IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 70 OF 2012

JUMA KILIMO .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated the 19th day of December, 2011
in
Criminal Sessions Case No. 8 of 2009
.....

JUDGMENT OF THE COURT

2nd& 9th July, 2012

RUTAKANGWA, J,A.:

The appellant was convicted by the High Court sitting at Tanga of the murder of one Hussein s/o Abdallah (the deceased) on 18th November, 2009. He was then sentenced to suffer death by hanging. Aggrieved by the conviction and sentence, he has preferred this appeal, through Mr. Steven Sangawe, learned advocate.

Admittedly, the case for prosecution case rested entirely on the evidence of a single witness. This was PW1 Omari Salimu, who was with the deceased, when the undisputed killing took place.

PW1 Omari, told the trial High Court (trial court) that on 18th November, 2007, he had been playing a game of draughts with the deceased up to about 8.00 p.m. when they decided to leave for home. It was a dark night. Along the

way they confronted the appellant who was their villagemate. They went past him but he followed them closely from behind. When he closed on them, PW1 Omari went on, the appellant asked the deceased whether or not he (deceased) was going to pay back the money he owed him. The deceased assured the appellant that he would pay him. The appellant repeated the same question and he got the same answer in return.

The appellant complained that the debt was long overdue. PW1 Omari allegedly informed him that he would ensure he got paid. Then the appellant *"made a stride past"* PW1 Omari's right hand side while proclaiming *"hatanilipa huyo",* that is, *"he won't pay me."* Then suddenly PW1 Omari "heard something like *"taa."* He figured that the *"accused had attacked the deceased."* On account of the darkness, he claimed, he *"could not immediately identify the implement used."* Then the deceased fell down. He then saw the appellant with an upraised machete in his hand. He threatened the appellant with a bottle while raising an alarm. Many people rushed to the scene of the crime. The appellant was arrested and sent to Songe Police Station while the deceased was rushed to hospital where he passed away at 02.00 hrs on 19/11/2007. The appellant was charged accordingly after it was established that the cause of death was acute anaemia due to severe bleeding.

In his evidence the appellant admitted causing the death of the deceased, a fact he had never denied from the beginning. What he vehemently denied was killing with malice aforethought.

The appellant told the trial court that the deceased had been indebted to him since August, 2006. On the material day at around 18.00 hrs, he had met the deceased who had promised to discharge the debt that same day. Later, he found the deceased playing draughts. On reminding him of the debt, the deceased dismissed him contemptuously saying:-

"Wewe msenge. Ondoka nitakupiga." (meaning: you homosexual. Go away I will beat you.)

He left as ordered, only to come across the deceased later on at around 20.00 hrs, in the company of PW1 Omari.

The appellant again reminded the deceased about the long standing debt. The deceased, allegedly requested him not to pester him. Further to that, the deceased threateningly walked towards him. He had a knife. He again abused him, this time saying *"kuma ya mama yako, msenge",* and physically assaulted him. Enraged by the assault and abuses, he (appellant) instantly picked up a black object which he saw on the ground and hit the deceased with it on the head. He later realized that it was a machete. PW1 Omari raised an alarm. The appellant was arrested by the people who responded to the alarm and taken to the police station after receiving a beating from the mob, from where he learnt of the death of the deceased. He was totally remorseful as he never intended to kill the deceased, who was his friend, he told the trial court.

In his summing to the assessors, the learned trial judge, correctly told them that he had discerned two possible defences to the preferred charge. These, he said, were self-defence and provocation. The assessors unanimously opined that the appellant was guilty as charged.

In his judgment, the learned trial judge rejected the two defences saying:

"... As already remarked, the prosecution version is almost entirely derived of Omari, upon my own recollection of the witness, I could not help being thoroughly impressed of Omar in the course of his testimony. He related the occurrence in a simple, straightforward manner and the way I figured it,

without the slightest ill – will or disfavour towards the accused. To say the least, his telling was coherent and by the way, he sailed through unimpeached..."

We shall remain mindful throughout of the naked fact that while PW1 Omari testified on 17th June, 2010, judgment was delivered on 19th December, 2011.

Regarding the appellant, he had this to say:-

"True the accused sought to corroborate his sworn testimony with an own previously made extra – judicial statement. But, in the process, he could not avoid an own shelling. As hinted upon, the accused account is itself riddled with a bit of a contradiction as to whether the attack was in the aftermath of a fight or, rather, it was part of a defensive reflex in the wake of deceased's single handedly attack. I am of course, well alert of the settled rule to the effect of that the case for the prosecution stands or falls on its own version that is, as against whatever weaknesses availing from the defence. Nonetheless, the prosecution version being as here, upon a well constituted setting , it will require a plausible account from the other end with which to create a reasonable doubt. To this end, as against a damning prosecution version there is nothing well worth a reasonable doubt of, as I said, the accused's wavering version. That is to say I reject his telling of the happening of either insulting language or an attack from the deceased as pure fantasy. More fantasy was

constituted in the particular about his, coincidentally picking the machete, that is to beef up the claim about unintentional killing. I would, additionally, reject this detail as sheer concoction. In the result, I fully subscribe to the learned State Attorney's submission to the effect that the killing was unprovoked and intentional."

In this way, the learned trial judge found the appellant guilty as charged and convicted him accordingly.

The failure by the learned trial judge to articulate on how the appellant was a victim of his *"own shelling"*, apart from a fleeting reference to the effect that *"the extra – judicial statement slightly differs with his testimonial narrative"*, impelled the appellant to come to this Court with two grounds of complaint . Briefly put, they are as follows:-

(a) The learned trial judge erred in law and on the facts when he failed to consider the appellant's defence of self-defence and/or provocation.

(b) The learned trial judge erred in law and on the facts by failing to hold that on the evidence available, the alleged murder weapon was picked up at the scene of the crime.

At the hearing of the appeal, the appellant was represented by Mr. Sangawe. On the other hand, the respondent Republic was represented by Mr. Mseley Issa Mfinanga, learned State Attorney, who resisted the appeal.

Mr. Sangawe combined the two grounds of appeal and argued them generally. It was his contention that the learned trial judge erred in holding that the appellant was not provoked into a fight. The fight, he said, led the appellant to pick up the killing weapon, which due to the undisputed darkness

at the scene of the crime, he could not immediately realise to be a machete, and hit the deceased with it on the head. He aiso faulted the trial judge in holding that the defence evidence was contradictory while, in fact, it was consistent throughout. He accordingly urged us to allow the appeal and quash the conviction for murder and substitute a conviction for manslaughter.

On his part, Mr. Mseley, vigorously argued that on the truthful evidence of PW1 Omari, the defence of provocation and/or self defence was not available. He pressed us to consider the undisputed facts that the appellant used a lethal weapon to cut the deceased on the head, a very vulnerable part of the body. He (the appellant), therefore, had the necessary malice aforethought in terms of section 200 (a) of the Penal Code, he stressed. On this premise, he urged us to sustain the conviction for murder and dismiss the appeal in its entirety.

As the appellant does not dispute killing the deceased, we have found that the only crucial issue demanding our determination in this appeal is whether or not he killed with malice aforethought so as to make the killing murder.

Our approach in resolving this issue will be premised on these two legal principles of respectable antiquity. **One,** in cases of this nature, the duty is always on the prosecution to prove the charge against the accused beyond a reasonable doubt. **Two,** where death occurs as a result of a fight or on account of provocation, the killing is manslaughter and not murder.

The prosecution sought to prove through PW1 Omari that the killing of the deceased was premeditated and was accompanied by the requisite mens rea as already alluded to above. The appellant unequivocally denied killing with malice aforethought. He said he killed under provocation and in self defence. So, we have the word of PW1 Omari against the word of the appellant. It is

no wonder, then, that the learned trial judge, very correctly, found the decisive factor in the case to be credibility. Who, among the two, was telling the truth? The law, of course, does not require the accused to tell the absolute truth. It will suffice to win him an acquittal if his defence introduces a reasonable doubt into the mind of the court.

As shown earlier on in this judgment, the learned trial judge took PW1 Omari to be a very truthful witness because his demeanour in the witness box was remarkably impressive. To put it neatly, according to the learned judge, PW1 Omari cut out a striking figure in the witness box and he was, therefore, a truthful witness. Having so held, he rejected the appellant's defences as mere *"fantasies."*

We shall start our discussion on this issue by making clear our position of our understanding of the word fantasy. We know that it is not a word of art but an ordinary English word. It must, therefore, be given its ordinary plain meaning. It simply means, *"a pleasant situation that you imagine but that is unlikely to happen"* or a product of one's own imagination: see, for instance, Oxford Advanced Learner's Dictionary of Current English, 6th ed. at page 479. Was the appellant's defence a fantasy, either wholly or in part, so as to deserve a summary rejection?

This is a first appeal. It is trite law that it is in the form of a re-hearing. The appellant is entitled in law, to have our own consideration and views of the entire evidence and our own decision thereon: see, **D.R. Pandya v. R.** [1957] E.A 336. All the same, we can only interfere with a finding of fact by a trial court where the Court *"is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises",* **(Salum Bugu v. Mariam**

Kibwana, Civil Appeal No. 29 of 1992, CAT, (unreported)**).** Do we have good cause to interfere in this appeal as urged by Mr. Sangawe?

In determining the credibility of PW1 Omari, the learned trial judge was wholly influenced by his demeanour. He had the power to do so. It is trite law that an appellate court will rarely interfere with a finding of fact by a trial judge based on demeanour as that judge has had the advantage of watching the behaviour and conduct of a witness. But it is now axiomatic that such impressions may be deceptive and trial judges should be wary of judging issues of facts by appearances only.

Lord Bingham in his work entitled, "**The Business of Judging, Selected Essays & Speeches,"** (O.U.P. 2000) [1985] 38 CLP, 1-27, at page 10, says:-

> *"... a coherent, plausible, assured and well presented story has always been the mark of a confident trickster."*

Also P.Ekman in his book, **"Telling Lie: Clues to Deceit in the Marketplace, Politics and Marriage",** Norton, New York, 1985 says that *"most liars can fool most people most of the time."* This is quoted by Giles in his article, **"The Assessment of Reliability and Credibility"** (1996) 2 TJR 281 at page 285. Justice Peter MacClellan, Chief Judge at Common Law, Supreme Court of New South Wales, treats as fallacious, and we agree with him, the belief that the confidence of a witness is a conclusive measure of the witness' honesty: in **"Who is telling the truth? Psychology, Common sense and the Law",** a paper presented at the Local Courts of New South Wales Annual Conference, 2 – 4 August, 2006. Indeed, in 1859, Charles Dickens, who was renowned for his humour, satire and keen observation of character, in his book, **"Hunted Down,"** Peter Owen Publishers, 1996, p. 176, had aptly observed thus:-

"I have known a vast quantity of nonsense talked about bad men not looking you in the face. Don't trust the conventional idea. Dishonesty will stare honesty out of countenance, any day of the week, if there is anything to be got by it."

For all these reasons, we now have these settled principles of law:-

(i) *An impression as to demeanour of a witness ought not to be adopted without testing it against the whole of the evidence of the witness in question, and we may add, the entire evidence on record and to ordinary human conduct: See,* ***Byamungu s/o Rusiliba v.R*** *[1951] 18 EACA 233 followed,* ***inter alia,*** *by this Court in* ***Jackson s/o Mwakatoka & 2 Others v. R.*** *[1990] T.L.R 17.*

(ii) *Where there is a long delay between hearing and delivery of judgment, it is doubtful whether determinations of manner and demeanour can be effective and it may be that the trial court has no advantage over an appellate court in these circumstances. A long delay in delivering judgment after the testimony of a witness could blur a judge's decision on the assessment of credibility based on demeanour: see,* ***William Murray v. Fatehali H.L. Murji t/a Dar es Salaam Commercial House*** *(1968) HCD n. 390,* ***Ramadhan Chelliah v. Public Prosecutor*** *(2005) 3 AMR 546 (High Court of Malaya), etc.*

(iii) Remarks about demeanour of a witness must be factual and there should be a note of the observations by the court in the record of proceedings and not of its inferences. To note these remarks for the first time in the judgment might as well be a negation of the constitutionally enshrined right to a fair trial. Such remarks should be made while the witness is being examined or soon thereafter and should be made known to the parties, who may have suggestions to make about the observations and the inferences to be made therefrom. This requirement becomes unavoidable "when the judgment is prepared after a lapse of a reasonable period of time.": see, for instance, ***Alfeo Valentino v. R.,*** *Criminal Appeal No. 92 of 2006 (unreported).*

In the case of **Ramanathan Chelliah** (supra), the High Court of Malaya found reliance on demeanour after a lapse of over three years to have occasioned grave injustice to the appellant. The conviction was quashed. Back home, in the case of **William Murray** (supra), it was found reliance on manner and demeanour of witnesses after a lapse of 9 months not to be fair.

In this case, as we have already sufficiently demonstrated, the learned trial judge, while composing his judgment eighteen (18) months after seeing PW1 Omari in the witness box, relied on the latter's manner and demeanour as the only yardstick of his credibility. We have read the record of proceedings carefully and we have found out that these positive remarks on PW1 Omari's demeanour were raised for the first time while the judgment was being composed. The appellant was not afforded opportunity to make any observation

on this important aspect of the trial upon which his conviction for the gravest of all crimes was predicated. In our respectful opinion, the appellant was not fairly treated.

The above notwithstanding, our dispassionate study of the entire evidence has led us to the conclusion that the defence of self defence was not justifiably rejected as a mere concoction or fantasy. We are saying so advisedly because the appellant was not raising it for the first time in his oral testimony in court.

Exhibit D1, the extra-judicial statement, was taken on 22nd January, 2008. The appellant categorically stated therein that there was a fight and he killed the deceased in self-defence. We are in agreement with the learned trial judge in his observation that exh. D1 *"slightly differs"* with the appellant's *"testimonial narrative."* The *"slight"* differences, in our considered opinion, ought not to have been a basis for the outright rejection of the appellant's defence in the way indicated. We have found these differences to be differences on details. He only added that the deceased used insulting language. He might have been lying or he might have been telling the truth. But this did not detract from his all time claim that he killed in self-defence. This alleged defence was not abandoned at all.

The entire evidence on record taken together goes to establish a likelihood of a fight to have occurred prior to the inflicting of the fatal blow. Although the prosecution had been in possession of exh. D1 for slightly over 2 ½ years before PW1 Omari testified, it never led direct evidence through him to unequivocally negate this allegation of a fight having taken place. It was only while under cross examination that PW1 Omari said there was no fight. This, in our considered view, might have been an afterthought, and it is unfortunate that the learned trial judge did not advert to this fact before rejecting the appellant's defence. We are saying so deliberately because prior to that this witness had

twice testified on there having been a confrontation between him and the deceased on the one hand and the appellant on the other. We are left wondering on what would have been the decision of the learned trial judge if he had in any way directed his attention on this piece of evidence which implicitly lent credence to the appellant's version. There are some other pertinent factors which the learned trial judge never considered at all. We shall mention a few of them.

One, no iota of evidence was led to show that the appellant was armed at all when PW1 Omari and the deceased met him. His evidence that he stumbled over the machete at the scene was not disputed. Had the trial judge considered this fact, and that it was dark, in our considered opinion, he would not have readily dismissed as *"sheer concoction"* the appellant's contention that he picked up the machete at the scene of the crime.

Two, no shred of evidence was given by the prosecution to establish that the appellant had prior knowledge that the deceased and PW1 Omari would use that route on their way home during that dark night, so as to justify the finding that the killing was a premeditated one.

Three, the appellant, PW1 Omari and the deceased were known to each other. They were villagemates. No evidence was given to indicate that the appellant was insane. To us, it does not add up that the sane appellant would have murdered the deceased in the presence of PW1 Omari and remained at the scene, until such people as PW2 Omari Abdalla, who was ½ a kilometre away when he heard the alarm, found him there. He had, in our opinion, two options at his disposal. Since nobody had previously seen him in the company of the deceased and PW1 Omari, he could have fled immediately, leaving PW1 Omari as the only suspect. Alternatively, he could have finished off the deceased and, since he was better armed, eliminated PW1 Omari, the only eyewitness, and

gone anywhere he liked, home and dry. His conduct, then, was indicative of an innocent person, who had killed unintentionally and was remorseful for his act.

Four, it is common knowledge that in assessing credibility of witnesses, it is not only the demeanour of a witness to be considered but also his position, character, and antecedents and his or her probable motive for giving evidence in the case. As Lord Pearce said in **Onasis v. Vergottis** (1968) 2 Llyods, 403 at page 431, a witness' evidence might be *"motivated by hope of gain, the desire to avert blame or criticism, or misplaced loyalty to one or other of the parties."* We subscribe wholly to this holding.

In our present case, there is no dispute on the fact that the appellant was arrested at the scene of the crime by PW1 Omari, PW2 Omari Abdalla, PW3 Kilimo, among others. The appellant claimed, and he was not discredited on this, that he was physically assaulted and sustained many bodily injuries. This claim is supported by exh. D1 in which DW2 David, the Justice of Peace, noted that he found many recent scars on the body of the appellant. This might go to explain the delay of 3 months before sending the appellant to a justice of peace. The wounds had to heal first. But who inflicted those bodily injuries? It was PW1 Omari and others. It would not be wishful thinking on our part, or sheer fantasy to hold in the favour of the appellant that PW1 Omari might have been motivated by a desire to please the prosecution and offer himself as its star witness in order to *"avert blame"* or prosecution for unjustifiably causing actual bodily harm to the appellant when he was not denying the killing.

All in all, we are now increasingly of the view, that had the learned trial judge adverted his mind to these salient acts and issues, he would not have rejected the appellant's defence of self-defence out of hand. As matters stand now, it will be reasonable to hold that the appellant might have killed the

deceased in self-defence. The appellant, therefore, ought to have been convicted of manslaughter in terms of section18B (c) of the Penal Code.

All said and done, we allow this appeal against conviction for murder and the death sentence which are hereby quashed and set aside. We substitute therefor, a conviction of manslaughter c/s 195 of the Penal Code. As the appellant has been in custody for over four years, we sentence him to a term of imprisonment of ten (10) years.

DATE at TANGA this 9th day of July, 2012

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL