IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

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

CRIMINAL APPEAL NO. 421 OF 2019

PETER DIDIA @ RUMALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Shinyanga)

(Ebrahim, J.)

dated the 27th day of September, 2019
in
Criminal Sessions Case No. 24 of 2017

JUDGMENT OF THE COURT

7th & 11th November, 2022

KEREFU, J.A.:

The appellant, Peter Didia @ Rumala was charged with the offence of murder contrary to section 196 of the Penal Code in the High Court of Tanzania sitting at Shinyanga (Ebrahim, J.) in Criminal Sessions Case No. 24 of 2017. It was alleged that, on 18th December, 2014 at Mwasekagi Village, within Shinyanga District in Shinyanga Region, the appellant did murder one Tungu s/o Bahati, the deceased. The appellant pleaded not guilty to the charge. However, after a full trial, he was found guilty, convicted and sentenced to suffer death by hanging.

In essence, the substance of the prosecution case as obtained from the record of appeal indicate that, the deceased was a son of Bahati Malengela (PW5) who was doing business with the appellant. Out of the said business, the appellant was indebted by PW5, who finally decided to confiscate and retain the appellant's bicycle to put pressure on him to pay the debt, but the appellant did not do so. It was the testimony of PW5 that, on 18th December, 2014 he was approached by the appellant who asked to borrow the said bicycle for a while, but PW5 declined as he told the appellant that he wanted to send the keys to his in-law one Elias Mathayo (PW6).

Instantly, PW5 asked his son (the deceased), to use the said bicycle, to take the keys to PW6 and the son never returned home. Thus, PW5 phoned PW6 to inquire on the whereabouts of his son and PW6 informed him that he left his house with the appellant. Efforts were made by PW5 to search for his son but ended up in vain. Thereafter, PW5 reported the matter to the Militia (the *Sungusungu*) Commander and the entire village, through a *mwano*, gathered and started searching for PW5's son. Later, on 20th December, 2014 around 18:00 hours, the deceased body was found dumped in a swamp.

In his testimony, PW6 supported the narration by PW5 and he specifically, confirmed that on 18th December, 2014 around 15:00 hours,

the deceased accompanied by the appellant, went to his shop and they left together telling him that they were going back home. That later, around 18:00 hours, PW6 received a phone call from PW5 asking the whereabouts of the deceased and he told him that he had already left with the appellant. Severine Joseph (PW1) and the Village Executive Officer testified that, on 20th December, 2014, in the morning, he received a phone call on the missing of PW5's son. That later, in the evening PW1 was informed that the missing child was found dead and the last person to be seen with the deceased was the appellant.

Upon receiving that information, PW1 ordered the *Sungusungu* to look for the appellant. PW1 stated further that, he went to the scene where he saw the deceased body in the water oozing with blood from the nose and the neck was loose. PW1 testified further that, around 18:00 hours, he was informed that the appellant had been found at the house of his relative, one Bulaga Salago (PW3). PW1 availed that information to the police, who went to arrest the appellant together with PW3 and took them at the *Sungusungu's* office. It was PW1's testimony that, following the appellant's admission to the commission of the offence, they took him in a police motor vehicle together with his bicycle to the police station. PW1 said that, on the way to the police, No. F.4174 D/CPL Lukas Musa Mchembe (PW7), interviewed the appellant who

confessed to have killed the deceased out of revenge, because PW5 had confiscated his bicycle as he had failed to refund his money. PW1 tendered the certificate of seizure which was admitted in evidence as exhibit P2.

The evidence of PW1 was supported by PW3 who testified that, on 20th December, 2014, while at his house with his family, he saw the appellant riding a bicycle. That, the appellant got out of the bicycle and entered inside the house to greet them. While still there, several people came, arrested and took them to the *Sungusungu's* office together with the appellant's bicycle. PW3 stated further that, in the course of being interviewed he heard the appellant confessing that he drowned the deceased in the swamp and took his bicycle.

No. F.4174 D/CPL Lukas Musa Mchembe (PW7), the investigation officer testified that, on 20th December, 2014 he went to the scene and found many people surrounding two people and one of them (the appellant) was tied with ropes. They took the appellant, the deceased body and the bicycle to the police station. On the way, the appellant confessed that he had killed the deceased to take back his bicycle as he could not refund PW5's money.

An autopsy on the deceased's body was conducted by Dr. Richard Mikwabe Okwachi (PW4), who concluded that the cause of death was

strangulation on the deceased's neck. A postmortem report to that effect was admitted in evidence as exhibit P1.

In his defence, the appellant denied to have killed the deceased. He testified that he was arrested on 18th December, 2014 around 18:00 hours together with PW3 and they were taken to the *Sungusungu's* Office where he was tortured and, on 20th December, 2014 he was taken to the Police Station. He denied to have confessed before the *Sungusungu* or even inside the police motor vehicle. He however admitted to have bad blood with the deceased's father (PW5) following their business dispute where his bicycle was confiscated.

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. They unanimously returned a verdict of guilty against the appellant. Having concurred with the unanimous verdict of the assessors, the learned trial Judge found the appellant guilty and convicted him as charged based on the circumstantial evidence and his own oral confession. Thus, the appellant was sentenced as indicated above.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court armed with seven grounds of appeal which can conveniently be paraphrased as follows; **first**, that, the prosecution case

was based on the hearsay evidence; **second,** The case against the appellant was fabricated and should not be trusted; **third,** the evidence adduced by PW1, PW3 and PW7 was doubtful and unreliable to mount the appellant's conviction; **fourth,** the exhibits relied upon by the trial court to convict the appellant were illegally obtained and unprocedurally admitted in evidence; **fifth**, the evidence of PW4 and PW5 are tainted with contradictions and inconsistencies; **sixth**, the sketch map of the scene of crime was not tendered before the trial court to prove the place where the deceased body was found; and **seventh**, the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant was represented by Mr. Frank Samwel, learned counsel whereas the respondent was represented by Ms. Ajuaye Bilishanga Zegeli, learned Principal State Attorney assisted by Ms. Caroline Mushi, learned State Attorney.

At the outset, and before we could embark on the hearing of the appeal, Mr. Samwel sought and obtained leave to abandon the fourth ground of appeal and added the two following grounds:

1. *The learned trial Judge erred in law to rely on the evidence of PW7 whose statement was not read during the committal; and*
2. *The learned trial Judge erred in law to accept and consider the evidence of one Elias Mathayo (PW6) while the Court had been notified earlier that the said person was dead.*

On taking the stage, Mr. Samwel intimated that he will start to argue the two additional grounds and thereafter, the grounds in the memorandum of appeal.

Starting with the second additional ground, Mr. Samwel faulted the procedure adopted by the trial court to receive and consider the evidence of PW6 even after it had been notified that such witness was dead. He referred us to page 116 of the record of appeal and argued that, on 23rd August, 2019 the prosecution filed a 'Notice to produce a statement of a witness who is dead' and notified the trial court that, their intended witness by the name of Elias Mathayo was dead and therefore, his evidence will be availed through a statement that will be filed under section 34B (2) of Evidence Act. However, and without any explanation, on 27th August, 2019 the said deceased person resurfaced before the trial court and testified as PW6. It was the argument of Mr. Samwel that, since the said witness had already been reported dead, it was improper for the prosecution side to, again, summon him to testify before the trial court without any explanation. That, the trial court erroneously received and relied on that evidence to convict the appellant. As such, Mr. Samwel urged us to disregard the evidence of

PW6 and find that, the case against the appellant was cooked and fabricated.

In response to this ground, Ms. Zegeli, though, readily conceded that, on 23rd August, 2019 the prosecution lodged a notice to produce the statement of PW6 under section 34B (2) of Evidence Act, but she argued that, on 26th August, 2019, during the trial, the prosecution, having received the information that the said Elias Mathayo was not dead, prayed to withdraw the said notice and their prayer was not objected by the defence counsel together with the appellant, thus, the trial court marked the said notice withdrawn. She thus urged us to find the second additional ground of appeal devoid of merit.

Having perused the record of appeal, we find that this is a straight forward issue as, it is apparent at page 42 of the record of appeal that during the trial, the said notice was withdrawn without any objection from Mr. Samwel who represented the appellant before the trial court. It is also on record that, on 27th August, 2019 when the said Elias Mathayo testified as PW6then, Mr. Samweli did not raise any objection regarding his evidence. Likewise, the appellant, who was as well before the trial court and familiar with Elias Mathayo, did not complain or even object to his evidence. In the circumstances, and with respect, we find the

submission of Mr. Samwel on this ground, to be nothing but, an afterthought.

With regard to the first additional ground, Mr. Samwel faulted the learned trial Judge to convict the appellant basing on the evidence adduced by PW7 on account that, the said witness was not among the witnesses listed by the prosecution that would testify in this case and the substance of his statement was not read out during committal proceedings. For that reason, Mr. Samwel contended that PW7 was not a competent witness to testify during the trial because the respondent had not complied with the requirements of section 289 (1) of the Criminal Procedure Act (the CPA) which requires a notice to add a witness to be availed and the substance of his evidence to be brought to the attention of the accused. It was the argument of Mr. Samwel that, since that was not done, it was improper for the trial court to receive the evidence of PW7 and subsequently act on it to convict the appellant. He thus urged us to expunge the said evidence from the record.

In her response, Ms. Zegeli also readily conceded that PW7 was not listed on the list of witnesses to testify during the trial and the notice to add such witness, though appearing at page 113 of the record of appeal and it was neither tendered during the trial nor served to the appellant. She however, urged us to find that the appellant was not

prejudiced as PW7 was mentioned in the evidence of PW1 and the appellant. With profound respect, we are unable to agree with Ms. Zegelii on this aspect, as the law is settled that, no witness whose statement or substance of evidence was not read at the committal proceedings shall be called by the prosecution at the trial to testify, unless a reasonable notice in writing is issued to the defence side of its intention to do so. The provisions of sections 246(2) and 289(1), (2) and (3) of the CPA are all to that effect. The Court had an occasion to consider an identical matter in **Jumanne Mohamed and 3 Others v. Republic,** Criminal Appeal No. 534 of 2015 (unreported).

> *"We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appellants during committal proceedings...His evidence was thus taken in contravention of section 289(1)(2) and (3) of the Act...In case where evidence of such person is taken as is the case herein; such evidence is liable to be expunged...We accordingly expunge the evidence of PW9 including exhibits P6 and P7 from the record."*

Since, the circumstances obtaining in the above cited case is in all fours with the instant appeal, we agree with Mr. Samweli that the evidence of PW7 was taken contrary to the law and the same deserve to be expunged from the record, as we hereby do.

Having considered Mr. Samwel's additional grounds, we shall now consider the remaining grounds and we propose to, first, deal with the fifth and sixth grounds on the contradictions between the evidence of PW4 and PW5. Submitting in support of these grounds, Mr. Samwel challenged the evidence of PW4 and PW5 for being contradictory in relation to where the deceased body was found. He clarified that, PW4, the doctor who conducted an autopsy testified that he found the deceased's body at home, while PW5 said that, it was found in the swamp. Mr. Samweli faulted the prosecution side for failure to tender the sketch map of the scene of crime to shed light on where specifically, the deceased body was found. On account of that omission, he invited us to find that PW4 and PW5 were unreliable and incredible witnesses.

Responding on the alleged contradictions, Ms. Zegeli contended that PW4 and PW5 were credible and reliable witnesses. She, however argued that, even if the said contradictions do exist, the same are minor defect which do not go to the root of the matter and do not contradict the fact that the deceased was killed by the appellant.

Having considered the contradictions complained of, we do not, with respect, consider them to be material to the extent of affecting the credibility and reliability of PW4 and PW5. By any means, we cannot expect PW4 and PW5 to match in their testimonies in all aspects. As

such, we have no hesitation to agree with Ms. Zegeli that the appellant's complaint on these grounds is plainly baseless as the pointed-out contradictions do not go to the root of the matter. We equally find that, even the failure by the prosecution to tender the sketch map of the scene, in the circumstances of this appeal, is not fatal. That said, we find the fifth and sixth grounds to have no merit.

On the first, second and third grounds, Mr. Samwel faulted the learned trial Judge to have relied on the evidence of PW1, PW3 and PW7 on the appellant's oral confession as he argued that their evidence was wholly hearsay thus incapable of incriminating the appellant with the offence charged. Before going further on these grounds, we wish to note that, having expunged the evidence of PW7 from the record, we will only consider the submission made by Mr. Samwel in relation to the evidence of PW1 and PW3.

It was the argument of Mr. Samwel that, although, both, PW1 and PW3 testified to have heard the appellant confessing to have killed the deceased before the *Sungusungu,* none of the said *Sungusungu* was summoned to testify before the trial court to prove that fact. He argued that, the failure by the prosecution to field those important witnesses, without reasons, should have prompted the learned trial Judge to draw

an adverse inference against the prosecution. He thus urged us to find that the evidence of PW1 and PW3, on the oral confession of the appellant before the *Sungusungu*, was hearsay as no one testified to have seen the appellant killing the deceased. Finally, Mr. Samwel prayed for the appeal to be allowed, as he said the prosecution failed to prove the case against the appellant beyond reasonable doubt.

In response, Ms. Zegeli challenged the submission of Mr. Samwel by arguing PW1 and PW3 gave direct evidence on what they heard the appellant telling the *Sungusungu* and their evidence by any standard cannot be termed as hearsay evidence. To support her proposition, she cited the case of the **Director of Public Prosecutions v. Nuru Mohamed** [1988] T.L.R. 82 and argued that the trial court was correct to find that PW1 and PW3 were credible and reliable witnesses.

Ms. Zegeli argued further that, the evidence of PW1 and PW3 was corroborated by the evidence of PW6 who testified to have lastly seen the appellant with the deceased on 18th December, 2014 before the deceased went missing. She added that the evidence of PW6 was corroborated by the appellant's own confession.

On the failure by the prosecution to summon the *Sungusungu* before the trial court to testify, Ms. Zegeli cited section 143 of the

Evidence Act and argued that, the said law does not require a specific number of witnesses to prove a fact. She added that what is required is the quality of evidence and credibility of witnesses. She concluded her submission by urging the Court to find the appeal unmerited and dismiss it in its entirety.

In rejoinder submission, Mr. Samwel reiterated what he submitted earlier and insisted that the prosecution case against the appellant was cooked and fabricated.

Having carefully considered the submissions made by the learned counsel on these grounds, 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, there is no doubt 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 the instant appeal, it is on record that in convicting the appellant, the learned trial Judge relied on the evidence of PW1, PW3, PW6, PW7 and the appellant's confession. For clarity, at page 144 of the record of appeal, the learned trial Judge concluded that:

"The morning before the death of the deceased, the accused went to PW5 asking for such bicycle. When the deceased disappeared, the accused was found with the said bicycle. The deceased was found dead in a swamp strangled and his neck was broken. The accused admitted before PW7 and was heard by PW1 and PW3 admitting the killing and how he drowned the deceased..."

In his submission before us, Mr. Samwel challenged the evidence of PW1 and PW3 that it was hearsay and thus inadmissible. Having revisited the evidence of these witnesses, with due respect, we are unable to agree with Mr. Samwel on this point. This is so, because PW1 and PW3, in our view, gave direct evidence on what they directly heard the appellant saying. For instance, PW3, the relative of the appellant narrated on how he was arrested together with the appellant on 20th December, 2014 and then, taken to the *Sungusungu's* office where they were both interviewed. PW3 testified that, in the course of the said interview, he heard the appellant confessing to have killed the deceased. In his own words, found at page 57 of the record of appeal, PW3 testified that:

> *"He was asked about the whereabouts of the son of Bahati Manegela whom he had been seen with the day before. Peter replied that, he went to swim with the deceased kwenye bwawa at the village. However, when they got there, he drowned the deceased into the water, Peter said, after drowning the deceased, he took the deceased's bicycle and left. Peter was asked what was his motive of drowning the deceased? Peter responded that, Bahati had taken his bicycle akimsingizia kwamba he caused him loss in his business of collecting mazao. Peter said that was his*

bicycle. Later police took Peter. I was also asked to go to the police the next day to give my statement."

Confession is defined under section 3 of the Evidence Act to mean '*words*' or '*conduct*' or '*combination of both.*' In the case of **Posolo Wilson @ Mwalyengo v. Republic,** Criminal Appeal No. 613 of 2015 (unreported) the Court gave guidance as to when an oral confession can be relied upon, thus:

> *"It is settled that* ***an 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 suspects.*** *See for example Director of Public Prosecutions v. Nuru Mohamed [1988] TLR 82." [Emphasis added].*

Being guided by the above authority, it is our considered view that, the oral confession made by the appellant before the *Sungusungu* and heard by PW3 is significant and had provided overwhelming evidence of the appellant's participation in the commission of the offence. We therefore, agree with the submission of Ms. Zegeli that failure to call the *Sungusungu* to testify before the trial court, did not, in any way, weaken the prosecution case as, pursuant to the provisions of section 143 of the Evidence Act, there is no legal requirement for the prosecution to call a specific number of witnesses. What is required is

the quality of evidence and the credibility of witnesses. See **Yohanis Msigwa v. Republic** [1990] T.L.R. 148 and **Hassan Juma Kanenyera v. Republic** [1992] T.L.R. 100.

It is also on record that, the evidence of PW3 was corroborated by the evidence of PW1 and the appellant himself, as he also admitted that he was arrested together with PW3 and they were both taken to the *Sungusungu's* office where they were interviewed.

In our considered view, the above circumstance leaves no doubt that the appellant had the knowledge that the deceased was going to be killed and he procured him for such purpose. In the case of **Mathayo Mwalimu and Another v. Republic,** Criminal Appeal No. 147 of 2008 (unreported), it was 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..."*

In the instant appeal, it is on record that the appellant did not dispute before the trial court the assertion by PW6 that he was the last person to be seen with the deceased until the time of his death. Based on the principle stated in the above case and considering the oral

account of PW1, PW3, PW5 and PW6, 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 evidence, 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.

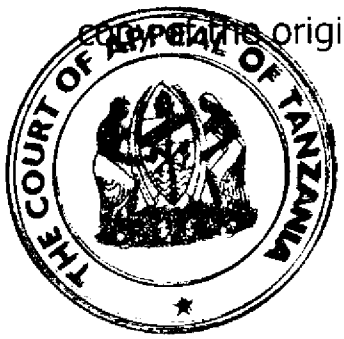
DATED at **SHINYANGA** this 11th day of November, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 11th day of November, 2022 in the presence for the Appellant in person and Ms. Gloria Ndondi, learned State Attorney, for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL