IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWANDAMBO, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CRIMINAL APPEAL NO. 437 OF 2020

PRIVA COSTANTINE @ SHIRIMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 16th day of April, 2020

in

Criminal Session No. 59 of 2018

JUDGMENT OF THE COURT

12th & 22nd March, 2024

MGEYEKWA, J.A.:

This is an appeal against the decision of the High Court of Tanzania at Moshi in which Priva Constantine Shirima, the appellant, was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code. It was alleged that, on 7th June, 2016 at about 16:00hrs at Urauri village within Rombo District in Kilimanjaro Region he did murder one Remmy Pius Massawe (the deceased).

The appellant denied the charge following which, in order to establish its case, the prosecution paraded a total of seven (7) witnesses and tendered three documentary evidence namely; postmortem

examination report of the deceased (exhibit PI), a sketch map of the scene of crime (exhibit P2) and an iron bar and log (exhibit P3 collectively). The appellant was the only witness for the defence side.

The facts underlying the present appeal are briefly as follows: On the fateful day in the afternoon, Gabriel Francis Shayo (PW1) was at home together with his house boy one Remmy (the deceased) sitting on a bench which was near a shop. Suddenly, the appellant and one Edwin John Shirima allegedly entered forcefully into his shop through a gate. They assaulted PW1 while searching his pocket and robbed him TZS 40,000.00. Shortly thereafter, the deceased came for his rescue, but they attacked him with an iron pot and a piece of thick log on his chest, back and head. On seeing the deceased being hacked, PW1 screamed for help, his neighbours responded to his call. When they arrived, they found the deceased lying down, and the appellant and his accomplice had already fled from the scene of crime.

What PW1 recounted was cemented by ten cell leader (PW4) who happened to be not far from the scene of crime. When he was heading to PW1's house, he claimed to have seen the appellant and Edwin John leaving and on reaching there, he found the deceased lying down unconscious. He rushed and informed the Village Executive Officer (VEO)

Francis Peter Mushi (PW5) about the incident and with him, they proceeded to the scene of crime. They saw the deceased body on the ground with biood oozing from his mouth, ears and nose.

The incident was reported to the police and WP 2891 Sgt Veronica (PW3) visited the scene of crime and found the deceased's body lying in the ground. Upon interrogation, PW1 named the appellant and Edwin John as the suspects. PW3 then drew a sketch map and left the scene of crime. Detective Corporal Evance (PW6) informed the trial court that the appellant was arrested a year later, in 2016, by the local village militia. E.1344 Detective Seegant Andrew (PW7) identified exhibit P3 before the trial court and indicated that they were labeled as TKE/IR/500/2015 and were at all the material time kept in the exhibit room.

In his defence, the appellant denied each and every detail of the prosecution's accusations. He raised a defence of *alibi* linking his accusation with grudges. He said, what he knew is that the deceased was murdered by Edwin. After the incident, he continued staying at Urauri village.

After the trial, the learned trial Judge summed up the evidence to the assessors who returned a unanimous verdict of guilty. Upon being

satisfied that the prosecution account was true, as earlier stated, the appellant was convicted and sentenced to suffer death by hanging.

Aggrieved, the appellant preferred an appeal to the Court fronting nine grounds of complaint in a memorandum of appeal. Subsequently, through his advocate, he filed a supplementary memorandum dated 13th May, 2021 comprising four grounds, which can be conveniently reduced into six grounds as follows; **one**, that, the appellant was convicted based on the evidence of PW5 and PW7 and exhibit P3 which were not listed during committal proceedings, **two**, that, the dates of the occurrence of the incident in the charge sheet and evidence are at variance**, three**, that, the prosecution witnesses did not describe the appellant's physical appearance, **four**, that, there was an unexplainable delay in arresting the suspect, **five**, that, material witnesses were not called and **six**, that, the case was not proved beyond reasonable doubt.

At the hearing of the appeal, the respondent was represented by two learned counsel, Ms. Sabina Silayo, learned Senior State Attorney, and Ms. Neema Moshi, learned State Attorney. The appellant enjoyed the legal representation of Mr. Charles Mwanganyi, learned counsel.

Starting with the first ground of appeal, Mr. Mwanganyi contended that the learned trial judge erred in relying on the evidence of PW6 and

PW7 and exhibit P3 to convict and sentence the appellant while the same were not listed during committal proceedings. Their substance was also not read over during the committal proceedings thereby contravening section 246 (2) of the Criminal Procedure Act (the CPA). To support his argument, he referred us to Mussa Ramadhani Magae v. Republic, Criminal Appeal No. 545 of 2021 [2023] TZCA 181 (11 April 2023) TanzLII.

Ms. Silayo conceded to ground one and urged the Court to expunge exhibit P3 and the evidence of PW6, and PW7 from the record. However, she maintained that, after expungement, the remaining evidence was sufficient to support the appellant's conviction.

We respectfully agree with both learned counsel on the effect of non-compliance with sections 246 (2) and 289 (1) of the CPA to be fatal. Upon the authorities placed before us we expunge the evidence of PW6 and PW7 as well exhibit P3 for being introduced in the record in contravention of the law.

As for ground two, the learned counsel for the appellant contended that the dates on the occurrence of the incident in the charge sheet and evidence was at variance. Mr. Mwanganyi in his written submission contended that whereas the incident occurred on 7th June, 2015, the evidence points out that the incident occurred on 7th June, 2016, In the

first place, we agree with Mr. Mwanganyi that the charge before the committal court shows that the incident occurred on 7th June, 2016. However, the information which was read over to the appellant at page 24 indicates that the incident occurred on 7th June, 2015. Therefore, we find this complaint without substance and dismiss it.

The complaint in ground three is that, PW1 did not recognize the appellant. In his submission, Mr. Mwanganyi simply contended that it is doubtful whether PW1 recognized the appellant at the scene of the crime because he did not describe his physical appearance, skin complexion and body features. On her side, Ms. Silayo argued that the incident occurred in the afternoon and the appellant knew him prior to the incident. Therefore, she contended that, the appellant's complaint is unfounded and urged us to dismiss this ground.

We agree with Ms. Silayo that the appellant was known to PW1 before the incident. Consequently, we hold that in the circumstances of this case, there was no need for PW1 to give a description. This ground crumbles.

Ground four relates to unreasonable delay to arrest the suspect while ground five relates to failure to call material witness. Both of them seek to establish that the case was not proved beyond reasonable doubt. They will

therefore be determined together with the last ground which seek to faults the trial court for convicting the appellant while the prosecution case was not proved beyond reasonable doubt.

We shall start with ground three which is related to an unexplainable delay in arresting the appellant. In relation to the issue, it was stated in **Wambura Marwa Wambura v. Republic**, Criminal Appeal No. 115 of 2019 [2022] TZCA 429 (14 July 2022) TanzLII that:

> *"It is settled position that unexplained delay in arresting a suspect cast doubt on the veracity of the witnesses - see: Juma Shabani @ Juma v. Republic, Criminal Appeal No. 168 of 2004;* ***Chakwe Lekuchela v. Republic****, Criminal Appeal No. 204 of 2006 and Samuel Thomas v. Republic, Criminal Appeal No. 23 of 2011 (all unreported)".*

The learned advocate for the appellant contends that, the appellant was arrested after a lapse of one year and four months without any explanation from the prosecution for the delay. He was flabbergasted as to why there was such a delay while according to the evidence of PW4 and PW5, the appellant was staying in the same village. The learned counsel concluded that such unexplained delay in arresting the appellant casts doubt on the veracity of the prosecution evidence. To fortify his stance, he cited the case of **Wambura Marwa Wambura v. Republic** (supra).

In response, Ms. Silayo simply argued that, the delay was well elaborated by PW3's evidence, who said that the appellant ran away after the incident. To cement her submission, she referred us to the evidence of PW4 and PW5 which, in her view, corroborated PW3's evidence.

In the case at hand, it is an undeniable that the appellant was apprehended after a lapse of sixteen months from the occurrence of the murder. This was so notwithstanding the claim by PW3 that the appellant was named on the date of incident as a suspect. In her testimony, PW3 simply said that, on the material day, she was unable to arrest the suspect without stating any reasons. In cross-examination, she said, "I was unable to arrest the accused on the date of the incident in the village because they ran away." She did not say why he was not arrested subsequent to the date of incident while the prosecution case and that of the appellant was common ground that he was present in the village. Guided by the above cited authority, we agree with the appellant's counsel and hold that on the evidence, the unexplained delay in arresting the accused raises reasonable suspicion as to his involvement in the commission of the offence.

The above is supported by the prosecution failure to produce material witnesses. From the record, it is alleged that the appellant was

arrested by militiamen. Notwithstanding section 143 of the Evidence Act, on number of witnesses required in any particular case for the proof of any fact, in the present case, the militiamen were named by the appellant's counsel as prospective witnesses. As we agree with Mr. Mwanganyi that, had the prosecution called the material witnesses they could have explained the missing links in PW1's and PW3's claims linking the appellant with the murder of the deceased.

It is settled that failure by the prosecution to call material witness without explanation entitles the trial court to draw an adverse inference against the prosecution. We have this principle in a number of decisions. One such case is **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported). When considering a similar matter, the Court stated that:

> *"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

We had earlier taken the same position in our earlier decision of **Aziz Abdallah v. Republic** [1991] T.L.R 71.

Closely related to the above, in his defence, the appellant attributed his arrest to grudges between him and PW1's family to argue that the case against him was fabricated. The learned counsel for the appellant invited us to hold that, there were such grudges. He added that, PW5's evidence was supported by DW1. Ms. Silayo contended that. PW1 who was the key witness informed the trial court that there were no any grudges between the two families, thus, PW1 ought to be believed. She urged us to dismiss this ground of appeal.

It is common knowledge that, under normal circumstances, it is not easy for PW1 to admit because his family was involved in the alleged grudges. Therefore, we find VEO's version convincing because it backed by the appellant considering that, PW5 was a leader who dealt with villagers' matters and so was in a better position on what was happening in the community. In somewhat similar circumstances, in **Yust Lala v. Republic**, Criminal Appeal 337 of 2015) [2015] TZCA328 (15 October 2015) TanzLII, the Court observed that:

> *"Had the learned appellate Judge considered there existed grudges between the appellant and PW2 on a land dispute, she would have found that the evidence of PW1 was doubtful."*

Applying the above holding, we similarly hold that, the learned judge misdirected herself by not considering the grudges between the appellant's family and PW1's family in her judgment.

The appellant's further complained was that, the trial court misdirected itself to convict the appellant while the evidence of PW1 was contradictory and inconsistent. In his submission, the learned counsel for the appellant tried to convince us that the evidence against the appellant by PW1 was riddled with glaring inconsistencies. Mr. Mwanganyi concluded that the conclusion that the case was not proved beyond reasonable doubt.

In her submission, the learned Senior State Attorney submitted that there was no any inconsistence in the evidence of prosecution witnesses. She pressed us to disallow the appeal because the prosecution proved the case beyond reasonable doubt.

It is noted that, the discrepancy is related to PWl's evidence. According to him, the first person who arrived at the scene of the crime immediately after the occurrence of the crime was PW5 who version was that, upon receiving the information from PW4, they went to the scene of crime. PW4's version is the same as PW5. Such version raises doubt

whether PW1 was telling the truth because his story was not corroborated by any prosecution witness.

The law on this point is clear that the court will only take into consideration contradiction which are not minor which do not go to the root of the matter. The Court has said so in various cases, amongst others, **Mohamed Said Matula v Republic** [1995] TLR 3, **Issa Hassan v. Republic**, Criminal Appeal No. 129 of 2017 (unreported) and **Dickson Elia Nsamba Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008) TanzLII.

In the latter case, the Court state that:

> *"In evaluating discrepancies, contradictions, and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

Applying the above principle, the contradiction in the evidence by PW1 on one hand and PW4 and PW5 on the other was material and went to the root of the prosecution case. On the whole, failure to call material witnesses, unexplainable delay to arrest the appellant and contradiction in the evidence linked with the defence that there were

grudges between the appellant's family and PW1's family raised reasonable doubt on the prosecution case. Such doubt should have been in favour of the appellant.

For the foregoing reasons, we allow the appeal, quash the conviction, and set aside the sentence. We hereby order his immediate release from prison unless otherwise lawfully held.

DATED at **MOSHI** this 22nd day of March, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of March, 2024 in the presence of Mr. Charles Mwanganyi, learned advocate for the appellant, Ms. Bertina Tarimo, learned State Attorney for the respondent-Republic, and appellant in person is hereby certified as a true copy of the original.

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL