IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A. AND RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 62 OF 2004

MATHIAS BUNDALA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Tabora)

(Mwita, J.)

dated the 27th February, 2004
in
Criminal Sessions Case No. 110 of 1997

JUDGMENT OF THE COURT

22 February & 16 March 2007

RUTAKANGWA, J. A.:

This is an appeal against conviction and sentence of death passed on the appellant by the High Court (Mwita, J.) sitting at Tabora.

The appellant was convicted of the murder of Sarah d/o Stephen, who was his second wife on or about 26th October, 1995 at Mwishole Village, Lutende ward within the District and Region of Tabora. The case against him was substantially based on circumstantial evidence and was as follows:-

It all started as a rumour at Mwishole Village that the appellant had killed his wife Sarah. The said Sarah, the deceased hereinafter, was a nurse and worked at the appellant's dispensary which was at Mwishole Village (the village hereinafter). The appellant is a Medical Assistant by profession and owned the said dispensary which was known as Wazazi Dispensary.

On 26th October, 1995, a few days before the first multiparty elections in the country, PW.5 Lazaro Kikando, a game ranger residing at the village, was informed by PW.6 Marina d/o Paulo @ Mwawandula, his neighbour, that the appellant had physically assaulted the deceased the previous night. PW.5 Lazaro then went to the appellant's home. The appellant was at home and told PW.5 Lazaro that all was well at his

home. However, PW.5 Lazaro saw blood near the house which the appellant was constructing. He never saw the deceased anywhere. Being uncertain of the information he had obtained from PW.6 Marina, PW.5 Lazaro never reported the matter to anybody. All the same on 27th October, 1995, PW.3 Pastory Ngasa, the Village Chairman, was informed by Robert Bundala that the appellant had killed his wife. Robert was the appellant's brother. PW.3 Ngasa was thereafter informed of the alleged murder by PW.6 Marina who allegedly had seen a body lying outside the appellant's house on the morning of 26.10.1995. He decided to report the disturbing information to PW.2 Amani Mrisho, the Village's Executive Officer (V.E.O.) who was at Lutende attending the General Elections Seminar. This was done on the same day. PW.2 Amani reported the matter to the Ward Executive Officer (W.E.O.). Eventually the report reached the police.

On 29th October, 1995, PW.1 Francis Massawe, an Assistant Superintendent of Police, was at the Village's polling station ready for the polling the following day. He was informed of the suspected murder of Sarah by the appellant and that the deceased was last seen alive on

26th October, 1995. In the company of P. C. Emmanuel and the Village leadership, PW.1 A.S.P. Massawe approached the appellant.

At the appellant's home PW.1 Massawe saw blood. When the appellant was asked about the whereabouts of his wife Sarah he prevaricated. At first he told them that the deceased had run away. On further questioning the appellant volunteered to take PW.1 Massawe and his team to the place where he (appellant) said he had buried the body of the deceased. The appellant led them to his farm, which was about four kilometers from his house. The spot the appellant showed them was a saw pit.

The pit was about five feet deep and half filled. They dug the plt and came across a human body. It was Sarah's. As it was night they never dug out the body. This was done the next morning when PW.4 Dr. Reuben M. Nyaruga, of Ndala hospital, performed a Post Mortem Examination on the body of the deceased. The doctor opined that death had occurred four days before the examination. However, since the body had already swollen and decomposed it was not possible for

him to establish the cause of death. The report on Post Mortem Examination was tendered in evidence at the trial of the appellant as Exhibit P.3.

The appellant relied on the defence of alibi. He told the trial High Court that accompanied by his uncle Simon, he left the Village for Simbo Village, about 30 miles away, on a bicycle on 25.10.1995 leaving the deceased at home. He spent the night at Simbo and on 26.10.1995 he attended at Simbo Primary Court where he had a civil matter against one Mwanaswaganya. He returned to the village on the evening of 27.10.1995. The deceased was not at home. He believed she had taken the opportunity of his absence to go to Iringa to visit her parents. For two days he went about his business without reporting to anybody about the disappearance of his wife. It was, he said, on 29.10.1995 when he was arrested by the police in the company of PW.3 Ngasa, among others, at about 19.30 hours. He was then told by them that he "was being taken to where the dead body of the deceased was". According to the appellant he was forced to go there and they found the body of his wife in his shamba lying face downwards. In this way he

denied being involved in any way in the death of his wife. Significantly, he called no witness. We are aware, however, that he was under no obligation to prove his innocence.

The lady and gentleman assessors returned a verdict of not guilty. They were of the opinion that since nobody saw the accused commit the offence and the cause of death was not established the prosecution had failed to prove the case. The learned trial judge, however, was firmly of a different opinion.

After dispassionately evaluating the entire evidence before him, he found the prosecution case was wholly based on circumstantial evidence. He found the evidence of PW.6 Marina to the effect that she had seen a dead body near the appellant's residence dented by her equivocations. He, rightly in our view, discounted her evidence. All the same he was satisfied that PW.1 Massawe, PW.2 Amani, PW.3 Ngasa and PW.5 Lazaro had told the court nothing but the truth. Having accepted them as witnesses of truth, he was satisfied beyond any shadow of doubt that their evidence, taken together with the appellant's

misleading information, pointed irresistibly to the guilt of the appellant. Before reaching this conclusion, he relied on the cases of **RAFAEL MUNYA V. R.** (1953) 20 E.A.C.A., **PYARAL M. BASSAM AND ANOTHER V. R.** (1960) E.A.C.A. 854, **DISTRIN D. MAPUNDA V. R.,** Criminal Appeal No. 2 of 1989 ***(unreported)*** and **RICHARD MATANGULE E. RICHARD V. R.** (1992) TLR. 5. He also adequately addressed his mind to the defence of alibi and the relevant law on alibi. He was satisfied that that defence did not raise any reasonable doubt on the guilt of the appellant, "in view of strong evidence connecting the accused with the deceased's death".

The appellant, through Mr. Galati, learned advocate, has come to this Court with essentially two grounds of appeal. These are:

"2. As the conviction was based on circumstantial evidence, the evidence adduced by the prosecution side was not sufficient to prove that it was the accused who killed the deceased.

3. That the learned trial judge erred in law by shifting the burden of proof to the accused when he was deciding on the issue concerning the defence of alibi".

Submitting in support of the second ground of appeal, Mr. Galati vehemently argued that the circumstantial evidence upon which the appellant's conviction was based was not cogent enough to prove that the appellant killed, leave alone murdering, the deceased. He was of this firm view because firstly, the cause of death was not established. Secondly, none of the six prosecution witnesses was an eye witness to the killing. Thirdly, the prosecution case had a lot of "controversies", as he put it. On this he cited the apparent contradictions in the evidence of PW.1 Massawe and PW.2 Amani, regarding the specific place where the appellant was arrested. Fourthly, if the appellant was the one who had led the authorities to the saw pit, then his statement ought to have been recorded as that conduct amounted to a confession. Mr. Galati abandoned the third ground of appeal during the hearing of the appeal.

Responding to the submissions by Mr. Galati, Mr. Mdemu, learned State Attorney, urged us to dismiss the appeal because the evidence on the cause of death does not bind the Court where there is other cogent evidence to prove the charge. On this he relied on the cases of **HILDA ABEL V. R.** [1993] TLR. 246 and **FILBERT HUBERT V. R.,** Criminal Appeal No. 28 of 1999 ***(unreported).*** In the latter case this Court discounted the report on Post Mortem Examination which was showing the cause of death but had been irregularly admitted in evidence and yet it proceeded to hold on the remaining evidence that it was the appellant who had killed the deceased.

Mr. Mdemu further submitted that the circumstances surrounding the death led irresistibly to the conclusion that she had been murdered. This was because she was not involved in the business of sawing timber such as to suggest that she had accidentally fallen into the saw pit, he argued. Secondly, the appellant at first told lies to the authorities on the whereabouts of the deceased. Thirdly, it was the appellant who voluntarily took the police and the village leadership to the pit where the deceased body was found buried. He urged us to ignore the claim of

the appellant that he was forced by the police to go to the pit, because PW.1 Massawe was not cross-examined on this. Fourthly, the appellant was callous about the sudden disappearance of his wife. On the contradictions pointed out by Mr. Galati, Mr. Mdemu invited us to disregard them as they were not fatal.

In view of the submissions of both counsel in this appeal the pressing issue becomes whether the conviction for murder is supported by the circumstantial evidence exclusively relied on by the prosecution. First of all we agree with the learned State Attorney that the minor discrepancies submitted upon by Mr. Galati are immaterial and therefore not fatal. We would like to reiterate here what the Court said in the case of **KIROIYAN OLE SUYAN V. R.,** Criminal Appeal No. 114 of 1994 ***(unreported).*** In its judgment dated 17.02.2002, the Court unequivocally stated that when a witness gives evidence after a long interval, say six years, following the event, allowance ought to be given for minor discrepancies. In the case at hand the witnesses were testifying after a lapse of nine years. Such expected trifling contradictions should be appropriately ignored. In this case crucial the

evidence which the trial judge relied on was not the place of arrest but whether it was the appellant who led the police and the village authorities to the saw pit where the body was dug out. The learned judge conclusively held that on the credible evidence of PW.1, PW.3 and PW.5 that was the case. Should the learned judge be faulted on this finding of fact? Our considered answer to this question is in the negative for the following reasons.

First of all we are in full agreement with Mr. Mdemu on his contention that the claim by the appellant that he was forced by the police (PW.1) to go to the saw pit was an after thought. This allegation was not put to PW.1 Massawe for him to deny or confirm. The questions put to him on cross-examination were routine ones and totally irrelevant. Equally, PW.3 Ngasa and PW.5 Lazaro were not cross-examined on this.

Secondly, the determination of this issue depended very much on the credibility of the witnesses. The trial judge was in the best position to assess the witnesses. In our considered judgment if a witness is not

an infant and has normal mental capacity as were PW.1 Massawe, PW.2 Amani, PW.3 Ngasa and PW.5 Lazaro, the primary measure of his / her credibility is whether his or her testimony is probable or improbable when judged by the common experience of mankind. The assumption will always be that the testimony is true unless the witness's character for veracity has been assailed some motive on his or her part to misrepresent the facts has been established, his or her bias or prejudice has been demonstrated and he or she has given fundamentally contradictory or improbable evidence or has been irreconcilably contradicted by another witness or witnesses. In short, as this Court held in **GOODLUCK KYANDO V. R.,** Criminal Appeal No. 118 of 2003 ***(unreported),*** "it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness".

We have subjected the evidence of PW.1, PW.2, PW.3 and PW.5 to a very objective scrutiny. We have found nothing in their evidence to lead us to any assumption that the same is improbable. Except for PW.2 Amani and PW. 3 Ngasa the evidence of the other two witnesses

has not been challenged at all on the basis of the above set out criteria. Save for the appellant's bare denials, their evidence is above suspicion. The evidence of PW.2 Amani and PW.3 Ngasa was challenged on the basis of bias, the appellant claims that he had "a business rivalry" with PW.3 Ngasa and that he was "not in good terms with PW.2 Amani". He never elaborated on why he was not in good terms with PW.2, neither did he cross examine PW.2 Amani on this alleged misunderstanding which he raised for the first time in his defence. Indeed it was PW.2 Amani, in demonstrating his honesty and good faith, who had stated in his evidence in chief that he had in the past arrested the appellant thrice in his capacity as Village Executive Officer. To us that did? constitute a basis for a permanent rivalry. If that was the case the appellant would have cross – examined him on that. As for PW.3 Ngasa, he was very categorical in his evidence that he had never quarrelled with the appellant. He was equally unequivocal that he had never entertained the idea of running a joint dispensary business with the appellant. But even if one were to assume that there was bad blood between these two witnesses and the appellant, there is still the unimpeached evidence of PW.1 Massawe and PW.5 Lazaro. PW.1 Massawe was a total

stranger to the appellant and the other witnesses. The appellant has failed to convince us that PW.1 was bulldozed by PW.2 and PW.3 to fabricate the case against him. After all, PW.2 Amani was not present when the body of the deceased was found in a saw pit. We are satisfied, therefore, that the learned trial judge was justified in holding that PW.1, PW.2, PW.3 and PW.5 were witnesses of truth and was accordingly entitled to rely and act on their evidence.

If PW.1, PW.2, PW.3 and PW.5 were witnesses of truth then the learned judge rightly rejected the appellant's defence of alibi, a holding which has not been challenged in this appeal. From the truthful evidence of PW.5 Lazaro it was established that the appellant was at his home on 26.10.1995 and told PW.5 that all was well when, indeed, that was not the case. He was lying. Again, on the basis of this truthful evidence of PW.1, PW.3 and PW.5, we hold without demur, as did the learned trial judge, that it was the appellant who led them to the saw pit where the deceased body was found virtually dumped. Indeed going by the credible evidence of PW.1 Massawe the appellant told them that "he

had taken the dead body to the pit by using some sort of cattle drawn cart-the sort of pole used to transport plough or training plough cattle".

This is the quality of the evidence which Mr. Galati has gallantly urged us to disregard because it is so disjointed that any court could not found a conviction for murder on it. He was so convinced because since the cause of death was not established, proof of death only cannot be taken to be proof of murder.

We agree with Mr. Galati that nobody witnessed the killing of the deceased. To us this was not fatal, because if every killing had to be eye – witnessed then many homicides would remain unsolved. We believe so because killing may be by poisoning, starving, drowning and a thousand other forms of death by which human nature may be overcome. Such killings can hardly be eye-witnessed by independent witnesses.

We agree with Mr. Galati that the cause of the death of the deceased has never been established to this day. However, our brief

response to this shortcoming is 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 the production of the body of the alleged dead person: See, for instance, **LEONARD MPOMA V. R.,** [1978] T.L.R. n. 58. Even Mr. Galati conceded to this.

In the case of **JUMA ZUBERI V. R.,** [1984] T.L.R. 249, the appellant was recognized as one of the robbers who had waylaid and attacked a party in a motor vehicle on a road at night. In the course of the robbery a 5 – year old girl was abducted. A month later remains of a child were found in a bush about one mile from the incident. Evidence established that the remains were of the abducted child. The appellant was charged with and convicted of the murder of the child. He appealed mainly on the ground that there was no evidence as to the cause of death. In dismissing the appeal, the court held that it was the appellant who had caused her death after abandoning her in the bush. The Court went on to say:

> "It is true there is no evidence as to how the child died; she might have been assaulted and killed or might have died of starvation or attacked by wild animals after she was abandoned in the bush or from some other cause" at pg. 250.

A case almost identical with this one is **R. V. MGUMBO: S/O BWANYIGETA** [1973] LRT. N. 90. In that case the accused was accused of murdering his father. He was seen by a witness leaving a pombe shop drunk and in a quarrellsome mood together with the deceased and that was the last time that deceased was seen alive. However, after some time one set of confirmed human remains were found at the village of the accused. The accused had persistently claimed that his father had travelled. They were exhumed from an anti-eater burrow. Just nearby were a bangle and 'shuka' which were positively identified to be the accused father's. These strands of evidence were accepted by the High Court to prove that the accused's

father had indeed died. A police investigator told the court and was believed that it was the accused who had led him to the scene where the human bones and deceased's shuka and bangle were found. From these pieces of evidence the High Court inferred that either it was the accused who hid the body in the burrow or he knew the one who did so, as the dead body could not have hidden itself there. The High Court rightly concluded that whoever did so wanted to cover up his / her crime. This inference taken together with the lies of the accused when asked on the whereabouts of his father, led the learned trial judge to hold that:

> "... the circumstances adduced in this case are incapable of any other explanation except the guilt of the accused. The evidence is incompatible with his innocence".

For understandable reasons the accused was convicted of manslaughter. It goes without saying, therefore, that it is now established law that a

homicide can be satisfactorily proved without first establishing the cause of death.

As said at the outset, the case against the appellant was exclusively circumstantial. As in most cases even where witnesses purport to give direct evidence, there is always a common fear of manufactured evidence. As stated in the book of **CROSS** and **TAPER ON EVIDENCE,** 9th edition 1999 at pg. 24, this fear, "applies, perhaps even more strongly, to circumstantial evidence". Hence the need for closely and critically examining such evidence.

As was aptly observed in TAPER V. R. [1952] A. C. 480, circumstantial evidence should not be considered as a chain and each piece of evidence as a link in the chain, for if one link breaks the chain would fall. Rather as shown on page 489:

> "... it is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight but these

> stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion but the three taken together may create a conclusion of guilt with as much certainty as human affair can require or admit of", per Pollock, C.B. in **R. V. EXALL** (1886), cited with approval in **THOMAS V. R.** [1972] N.Z.L.R. 34.

In short, a case depending conclusively on circumstantial evidence, the court must before deciding on a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilty: See, for instance, **ELISHA NDATANGE V. R.,** Criminal Appeal No. 51 of 1999 ***(unreported)*** in which earlier decisions are discussed.

To recapitulate, in the instant case we have sufficiently demonstrated that the appellant was not only working but also living with the deceased as his wife. The last time she was seen alive at the village was on or about 26.10.1995. When asked on the whereabouts of the deceased, the appellant lied to PW.1 Massawe, PW.3 Ngasa and PW.5 Lazaro that she had gone to Iringa. However, he later volunteered to take them to where her body had been disrespectfully dumped in a saw pit not in Iringa but in his farm, after telling PW.1 Massawe how he had taken the deceased body to what eventually became her temporary final resting place.

In our considered opinion the manner the deceased was surreptitiously buried in a half filled saw pit leads to an irrestible inference that she did not die a natural death. She was killed. If the killing was only unlawful she would not have been so interred, at least the killer would have offered an explanation. In the absence of such explanation the only irresistible inference to be drawn is that she was murdered and hidden in the pit hoping the body would never be discovered either at all or quickly. That the murderer was the appellant

was proved beyond any doubt by his false statement first to PW.5 Lazaro and later to PW.1 Massawe taken together with his act of leading the investigators to the saw pit, even if this was done out of remorse. All these facts taken together become incapable of any explanation or any other reasonable hypothesis than that of guilty. We are accordingly satisfied beyond any reasonable doubt, as was the learned trial judge, that Sarah d/o Stephen was murdered by the appellant Mathias s/o Bundala.

We accordingly dismiss this appeal in its entirety.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR