

**IN THE COURT OF APPEAL OF TANZANIA
AT TANGA**

(CORAM: MUGASHA, JA., KOROSSO, JA., And MWANDAMBO, JA.)

CRIMINAL APPEAL NO. 131 OF 2021

EMMANUEL ALOYCE DAFFAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal against conviction and sentence from the judgment of the
High Court of Tanzania at Tanga)**

(Mkasimongwa, J.)

dated the 29th day of July, 2020

in

Criminal Sessions Case No. 26 of 2017

JUDGMENT OF THE COURT

25th May, & 7th June 2021

MWANDAMBO, J.A.:

The High Court sitting at Tanga, convicted Emmanuel s/o Aloyce Daffa, the appellant, of murder and sentenced him to suffer death by hanging. The appellant's conviction and sentence resulted from a trial in which the prosecution preferred an information predicated under section 196 and 197 of the Penal Code [Cap. 16 R.E. 2002 now R.E 2019] alleging that the appellant did, on 27/11/2015, murder a person going by the name of Hussein Hassan @ Kingazi (the deceased) to which he pleaded not guilty. The killing was alleged to have occurred in a village called Ngwelo 'B' within Lushoto District, Tanga Region. The trial

terminated in a finding of guilty and the resultant conviction and sentence challenged in this appeal.

The tale resulting into the appellant's arraignment is rather sad and unfortunate. The appellant was one of the children of Aloyce Daffa staying in Ngwelo 'B' village. Aloyce Daffa happened to be Hamlet Chairman of Mission Hamlet in that village. At that time, Beatrice Yohana Zuakuu (PW1) was the Village Executive Officer (VEO). It turned out that in the afternoon of the material date, Aloyce Daffa contacted the VEO by phone asking her assistance to calm a commotion at his home caused by his son; Denis Aloyce Daffa disturbing his mother. However, the VEO was not in office at that time. Nevertheless, she attended to the request. Upon consultation with the Village Chairman, one Zuberi Mnkande, PW1 instructed three militia men namely; Rajabu Abdallah, Abdallah Omari and Ayubu Sebarua to arrest the trouble maker. At that time Aloyce Daffa had already gone to the VEO's office where he met PW1 and the village chairman.

Apparently, PW1 and the village chairman found necessary to accompany the three militiamen to the home of Aloyce Daffa but as they were about to get there, they were met by Dennis resisting the arrest with threat of dire consequences should any one dared doing so. Within

moments, PW1 and the village chairman retreated back to the office. Thereafter, she reinforced the team of the militia with two more; Ramadhani Mshahara and Hussein Hassan Kingazi with instructions to arrest Denis, the trouble maker upon obtaining assurance cooperation from Aloyce Daffa. Quite unexpectedly and in a manner which is hard to explain, the process became nasty resulting into assaults of the very people who had gone to arrest a trouble maker at Aloyce Daffa's home. The tale had it that the appellant who had just returned from shamba holding a machete and axe became furious against the arrest of his sibling by the militia men who were in turn attacked and assaulted compelling them to flee. However, Hussein Hassan Kingazi was not as lucky as his colleagues. He is said to have been overpowered and seriously assaulted with a thick stick in the hands of the appellant and Aloyce Denis Daffa. Later on, he was dragged by his assailants to a road side where PW1 spotted the appellant and his brother manhandling him seriously wounded.

The news regarding the commotion from the abortive arrest, attracted a mob which invaded the home of Aloyce Daffa turning it into no less than a battle ground claiming the lives of Aloyce Daffa and Denis Daffa who were burnt to death before the police arrived at the place.

Incidentally, the appellant had already run away to a nearby village called Vulii in Mahezangula Ward where he was arrested later and arraigned in the trial court for the murder of Hussein Hassan Kingazi. Not unsurprisingly, the appellant distanced himself from the accusations.

To prove its case, the prosecution paraded five witnesses comprised of the VEO (PW1), two militia men who were in the team sent to arrest Denis namely; Ayubu Juma Sebarua (PW2) and Rajabu Abdallah (PW4). Others were, Dr. Evans Matata (PW3) who conducted an autopsy of the deceased and F. 6488 D/Cpl Witness (PW5), a police detective who investigated the case and drew a sketch map tendered in evidence as exhibit P2. PW3 for his part tendered in evidence a post-mortem report (exhibit P1) on which he posted his findings showing that the cause of death of the deceased Hussein Hassan Kingazi was a result of bleeding from the head injury resulting from physical assault. The summary in exhibit P1 revealed that part of the deceased's skull had a fracture with cut wounds due to heavy blows.

In his defence, the appellant denied involvement in the killing of the deceased blaming the death of the deceased on the militiamen for what they did to Denis. He shifted the responsibility to his deceased father together with Denis.

Having heard the evidence from both the prosecution and the defence, the trial court was satisfied that the appellant was responsible for the death of the deceased with malice aforethought and hence his conviction and sentence challenged in this appeal. Initially, the appellant lodged a memorandum of appeal containing eight grounds of appeal. Subsequently, Mr. Ramadhani Rutengwe, learned advocate assigned to represent the appellant lodged a supplementary memorandum consisting two grounds.

Before the commencement of hearing, Mr. Rutengwe prayed and was granted leave to abandon grounds 2, 3, 6 and 7 in the memorandum of appeal thereby remaining with four grounds and two additional grounds in the supplementary memorandum. Basically, without showing any lack of respect to the learned advocate, closely examined, the remaining grounds boil down to three clusters, that is to say; **one**, the appellant was not properly identified as the person who assaulted the deceased with a bush knife or stick; **two**, conviction was grounded on the uncorroborated and contradictory evidence of PW1, PW2 and PW4 without the prosecution tendering the stick or bush knife used in killing the deceased; **three**, the trial court omitted to consider PW1's testimony on the possibility of the deceased being killed by a mob

from a bus stand rather than the appellant. In the end, clusters crystallise into one main issue; whether the applicant's case was proved to the required standard in criminal cases.

Generally, the learned advocate's submissions dwelt into the above clusters. For a start we heard the learned advocate prefacing his submissions with a note that the evidence which the trial court used to convict the appellant was direct evidence particularly from PW1, PW2 and PW4 who claimed to have been at the scene of crime. The learned advocate suggested to us that if PW1, PW2 and PW4 were all present at the scene of crime at the same time, they ought to have identical evidence on the specific weapon the appellant used to assault the deceased to death. This was more so, the learned advocate argued, there were other people at the scene of crime including Samvi Stephano Daffa who were involved in the fracas. At any rate, the learned advocate submitted that the evidence shows that the death resulted from a fight between the militiamen on the one hand and family members of the deceased Aloyce Daffa on the other. According to him, that was enough to negate the existence of malice aforethought warranting a finding that the information of murder was not proved to the required standard resulting into the appellant's acquittal.

Submitting on the second cluster, Mr. Rutengwe dealt with the complaint on the alleged contradictory and uncorroborated evidence of PW1 on the one hand against PW2 and PW4 on the other. Specifically, he pointed out that these witnesses gave contradictory versions of the weapon the appellant is alleged to have used to assault the deceased; a stick or a panga. According to the learned advocate, the discrepancies in the testimonies of the witnesses who claimed to have been present at the scene of crime were material to the prosecution's case raising doubt on the appellant's culpability which should have been resolved in the appellant's favour. To fortify his argument, Mr. Rutengwe cited to us our decisions in **Mohamed Matula v. R** [1995] T.L.R. 3 and **Frank Maganga v. R**, Criminal Appeal No. 93 of 2018 (unreported) for the proposition that a trial court has a duty to address itself to the contradictions in the evidence and decide whether they are minor or not.

As to the third cluster, Mr. Rutengwe suggested that since PW1 referred to a mob emerging from the bus stand towards the place where the deceased was found dead, there was a possibility that such mob might have been responsible for the death. Before winding up his submissions on the grounds of appeal, we invited Mr. Rutengwe to

address the Court on the effect of the trial court's failure to consider the appellant's defence and whether it had any bearing on the appellant's conviction. The learned advocate drew our attention to the appellant's defence showing that it was his deceased father and brother who assaulted the deceased to death which was not considered in the judgment. According to the learned advocate, had the trial court considered it, it should have held that the defence raised reasonable doubt in the prosecution case sufficient to acquit the appellant. On the foregoing, Mr. Rutengwe concluded that the trial court convicted and sentenced the appellant on the evidence which did not prove the case against him beyond reasonable doubt warranting an order allowing the appeal and ultimately acquitting him.

Mr. Pius Hilla, learned Senior State Attorney who teamed up with Ms. Regina Kayuni, learned State Attorney resisted the appeal supporting conviction and sentence. Submitting on the first cluster, Ms. Kayuni argued that there was sufficient evidence proving how the appellant participated in assaulting the deceased using different weapons, dragging him together with the deceased Denis Aloyce Daffa to a road side and dumping him there in his last breath at a stage when he was seriously wounded.

In relation to the complaint on contradictions and inconsistencies in the testimonies of the prosecution witnesses, Ms. Kayuni prefaced her submissions with the general rule that such contradictions are bound to occur in each and every case. That rule holds that where such happens, it is the duty of the trial court to address them and decide whether they are a minor or not. Needless to say, the learned State Attorney argued that if there were any contradictions or discrepancies, they were too immaterial to have had any bearing in the respondent's case. In elaboration, she invited us to accept the fact that the evidence on the nature of the weapon which the appellant used to assault the deceased came from two different scenes and occasions. She pointed out that there were no any contradictions in the evidence of PW1 as against PW2 and PW4. This is so, the learned State Attorney argued, PW2 and PW4 gave evidence based on what they saw the moment they arrested Denis Aloyce by tying him with ropes which attracted the appellant's reaction inflaming the atmosphere into the ultimate fracas.

Lastly, Ms. Kayuni urged us to reject the complaint on the third cluster suggesting that the deceased may have met his death in the hands of a mob from the bus stand which was referred to by PW1. Ms. Kayuni contended that the complaint was baseless in the light of the uncontroverted evidence from PW1 which proved that the appellant and

his deceased brother were seen dragging the deceased and assaulting him before dumping him at the road seriously wounded and in his last breath.

Finally, like her learned friend, Ms. Kayuni addressed the Court on the trial court's failure to consider the appellant's defence to which she conceded. However, she was firm that the failure did not vitiate the trial. She invited the Court to exercise its power as a first appellate Court to re-evaluate the evidence afresh and come to its own findings which, according to her, will show that the appellant's defence did not cast any reasonable doubt. In conclusion, the learned State Attorney impressed upon the Court that the appeal was devoid of merit warranting dismissal.

We are grateful to the learned Counsel for their submissions. We shall now turn our attention to our consideration and determination of the issues in this appeal. First and foremost, we find it necessary to state at this juncture that we are sitting as a first appellate court. It is long settled that the first appellate court as it were, has the power and duty to reconsider and re-evaluate the evidence on record and come to its own conclusions except on credibility of witnesses which is in the exclusive domain of the trial court which had the benefit of seeing

witnesses testify before it. See for instance: **Maramo s/o Slaa Hofu & 3 others v. R**, Criminal Appeal No. 246 of 2011 and **Christina d/o Damiano v. R**, Criminal Appeal No. 178 of 2012 (both unreported). It is also opportune to point out at this stage two more principles which will guide us in the determination of this appeal. The first is connected to credibility of witnesses. It is to the effect that each witness is entitled to credence and to be believed in the absence of anything to the contrary on the authority of **Goodluck Kyando v. R** [2006] T. L. R. 363. As we said in **The DPP v. Mohamed Said & Another**, Criminal Appeal No. 432 of 2018 (unreported), the rule applies to witnesses of both the prosecution and the defence. Apparently, there is no complaint against the credibility of any of the witnesses. The second principle relates to treatment of contradictions and discrepancies in the evidence. Again, from the authorities, it is settled that each evidence must be subjected to scrutiny rather than picking a few pieces and where there are contradictions in any of the testimonies, it is the duty of the trial court to determine whether they are material going to the root of the case or just minor which may be disregarded. See: **Dickson Elia Nshamba Shapwata & Another v. R**, Criminal Appeal No. 92 of 2007 (unreported) in which the Court stated:

"In evaluating discrepancies, contradictions and omission, 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 discrepancies and contradictions are only minor or whether they go to the root of the matter."

See also: **Mohamed Matula v. Republic**, [1995] T.L.R. 3, **Frank Maganga v. R**, Criminal Appeal No. 93 of 2018 (unreported) **Mwita Chacha Kabaila v. R**, Criminal Appeal No. 356 of 2013, **Msafiri Hassan Masimba v. R**, Criminal Appeal No. 302/2015, **Shukuru Tunungu v. R**, Criminal Appeal No. 234 of 2015 (all unreported).

We shall begin with the complaint on the lack of proper identification of the appellant as the killer. From the evidence on record, it is common that the deceased was amongst five militia men who were instructed by PW1 to arrest the deceased Denis Aloyce at the request of his father; Aloyce Daffa. It is equally not in dispute that it is the appellant who intercepted the arrest of his deceased brother protesting his arrest by attacking the militiamen with a thick stick and, in the process, the deceased Aloyce Daffa made a u turn by joining his son preventing the arrest which saw Denis Aloyce released. Thereafter, the trio (appellant, Aloyce Daffa and Denis Daffa) joined hands in attacking

and assaulting the militiamen which included PW1 and PW4 as well as the deceased with a panga and sticks.

The militiamen, except the deceased who was overpowered, took to their heels to save their lives. That piece of evidence from PW2 and PW4 was not challenged. Under the circumstances, the suggestion that there was a fight negating malice aforethought is, with respect, baseless. On the other hand, PW1's evidence (at page 48 of the record) had it that when PW2 and PW4 reported to her regarding the attacks against the militiamen, she decided to go to the scene in the company of one Glory Mushi, the Ward Executive Officer (WEO) and the village chairman. She did so after contacting the police, Bumbuli Police Station for assistance. At a distance of 35 – 40 paces, she saw the appellant, a person who was familiar to her and his deceased brother dragging the deceased to a roadside, assaulting him on several parts of his body by a stick held by the appellant and a panga by Denis. According to PW1, the appellant was, at that time, holding the deceased's shirt. PW2 testified as such on the two brothers dragging the deceased from their home to the road. PW4's evidence shows that, before dragging him, the deceased was already unconscious from the assaults in the hands of the appellant and his family members using sticks, pangas and knives. That

evidence corroborated PW1's evidence who stated that the deceased was seriously wounded and dumped on a road side in his last breath. Again, the appellant did not controvert that evidence in cross examination.

Next, we shall deal with the third cluster of the issues in which the appellant's advocate suggested that the deceased might have met his death in the hands of the mob which PW1 mentioned in her testimony. What all this was meant to achieve was that the prosecution did not clear that doubt which should have been resolved in the appellant's favour. There is no doubt that after witnessing the appellant and his deceased brother dumping the deceased at the roadside PW1 heard yells from a mob of people from the bus stand which frightened her and she immediately ran to her office.

It is plain from the record that PW1's evidence seeing the two brothers dragging the deceased and assaulting him with a thick stick was not controverted in cross examination. Guided by our decision in **George Mail Kemboge v. R.** Criminal Appeal No. 327 of 2013 (unreported) that evidence remains intact. On the other hand, according to PW1, at the time she saw the deceased being dragged he had been seriously wounded and succumbed to death later in the day. Finally,

whilst it is true that PW1 heard yells from a mob coming from a bus stand which later on proceeded to the scene, that in itself does not displace the uncontroverted evidence of the appellant's involvement in assaulting the deceased and dumping him at the road side in the state that he was seen by PW1 before she heard the yells. At any rate, there is no suggestion that the mob went to where the deceased was dumped by the appellant before he was found dead.

From our own evaluation of evidence, we are satisfied that it is the appellant and his deceased brother who were the last persons to be seen with the deceased in an unconscious state. Consequently, the suggestion that the deceased might have been killed by the mob does not raise any reasonable doubt benefiting the appellant. At its best, the suggestion is not only remote but also a fanciful possibility not sufficient to exonerate the appellant. See: **Magendo Paul & Another v R** [1993] TLR 220 followed in **Chandrakant Joshubhai Patel v. R**, Criminal Appeal No. 13 of 1998 (unreported). Contrary to the learned advocate's submission, the evidence from PW1, PW2 and PW4 placed the appellant in the group of the people who actively participated in assaulting the deceased. Moreover, as rightly submitted by the learned State Attorney, the appellant's disappearance from his parent's home

amidst loss of his father and brother is inconsistent with innocence. Evidence shows that he fled to a nearby village, Vulii, where he was arrested later. The appellant admitted this but offered no explanation to justify his disappearance in such an appalling state of affairs.

We shall now turn our attention to the second cluster in relation to contradictions and inconsistencies in the prosecution witnesses. Having examined the evidence and made our own evaluation, we are again inclined to agree with the learned State Attorney that appellant's complaint is misplaced. We say so because, PW1 on the one hand and PW2 and PW4 on the other gave evidence on different intervals in the chronology of events.

The first set of the events was when PW1 in the company of the Village Chairman and Aloyce Daffa after detailing three militiamen to arrest Denis at the home of Aloyce Daffa. Evidence shows that as PW1 and her company were about to get there, Denis Aloyce Daffa threatened them with dire consequences if they dared get closer to him and they retreated with a view to reinforcing the number of the militia men. At that time, the appellant had not yet arrived at the scene.

The second set in the series of the events, occurred upon a report by PW4 on what had befallen them in effecting the arrest. PW1 in the

company of the WEO and the village chairman decided to visit the scene of crime but before reaching there, they saw the appellant and his deceased brother at a distance dragging the deceased to the roadside assaulting him with a thick stick held by the appellant. On the other hand, there is evidence from PW2 that the appellant attacked them with a panga in a bid to rescue his brother from the hands of the militia men who had already tied him with a rope to effect an arrest. PW4 for his part talked about the appellant attacking them with a stick. In cross examination, PW4 had it that the appellant had a stick and an axe. None of the two witnesses said which weapon the appellant used in assaulting the deceased thereby contradicting PW1's testimony.

It will be clear by now that unlike PW1, the evidence of PW2 and PW4 was confined to what they saw at the home of Aloyce Daffa at the time of arresting Denis Aloyce Daffa. PW1's evidence was largely on what she saw outside that place. It is thus hard to see any contradiction or discrepancy in the evidence in which the witnesses gave involving different scenes and time. Needless to say, guided by the cases referred to above, if there were any such contradictions and discrepancies, they were minor; they did not go to the root of the case. Undeniably, there is strong evidence proving that some weapons were used in assaulting the

deceased. There was, in our view, sufficient corroboration on the use of some weapons from the evidence by PW3 and exhibit P1. That evidence shows that the deceased's body had cut wounds from sharp objects with wounds all over parts of his body with severe ones in the head. The post-mortem report (exhibit P1) shows that the deceased's death was due to severe bleeding due to head injury as a result of physical assault. What emerges from PW3's testimony and exhibit P1 is that it is consistent with the testimonies of PW1, PW2 and PW4 that the deceased suffered fatal blows all over parts of his body using a sharp object; a stick held by the appellant whilst Denis had a panga. The upshot of the foregoing is that the complaint in the alleged discrepancies and contradictions is bereft of merit. It is rejected.

Finally on the trial court's failure to consider defence evidence. Counsel are agreeable that the trial court made an error in failing to consider the appellant's defence. However, they part company on the consequences arising from it.

There is hardly any dispute that the trial court strayed into an error in its judgment as rightly submitted by both learned counsel. The Court's decision in **Mkulima Mbagala v. R.**, Criminal Appeal No. 267 of 2006 (unreported) cannot be more apt. It stated:

*"For a judgment of any court of justice to be held to be a reasoned one, in our respectful opinion, it ought to contain an objective evaluation of the entire evidence before it. **This involves a proper consideration of the evidence for the defence which is balanced against that of the prosecution in order to find out which case is more cogent. In short, such an evaluation should be a conscious process of analysing the entire evidence dispassionately in order to form an informed opinion as to its quality before a formal conclusion is arrived at.**"[emphasis supplied]*

Nevertheless, the submissions of the learned counsel considered, we accept the invitation by the learned State Attorney that the error was incapable of vitiating the trial. We accept that such error can be cured in the course of the Court's evaluation of the evidence on record. Having closely examined the evidence in the record of appeal, we are satisfied that despite the trial court's failure to consider the appellant's defence, such defence was simply a denial of him participating in assaulting the deceased. Against all odds, the appellant had the luxury of shifting the blame on his deceased father and brother. Such a move was too remote to cast any doubt let alone a reasonable one in the prosecution's evidence.

In the light of the foregoing, except for its failure to consider the appellant's defence, which was nonetheless innocuous, we are satisfied that the trial court rightly convicted and sentenced the appellant on the weight of evidence which proved the case to the standard required in criminal cases. Consequently, we find no merit in the appeal and dismiss it in its entirety.

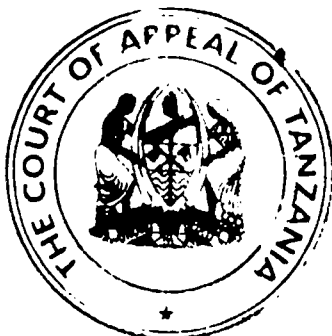
DATED at TANGA this 4th day of June, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 7th day of June, 2021 in the presence of Mr. Ramadhani Rutengwe and Mr. Shukuru Halifa, learned counsels for the Appellant and Mr. Joseph Makene, learned Senior State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL