IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 18 OF 2004

JOHN MAGULA NDONGO..... APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kimaro, J.)

dated the 21st day of October, 2002
in
Criminal Sessions Case No. 90 of 1995

JUDGMENT OF THE COURT

MSOFFE, J.A.:

The appellant was sentenced to suffer death by hanging consequent upon his conviction for murder by the High Court, Kimaro, J. sitting at Dar-es-Salaam. In his appeal before us he is advocated for by Mr. Ndolezi, learned advocate, and the appeal is resisted by Mrs. L.M. Mutaki, learned State Attorney.

It was common ground at the trial, as it is now, that the evidence against the appellant was circumstantial. The appellant and the deceased were a husband and a wife, respectively. When the death occurred on 14/11/94 they had voluntarily separated for a period of about six months. PW2 Benedict Nkini, a social welfare officer stationed at Kisarawe at the time, testified on the matrimonial difficulties encountered by the spouses and the futile attempt to reconcile them. The evidence of PW3 B 7450 Lt. P. Mgaya was basically that the appellant, an army officer, was assigned the duty of

supervising a military parade at Mgulani, Dar-es-Salaam, at the material time, and that on the date of the deceased's death (14/11/94) he did not report for duty at Mgulani.

On the other hand, the appellant testified and stated that the last time he saw his estranged wife was in May, 1994 i.e. before the separation. That on 14/11/94 he was at Mgulani supervising the above mentioned parade. After the parade he received information that his mother way back home at Mwanza was sick. So, on 19/11/94 he travelled to Mwanza to attend to his sick mother. To use his own words he "absconded" because he was not given a military pass for the journey. While at Mwanza he was arrested. According to him, he was arrested because he absconded from duty. We wish to pause here and say that no evidence was forthcoming from either the prosecution, or the defence for that matter, to show when exactly the appellant was arrested. We make this point here because Mrs. Mutaki insisted at some stage in her oral submission before us that the arrest was made about one year after the death. With respect, this submission is not borne out by the evidence on record. Following the arrest the appellant was charged in court. In the appellant's evidence, he knew about his wife's death when he appeared in court.

The prosecution case against the appellant was therefore mainly built on the premise that he frequently quarrelled with his wife; that he was seen with the deceased on 14/11/94; that he did not report for duty at Mgulani on 14/11/94; and that after the death he absconded to Mwanza. In the submission of Mrs. Mutaki, the above chain of events provided circumstantial evidence to ground the conviction in question.

On the other hand, Mr. Ndolezi's submission was basically that no circumstantial evidence was forthcoming to justify the conviction. If anything, according to him, the chain of events, if any, was broken as evidenced by the following notable factors. One, the voluntary separation lasting about six months before the death was too long a period to show that the appellant could not have harboured any intention to kill his wife. In Mr. Ndolezi's view, why kill her when they had voluntarily separated any way? Two, if the appellant killed his wife he could not have stayed for five days i.e. from 14/11/94 to 19/11/94, before absconding. In his opinion, a guilty person in the circumstances could have absconded immediately after the death.

Having set out the above background information it is now opportune and pertinent to look at the grounds of appeal. The memorandum of appeal filed by Mr. Ndolezi has three grounds which read as follows:-

1. That the evidence adduced in court by the prosecution was not strong enough to justify the conviction and sentence imposed on the appellant.

2. That the trial Judge's finding that the appellant was the person who was last seen with the deceased was erroneous
because it is not supported by any evidence on record.

3. That the weakness of the DEFENCE could not be the basis of the Appellant's conviction in a serious charge of murder.

As learned counsel did, we too propose to begin with the second ground of appeal. Thereafter, we will deal with the first ground.

The complaint in the second ground of appeal arises from two aspects of the record. One, the fact that the trial judge kept on saying quite consistently in her judgment that the appellant was the last person to be seen with the deceased. Two, that under item 4 of the memorandum of undisputed facts, which was drawn on 15/4/96 and signed by the parties, it was agreed that "the accused was seen with the deceased". In arguing the ground Mr. Ndolezi maintained that there was no evidence that the appellant was the last person to be seen with the deceased. At any rate, he went on to say, in his evidence at the trial the appellant denied ever being seen with the deceased on the material day. He went on to contend that once the appellant disputed the contents of item 4 the trial judge ought to have invoked the latter part of the provisions of S. 192 (4) of the Criminal Procedure Act, 1985 and thereby direct that the fact alleged under the item be formally proved. On her part, Mrs. Mutaki was of the view that it was undisputed at the preliminary hearing that the appellant was the last person to be seen with deceased and that in this regard there was no need of invoking S. 192 (4).

In disposing of the second ground of appeal we think it is necessary, first, to quote S. 192 (4) of the above Act. It reads as follows:-

> " (4) Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved; save that if, **during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved".** (Emphasis added).

In our construction of the above provision, it is clear to us that once a fact or document is admitted or agreed in the memorandum of undisputed facts it shall be deemed to have been duly proved, in which case there would be no need to call for evidence to prove it. However, if the court is of the opinion that the interests of justice so demand it may direct that the fact or document be formally proved. We may emphasize here in passing that the court has a discretion to invoke the latter part of the above provision as evidenced by the use of the word "may".

The question is whether this was a fit case for the trial court to invoke its discretion and thereby direct that the contents of item 4 of the memorandum of agreed facts be formally proved. Without hesitation our answer to the question is in the affirmative. We say so

for two main reasons. One, once the appellant had disowned the contents of the item we think it was only fair and prudent that the fact be formally proved. Two, proof of the item was even more important and wanting in the context of this case in that the contents thereon were not conclusive enough. For instance it was not stated as to who saw the appellant with the deceased, when and where they were seen together, and at what time if that could be ascertained. In the absence of such positive evidence, it was not fair to say that the appellant was the last person to be seen with the deceased. Therefore, once the contents of item 4 were discounted, the only question remaining would be whether there was any other evidence to ground the conviction. This leads us to the first ground of appeal which we now proceed to discuss.

In arguing the first ground Mr. Ndolezi was of the general view that there was no strong circumstantial evidence to warrant the conviction. In this regard he carried us through a number of authorities on circumstantial evidence notably **Magendo Paul And Another v. R** (1993) TLR 219, **Hamidu M. Timotheo v. R And Another** (1993) TLR 125 **Hassani Fadhili v. R** (1994) TLR 89, and **Abdul Muganyizi v. R** (1980) TLR 263.

In principle we agree with Mr. Ndolezi in his submission, and as supported by the above authorities, that in a case depending entirely on circumstantial evidence before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with the innocence of the accused person and incapable of explanation upon any other reasonable hypothesis than that of guilt. And it is necessary

before drawing the inference of guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. Indeed, this principle is well enunciated in the case of **Ilanda Kisongo v. R** (1960) EA 780 at page 782.

The issue is whether there was circumstantial evidence upon which the appellant could be convicted and the conviction safely upheld by this Court. In our considered view, the point should not detain us. We are satisfied that there was no strong circumstantial evidence upon which a conviction could safely lie. We say so for a number of reasons. One, as correctly argued by Mr. Ndolezi, the chain of events, if any, was broken. Without necessarily repeating Mr. Ndolezi's submission, it was unlikely that the appellant could kill the deceased six months after they had voluntarily separated. Also, a guilty person in the circumstances would not have waited for five days after the death to abscond to Mwanza. Mrs. Mutaki spent quite some time in urging that the act of absconding to Mwanza was a result of guilt conscience on the part of the appellant and generally that this conduct evidenced malice aforethought. With respect, we do not agree. The appellant explained, and he was uncontradicted for that matter, that he absconded to Mwanza to attend to his sick mother. Surely, in the absence of evidence to the contrary it could not be safely said and concluded that he absconded because he had killed his wife. Indeed, the appellant was also uncontradicted in his assertion that when he was arrested at Mwanza he was told that he was being arrested for absconding from duty. This would suggest that he was not arrested because he killed.

Having discussed the first and second grounds of appeal we find no need in discussing the third ground of appeal. We are satisfied that the first and second grounds of appeal are enough to dispose of the appeal.

In the totality of the evidence on record, we are satisfied that the case against the appellant was not proved beyond reasonable doubt. The appeal is accordingly allowed, conviction quashed and sentence set aside. The appellant is to be released from prison unless he is lawfully held therein.

DATED at DAR ES SALAAM this 30th day of August, 2005.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR

THE COURT OF APPEAL OF TANZANIA
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dated the 21st day of October, 2002
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Between
The Republic.....
Prosecutor
Versus
John Magula Ndongo.....
Accused

In Court this 30th day of August, 2005

Before: The Honourable Mr. Justice H.R. Nsekela, Justice of Appeal
The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal
And The Honourable Mr. Justice S.N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on the 17th day of August, 2005 in the presence of the Appellant AND UPON HEARING Mr. Ndolezi, Counsel for the Appellant and Mrs. Mutaki, State Attorney for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day:-

IT IS ORDERED that, the appeal be and is hereby allowed, conviction is quashed and sentence is set aside.

The Appellant is to be released from prison unless he is otherwise lawfully held therein.

Dated this 30th day of August, 2005.

Extracted on the 30th day of August, 2005.

(S.M. RUMANYIKA)

DEPUTY REGISTRAR