IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 305 OF 2021

WILLIAM SAFARI @ WAYDA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Mzuna, J.)

dated the 12th day of March, 2021

in

Criminal Sessions Case No. 78 of 2014

.....

JUDGMENT OF THE COURT

14th & 23rd February, 2024

ISSA, J.A.:

The appellant, William Safari @ Wayda was arraigned before the High Court sitting at Arusha for the offence of murder contrary to section 196 of the Penal Code, Cap. 16. The appellant was initially in Criminal Sessions Case No. 78 of 2014 tried and convicted as charged and sentenced to death by hanging. Aggrieved, the appellant appealed to the Court in Criminal Appeal No. 37 of 2017 where the proceedings were nullified due to the failure of the trial court to properly involve the assessors. A re-trial was thus ordered. It is the said judgment after re-trial which is the subject of the present appeal.

The appellant's arraignment before the trial court was a result of an accusation that, on 7.8.2012 at 17.45 hours at Getak-Wareta village within Hanang District in the Region of Manyara, the appellant murdered his brother, Petro s/o Safari. The appellant pleaded not guilty to the charge. The prosecution fielded four witnesses to prove the charge: Elihuruma Michael (PW1), Rogati Paul (PW2), Magdalena Samwel (PW3), and D. 2364 D/Sgt Hassan Mgaza (PW4).

The brief facts of the case were that, the appellant and the deceased are siblings with a long standing dispute of a piece of land pursuant to the disposition of the land in the administration of the estate of their late father. The prosecution alleged that, on the fateful day, the deceased went to cut sisal in the farm which happened to be within the compound of the appellant. Alerted by his son who had seen the deceased cutting the sisal, the appellant went to the farm armed with two spears and a machete. He confronted the deceased and stabbed him with a spear on the stomach. The deceased fell down and pleaded for help. PW1 who witnessed everything starting from the deceased cutting the sisal and the stabbing by the appellant raised an alarm.

PW2 was the first to respond to the alarm and reached the crime scene while the appellant was still stabbing the deceased. She also

raised an alarm and PW3 also arrived. They all witnessed the appellant stabbing the deceased in the stomach, neck and chest. Their attempt to help the deceased was met with a threat of being stabbed by the appellant. The deceased was down unconscious and he died at the scene of crime. The appellant took to his heels, but he was apprehended by the villagers who had already gathered at the scene. The doctor who conducted post-mortem examination established that the cause of death was severe bleeding occasioned by the injuries sustained by the deceased.

In his defence, the appellant did not contest to have caused the death of the deceased. However, he claimed that the death was occasioned by a fight between him and the deceased and that he was also injured in the process. He added that he acted in self defence and the deceased was killed when he fell down on a machete which cut him on the stomach.

The trial court on the strength of that evidence, which it found to have proved the case against the appellant beyond reasonable doubt, sentenced the appellant to death by hanging.

Undaunted, the appellant has instituted the instant appeal. Initially, the appellant lodged a memorandum of appeal containing five grounds

of appeal. The appellant also on 12.2.2024 lodged a supplementary memorandum of appeal containing three grounds appeal. When the appeal was called on for hearing, the appellant abandoned the fourth and fifth grounds of appeal in the memorandum of appeal, and the first and second grounds of appeal in the supplementary memorandum of appeal. We thus rephrase and rearrange the remaining four grounds of appeal as follows: **One,** that the weapons used in the commission of offence was not tendered in court. **Two**, the prosecution evidence was weak as the sketch map was not tendered in evidence. **Three**, that the person who conducted post-mortem examination of the deceased's body was not summoned to testify in the trial court. **Four**, that the conviction was based on contradictory, inconsistent and implausible evidence of four prosecution witnesses, hence the case for prosecution was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant was represented by Mr. Kapimpiti Mgalula, learned advocate whereas the respondent Republic was represented by Ms. Janeth Sekule, Ms. Upendo Shemkole and Ms. Lilian Kowero, learned Senior State Attorneys.

Mr. Mgalula started his submission on the 1st and 2nd grounds of appeal which he argued together. He submitted that the prosecution

evidence was weak as the weapons which were used in the commission of the offence as well as the sketch map drawn at the scene were not tendered in evidence.

Ms. Shemkole addressed the Court on behalf of the respondent Republic. She supported the conviction and sentence imposed on the appellant. With respect to the 1st and 2nd grounds of appeal, she admitted that the weapons as well as the sketch map were not tendered in evidence, but she argued that it did not affect the prosecution case. In fact, she submitted that the trial judge discussed that issue and dismissed it as it did not affect the substance of the prosecution case.

There is no dispute that there are weapons which were used in the commission of the offence and there is a sketch map which was drawn at the scene of crime. These exhibits were not tendered at the trial court on the contention that they were misplaced. PW4 testified to that affect. Similarly, the learned trial judge addressed this issue on page 193 of the record of appeal and he said:

> *"The mere fact that the spears and pangas were not tendered during this session while PW4 said he collected them from the scene and then tendered them in the first session, does not in*

my view weaken the strong case for the prosecution."

We cannot agree more with the learned trial Judge. There are three eye witnesses in this case who saw the appellant stabbing the deceased with a spear. PW1 also saw the appellant leaving his house armed with two spears and a machete and he proceeded to the farm and stabbed the deceased. These witnesses were cross-examined by the appellant's advocate, but they were firm and unshakable in their narrations. Furthermore, the appellant did not dispute his presence and the presence of the weapons at the scene of crime. In addition, he did not dispute that, the weapons were used and caused injuries to the deceased. In essence, the narration of the appellant was furthering the prosecution case which is acceptable in law. In **David Gamata and Another v. Republic** (Criminal Appeal No. 216 of 2014) [2015] TZCA 362 (7th December 2015, TANZLII), the Court stated:

"We take it to be one of the settled principles of law that if an accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of

the accused in deciding on the question of his guilty".

Therefore, we are of the settled view that the evidence of the appellant strengthened the prosecution case on the nature of the weapons which were used at the scene of crime. Therefore, the fact that the weapons and sketch map were not tendered do not in any way cause the prosecution case to flop. Hence, the 1st and 2nd grounds of appeal are found devoid of merits and are dismissed.

With respect to the 3rd ground of appeal, Mr. Mgalula submitted that according to the record of appeal the doctor who conducted post-mortem examination was not called to testify at the trial court. This omission, he argued, prejudiced the appellant. To bolster his argument, he cited the case of **Lucia Antony @ Bishengwe v. Republic,** (Criminal Appeal No. 96 of 2016) [2018] TZCA 542 (24th April 2018, TANZLII) where the Court remarked as follows:

"We are of settled mind that, in the circumstances of the case it was crucial for the investigator also to be called to testify at least on the appellant's arrest in connection with the capital offence of murder which is punishable by death".

Responding to Mr. Mgalula's submission on this ground of appeal Ms. Shemkole submitted that the appellant was given the right under section 291 of the Criminal Procedure Act, Cap. 20 (the CPA) to call the doctor as reflected at page 77 of the record of appeal, but Mr. Masanja, the counsel who represented the appellant did not see the need of calling the doctor. Further, on page 84 of the record of appeal the trial judge similarly gave the right to the appellant, but he also followed the advice of his advocate.

Our starting point in determining this ground of appeal is section 291 of the CPA which provides:

> *"(1) In any trial before the High Court, any document purporting to be a report signed by a medical witness upon a purely medical or surgical matter, shall be receivable in evidence save that this subsection shall not apply unless reasonable notice of the intention to produce the document at the trial, together with a copy of the document, has been given to the accused or his advocate.*
>
> *(2) N/A*
>
> *(3) Where the evidence is received by the court, the court may, if it thinks fit, and shall, if so,*

requested by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection.

(4) N/A".

Subsection (3) of section 191 of the CPA is very clear regarding the duty of the trial court. It has a duty to adhere to the request made by the accused or his advocate to summon the person who made the report. It also has a duty to inform the accused about his right to summon the person who made the report [see **The Director of Public Prosecutions v. Emmanuel Erasto Kibwana and 2 Others,** Criminal Appeal No. 576 of 2015 (unreported)].

In the case at hand, the post-mortem examination report was admitted at the preliminary hearing as exhibit PE1. During the trial neither the accused nor his advocate requested the trial court to summon the doctor who performed the post-mortem examination. It is in the record that the initiative came from the trial judge who informed the advocate to notify the court if the defence needed the attendance of

the doctor, but Mr. Masanja who represented the appellant responded that he was not interested to do so. Further, in spite of the fact that the appellant was represented by advocate, the trial judge informed the appellant about his right to call the doctor. Nonetheless, the appellant expressed the same position taken by his advocate earlier. Therefore, the record of appeal leaves no doubt that the right under section 291 (3) of the CPA was availed to the appellant.

With respect, therefore, we find that the case of **Lucia Anthony @ Bishengwe v. Republic** (supra) cited by Mr. Mgalula in support of his submission is distinguishable to the present case. In that case, the issue was on the importance of the presence of the investigator in the prosecution case and no reference was made to section 291(3) of the CPA which is the epicenter of the appellant's complaint in this ground. Therefore, the 3rd ground of appeal has no merit and is dismissed.

The 4th ground of appeal is centered on the issue of contradictions, and whether the prosecution was able to prove its case beyond reasonable doubt. Mr. Mgalula's arguments on the issue of contradictions were: **Firstly**, that PW1, PW2 and PW3 testified that, the offence was committed on 7.8.2012 while PW4, the investigator testified that the offence was committed on 8.8.2012. **Secondly**, that PW1, PW2

and PW3 testified that the appellant had two spears and one machete, but PW4 testified that he found two spears and two machetes at the scene of crime. **Thirdly**, that the wounds which were mentioned by PW4 on page 75 of the record of appeal are different to those mentioned by PW1, PW2 and PW3. He, therefore, concluded that PW4 is not a trust-worthy witness. **Fourthly**, that there is variances in the exhibits mentioned in the preliminary enquiry vis-a-vis those mentioned in the preliminary hearing, but all were not admitted.

Addressing this ground of appeal, Ms. Shemkole insisted that, there were no contradictions in the prosecution case. With respect to the issue of date of the commission of the offence mentioned by PW4, which is 8.8.2012, she submitted that this contradiction is minor and it was caused by the lapse of memory. The offence was committed in 2012, but PW4 testified in 2021 after a long period had lapsed. Hence, this contradiction is minor and did not affect the prosecution case.

The Court went through the record of appeal, and it is true that PW1, PW2 and PW3 testified to the effect that, the offence was committed on 7.8.2012, while PW4 on page 73 to 74 of the record of appeal testified that:

"I recall that on 08/08/2012 I was at the Police Station Kateshi. We received information that at Wareta Village, Getaki Village, there was murder incident. I went there together with the OC-CID, Dr. Chalokiwa Msangi".

This testimony does not say that the offence was committed on 8.8.2012, it only shows that PW4 got the information on that day and went to the scene of crime together with Officer in Charge Criminal Investigation Department (OC-CID) and the doctor. This means the body had been lying at the scene from 17.45 hours of 7.8.2012 to 8.8.2012 when PW4 and his team went there. Thus, we find that there is no contradiction at all as PW4 went to the scene on the next day.

Responding to the issue of two machetes being found at the scene, Ms. Shemkole started to insinuate that probably as the deceased was cutting sisal, he must have possessed a machete or a knife. Therefore, the contradiction is not material.

Turning to the record of appeal, the three eye-witnesses, PW1, PW2 and PW3 all testified how the deceased was stabbed by the appellant and the weapon used in the stabbing was a spear. PW1 is the only witness who saw the appellant coming from his house armed with

two spears and one machete. On the other hand, PW4 who went to the scene of crime on the second day and observed the body of the deceased at zero distance stated that he found two spears and two machete. There is no doubt that PW4 differed with the evidence of PW1, PW2 and PW3 who were the eye witnesses. However, we are of the view that the contradiction is not material. It is noteworthy that all witnesses saw the appellant stabbing the deceased with spear. Besises, the appellant does not dispute that the spear and the machete were there at the scene of crime and were used during the encounter with the deceased.

Responding on the issue of wounds found on the deceased's body, Ms. Shemkole insisted that all three witnesses mentioned three areas: navel, stomach and chest. The witnesses were watching at a distance while the onslaught was continuing whereas, PW4, and the doctor who went to the scene on the second day observed the body at a zero distance.

We, again, agree with Ms. Shemkole that there is no contradiction on the nature of the wounds the deceased sustained. All three witnesses mentioned the areas of stomach, chest and neck. PW4 who observed the body of the deceased on the second day was more elaborate. He

said: "the deceased had cut wounds at the head, back, throat and near private parts (at the testicles) ... the cut wound at the neck was due to sharp object". The doctor was more precise. In the post-mortem examination, he described what he found as follows:

> *"Seen the body with a huge cut around neck zone all big arteries and veins were cut off also trachea and throat was involved and a big cut wound Abdominal Region. Some intestinal were visible".*

From the finding of the doctor, we are of the view that what was described was consistent with the four prosecution witnesses on the nature of the wounds. The Court in **Sano Sadiki and Another v. Republic** (Criminal Appeal No. 623 of 2021) [2023] TZCA 17476 (9th August 2023, TANZLII) dealt with the issue of contradictions and stated thus:

> *"... not every contradiction or discrepancy on witnesses' account will be fatal to the case. Minor discrepancies on details due to normal errors of observations, lapse of memory on account of passage of time or due to mental disposition such as shock or horror at the time of occurrence of the event could be disregarded*

whereas fundamental discrepancies that are not expected of a normal person count in discrediting a witness".

It is our finding that in this case, the noted contradiction regarding the number of machetes found at the scene of crime is not fundamental but minor and it did not go to the root of the prosecution case.

We now turn to discuss whether the prosecution case was proved beyond reasonable doubt. The argument of Mr. Mgalula is that, the prosecution failed to prove its case beyond reasonable doubt. He stated that malice aforethought which is a primary ingredient of murder was not proved. In his submission this is due to the following reasons: **One,** the stabbing at the navel shows that the appellant did not intend to kill the deceased. According to Mr. Mgalula the navel is a lower abdomen which is not a dangerous area of the body. **Two,** there are contradictions in the prosecution evidence which should be interpreted in favour of the appellant. To buttress this argument he cited the case of **Awadhi Abrahmani Waziri v. Republic** (Criminal Appeal No. 303 of 2014) [2015] TZCA 274 (24th February 2015, TANZLII), where it was stated that the contradictions and inconsistencies should be determined

in favour of the appellant. Mr. Mgalula, finally, urged the Court to allow the appeal as the appellant did not intend to kill the deceased.

Ms. Shemkole was adamant that the appeal has no merit as malice aforethought was proved by the prosecution. Firstly, she submitted that the number of wounds inflicted on the deceased says a lot. The deceased had wounds on the neck, chest and abdomen. In fact, the post-mortem report reveals that the intestine was protruding. Further, she argued that a person who fell on a machete as alleged by the appellant, could not have sustained such multiple injuries. Secondly, she added that the areas of the body where the injuries were inflicted are those which endangered life. Neck, stomach and chest are areas which are vulnerable and can easily cause death. She concluded that the death of the deceased was not caused by a fight; it was intentional. Further, the land dispute which existed on their family was a history and on that day the issue did not arise.

Mr. Mgalula on his brief rejoinder reiterated his stance that the killing was not intentional and that misplacement of the exhibits created doubts to the case.

In determining the presence of malice aforethought, we will be basically guided by section 200 of the Penal Code which provides:

"Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances -

a) an intention to cause death or do grievous harm to any person, whether that person is the person actually kılled or not;

b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is actually killed or not, although that knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused,

c) an intent to commit an offence punishable with a penalty which is graver than imprisonment for three years,

d) an intention by the act or omission to facilitate flight or escape from custody of any person who has committed or attempted to commit an offence".

Further, the Court's decision in **Enock Kipera v. Republic** (Criminal Appeal No. 150 of 1994) [1999] TZCA 7 (10th June 1999, TANZLII) laid down guidelines for assessing the presence of intention to cause death. It stated:

> *"... usually, an attacker will not declare his intention to cause death or grievous harm. Whether or not he had that intention must be ascertained by various factors including the following: The type and size of the weapon used, the amount of force applied, part or parts of the body or blow or blows are directed at or inflicted on, the number of blows although one blow may be sufficient for this purpose, the kind of injuries inflicted, the attacker's utterances if any made before or after killing, and the conduct of the attackers before and after killing".*

[See also **Mark s/o Kasimiri v. Republic** (Criminal Appeal No. 39 of 2017) [2020] TZCA 170 (24th March 2020, TANZLII) and **Charles Bode v. Republic** (Criminal Appeal No. 46 of 2016) [2019] TZCA 578 (6th March 2019TANZLII)].

Applying the law and the principles stated in the above cited cases to the instant case, there is no doubt that the appellant acted with malice aforethought. This is because; firstly, it is clear that when the appellant was alerted by his son that the deceased was cutting sisal in the farm nearby, he rushed to the scene armed with two spears and a machete and first he stabbed the deceased with a spear on the stomach.

He continued the onslaught by stabbing the helpless deceased on the chest and neck. The fact that the appellant was armed with two spears and machete which are deadly weapons before he came out of his house, reveals the intention of the appellant which was to kill.

Secondly, the injuries inflicted on the deceased which were on the stomach, chest and neck; all vital parts in human body shows his intention that he was going to kill.

Thirdly, the number of blows which are confirmed by the number of wounds on the deceased's body substantiate the appellant's intention to kill. Lastly, the conduct of the appellant validated his intention as he threatened to stab all those who wanted to intervene and rescue the deceased from continued attack with deadly weapons. Besides, the appellant took a flight when his intention was accomplished; that is when he made sure the appellant was dead. PW1, PW2, and PW3 all witnessed the appellant putting an end to his brother's life. In the circumstances, we have no hesitation in confirming the findings of the trial court that, the appellant killed his brother with malice aforethought.

With regard to issue of contradiction, we have already made a finding that a minor contradiction on the number of weapons found at the scene of crime did not weaken the prosecution case. It follows that

the prosecution case was proved beyond reasonable doubt. Therefore, the 4th ground of appeal has no merit and is dismissed.

Having dismissed all the grounds of appeal, we accordingly sustain the conviction and sentence imposed on the appellant by the trial court and hereby dismiss the appeal in its entirety.

DATED at **ARUSHA** this 22nd day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 23rd day of February, 2024 in the presence of the appellant in person, and also represented by Ms. Judith Akinyi holding brief for Mr. Kapimpiti Mgagula and Mr. Godfrey C. Nugu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL