IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 121 OF 2022

MENROOF JANUARY HAULE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mambi, J.)

dated the 11th day of April, 2022
in
Criminal Sessions Case No. 47 of 2020

JUDGMENT OF THE COURT

12th & 20th February, 2024

KEREFU, J.A.:

The appellant, Menroof January Haule was charged with two counts of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 (the Penal Code). He was charged in the High Court of Tanzania sitting at Dodoma in Criminal Sessions Case No. 47 of 2020. The information laid by the prosecution alleged that, on 4th August, 2015, at State Oil Petrol Station, Kisasa area within the Municipality and Region of Dodoma, the appellant did murder Paulo Nduluma and Aloyce Patsango (the deceased

persons). The appellant pleaded not guilty to the charge. However, after a full trial, he was convicted and sentenced to suffer death by hanging.

In essence, the substance of the prosecution case as obtained from the record of appeal indicates that, in the morning of 4th August, 2015 at around 05:00 hours, Bilha Yaho, the food vendor, who used to sell food to the masons, who were constructing the State Oil Petrol Station (the construction site), went to the construction site for her normal routine. Upon arrival, she called the deceased persons, who were the security guards at the construction site, but in vain. She decided to go to fetch water to clean her utensils for the use of the day. Surprisingly, she saw blood on the wall and veranda and the bodies of the deceased persons were lying on the ground. She phoned Abedi, who was one of the masons at the site and informed him about the incident. The said Abedi informed other masons including Fredy and Nassoro Juma (PW2) who informed Anuwari Said (PW3), the Project Supervisor and reported the matter to the police.

PW1 went on to state that, when the police arrived at the scene, they took the bodies of the deceased persons to the General Hospital for medical examination. PW1 stated further that, the appellant, who was also one of the masons at the construction site, had some quarrels with

the deceased persons, as they accused him to have stolen their cooking oil and told him to pay TZS 20,000.00 and the appellant, grudgingly, paid the said amount.

PW3 testified that, while at the scene, the police asked him if he knew the appellant and he told them that he knew him. The police asked him to call the appellant, which he did. Upon his arrival at the scene, the police arrested and interrogated him. In their testimonies, PW2 and PW3 testified that they heard the appellant confessing to the police that he killed the deceased persons and led them to where he hid a pick axe the instrument which he allegedly used to commit the offence.

Inspector Marik Nyenza (PW8), the investigation officer testified that, on 4th August, 2015, he received information on the death of the deceased persons and went to the scene of crime where he met PW1 and PW3 and found the bodies laid on the ground with wounds on their heads. That, they also found that the container was broken into and sixty bags of cements were missing. PW8 testified further that he prepared a sketch map of the scene of crime and participated in the examination of the deceaseds' bodies at the hospital. The post mortem reports to that effect were collectively admitted in evidence as exhibit P3 and the sketch map of the scene of crime as exhibit P4.

No. F.3630 D/SGT Zephania (PW6) and No. E.9788 Detective Fabian (PW7) testified that, on 4th August, 2015, they were assigned to investigate the murder incident at the construction site. They went to the scene on the same day and found blood and the broken container and were informed about the theft incident. It was further testimony of PW6 that they arrested the driver and the motor vehicle which was used to carry the stolen sixty bags of cement from the construction site. The said driver took them to Mustapha Salum Rajab (PW5), the buyer of the stolen cement who told them that he bought the same from the appellant.

Subsequently, the appellant was arrested on 9th August, 2015 and upon interrogation, he confessed to have killed the deceased persons by using the pick axe and thereafter, stole the sixty bags of cement. PW7 testified that he interviewed the appellant and recorded his cautioned statement. In the said statement, the appellant confessed to have committed the offence and led them to a place where he hid the pick axe, he used to kill the deceased persons. The appellant's cautioned statement and the pick axe were admitted in evidence as exhibits P2 and P5 respectively.

Thereafter, on 10th August, 2015, the appellant was taken to Rachel Magoti (PW4), the Justice of Peace and the Resident Magistrate who was

stationed at Makole Primary Court, for her to record his extra-judicial statement. In his evidence, PW4 affirmed that the appellant was brought to him and confessed to have killed the deceased persons and stole the cement. The appellant's extra-judicial statement was admitted in evidence as exhibit P1.

In his defence, the appellant admitted to be one of the masons at the construction site and that, he knew the deceased persons and they were his best friends with whom he never quarrelled. That, in the afternoon of 3rd August, 2015, he went to the construction site and stayed with the deceased persons peacefully and on 4th August, 2015, he was informed by PW1 of the murder incident. He also admitted that, on 9th August, 2015, he was arrested in connection with the murder incident. He alleged that he was tortured when he was arrested. He, however, admitted to have recorded his two statements and signed them.

When the respective cases on both sides were closed, the presiding learned trial Judge summed up the case to the assessors who sat with him at the trial. In response, the assessors unanimously returned a verdict of guilty against the appellant on account of his own confession. Having concurred with the unanimous verdict of the assessors, the learned trial Judge found the appellant guilty based on the circumstantial

evidence and his cautioned and extra-judicial statements which, he said, were detailed and gave full account on how he killed the deceased persons. Thus, the appellant was convicted and sentenced as indicated above.

Aggrieved by both, the conviction and sentence, the appellant has come to this Court armed with twelve grounds of appeal. However, for reasons to be apparent in due course, we shall not reproduce the said grounds herein.

When the appeal was called on for hearing, the appellant was represented by Mr. Fredy Peter Kalonga, learned counsel whereas the respondent was represented by Ms. Rehema Mgimba assisted by Mses. Rachel Balilemwa and Bertha Kulwa, all learned State Attorneys.

At the outset, Mr. Kalonga prayed to abandon the second, third, fifth, sixth, seventh and ninth grounds of appeal and amended the fourth and eleventh grounds. He then intimated that he would argue the following grounds: **first**, that, the prosecution case was not proved beyond reasonable doubt; **second,** the learned trial Judge erred in law and fact to convict the appellant based on the extra-judicial and cautioned statements; **third,** exhibit P5 was unprocedurally admitted in evidence; **fourth,** that, the chain of custody of exhibit P5 was not

established; **fifth**, that, the learned trial Judge erred in law and fact to convict the appellant based on exhibit P3; and **sixth**, the appellant's defence evidence was not properly considered.

Mr. Kalonga intimated further that he will argue the third and fourth grounds conjointly and the remaining grounds separately.

Submitting in support of the first ground, Mr. Kalonga faulted the learned trial Judge for finding that the charge against the appellant was proved to the required standard while, among the eight witnesses summoned by the prosecution, there was no single witness who testified on how the appellant was arrested. To fortify his argument, he referred us to the testimonies of PW5, PW6, PW7 and PW8 and argued that all these witnesses were not credible witnesses. Specifically, he referred us to the evidence of PW6 and argued that, apart from testifying that they arrested the driver and seized the motor vehicle used to carry the stolen sixty bags of cement from the construction site, PW6 did not mention the person who gave him the information about the said driver and the motor vehicle.

It was his argument that the person who revealed that information to PW6, should be in a position to know the culprit of the murder incident. He further argued that, PW5 who was said to have mentioned

the appellant, was arrested on 8th August, 2015 but the appellant was arrested on 9th August, 2015. The learned counsel wondered why the appellant was not arrested immediately on 8th August, 2015 after being mentioned by PW5. That, since what was testified by prosecution witnesses had raised serious doubts on how the appellant was arrested, the same should be resolved in favour of the appellant.

On the second ground, Mr. Kalonga faulted the learned trial Judge for relying on the appellant's extra-judicial and cautioned statements allegedly made before PW4 and PW7 while the said statements are contradictory to each other on the type of the weapon used to commit the offence. He argued that, in the extra-judicial statement, the appellant was recorded to have stated that he killed the deceased persons by using a heavy object while, in the cautioned statement, he was recorded to have stated that he killed them by using a pick axe. On the other hand, PW4 who recorded the appellant's extrajudicial statement testified that, the appellant told him that he killed the deceased persons by using a hammer.

When probed by the Court as to whether that issue was raised during the trial and specifically when the said statements were being admitted in evidence, though, he conceded that the said issue was not

raised during the trial, Mr. Kalonga argued that, the same can as well be raised at the appeal stage. He insisted that, the pointed-out contradiction raises doubts on the appellant's confession in the said statements that should have been, again, determined in favour of the appellant.

As for the third and fourth grounds, Mr. Kalonga faulted the learned trial Judge by relying on exhibit P5 while PW8 who produced it, did not establish its chain of custody. That, PW8 did not explain on how the said exhibit was seized, stored and finally tendered in court. He added that, even in their evidence, apart from stating that the appellant showed the police where he hid the said exhibit, PW2, PW3, PW5, PW6 and PW7 did not explain on how and when the said exhibit was seized. He referred us to the evidence of PW8 and argued that, PW8 testified that they did not collect fingerprints on exhibit P5 because it was contaminated. In the circumstances, it was improper for the learned trial Judge to connect the appellant with that exhibit, he argued.

With regard to the fifth ground, Mr. Kalonga questioned the evidential value of post mortem reports (exhibit P3) for failure to indicate the name of the hospital where the examination of the deceaseds' bodies was conducted and the name/number of the doctor who conducted the same. He contended further that, exhibit P3 is inconsistent with the

evidence of PW1 and PW2. That, PW1 testified that the bodies of the deceased persons were taken to the General Hospital, while PW2 mentioned the Regional Hospital but exhibit P3 was stamped by the Regional Medical Officer of Dodoma Region. According to him, due to the said omission and contradictions, it was not safe for the learned trial Judge to rely on exhibit P3.

On the last ground, Mr. Kalonga contended that the appellant's defence was not properly considered. To justify his argument, he referred us to pages 157 and 158 of the record of appeal and argued that, in his defence, among others, the appellant testified that he was tortured and forced to admit the offence under threat. He said, the said evidence was simply ignored by the learned trial Judge. He was convinced that, had the learned trial Judge properly considered the appellant's defence, he would have arrived into a different conclusion. To support his proposition, he cited the case of **Joseph Mkubwa & Another v. Republic**, Criminal Appeal No. 94 of 2007 [2011] TZCA 118: [23 June 2011: TanzLII]. Based on his submission, Mr. Kalonga urged us to allow the appeal, quash the conviction, set aside the sentence imposed on the appellant and set him free.

In response, Ms. Mgimba declared the respondent's stance of opposing the appeal. Starting with the first ground, although, Ms. Mgimba readily conceded that in their testimonies, PW6 and PW7 did not disclose the person who linked them to the said driver and the motor vehicle used to carry the stolen cement from the scene, she argued that, upon his arrest on 8th August, 20158, PW5 mentioned the appellant as the person who sold the stolen cement to him and, subsequently, the appellant was arrested on 9th August, 2015 and admitted to have committed the offence. She added that, in convicting the appellant, the learned trial Judge relied on the appellant's confession contained in his cautioned and extra-judicial statements in which he clearly narrated on how he killed the deceased persons, stole the said cement, sold it to PW5 and finally arrested. She thus urged us to find the first ground of appeal with no merit.

On the second ground, Ms. Mgimba challenged the submission by her learned friend by arguing that there is no contradiction between exhibits P1 and P2 on the type of the weapon used by the appellant to kill the deceased persons. She referred us to pages 187 and 196 of the record of appeal and argued that, in exhibit P1, the appellant confessed that he killed the deceased persons by using a heavy object, and in

exhibit P2, he specifically stated that he killed the deceased persons by using a pick axe. She added that, the appellant's confession in the two statements supported the prosecution case and specifically, the testimonies of PW2, PW3, PW6 and PW8. She contended that the said contradiction, having not been raised during the trial when the said statements were admitted in evidence, the act of the appellant raising the same at this stage, is purely an afterthought. She thus urged us to find that the second ground of appeal is devoid of merit.

In response to the third and fourth grounds of appeal, although, Ms. Mgimba conceded that the prosecution did not collect latent fingerprints on exhibit P5, she argued that the same is not a legal requirement in proving a criminal case. She contended that, since in the instant appeal, it was the appellant himself who led the police to the place where he hid exhibit P5, and clearly explained how he used it to kill the deceased persons, issues of chain of custody and/or collection of fingerprints on exhibit P5 do not arise. To bolster her proposition, she cited the cases of **Michael Mgowole & Another v. Republic**, Criminal Appeal No. 205 of 2017 [2019] TZCA 341: [30 September 2019: TanzLII] and **Rutu Qamara @ Qares v. Republic**, Criminal Appeal No. 110 of 2018 [2021] TZCA 732: [3 December 2021: TanzLII]. She then, also

urged us to find the appellant's complaint on the third and fourth grounds to have no merit.

On the fifth ground, although, Ms. Mgimba readily conceded that the name and/or number of the doctor who conducted an autopsy on the deceaseds' bodies was not indicated on exhibit P3, she argued that the said omission is not fatal as PW1 and PW2 clearly testified that the bodies of the deceased persons were taken to the General Hospital and or Regional Hospital respectively. According to her, both witnesses referred to Dodoma Regional (General) Referral Hospital. It was her argument that, since the examination was conducted in that Hospital, it was proper for the post-mortem reports (exhibit P3) to be stamped by the Regional Medical Officer of Dodoma Region. She therefore, once again, challenged Mr. Kalonga for raising these issues at this stage. She spiritedly argued that, the same, having not been raised during the trial when exhibit P3 was admitted in evidence, is nothing but an afterthought. To support her argument, she referred us to page 150 of the record of appeal and urged us to find the fifth ground devoid of merit.

With regard to the last ground, Ms. Mgimba was very brief and to the point that, the appellant's complaint that his defence was not properly considered is not supported by the record. It was her argument that the

learned trial Judge at pages 247 and 248 of the record of appeal sufficiently considered the appellant's defence and rejected it for being incapable of weakening the prosecution case. She thus urged us to find the sixth ground with no merit. In conclusion and based on her submission, she urged us to find the appellant's appeal unmerited and dismiss it in its entirety.

In his brief rejoinder, Mr. Kalonga reiterated his earlier submission and stressed that the prosecution case was not proved to the hilt. He thus, once again, urged us to allow the appeal and set the appellant at liberty.

On our part, having carefully considered the grounds of appeal, the submissions made by the learned counsel for the parties and examined the record before us, we think, the burning issue for our consideration is whether the prosecution proved its case beyond reasonable doubt.

We wish to start by stating that, this being a first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted, to arrive at its own conclusion of fact. See the cases of **D.R. Pandya v. Republic** [1957] EA 336 and **Reuben**

Mhangwa and Another v. Republic, Criminal Appeal No. 99 of 2007 [2019] TZCA 341: [30 September 2019: TanzLII].

In the instant appeal, there is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed the appellant committing the offence. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic,** Criminal Appeal No. 159B of 2017 [2018] TZCA 188: [27 August 2018: TanzLII], 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:*
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> *1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*

2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."

In determining this appeal therefore, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellant.

In the instant appeal, the evidence on record which the learned trial Judge used to convict the appellant is, **first**, the oral account of PW1, PW2, PW6 and PW7; **second**, his oral confession before PW6 which finally led to the place where he hid the weapon he used to kill the deceased persons; **Third,** the circumstances surrounding the case like the events which occurred before the incident, his conduct before and after the event; and **fourth**, his own confession contained in the extra-judicial and cautioned statements where he clearly narrated on how he planned and killed the deceased persons. For the sake of clarity, we find

it apposite to reproduce the relevant part in his extra-judicial statement found at page 187 of the record of appeal:

> *"...Kuanzia saa mbili usiku nilianza kuwavizia kujua wanalala wapi. Nilipoona wamelala huo usiku wa tukio, niliamua kuwafuata na kuwapiga na kitu kizito kichwani nikaona wote wamekufa baada ya kuwagonga, walikuwa wawili. Nilipojua wamekufa nilichukua nyundo nikafungua kontena nikachukua mifuko ya cement jumla mifuko 60..."*

Again, in his cautioned statement found at page 192 to 196 of the same record, the appellant confessed that:

> *"...Ilipofika tarehe 4/8/2015 nikaingia kazini asubuhi nikafanya kazi nikamaliza majira ya saa 17:00 hours na kuacha sululu ndani ya shimo ambalo lina urefu wa futi 5 ambalo mimi ninaweza kuingia na kuzama ili inisaidie kutekeleza dhamira yangu ya kuwadhuru/kuwaua walinzi wote wawili...Majira ya saa 20:00 hours nikiwa tayari nimekwisha pitia pale shimoni na kuchukua sululu tayari kwa kuwavizia walinzi wa kimasai na kuwaua kabisa walikaa wakiwa wanaongea kwa muda mpaka ilipofika majira ya 00:00 hours ndipo nikawaona wametawanyika na kila mmoja ameelekea kulala. Mmoja akapanda kwa juu na*

mwingine akalala kwa chini...Nikakaa kidogo kuwasubiria usingizi uwapitie kwanza kwa muda wa nusu saa hivi, dakika (30). Ndipo nikaona muda ule unatosha nikavua viatu vyangu na kuviacha nje kwenye banda la Mama Lishe nikarudi na kuruka ukuta nikatembea kwa kuambaa amba ana ukuta huku nikinyatia mpaka sehemu ya juu ya jengo na nikamkuta mmasai mmoja amelala, nikiwa nimeshikilia sululu mikononi ambayo ilikuwa imekatika upande mmoja. Nikampiga na sululu kichwani mara mbili kwa kutumia upande ule uliokatika nikahakikisha nikaona hatikisiki kabisa nikateremka kumtafuta mlinzi mmasai mwingine nikamkuta na yeye amelala na yeye nikampiga kichwani mara tatu (3) kwa 'kutumia ile ile sululu na kumpasua kichwa naye hakuamka wala kutikisika. Ndipo nikapata wazo la kwenda kuvunja kontena ili nichukue cement."

It is our considered view, and as rightly found by the learned trial Judge that, all these facts provide overwhelming evidence of the appellant's participation in the commission of the offence. In the circumstances, and taking into account that the appellant did not challenge the admissibility of the said statements during the trial, we

agree with Ms. Mgimba that challenging them at this stage of an appeal, is nothing but an afterthought. In the case of **Mohamed Haruna Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 [2010] TZCA 141: [4 June 2010: TanzLII], the Court stated that: *"The very best of the witnesses in any criminal trial is an accused person who freely confesses his guilt."* Similarly, in the instant appeal, it is our settled view that, what is contained in the appellant's statements is the best evidence, we can have on what transpired on that fateful night.

We are aware that in the first ground, Mr. Kalonga argued that the case against the appellant was not proved to the required standard because, among the eight witnesses summoned by the prosecution, there was no single witness who testified on how the appellant was arrested. With profound respect, we find the submission of Mr. Kalonga not supported by the record. In his testimony found at page 127 of the record of appeal, PW3 testified that, while at the scene, the police asked him if he knew the appellant and he told them that he knew him. The police asked him to call the appellant, which he did. Upon his arrival at the scene, the police arrested and interrogated him. Again, at pages 124 and 127 of the same record, PW2 and PW3 testified that they heard the appellant confessing to the police that he killed the deceased persons and

led them to where he hid the pick axe he used to kill them. It is also on record that the appellant was mentioned by PW5, the buyer of the stolen cement. In the event, and considering the appellant's confession contained in exhibits P1 and P2, we find the first and second grounds of appeal to have no merit.

We are also mindful of the fact that in his submission, Mr. Kalonga challenged the evidential value of exhibit P3 for failure to indicate the name of the hospital and the name/number of the doctor who conducted an autopsy on the deceased's bodies. With respect, we are unable to agree with the learned counsel's submission on this point. Having perused the contents of exhibit P3 and revisited the evidence of PW1 and PW2, we agree with the submission of Ms. Mgimba that the said omission is not fatal as PW1 and PW2 clearly testified that the bodies of the deceased persons were taken to the General Hospital and or Regional Hospital respectively, while referring to Dodoma Regional (General) Referral Hospital. We equally agree that, since the said examination was conducted in that hospital, it was proper for exhibit P3 to be stamped by the Regional Medical Officer of Dodoma Region. It is also clear to us that during the trial, the appellant did not cross examine PW1 and PW2 on that aspect. It is trite law that, a party who fails to cross examine a

witness on a certain matter is deemed to have accepted and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. See our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). We are therefore in agreement with the learned State Attorney that, since the appellant did not utilize that opportunity during the trial, challenging the said exhibit at this stage of an appeal, is nothing but an afterthought. As such, we find the fifth ground with no merit.

The third and fourth grounds are straightforward and should not detain us because it is apparent, at pages 124 and 127 of the record of appeal that, it was the appellant himself who led the police to the place where he hid exhibit P5, and clearly explained how he used it to kill the deceased persons. We thus agree with the submission of Ms. Mgimba that, in the circumstances of this appeal, issues of chain of custody and/or collection of latent fingerprints on exhibit P5 are irrelevant.

Lastly on the sixth ground. Having perused the record of appeal, we agree with the learned State Attorney that the appellant's complaint under this ground is not supported by the record, as it is apparent at

pages 247 and 248 of the record of appeal that the learned trial Judge adequately considered and weighed the appellant's defence against the prosecution case but rejected it. We thus find the case of **Joseph Mkubwa & Another** (supra) cited to us by Mr. Kalonga distinguishable with the facts of this case, because in that case the appellants were arrested nearly three months after the commission of the offence and alleged to have been tortured which is not the case herein. In the instant appeal, although the appellant alleged in his defence that he was tortured, at page 131 of the record, when he was asked by PW4 if he was beaten, he categorically respondent that he was not. We wish to emphasize that it is one thing to consider the defence case and it is quite another to accept it. It cannot be argued that the defence was not properly considered merely because its version was not accepted by the court. See the case of **David Gamata and Another v. Republic**, Criminal Appeal No. 216 of 2014 [2015] TZCA 362: [7 December 2015: TanzLII]. That said, we equally find the sixth ground of appeal devoid of merit.

Consequently, looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the learned trial Judge

properly held that the case against the appellant was proved beyond reasonable doubt.

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

DATED at **DODOMA** this 19th day of February, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2024 in the presence of Mr. Fred Kalonga, learned counsel for the Appellant who is also present and Mr. Francis M. Kesanta, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL