IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI

(CORAM: SEHEL, J.A., KEREFU, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 394 OF 2019

NICAS PAUL MARTIN..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Khamis, J.)

dated the 12th day of September, 2019
in
Criminal Sessions No. 21 of 2018

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JUDGMENT OF THE COURT

4th & 11th December, 2023

SEHEL, J.A.:

In the morning hours of 27th July, 2016, Bernard Alphonce Venance (PW3) heard Rose d/o Pachal Mnarie (the deceased or Rose) crying for help. He responded to the alarm. He knocked at the door but there was no response. He tried to open it. It was locked. So, he went to peep at the window. He saw Rose inside, profoundly bleeding from her chest. She was holding the window, asking for help. PW3 also saw Nicas or Jose behind

Rose holding a knife with clotted blood. Nicas pulled Rose from the window and stabbed her on the head near her ear using the knife. Shocked with what he saw, PW3 run for help. On his way, he met with a passerby holding a hoe. Together, they went back to the window. There and then, PW3 saw Nicas directing a knife towards his stomach. As PW3 was scared, he closed his eyes and ran away for further help. By then, William Boniface Kavishe (PW1), a ten-cell leader and member of the street council together with the police officers, including G. 7280 Detective Corporal Nsangalufu Uswege Mwaipopo (PW5) arrived at the scene. The police officers opened the door with a key which they picked from outside the room.

Inside the room, blood was scattered all over while Rose was found lying on the bed, covered with bedsheet. The bed was full of blood. Nicas Paul Martin (the appellant) was also lying on the bed with blood oozing from his stomach below the belly button. He was sub-conscious. A knife from the scene was collected, tendered and admitted as exhibit P2. PW5 also found a suicide note in the room which was admitted as exhibit P3. The police collected the body of the deceased and took the appellant to

KCMC hospital. At the hospital, the deceased was pronounced dead whereas the appellant was admitted at the Intensive Care Unit (ICU).

Patrick Tiotem Amsi (PW2), a doctor at KCMC hospital conducted an autopsy to the deceased's body. Upon examination, PW2 observed two wounds on the deceased's body. One, on the right side of the ear and below the ear extending up to the chest. The other wound, on the left side of the body slightly above the chest. He concluded that the deceased's death was due to stub wound injury to the chest. He recorded his findings in the Post Mortem Examination Report which was tendered and admitted as exhibit P1.

The appellant was then charged with the offence of murder contrary to Section 196 of the Penal Code before the High Court of Tanzania at Moshi (the trial court).

In his evidence, the appellant admitted to have been found inside the deceased's room. He also admitted to have love affair with the deceased. However, he completely denied to have stabbed the deceased. He insinuated that, upon his return from the toilet, he found a man in the

room who accused him to cause Rose to break-up their love affairs. Having denied the claim, the said man abruptly stabbed him with a knife on his stomach. He became unconscious. Having regained his conscious, he found himself at the hospital.

The lady and gentleman assessors returned a verdict of guilty. They were of the opinion that the prosecution proved its case beyond reasonable doubt as PW3, who was at the scene of crime, saw the appellant stabbing the deceased with a knife; and that, the appellant was familiar to PW3.

After objectively evaluating the entire evidence, the learned trial Judge was not convinced with the appellant's story. He concurred with the assessors that the appellant stabbed the deceased with a knife, exhibit P2 as evidenced by PW3 and corroborated with the evidence of PW1 and PW5. Accordingly, the appellant was found guilty, convicted of murder and sentenced to the mandatory sentence of death by hanging.

Aggrieved, the appellant initially lodged a six-point memorandum of appeal that:

1. *The learned trial Judge erred in law and in fact by relying on the evidence of PW1 and PW3 whereas there was no sufficient evidence of proper identification of the appellant by the said witnesses, since in their statements recorded at the police, they mentioned the name of Jose and not appellant.*

2. *The learned trial Judge erred in law and in fact by failing to notice that there was a third person who is alleged to be in that room when the incident happened and goes by the name of Jose.*

3. *The learned trial Judge erred in law and in fact by failing to notice that the chain of custody of exhibits P2 and P3 was broken.*

4. *The learned trial Judge erroneously acted upon inconsistency evidence of PW5 and PW2 to exhibit P3.*

5. *The learned trial Judge erred in fact and in law by failing to notice that there were contradictions and inconsistencies due to the time of the incidence occurred.*

6. The learned trial Judge erred in law and in fact in holding that the prosecution proved its case beyond reasonable doubt against the appellant.

Later on, 3rd September, 2020, the appellant filed a supplementary memorandum of appeal comprising of sixteen (16) grounds which was abandoned at the hearing of the appeal on 4th December, 2023, by Mr. David Shilatu, learned advocate, who appeared before us on behalf of the appellant. On the other side, Ms. Dorothy Massawe, learned Principal State Attorney, assisted by Mses. Jacqueline Werema and Grace Kabu, learned State Attorneys, appeared for the respondent Republic.

Mr. Shilatu further abandoned the second ground in the memorandum of appeal. The remaining five grounds of appeal were clustered into three main issues. **One**, the appellant was not properly identified as his name is neither Nicas nor JoseJose nor Joseph as claimed by PW1 and PW3. **Two**, the prosecution evidence was full of contradictions and inconsistencies, and **three**, the prosecution failed to prove the case against the appellant to the required standard of proof beyond reasonable doubt.

Submitting on the ground that the appellant was not properly identified, Mr. Shilatu valiantly charged that the identification of the appellant by PW1 and PW3 is flawed as they both referred to a different person. Elaborating, the learned counsel for the appellant referred us to page 38 of the record of appeal where PW1 named the person who saw on the bed as NICAS or JOSEJOSE. He contended that the appellant's name is Lucas Paul Martin and not Nicas or JoseJose. He also referred us to page 49 of the same record to the evidence of PW3 who claimed to have identified the appellant by the name of Jose or Nicas; whereas, in his cross-examination, he referred to him as Joseph, Jose and Nicas.

The learned counsel for the appellant further submitted that, when PW3 was cross-examined as to his statement he made before the police, he admitted that he did not mention the name of NICAS. It was his submission that the identification of the appellant was not water tight as the appellant had all along be known or referred to as Lucas Paul Martin; at no point in time, he was known as NICAS or JOSE or JOSEPH as claimed by PW1 and PW3. To cement his contention, Mr. Shilatu referred us to the Preliminary Inquiry No. 30 of 2016 and Criminal Sessions No. 21 of 2018

where the name of the appellant is reflected as Lucas Paul Martin without an alias name. He contended that, if the appellant had an alias name, he would have been referred by his alias name like in the cases of **Twalibu Omary Juma @ Shida v. The Republic**, Criminal Appeal No. 262 of 2014 [2014] TZCA 183 (03 November, 2014; TANZLII) and **Issa Mwanjiku @ White v. The Republic**, Criminal Appeal No. 175 of 2018 [2020] TZCA 1801 (06 October, 2020; TANZLII). Therefore, Mr. Shilatu concluded that the appellant is not the offender as per defence.

Regarding contradictions and inconsistencies, the learned counsel for the appellant argued that the evidence of the prosecution witnesses was full of contradictions and inconsistencies thus made their evidence unworthy for belief. He pointed out the contradictions and inconsistencies as follows:

One, at page 38 of the record of appeal, PW1 said that the key used to open the door was thrown out by the deceased. It was the submission of the learned counsel for the appellant that it is inconceivable for PW1 to witness the deceased throwing out the key as he arrived at the crime

scene after the deceased was stabbed. He added that, even PW3 who witnessed the appellant stabbing the deceased said nothing about the key being thrown out of the window. It was his submission that, in the entire record of appeal, there is no scintilla of evidence supporting PW1's claim.

Two, PW2 claimed to observe two wounds on the deceased's body; one, on the right side of the ear, and the second, on the left side of the body slightly above the chest. Whereas, exhibit P1 shows that both wounds were on the chest of the deceased, and that, PW5 said the deceased had three big wounds on her head.

Three, the evidence of PW3 is not consistent with the observation made by PW2, the doctor who performed autopsy on the deceased's body and exhibit P1. PW3 said, he saw the appellant stabbing the deceased on her head but there is no mention of the said wound by PW2.

Four, PW5 told the trial court that the appellant was admitted at the ICU but PW1 said that the appellant was treated as an outpatient at the Out Patient Department (OPD).

On the whole, the learned counsel for the appellant urged the Court to find that the evidence of PW1, PW2, PW3 and PW5 is unreliable and unworthy for the Court to uphold appellant's conviction.

Submitting on the third ground of appeal that the prosecution failed to prove the case against the appellant, Mr. Shilatu contended that there is no evidence suggesting that the appellant had malice aforethought to kill the deceased who was his lover. To the contrary, he argued, there is evidence of PW5 showing that there was a fight between the appellant and the deceased. Mr. Shilatu further argued that the only evidence which brought the issue of malice came from PW3 whose evidence contradicted other prosecution witnesses hence daunted his credibility. He added that exhibits P2 and P3 do not connect the appellant with the deceased's death because, neither exhibit P2 was taken to the Chief Government Chemist to establish whether blood found on it belonged to the appellant nor exhibit P3 was taken to the forensic expert to verify whether the handwriting was that of the appellant. In the end, the learned counsel for the appellant urged us to allow the appeal, quash the conviction and set aside the sentence.

At the onset, Ms. Werema informed the Court that the respondent was resisting the appeal and pointed out that the appellant does not dispute that Rose died from unnatural death; they were lovers and he was found unconscious in the deceased's room. In that respect, learned State Attorney argued, the issue before the Court is whether the appellant caused the death of the deceased.

In persuading the Court that the appellant killed the deceased with malice, Ms. Werema referred us to the evidence of PW3 at page 49 of the record of appeal where PW3 said, he responded to the alarm raised by Rose and when he arrived at the deceased's room, he found the door was locked. Thus, he decided to peep through the window and saw the appellant standing behind Rose pulling her away from the window while holding a knife. He then saw the appellant stabbing Rose with the knife. The learned State Attorney added that, according to the account of PW3, the incident took place in broad daylight; the appellant was not a stranger to PW3 as he used to see the appellant visiting the deceased. That, the deceased introduced to him as Nicas or Jose. The learned State Attorney

submitted further that, given the familiarity and the time the incident took place, the identification of the appellant was impeccable.

Responding on exhibit P3, she argued that during tendering of the said exhibit, the appellant did not object; and that, the wording of exhibit P3 suggests that the writer intended to take his life. She added that it was the appellant who wrote exhibit P3 because he was found unconscious in the deceased's room.

Concerning exhibit P2, the learned State Attorney beseeched the Court to expunge it, as she argued, it was improperly received. She pointed out that it was not among the exhibits listed in the committal proceedings, and that, notice to rely on addition evidence was not issued.

Thereafter, the learned Principal State Attorney responded on the remaining issues. Responding on the names of the appellant, Ms. Massawe argued that although the name of appellant is cited as Nicas Paul Martin, he was also known as Nicas or Jose by PW1 and PW3. Besides, she argued, the complaint had no substance as the appellant was found in the deceased's room immediately after PW3 responded to the alarm raised by

the deceased. Ms. Massawe added that the appellant does not dispute that he was found unconscious in the said room. It was the learned Principal State Attorney's submission that going by the evidence of PW1 and PW3 there is no doubt that the appellant murdered Rose. At the end, a prayer for the dismissal of the appeal was made.

Having carefully considered the rival arguments for and against the appeal, the grounds of appeal and the record of appeal before us, we agree with the learned State Attorney that it is not in dispute that, Rose is dead, and that, her death was due to unnatural cause as testified by PW2, the doctor who performed the autopsy and as per the evidence of PW1, PW3 and PW5 who found the deceased's body lying in a pool of blood with wounds. It is also not disputed by the appellant that he was found unconscious inside the deceased's room. Therefore, the issue for our determination is whether the appellant murdered Rose.

In determining the present appeal, we shall be guided by the principle that a first appeal is in the form of a re-hearing. In that regard, the Court has a duty to re-evaluate the entire evidence in an objective

manner and arrive at its own findings of fact, if necessary while bearing in mind that it never saw the witnesses as they testified – see: the cases of **D.R. Pandya v. R.** (1957) 1 E.A. 336 and **Siza Patrice v. The Republic**, Criminal Appeal No. 19 of 2010 (unreported).

We wish to start with procedural flaw pointed out by the learned State Attorney on tendering and admitting a knife, exhibit P2. Having thoroughly revisited the record of appeal, we observed that a knife was listed during committal proceedings. This is reflected at page 25 of the record of appeal and it is listed under item five (5) of the intended exhibits to be relied on by the prosecution in the appellant's trial. Furthermore, we gathered from the proceedings of the preliminary hearing, specifically at page 30 of the record of appeal, that a knife was mentioned and listed as among the exhibits to be relied on by the prosecution. In that respect, we find that exhibit P2 was properly admitted in evidence, and that, there is no justifiable reason to expunge it from the record of appeal. We leave it intact.

Now back to the issue whether the appellant murdered Rose. The learned counsel for the appellant alleged contradictions and inconsistencies on the prosecution witnesses. The law on contradictions and inconsistencies is well settled that material discrepancies or contradictions which go to the root of the matter corrodes the credibility of a party's case, whereas, normal discrepancies do not. – see for instance; **Dickson Elia Nsamba Shapwata & Another v. The Republic**, Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008; TANZLII) and **Mohamed Haji Ali v. the Director of Public Prosecutions**, Criminal Appeal No. 225 of 208 [2018] TZCA 332 (12 December, 2018; TANZLII).

In this appeal, we do agree that the evidence of PW5 contradicts with the evidence of PW2 on number of wounds the deceased was stabbed. We acknowledge that at page 64 of the record of appeal, PW5 said he saw three big wounds on the deceased's body but PW2 said that he noticed two wounds on the deceased's body. Equally, exhibit P1 depicts two wounds only and it was categorically written that there was no any other external injury. We also agree that there is contradiction on the evidence of PW1 and PW5, that is, PW1 said that the appellant was taken

to the OPD while PW5 said that he was in the ICU. Nonetheless, we find that these discrepancies are minors as they do not go to the root of the matter. The number of wounds sustained by the deceased does not absolve the obvious fact that Rose died unnatural death. Moreover, the fact that the deceased died from unnatural was admitted by the appellant only that he claimed there was a third person in the room who also injured him. It is also on record that, when the room of the deceased was opened, it was only the appellant and the deceased who were found therein. There was no any other person in the room. In any event, contradictions in recounting minute details of events are expected to occur from one person to another either due to passage of time or due to mental disposition such as shock and horror at the time of occurrence of such event – see: **Dickson Elia Nsamba Shapwata & Another v. The Republic** (supra).

Regarding contradictions between the evidence of PW2 and exhibit P1, we revisited the record of appeal and noted that, at pages 45 and 46 of the record of appeal, PW2 detailed the wounds which he observed on the deceased's body after he had conducted an autopsy. In particular, he said:

"The body was covered with blood on the face and on the chest. Upon examination, I discovered that the body had two wounds. ***The first one was on the right side of an ear****. On top and below the ear and* ***extended up to the chest. The second*** *wound was* ***on the left side of the body, slightly above the chest."*** [Emphasis added].

Exhibit P1, appearing at pages 87 and 88 of the record of appeal, reads:

"Body of a young lady, bleeding per wounds. On Rt supra-auricular extend superior inferior to the chest subcutaneously 3 times 2 cm in size. Another stub wound on left side of superior chest cutting costochondral/joint at the claride (size 3 times 2 cm). No any other external injury..."

From the above extracted excerpts, it is obvious that the two pieces of evidence are in harmony. They both refer to two wounds near the chest which the deceased sustained. Even, PW3 did not have a different story as he said:

"...Nicas pulled her back and stabbed her on the head near the ear using a knife."

As such, the evidence of PW3 is corroborated with the evidence of PW2 that the wound which he witnessed was the right-hand side wound near the ear. It is a biological fact that ears are found on the either side of the head. In view of that, we find that the contradictions and inconsistencies, if any, did not shake the prosecution evidence which is also admitted by the appellant that the deceased died from an unnatural death.

Next for our determination is the issue of name of the appellant that the appellant was not known as Nicas or Josejose or Joseph. On this, we entirely agree with the submission of Ms. Massawe that the appellant was not a total stranger to PW3. It is on record that PW3 used to see the appellant visiting the deceased, and that, the deceased introduced the appellant to him as Nicas. This means that PW3 was familiar with the appellant. As such, the identification of the appellant was more of the recognition than identification by a stranger.

In **Athumani Hamis @ Athuman v. The Republic**, Criminal Appeal No. 288 of 2009 (unreported) where the Court dealt with the identification of the appellant through recognition said:

> *"Under the circumstances where the appellant recognised the appellant because of knowing him before, and given the conditions which made the complainant to recognise the appellant, it is safe to say that there was no mistaken identity of the appellant. In the Kenyan case of* ***Kenga Chea Thoye v. The Republic*** *Criminal Appeal No. 375 of 2006 (unreported), the Court of Appeal of Kenya held that: -*
>
> > *"Recognition is more satisfactory, more assuring and more reliable than identification of a stranger."*

We fully sub-scribe to the above position of law.

Further, when PW3 was cross-examined by Ms. Diana Solomon, the counsel for the appellant, he clarified on the name of the appellant by saying:

> *"In the streets, the accused is known as Nicas".*

The above means that the popular name of the appellant in his locality is Nicas.

Our further re-evaluation of evidence took us to the evidence of PW1, a ten-cell leader of the area where the appellant and the deceased used to reside. PW1 told the trial court that, on 27th July, 2016, while at work, he received a call from the street chairman who asked him to go to the house of Shukuru Ngowi where the deceased rented a room. He was informed that in that house there was a man stabbing his wife. He left his office and went to the said house. Upon reaching there, he found neighbours gathered outside the house and soon police officers arrived. He was told that inside there was a lady who had been stabbed with a knife but the neighbours could not enter as the door was locked. He moved closer to the window. He said:

> *"I saw a lady called Rose lying on the bed facing down. She slept on her stomach. The gentleman, NICAS or JOSEJOSE was lying on the bed up. He was half naked with no shirt. There was a knife on his chest. He was full of blood on his bed."*

Later, the police officers picked the key that was thrown out by the deceased and opened the room. Inside, he saw a man lying, in a pool of blood, unconscious. The appellant does not deny the fact that, on the incident date, he was found unconscious in the room with the deceased. In that respect, we have no hesitation to hold that the person who PW1 and PW3 identified as NICAS or JOSEJOSE was the appellant, and that, the appellant was the attacker of the deceased as rightly held by the trial court.

In addition, the evidence on record shows that the murder incident occurred in broad daylight, that is, around 10:00 am. Therefore, we are increasingly satisfied that the condition prevailing was favourable for correct identification of the appellant to rule out any possibility of mistaken identity or confusing/mixing the appellant with another person as Mr. Shilatu wanted us to believe. Furthermore, we find that the complaint on failure to refer the appellant in his alias is inconsequently taken into account that he was properly identified.

Lastly, on the complaint regarding malice aforethought, we need not be detained here. The learned trial Judge correctly applied the facts and the law on malice aforethought to hold that the appellant stabbed the deceased with a motive to kill. We, like the learned trial Judge, find that there are several pieces of evidence to infer malice aforethought. **First**, the appellant used a lethal weapon, a knife as evidenced by PW3. **Secondly**, the appellant stabbed the deceased on her vulnerable part of the body. The evidence of PW2 and exhibit P1 established that the deceased was stabbed on her chest, and **thirdly**, a suicide note, exhibit P3, which was retrieved from the deceased's room where the appellant was found lying unconscious with blood oozing from his stomach. All these pieces of evidence, taken together or singularly, *ipso facto,* establish malice aforethought – see: **Enock Kipela v. The Republic**, Criminal Appeal No. 150 of 1994 [1999] TZCA 7 (10 June, 1999; TANZLII).

All in all, on the strength of the evidence of PW3 coupled with the evidence of PW1, PW2, PW5 and exhibits P1 and P3, we are satisfied that the appellant was impeccably identified as the person who stabbed the deceased, and that, according to the evidence of PW2 and exhibit P1, the

said stub wound caused the death of the deceased. In that regard, we see no merit on the 1st, 3rd, 4th, 5th and 6th grounds of appeal. We hereby dismiss them.

In the end, it is our settled view that the prosecution case was proved beyond reasonable doubt, and that this appeal has been lodged without substance. Accordingly, it is hereby dismissed.

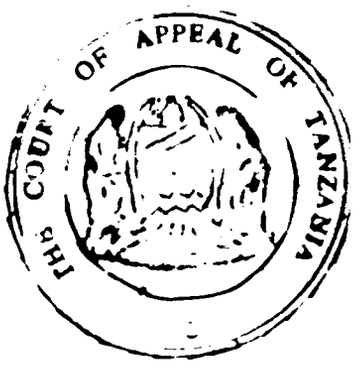
DATED at **MOSHI** this 11th day of December, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2023 in the presence of appellant in person and Ms. Dorothy Massawe, learned Principal State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL