IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: LILA, J.A., LEVIRA, J.A. And MURUKE, J.A.)

CRIMINAL APPEAL NO. 477 OF 2021

JOHN DICKSON @ NGONGOLE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Siyani, J.)

dated the 9th day of July, 2021

in

Criminal Sessions Case No. 88 of 2017

.....

JUDGMENT OF THE COURT

12th December, 2023 & 29th February, 2024

MURUKE, JA:

The appellant, John Dickson @ Ngongole was charged and convicted for murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002 now R.E. 2022, and sentenced to a mandatory death sentence by the High Court of Tanzania Dodoma Registry (Siyani, J, as he then was) on 09th July, 2021 in Criminal Sessions Case No. 88 of 2017. It was alleged by the prosecution that, on 20th September, 2015 at Ikuyu Village, Mpwapwa District the appellant caused the death of one Ernest Kitinya. The appellant denied the charge.

In order to prove their case against the appellant, the respondent/Republic lined up five prosecution's witnesses to testify namely deceased wife Vestina Chigulu (PW1), Dr. Hellen Sumari (PW2), Chibago Mapogo (PW3), Athanas Mwakenda (PW4), and Inspector Edwin Kitulo (PW5). The evidence of the prosecution witnesses was supplemented by two documentary exhibits of report on Post-mortem examination (Exhibit P1) and sketch map of the scene (Exhibit P2). On his part, in defence, the appellant relied on his own sworn testimony, he neither called any witness to beef up his defence nor tendered any documentary exhibit.

Brief facts leading to this appeal as found out in the trial court record is that; Vestina John Chugulu, an eye witness and deceased wife went to sale local brew commonly known as "Kangara" at Nanenane area, Ikuyu Village while accompanied by her husband Ernest Kitinya (the deceased). At around 15 hours, the appellant a resident of the same village being familiar to PW1, appeared and requested to be served with one litre of Kangara worth Tshs. 500/=. However, after being served, and finished drinking, the appellant refused to pay. PW1 attempted three times to get her money in vain, thus complained to the deceased who as stated earlier was also there. When the deceased intervened by asking the appellant to pay, the later quickly took his knife and while saying 'it was you I was looking for', stabbed

the deceased and started to run. After being stabbed, the deceased tried to chase the appellant but he lost energy and fell down almost 45 meters from the scene and died.

Mr. Chibago Mapogo (PW3), was among those who witnessed the whole incident. According to him, he met the deceased at Nanenane area where PW1 was selling local brew. As he was greeting the deceased, PW1 complained to him that the appellant was unwilling to pay his bill having been served with a litre of Kangara. While there, PW3 witnessed the accused stabbing the deceased after being asked by him to clear his bill. As it was for PW1, his testimony is to the effect that before the appellant stabbed the deceased and flee, he told the deceased that it was him he was looking for. PW3 joined others to chase the accused person, apprehended him, and returned him to the scene.

The matter was reported to the police and Assistant Inspector Edwin Kitulo (PW5) accompanied with Dr. Hellen Sumari (PW2) and DC George were among those who visited Ikuyu village on 21st September, 2015. While there, DC George prepared a sketch map of the scene (Exhibit P2) and PW2 examined the deceased's body which was identified to her by Athanas Mwakinda (PW4) and PW1. The report on post-mortem examination (Exhibit P1) indicates that the deceased had a 10 cms deep wound at the left side of

his neck and that his death was a results of severe blood loss from the wound.

In his defence, the appellant who was the sole defence witness (DW1), disassociated himself with the commission of the charged offence. He stated that on the material day he was drunk having started drinking alcohol around 8 am at Songambele area before shifting to Nanenane where he met many people including PW1 who was selling local brew, the deceased and PW3. It was his testimony that while there, the deceased requested him to buy them alcohol and although he initially declined the request, he later decided to pay the sum of Tshs. 500/= after being followed by PW1. That done, he left the three and find another place to sit, but just as he left them, the deceased took a stone from his pocket, hit him until he fell down, followed with deceased jumping at him and strangling his neck before picking his knife and stab him twice. According to the appellant, having been stabbed in the head, he lost consciousness, therefore he did not know what happened until the next day when he found himself at Kibakwe hospital. It was the appellant further defence that having regained his consciousness and later being discharged from the hospital, he went to report to the police station where he found PW1 and PW5 who told him that the person he had fought with on

20th September, 2015 has passed away. He was thus arrested and charged accordingly.

The appellant was dissatisfied with both conviction and sentence thus filed the present appeal raising two grounds, indicated in the memorandum of appeal as follows.

1. *The trial court erred in law and fact when convicted the appellant without considering that the prosecution did not prove malice afterthought against the appellant.*
2. *The trial court did not consider the appellants defence when analyzing and evaluating the evidence tendered in court by both sides.*

On the date set for hearing, Ms. Miyango Kezilahabi and Henry Chaula both learned State Attorneys represented the respondent/Republic, whereas Mr. Leonard Mwanamonga Haule represented the appellant. When given floor to address the Court, Mr. Haule, first dropped ground two, of the appeal. In the cause of submission on ground one, he introduced new grounds not part of record. Upon dialogue by the Court he sought leave to bring new grounds, a prayer that was not objected to by the respondent's counsel, thus granted by the Court. The raised new grounds were:

1. *Trial court did not consider the evidence of fight raised by the appellant at the trial court.*

2. *PW1, PW3, PW5 were not listed on the list of witnesses during committal proceedings, to have been testified.*
3. *Failure to read the substance of exhibit P1 and P2 during committal proceedings.*
4. *Trial court shifted burden of proof to the appellant at the trial court.*

The appellant's counsel on ground one submitted that, at page 63 line 2 the appellant is on records that the deceased jumped at him and stabbed twice the appellant on the head. He also said he was told by the police that, the person who was fighting with him had died. Had the trial court Judge considered the evidence, he would have finding made a that the offence was manslaughter. Mr. Haule referred the Court to the case of **Moses Mungasiani Laizer v Republic**, Criminal Appeal No. 99 of 1994 (unreported) to support his arguments.

Responding to ground one the learned State Attorney submitted that, the appellant's defence was well considered from page 53 – 63 of the record of appeal. In his defence nowhere the appellant raised defence of fight. Thus, such defence was not considered because it was not raised. More so, in the whole of the prosecution case, the appellant never raised the issue of fight by way of cross-examining prosecution witnesses. The only appellant's defence of intoxication was very well considered by the trial court, from page

94 – 97 of the record of Appeal. This ground is being raised here as an afterthought, insisted Mr. Kezilahabi.

In resolving ground one of appeal, we wish to state at the outset that throught proceedings the appellant raised the defence of intoxication that was deeply considered by the trial court as correctly submitted by the learned State Attorney. The appellant's counsel criticizes the trial court for not considering the evidence of DW1 alleging that if the learned trial Judge had done so he would have concluded that there was a fight. It is worth noting 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 submission from the bar, as Mr. Haule would want us to hold. The issue before us is whether there was fight. In the case of **Jacob Asegelile Kanune v. D.P.P**, Criminal Appeal No. 178 of 2017 (unreported) the Court held that:

> *"With respect, the question of there being a fight or not is a question of fact as we have said, to be proved by evidence. It is not a question of interpretation, or one requiring verbal acrobats as Mr. Issa would have us conclude. So, the question is; what is it that really happened"?*

Prosecution witnesses who were at the scene, Vestina John Chugulu (PW1) and Chibago Mapogo (PW3) both testified clearly how the appellant stabbed the deceased without there being a fight. In their testimonies there were no element of **fight at all**. More so, if at all the appellant wanted to raise the element of fight, be ought to have cross examined the two eye witnesses on the issue to contradict their testimonies, because the purpose of cross – examination is essentially to contradict. That is why it is useful principal of the law for a party not to cross – examine a witness if he/she cannot contradict. By its nature the function of cross-examination is to **impeach** the evidence of the witness on a particular issue. This was the holding of the Court in the case of **Mathayo Mwalimu and Masai Rengwa v Republic,** Criminal Appeal No. 147 of 2008 (unreported). It is settled principal of the law that failure to cross examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence. In the case of **Nyerere Nyague v. Republic**, (Criminal Appeal No. 67 of 2010) [2012] TZCA 103 (21st May 2017, TANZILII), which was referred to by the Court in **Kanaku Kidari v. Republic**, (Criminal Appeal No. 326 of 2021) [2023] TZCA 223 (4th May, 2023, TANZILII) the Court held that, a party who fails to cross examine a witness on a certain fact is deemed

to have accepted that fact and will be estopped from asking the Court to disbelieve what the witness said.

In the end, we are inclined to agree with the learned State Attorney's argument that this ground has been raised as an afterthought. We thus dismiss ground one of appeal for lack of merits.

On ground two, the appellant's counsel submitted that PW1, Vestina John Chugulu, PW3, Chibago Motogo and PW5 Inspector Edwin Kitulo were not listed in the Committal Proceedings, thus, they ought not to have testified on the trial court referring case of **Nathan Elias v Republic**, Criminal Appeal No. 478/2019 at page 13 – 14 (unreported). In response, the learned State Attorney submitted that, it is not true that PW1, PW3 and PW5 were not listed in the committal Proceedings. It is glaring at page 23 of the records in which PW1, PW3 and PW5 were all listed. Mr. Haule on being asked by the Court as to whether he has read page 23 of the records, he replied that, they are listed but there is spelling mistakes. The record of appeal, at page 23 during committal proceedings, the following witnesses were listed.

Court statement of the witnesses.

1. Statement of Vestina John Chigulu.
2. Statement of Chiago Mapogo.

3. Statement of Atanasi Mwakinda @ Kitinya.
4. Statement of Rojas Boramungu.
5. Statement of Agst Edwine.
6. Statement of Hon. Sammeera Suleman.

Complaint by the appellant's counsel is that, PW1 is written Vestina John **Chugulu** instead of **Chigulu** her last name. PW3 is written **Chiago** Mapogo instead of **Chibago** Mapogo. Whereas Inspector Edwin Kitulo is just written by one name of Edwine. All these are typing errors that does not change anything. They are termed as slip of the pen just like slip of the tongue, because the three witnesses are the same, that were listed in during committal proceedings, and testified during trial. Luckily, this is not a first scenario the Court is facing the issue of misstatement of the name of the witness.

In Civil Application No. 602/08 of 2017, [2020] TZCA 290 (10 June 2020, TANZILII) **Victor Rweyemamu Binamungu v. Geofrey Kabaka and Farida Hamza** (Administaratix of the Deceased Hamza Adam) at page 4 and 5 Court held that:

> *"Secondly the issue of names is in my view, designed to get a mountain out of the molehill, because the applicants argument that it is a typing error makes sense and as the Court's eye is more fixed on*

substantive justice than technicalities, the second respondents contention on the names can hardly find purchase. More so when two of the three names are correct, and a third only misses a syllable. Consequently, I find a preliminary objection lacking merit and overruled them".

On the same vein, in the case of **Issaya Renatus v. Republic**, (Criminal Appeal No. 542 of 2015) 542 of 2015 [2016] TZCA 218 (26th April, 2016,) TANZILII on the same point it was held that:

"Semantics will not make a case for the prosecution fail. Reference in evidence to "Fance Ntakimazi" and Faith Takimazi were regarded as mere display of semantics and an in advertent mishap which did not go to the roof of the matter".

Being guided by our previous decision above, we are satisfied that missing syllable in the names PW1 and PW3 is typing error. Court is more interested with substantive justice than technicalities that, Mr. Haule invite us to deal with which we are not ready to buy his idea.

On ground three the appellant's counsel submitted that, failure to read exhibit P1 and P2 at the committal stage, made the tendered exhibit P1 and P2 not relevant to the case at trial stage, they ought not to have been tendered and received by the trial court, same need to be expunged. On this

ground the respondent's counsel admitted failure of exhibit P1 and P2 to be read at the committal thus not properly tendered and received by the trial court. However, urged the Court, even if exhibit P1 and P2 are expunged from the records, yet oral account of PW2 is sufficient to prove that death had occurred.

It is true as admitted by the learned State Attorney that, exhibit P1 and P2 were not read during committal proceedings, thus, were wrongly tendered and admitted and same are expunged from the Court records. However, more important in the preliminary hearing, death of the deceased is not disputed, as reflected from pages 34 and 35 the record reproduced below: -

"**Mr. Yongolo, Advocate**: Hon. Judge, the accused names are correct and he is the resident of Ikuyu, Mpwapwa District, Dodoma, and that he was arrested in connection with the murder of Ernest Kitinya. He also admits that the deceased Ernest Kitinya is dead.

Court: Accused asked whether he agrees to the admitted facts led by his counsel and he says: -

Accused: I admit the undisputed facts of the case as narrated by my counsel.

MEMORANDUM OF UNDISPUTED FACTS OF THE CASE

1. That the accused names and addresses are correct.
2. That the late Ernest Kitinya is dead.
3. That the accused was arrested and charged with the Murder of Ernest s/o Kitinya.

Court: Memorandum of Undisputed facts of the case read over to the accused person in Kiswahili language and he says.

Accused: The undisputed facts recorded are correct."

From the reproduced record at the stage of preliminary hearing above, cause and death of the deceased is not disputed. More so, cause of death may be proved by other factors apart from medical report, because it is not a requirement of the law that cause of death must be proved by medical report. There are situations in which even if body of the deceased cannot be produced for examination, but death had occurred and can be proved, by other circumstances.

Having expunged Exhibit P2, the appellant's counsel argued that the remaining evidence by PW1 and PW2 was enough to prove the cause of death of the deceased, while the appellant's counsel contended that expunging Exhibit P2 leaves no evidence to prove cause of death. We agree with the learned State Attorney that cause of death may be proved by other factors apart from medical reports. There are various decisions of this Court

which have dealt with this aspect. In **Mathias Bundala** v. **Republic,** Criminal Appeal No. 62 of 2004 (unreported), the Court observed that:

> *"... it is not the requirement of the law that the cause of death must be established in every murder case. We are aware of the practice that death may be proved by circumstantial evidence even without production of the body of the alleged dead person".*

Another case which addressed this issue and set factors to consider to prove cause of death is **Ghati Mwita v. Republic**, Criminal Appeal No. 240 of 2011 (unreported) in which Court held that: -

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

The argument fronted by the counsel for the appellant is that the exhibits P1 and P2 were wrongly admitted by the trial court, we totally agree, thus ground three has merits thus allowed. Do we expunge then from the record.

On ground four, the appellant's counsel submitted that, the trial court shifted the burden of proof to the appellant, because at page 95 line 10, it was recorded that, the appellant never said what happened to the deceased. The statements seem to shift burden to the appellant which is not proper. The appellant is innocent because he did not confess to have committed the offence. No register tendered to prove that he was arrested, because he went on his own to the police, this proves that he was innocent. Generally, if the evidence of PW1, PW2, PW3, PW5 and exhibit P1 and P2 are expunged, there is nothing to prove the offence charged insisted Mr. Haule counsel for the appellant, who ultimately pressed for the appeal to be allowed.

In response to ground four Ms. Kezilahabi, learned State Attorney submitted that, there is nothing like shifting burden to the appellant as complained by the appellant's counsel. PW1 and PW3 testified to have witnessed the appellant stabbing the deceased on a day broad light as it was 5PM. The witnesses were trusted by the trial court. PW1 and PW3 testified

that after stabbing the deceased, the appellant run, they chased, arrested him and returned him to the scene. That piece of evidence was not contradicted by the appellant at the trial court. Learned State Attorney referred the Court to the case of **Goodluck Kyando v. Republic** 2006 TLR 363 to support her arguments. Ultimately the respondent's counsel urged the Court to dismiss ground four and the appeal in total for being raised as an afterthought.

Looking at ground four, it is a general ground of prosecution not proving their case, as submitted by the appellant's counsel. Thus, the issue on ground four is whether evidence by the prosecution proved the charge.

It is necessary noting that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. In our earlier decision in **Phinias Alexander and Others v. Republic**, Criminal Appeal No. 276 of 2019 (unreported) we cited with approval the decision in **Jonas Nkize** v. **Republic [1992] TLR 214** in which the High Court stated that:

"The general rule in criminal prosecution is that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking."

In the instant matter we are sitting as a first appellate Court, we are obliged to re-evaluate the evidence on record and subject it to critical scrutiny and if justifiable arrive at our own independent decision. We derive such powers from rule 36 (1) (a) of Tanzania Court of Appeal Rules, 2009 (the Rules), under which we can re-appraise the evidence on the record and draw our own inferences and findings of facts, of course having regard to the fact that, it is the trial Court, that had the advantage of watching and assessing the witnesses as they gave evidence see **Martha Wajja v. Attorney General and Another [1982] TLR 35**.

At this stage where we are dealing with an appeal, we can satisfy ourselves on the credibility of PW1 by assessing coherence of his testimony and consider it in relation to the evidence of other witnesses, particularly, PW3 and the appellant (DW1). In **Shabani Daudi** v. **Republic**, Criminal Appeal No. 28 of 2001 (unreported), the Court stated:

" Credibility of a witness is the monopoly of the trial court but only in so far as demenor is concerned. The

credibility of the witness can also be determined in two other ways. ***One,*** *when assessing coherence of the testimony of that witness, and* ***two,*** *is considered in relation to the evidence of other witnesses including that of the accused person. In those two occasions, the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellant court."*

While PW1 was being cross examined by Mr. Sosteness Mselingwa, Advocate at page 42 of the record he replied that:

"According to the records, prosecution evidence that grounded conviction, is that of two eye witnesses PW1 and PW3. The accused person is called John Dickson @ Ngongole. We don't have any dispute with him. John Dickson is the one who stabbed my husband with a knife. Nanenane grounds where we sell alcohol is in Halula village, Luhundwa ward in Mpwapwa. It was around 14-15 hours when I went to Nanenane. The accused person ordered alcohol around 15 hrs. I approached him to collect my money around 16 hrs. I don't drink alcohol. Both the deceased and the accused person were sober dispute drinking. John Dickson had a knife in his right side of the waist. I saw him at the time he took it and stabbed my husband. After the incidence I didn't see the knife again. The incident of killing happened

around 17 hrs. I don't remember all of those who were in the grounds as they were many people".

Evidence of PW1 is strengthened by PW3 while being cross examined by Mr. Sosteness Mselingwa, Advocate at page 50 of the record he replied that:

"Ernest Kitinya was my brother in law. I married his young sister. Vestina was the one who said that John didn't want to pay him her money. I was standing with Ernest when John stabbed him. I didn't drink. I never heard of any conflict between John and Ernest. The incident happened around 15 hrs. The police who arrested John came from a nearby post and Kibakwe they took John but the body of the deceased was left there while covered with cloth. I didn't see John's knife prior to the incident. I only saw him taking a knife from his right side of his waist and stabbed the left side of Ernest neck. I don't know the where about of the knife after the incident".

We had time to go through the evidence of PW1 and PW3. First and foremost, we agree with the trial Judge that PW1 and PW3 were credible witnesses. There is nothing on the record suggesting why these witnesses should not be believed. The law on credibility of a witness is settled, that

every witness is entitled to credence unless there are cogent reasons not to believe a witness.

At the trial Court, the appellant raised defence of intoxication. As a general rule intoxication is not a defence of murder. Section 14(2) of the Penal Code states:-

> *"Intoxication shall be a defence to a criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not understand what he was doing."*

The case of **Republic v. Michael Chibing'ati** [1983] TLR 441, ventured at interpreting section 14(2) of the Penal Code stating that:

> *"In a murder charge, intoxication would serve as a defence in three circumstances, namely; where the person charged did not at the time of the act or omission complained of, know what he was doing and the state of intoxication was caused without his consent by the malicious or negligent act of another person; where such person is by reason of intoxication insane, temporarily or otherwise or where it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm".*

The circumstances where a defence of intoxication will be considered include **one,** where the accused did not know what he was doing, **two,** that the state of intoxication was caused without his consent by malicious or negligent act of another person. **Three,** the accused is, by reason of intoxication insane, and **four,** that is temporarily or otherwise or it cannot be established that such person had the capacity to form the intention to kill or cause grievous harm.

Applying the above principles in the case at hand, it is clear that **one**: According to evidence of PW1 and PW3, the appellant was not intoxicated. He knew what he was doing because after he had stabbed the deceased run away until arrested. The act of running proves that, he knew what he had done was wrong. **Two**, he went to drink on his own with his friends not forced to drink. **Three**, the appellant had informed an opinion to kill because, he stabbed the deceased while saying "*wewe ndiye nilikuwa nakutafuta*". Meaning that it is you that I have been looking for, he then stabbed the deceased by knife on the neck. **Four**, by using knife (a leather weapon), and stabbing on the neck, a vulnerable p art, proves that, the appellant wanted the deceased to die.

Having considered the evidence before us, we are satisfied as rightly pointed out by the trial judge, that the defence of intoxication was an afterthought. The appellant's testimony if true, established that the intoxication was self-induced having gone to drink with friends on his own volition. Having examined the evidence or record, we agree with the learned State Attorney that ground 4 is baseless.

In the end and on the basis of the foregoing reasons the appeal fails in its entirely, thus dismissed.

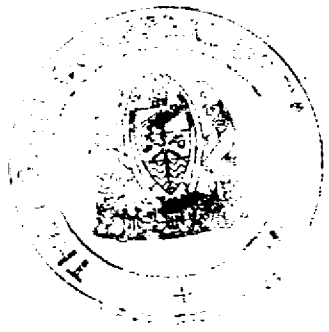
DATED at **DODOMA** this 28th day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of February, 2024 in the presence of Appellant appeared in person via video Link from IJC Dodoma and Ms. Mwilongo Tenge, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL