of injuring the deceased. On being cross-examined, he admitted that in the course of the fight, the deceased did not draw any weapon.

The three assessors who sat with the learned trial Senior Resident Magistrate returned a unanimous verdict of guilty. In convicting the appellant, the learned trial Senior Resident Magistrate found it undisputed that the deceased died an unnatural and violent death. He was alert, in the circumstances, that what was in dispute was whether the appellant was the deceased's assailant and if so, whether he killed with malice aforethought. On the first issue, the learned trial Senior Resident Magistrate noted that the evidence by PW1 and PW2 on how the deceased was killed was mostly circumstantial but he took the view that it irresistibly pointed to the appellant's guilt. He added that the said evidence corroborated the deceased's dying declaration, which he made to PW1 and PW2, that the appellant stabbed him with a knife. As regards the second issue, the learned trial Senior Resident Magistrate, citing the famous case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported), took the view that the evidence that the deceased was stabbed with a sharp object that penetrated so deep that it pierced his stomach and small intestines left no doubt that the appellant intended to cause him death or grievous bodily harm. Consequently, the learned trial Senior Resident Magistrate convicted the appellant of the

offence as charged and sentenced him to death by hanging, as we hinted earlier.

The appellant has predicated his appeal on three grounds: one, that the charged offence was not proved beyond reasonable doubt; two, that he was convicted on an incurably defective charge; and three, that the summing up to the assessors was irregular and inadequate.

At the hearing, Mr. Stephen Lekey, learned counsel, argued the appeal on a dock brief for the appellant, who was also present. The respondent had the services of Mr. Abdulrahman Msham, learned Senior State Attorney. Mr. Lekey canvassed the first and third grounds of complaint but abandoned the second ground of appeal.

We propose to begin with the third ground. In support of this ground, Mr. Lekey faulted the learned Senior Resident Magistrate for failing to address the assessors on the law on the criminal liability of an accused who causes death in the course of a fight. As the law stands, a killing in such circumstances would not amount to murder but manslaughter. He placed reliance upon our decision in **Malambi Lukwaja v. Republic**, Criminal Appeal No. 71 of 2018 (unreported), where we stressed that although a summing up is a matter of personal

style, it must contain all essential elements in a case. Submitting that the non-direction by the learned Senior Resident Magistrate was prejudicial to the appellant, he urged us to nullify the trial proceedings and the decision thereon as we did in **Malambi Lukwaja** (*supra*) upon being satisfied that the summing up was inadequate.

In his reply, Mr. Msham disagreed with his learned friend. He contended that the impugned summing up was so detailed that it covered all essential elements of the case. He added that it was not in the evidence that the appellant killed the deceased in the course of a fight and that the said issue did not feature in the final submissions of the learned defence counsel for the appellant. Hence, he urged us to find that it was not a non-direction on the part of the learned Senior Resident Magistrate in his summing up that he did not address the alleged fight. Accordingly, he prayed that the ground of appeal at hand be dismissed.

We begin by acknowledging that until recently in terms of section 265 of the Criminal Procedure Act, Cap. 20 R.E. 2019 ("the CPA"), every criminal trial before the High Court had to be conducted with the aid of, at least, two assessors. Pursuant to section 298 (1) of the CPA, the trial Judge is required to sum up the case to the assessors once the case on both sides is closed. It is settled that for assessors to make meaningful

participation by rendering informed opinions at the trial, the trial Judge must provide them with a proper and adequate summing up covering all vital points of the case – see **Washington s/o Odindo v. R** (1954) 21 EACA 392; **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007; **Respicius Patrick @ Mtanzangira v. Republic**, Criminal Appeal No. 70 of 2019 (both unreported) and **Malambi Lukwaja** (*supra*). Non-directions or misdirections in a summing up can vitiate the trial proceedings and the decision thereon as happened in, among others, **Malambi Lukwaja** (*supra*).

We have carefully scanned the record of appeal in the light of the competing submissions of the learned counsel. At the forefront, we go along with Mr. Msham's argument that the summing up, spanning over 25 pages from page 106 to page 131 of the record, is evidently so detailed that it covers all the essential matters of the case in line with what we underlined in **Malambi Lukwaja** (*supra*), which Mr. Lekey relied upon. Secondly, we think Mr. Lekey's criticism that the summing up was inadequate for not reflecting the alleged fight is clearly unwarranted. For, it was neither the prosecution case nor the appellant's defence that the death occurred in the course of a fight between the deceased and the appellant. Looking at the evidence on record in its

proper perspective, it is clear that the appellant lamented that the deceased slapped him and then a brawl ensued forcing him to run away from the deceased's backyard. The deceased pursued him but he stumbled and fell into a small ditch. The appellant denied attacking the deceased as he insisted that he died from an injury he sustained due to the fall.

We appreciate that where death occurs as a result of a fight between the deceased and the accused, barring exceptional circumstances the accused person should be found guilty of the lesser offence of manslaughter, not murder – see, for instance, **Jackson Mwakatoka & Two Others v. Republic** [1990] TLR 17; **Moses Mungasiani Laizer alias Chichi v. Republic** [1994] TLR 222; and **Republic v. Wimaana** [1968] HCD n.49. In the instant case, however, it is plain that the appellant neither asserted that he killed the deceased during a fight nor did he suggest that the homicide happened in the course of an act of self-defence. He simply denied flatly to have caused the death. Given his relentless denial of the killing, the alleged fight could not be a consideration in the case. We, therefore, find that the third ground of appeal is flawed and proceed to dismiss it.

We now turn to the general complaint in the first ground that the charged offence was not proved beyond reasonable doubt.

Arguing in support of the above ground, Mr. Lekey started off by observing, rightly so, that the evidence on record was mainly circumstantial as there was no eyewitness account on how the deceased met his death. Citing the case of **Nathanael Alphonce Mapunda and Benjamin Alphonce Mapunda v. Republic** [2006] TLR 395 at page 402, he submitted that it is a principle of law that for circumstantial evidence to ground a conviction, the facts from which an inference of guilt is drawn must be proven beyond reasonable doubt. On this basis, he urged us to take into account that the incident occurred at night, that the deceased ran over fifty metres from his home and that it was most probable that as the deceased was chasing the appellant, PW1 did not see them properly. It was his hypothesis, therefore, that another person might have intervened and attacked the deceased but he could not be seen by PW1 because the route was not illuminated by any light.

Coming to the dying declaration, Mr. Lekey cited our decision in **Sadick Ally v. Republic**, Criminal Appeal No. 81 of 2015 (unreported) for the settled principle that such evidence must be scrupulously examined and that for it to be acted upon corroboration is highly

desirable. Referring us to page 163 of the record of appeal, the learned counsel argued that the trial court's analysis and finding on corroboration for the deceased's dying statement was insufficient.

On his part, Mr. Msham, at the outset, stated his support for the appellant's conviction. Taking us through the evidence, he contended that it was undisputed that the appellant was at the deceased's home in the fateful night and that PW1 saw him there when he was conversing with the deceased. That a few moments later PW1, with the aid of solar lights outside the home, saw the deceased chasing the appellant up to the point where the deceased fell to the ground while the appellant disappeared. At that point, the deceased was crying in agony, complaining to have been stabbed by the appellant. The learned Senior State Attorney stressed that identification of the appellant was not an issue and ruled out the possibility that an intervening assailant joined the chase and caused the death.

Mr. Msham argued further that it is in the evidence that the deceased sustained a stab wound. This fact, he contended, was proved by the deceased's dying declaration as well as PW5's evidence supported by the autopsy report (Exhibit P2). Elaborating, he argued that the medical evidence established that the deceased's stomach was

punctured by a sharp object which pierced small intestines. That evidence, he added, negated the possibility that the wound was caused during the deceased's fall to the ground.

As regards the deceased's dying declaration, Mr. Msham posited that the said statement, which he conceded needed to be corroborated, was sufficiently validated mostly by PW1's testimony and the medical evidence. He urged us to take into account that PW1 and PW2 were not cross-examined on the dying declaration. He finally concluded that the evidence overwhelmingly established that the appellant killed the deceased and that the manner of the stabbing was intended to kill the deceased or cause him grievous bodily harm. On that basis, he prayed that the impugned conviction be sustained.

In a brief rejoinder, Mr. Lekey argued that PW5's autopsy results were questionable on the ground that the autopsy, which was conducted three days after the injury, could not establish accurately the extent and severity of the injury since the deceased had already been operated on and stitched at the hospital to treat the injury.

We have examined the record of appeal and duly considered the opposing submissions of the learned counsel as well as the authorities

cited. Two issues arise for our determination: one, whether the appellant killed the deceased; and two, if the first issue is answered affirmatively, whether in killing the deceased the appellant was actuated by malice aforethought.

We begin with the first issue: Did the appellant kill the deceased? It is noteworthy that the learned Senior Resident Magistrate observed, rightly so, that the case turned purely on circumstantial evidence and the deceased's alleged dying declaration. Citing the decisions in **Samson Daniel v. R.** (1934) EACA 134 and **Ally Bakari & Pili Bakari v. Republic** [1992] TLR 10, he was cognizant that circumstantial evidence in homicide cases can be acted upon if it leads to the inevitable conclusion that the death was the act or contrivance of the accused person. That the facts from which an inference of guilt is drawn against the accused must be proved beyond reasonable doubt.

It is common ground that the appellant was at the deceased's home in the fateful night. He admitted that PW1 saw him there and he later went out with the deceased for a conversation. Whatever was the subject of the conversation did not matter. PW1 did not hear what it was about. It was just the two of them chatting.

It was unchallenged that after a few moments PW1, with the aid of solar lights outside the home, saw the deceased chasing the appellant up to the point where the deceased was found lying on the ground, which was about fifty metres from the home. She had followed them in what was certainly a hot pursuit. On this evidence, we find untenable Mr. Lekey's contention that there might have been an intermeddling assassin who stabbed the deceased midway before he fell to the ground. Had there been one, PW1, who, as hinted, was in hot pursuit, would have definitely seen him. We agree with Mr. Msham that the circumstances of the case do not raise the appellant's identification as an issue. Furthermore, it was unchallenged that PW1 found her husband lying on the ground, crying in agony, pointing an accusing finger at the appellant that he had knifed him. At that point, the appellant had already vanished from the scene. We find the suggestion that the deceased sustained the injury when he fell to the ground so whimsical. Both PW1 and PW2 did not find any sharp objects on the ground where the deceased lay. On the whole, it is inferable that the appellant was the one who stabbed the deceased just before the deceased started running after him from his home. It is most probable that the deceased reacted to the stabbing by

pursuing the appellant but ended up falling to the ground where PW1 found him.

So far as the alleged dying declaration is concerned, the learned Senior Resident Magistrate was conscious, quite correctly, that such a statement was admissible in terms of section 34 (a) of the Evidence Act, Cap. 6 R.E. 2019 and that on the authority of our decision in **Reuben Mhangwa and Kija Reuben v. Republic**, Criminal Appeal No. 99 of 2007 (unreported) such a statement, as a matter of practice, required corroboration before it could be acted upon.

We have reviewed the testimonies of PW1 and PW2 that the deceased, while lying on the ground in anguish, named the appellant as the assailant who stabbed him with a knife. As rightly found by the trial court, this evidence was uncontroverted as none of the two prosecution witnesses was cross-examined on it. As did the trial court, we find it established that the deceased named the appellant as his assailant.

Was the dying declaration sufficiently corroborated? Without any hesitation, we agree with Mr. Msham that, indeed, the dying statement was sufficiently validated by the testimonies of PW1 and PW2 as well as the medical evidence. Here we have in mind the corroborative account of

PW1 from the moment the deceased and the appellant started their conversation and until when the former chased the latter to the point where the former fell to the ground. This testimony negates the possibility that the killing was an act committed by an intermeddling assassin.

Moreover, both PW1 and PW2 saw the stab wound on the deceased's lower right part of the stomach, with a lot of blood oozing shortly after the deceased had fallen to the ground. The medical evidence, contained in PW5's testimony and Exhibit P1, was consistent with the deceased's claim that he was stabbed. PW5 confirmed that the deceased sustained a penetrating wound caused by a sharp object that pierced the abdominal part and small intestines. Weighed against the prosecution case as explained above, the appellant's apparently self-serving denial of the killing naturally dissipates. It was rightly rejected by the trial court. That said, we are satisfied beyond reasonable doubt that it was the appellant who killed the deceased.

We now deal with the question whether in killing the deceased the appellant was actuated by malice aforethought.

In his judgment, the learned Senior Resident Magistrate referred to section 200 of the Penal Code defining the circumstances in which malice aforethought would be inferable. He took the view that the circumstances of the case fit neatly within paragraph (a) of section 200 in that the killing was committed with an intention to cause death of or to do grievous harm to the deceased. He sought guidance from our decision in **Enock Kipela** (*supra*) where we held that:

> *"Usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had that intention must be ascertained from various factors, including the following: (1) the type and size of weapon, if any, used in the attack; (2) the amount of force applied in the assault; (3) the part or parts of the body the blow or blows were directed at or inflicted on; (4) the number of blows, although one blow may, depending upon the facts of a particular case, be sufficient for this purpose; (5) the kind of injuries inflicted; (6) the attackers utterances, if any, made before, during or after the killing; and (7) the conduct of the attacker before and after the killing."*

The learned Senior Resident Magistrate concluded that on the evidence that the deceased was stabbed with a sharp object on a

vulnerable part of his body and that the said object went as deep as piercing his stomach and small intestines, there was not a shred of doubt that the appellant intended to kill the deceased.

Perhaps, before we go further we should deal with Mr. Lekey's effort to cast doubt on the results of the autopsy, as he contended that the extent and severity of the injury sustained by the deceased could not be accurately established by PW5. He based his submission on the fact that the autopsy was carried out after the deceased had already been operated on and stitched at the hospital to treat the injury. Indeed, that may be so as PW5 acknowledged in his testimony, at pages 84 and 85 of the record of appeal, that he found that the deceased's stomach and small intestines had already been stitched following surgery at the hospital. However, he firmly attributed the piercing of the deceased's stomach and small intestines by a penetrating sharp object. It is too plain for argument that the sharp object he referred to was supposedly the murder weapon.

Having fully reflected on the evidence on record in its totality and the trial court's reasoning, we entertain no doubt that it is inferable, from the stabbing by the appellant with a sharp object in the deceased's stomach causing him such a penetrating wound with the small intestines

pierced, that the killing was plainly with intent, at least, to cause grievous bodily harm to the deceased, if not causing him death. In the premises, we find no substance in the first ground of appeal. We dismiss it.

For the reasons we have given, we entertain no doubt that, on the evidence on record, the learned Senior Resident Magistrate rightly convicted the appellant of murder and sentenced him to suffer death by hanging. We, therefore, dismiss the appeal in its entirety.

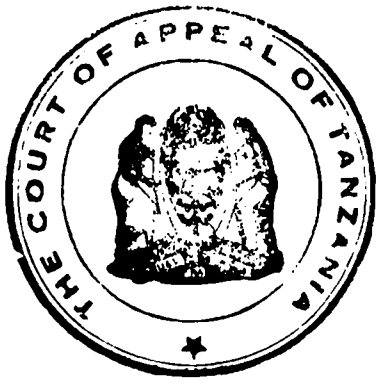
DATED at **MTWARA** this 30th day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 31st day of March, 2022 in the presence of the Appellant in person, unrepresented and Mr. Kauli George Makasi, Senior State Attorney for the respondent /Republic is hereby certified as a true copy of original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL