IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., ORIYO ,J.A., And MMILLA,J.A.)

CRIMINAL APPEAL CASE NO. 81 OF 2015

SADICK ALLY .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(SHANGWA,J.)

Dated the 18th day of November, 2011

in

Criminal Session No. 69 of 2009

JUDGMENT OF THE COURT

6th July & 19th August, 2015

ORIYO, J.A.:

The appellant was convicted of murder based on evidence which was purely circumstantial in nature. We say so because the only evidence which implicated the appellant was the dying declaration of the deceased which he repeated to his relatives and neighbours; PW1, PW2, PW3 and the statement of the late HadijaSeif, tendered by PW4 at the trial.

The deceased persistently mentioned the appellant as the person who cut him with a panga on various parts of his body including the face, thighs, shoulder and at the back.

At the end of the trial, he was convicted as charged and sentenced to the mandatory punishment of death by hanging.

Being aggrieved by the conviction, the appellant preferred this appeal to the Court with three grounds of complaints as hereunder:-

"1. *THAT the Hon. Trial Judge erred in law and fact to hold that the appellant herein was properly identified as the assailant of the deceased merely on persistent of the deceased in mentioning that he was assaulted by Sadick Ally.*

2. *THAT the Hon. Trial Judge erred in law and fact to hold that PW1,PW2, PW3 and the statement by HadijaSeif were credible and independent witnesses who testified on what they heard with their ears from*

the deceased's mouth that he was cut with a panga by the accused Sadick Ally.

3. *THAT the Hon. Trial Judge erred in fact and law to find that the defence of alibi raised by the appellant herein was disproved by the evidence of PW6 WP Rehema who testified that the accused disappeared after the incident."*

At the hearing before us, the appellant was represented by Mr. SalimAbubakar, learned counsel while the respondent Republic had the services of Mr. Credo Rugaju, learned Senior State Attorney. The appellant was absent with prior notice from the prison authorities. However, Mr. Abubakar sought leave of the Court to proceed with the hearing of the appeal, in the absence of the appellant in person.

As the learned State Attorney had no objection, we ordered that the hearing of the appeal proceeds as scheduled in the absence of the appellant.

Before considering the contentious issues, we find it appropriate to give, in a nutshell, the factual background which gave rise to the appeal. The deceased, Simon Ananias, and the appellant, were residents of Mhevue area, Mbogo Village, Mvomero District, Morogoro Region.It occurred that on the incident date, 7/10/2006, at around 8.00 pm, the deceased sustained cuts with panga on various parts of his body, including the head, face, neck, shoulder, backside and thighs, which resulted into deep, cut wounds, loss of lots of blood and a blood clot in the brain. He raised an alarm which received response from his relatives and neighbours.

Notwithstanding the serious injuries sustained, he informed those who responded to the alarm without hesitation, that he was cut by panga by the appellant Sadick Ally.

Subsequently a report was made to the police and he was taken to hospital. He named his assailant to the police and at the hospital, to be Sadick Ally. On 14/10/2006 he died, and the cause of death **was certified to be due to haemorrhage leading to shock and brain contusion.**

Submitting in support of the grounds of appeal, the learned counsel for the appellant vehemently stated that the appellant was not properly identified at the scene. He further submitted that mere naming of the appellant SADICK, by the deceased persistently, as his assailant is not sufficient to ground a conviction, as it is not certain that " Sadick" named by the deceased was Sadick Ally, the deceased's village mate from MhevueMorogoro. To fortify his submissions, he referredus to the cases of **HoromboElikanaVs Republic,** Criminal Appeal No. 50 of 2005 and **Anthony KigodiVs Republic**, Criminal Appeal No. 95 of 2005 (both unreported).

He concluded grounds 1 and 2 by submitting that since the High Court based the conviction on purely circumstantial evidence, he prayed that this Court finds the evidence on record insufficient to uphold the conviction.

As for the third ground of appeal that the trial High Court wrongly dismissed the defence of ALIBI put up by the appellant, the learned counsel stated that it was wrong to assume that the appellant had run away due to a guilty conscience. He further

stated that the assumption was wrong because even the deceased complainant could not be traced in the village either.

In response, the learned Senior State Attorney for the respondent Republic, stated that he was in support of the appeal because the Republic did not prove the offence against the appellant beyond proof.

In elaboration, the learned Senior State Attorney stated that the scene where the incident took place is unknown. There is no evidence on type of light and its intensity which was available at the scene. He submitted that those circumstances create doubts in the identification of the appellant at the scene. In conclusion he was of the view that, if the identification at the scene was not proper, then there was no basis to ground the conviction of the appellant. He asked us to allow the appeal.

There is no dispute that Simon Ananias died a violent death. The trial High Court formulated two issues for consideration:-

"1. What was the cause of death of Simon Ananias.

2. Who caused the death of Simon Ananias."

On the first issue, relying on the testimonies of the prosecution witnesses including PW5, the medical doctor who conducted the autopsy on the deceased body, the cause of death was due to haemorrhage leading to shock and brain contusion after suffering deep cut wounds on various parts of his body.

On our part, we have no quarrel with that first finding of the trial court on the cause of death.

As for the second issue, the trial court conceded that there was no direct evidence, save for the dying declaration, that it was the appellant who cut the deceased on various parts of his body. However,it was convinced, upon the circumstantial evidence tendered, that is was the appellant who caused the death of the deceased. We hasten to state here that we have strong reservations on this.

It is settled law that a court may ground a conviction solely on circumstantial evidence. This is so where the said evidence irresistibly lead to the inference that was the appellant and no one else committed the offence. Such evidence must also be

incapable of any other interpretation and the chain linking such evidence must not be broken;see **AugustinoLodaruVs Republic,** Criminal Appeal No. 90 of 2013 (unreported).

In **Julius Justine and Others Vs Republic** Criminal Appeal No. 155 of 2005 (unreported), the Court held as follows:-

> *"... the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established and that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused and that 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.."*

The main issue to be determined is whether the circumstantial evidence relied upon by the trial court met the benchmarks set down by the Court over a period of time and

whether the conditions were favorable for a proper identification the appellant.

The incident took place in the night when it was already dark and there is no evidence tendered on the source and strength of light at the scene. It was important to establish that the conditions were such that there was no possibility of mistaken identity, See **Waziri Amani VsRepublic** [1980] TLR 250; **Raymond Francis Vs Republic** [1994]TLR 100.

Reverting to the strength of the circumstantial evidence in that the deceased persistently mentioned the appellant as the assailant, by his first name, "Sadick", only, without mentioning his second name,"Ally". As it were, there was no description of the assailant at the scene of crime given to assist in determining on whether the assailant was the appellant or some other person know by the name of Sadick.

Without speculation, it cannot be ruled out that the deceased may have been mentallyimpaired from the attack on the

head leading to a possibility of confusion or loss of memory,thusresulting into a possibility of mistaken identity.

The law on the evidence of a **dyingdeclaration** was discussed at length in **OnaelDausonMachaVs Republic,** Criminal Appeal No 214 of 2007 (unreported). As to what amounts to a dying declaration the Court stated:-

> *"...It is a statement made by a deceased person as to the cause of his death."*

Regarding the weight to be attached to such evidence, the Court said the following:-

> *"It is now settled law that where a dying declaration is admitted in evidence, it should be scrupulously scrutinized, and in order to be acted on,**corroboration** is highly desirable." [Emphasis supplied].*

Further, the Court stated:-

> *"...It is trite law now that apart from what are really exceptional cases where the reliability of the deceased's statement cannot be impugned or questioned,* ***corroboration*** *has been held by all Courts in East Africa and India, to have been necessary ."[Emphasis supplied].*

See also **R. v Mohamed ShedaffaAnd Three Others** [1984] TLR 95; **Africa Mwambogo v R** [1984] TLR, 240.

We think that in the circumstances of this case, corroboration was needed before entering a conviction of murder.Unfortunately no such corroborative evidence is available, which renders the evidence of the dying declaration highly suspect and unreliable.

In the absence of corroborative evidence, we are satisfied that it was unsafe for the trial court to convict the appellant of murder on the uncorroborated evidence of a dying declaration.

For the reasons we have stated we are constrained to allow the appeal. Although there is sufficient evidence on record that Simon Ananias was murdered, it was not proved to the required standard in criminal cases that it was the appellant and no one else was responsible for his death.

We therefore quash the conviction of the appellant and set aside the sentence of death imposed on him. Our further orders are for the release of the appellant forthwith from prison unless he is otherwise legally held.

DATED at DAR ES SALAAM this 5th day of August, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B. K. MMILLA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL