IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 505 OF 2016

AJILI AJILI @ ISMAIL..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mutungi,J.)

dated 17th day of November, 2016
in
Criminal Sessions No. 29 of 2011

JUDGMENT OF THE COURT

14th & 23rd August, 2019

MKUYE, J.A.:

Before embarking on the determination of this appeal on merit, we find it appropriate to first put the record properly. This matter was initially scheduled for hearing on 3/5/2019 before the Court (Mussa, Lila and Wambali JJA) but it did not proceed for hearing and was adjourned. The reason for the adjournment was that it transpired that there was another appeal involving the same parties which was initially placed and determined by the Court (Mjasiri, Juma and Mugasha JJA) through Criminal Appeal No. 316 of 2015, whereby the proceedings and decision in Criminal Sessions Case No. 29 of 2016 to which that appeal originated were nullified

and quashed and was ordered to be heard afresh before another "trial judge and another set of assessors". Incidentally, the said Criminal Sessions Case No. 29 of 2011 was heard and determined by the Resident Magistrate's Court of Ruvuma at Songea (Dyansobera, PRM Ext. Jurisdiction (as he then was)). On the basis of the Court's order for a retrial, the matter was heard determined by the High Court of Tanzania at Songea (Mutungi, J.) in the same Criminal Sessions Case No. 29 of 2011 instead of another Resident Magistrate with Extended Jurisdiction. As we have hinted earlier on, our learned brothers (Mussa, Lila and Wambali JJJA) on 3/5/2019 adjourned the appeal in order to resolve the discrepancy.

After having examined this situation we share the view with our learned brothers that there is an anomaly. Ordinarily, since the matter was heard and determined by the Resident Magistrate with Extended Jurisdiction it ought to be retried by the judicial officer with the same rank instead of the judge with another set of assessors. However, as to the way forward, we think, it would be in the interest of justice if the matter proceeds for hearing rather than remitting it back, be it through a review or otherwise, to be heard and determined by PRM with Ext. Jurisdiction.

We have formed such opinion on the basis of three main reasons. **One,** the decision of the High Court to which the instant appeal emanates did not occasion miscarriage of justice or cause injustice to any of the parties in this case. **Two,** though, the High Court had initially transferred the matter to the Resident Magistrate's Court at Songea and tried by Dyansobera PRM with Extended Jurisdiction (as he then was), it did not waive its right to recall it if need arises. **Three,** on the basis of overriding objective principle enshrined in section 3A of the Appellate Jurisdiction Act, Cap 141 RE 2002 as amended by Act No. 8 of 2018 requiring disposal of cases on merit, remitting it back, be it through review of the court's decision or otherwise, would not serve the interest of justice as it would cause further delay in concluding the matter. It is for these reasons that we have found that it would be more appropriate to hear the appeal on merits.

Now back to the appeal. In the High Court of Tanzania at Songea, the appellant AJILI AJILI @ ISMAIL stood arraigned for the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002. It was the case for the prosecution that on the 18th day of June 2011 at Sautimoja village within Tunduru District in Ruvuma Region, the appellant

murdered one AJILI ISMAIL. The appellant denied the charge. After a full trial the High Court (Mutungi, J.) convicted the appellant of the offence of murder and sentenced him to suffer death by hanging.

The brief facts of the case leading to the arraignment of the appellant for the charge of murder are that: The appellant was a biological son of AJILI ISMAIL (deceased). The deceased was married to two wives that is SOPHIA HASSAN (appellant's mother) and AZIZA LIMBULI (PW2) appellant's step mother.

On 18th June, 2011 morning, the appellant went at PW2's house who was his step mother and enquired about his fathers' where about. When PW2 told him that he was at his mother's home, he left a message to her that once he comes back he was needed at his mother's home, then he left. Later at about 4.00 p.m the appellant went at PW2's home and found the deceased there. He asked him if he had received his message and the deceased affirmed to have received it. The appellant told him that he was waiting for evening meal and that he would leave thereafter. He again, left.

After a short period at about 5.30 p.m the appellant went at PW2's home and told the deceased that he was going to bed though it would

appear that he left. But again at about 8.00 p.m, while PW2 and her husband (deceased) and children were having supper, the appellant came while panting. The deceased turned round and in surprise asked the appellant " kwani mwanangu vipi?" meaning "my son what is wrong?" But alas! The appellant lifted the axe and hit the deceased on the head with it and ran away. On seeing that, PW2, called Mustapha (the deceased's son) (PW3) who responded and found his father laying down on a pool of blood. PW3 also raised alarm and neighbours came. They decided to take the deceased to the village executive officer who advised them to take him to Nakapanya Hospital. The deceased died while undergoing treatment. Postmortem examination was conducted and it was revealed that the deceased's death resulted from bleeding following head injury (Exh PI).

In his defence, the appellant denied involvement in killing the deceased. However, at one stage he said he did not know what was going on and at another stage he admitted killing the deceased but without intention. As already hitend herein above, the appellant was convicted and sentenced to suffer death by hanging.

Aggrieved by that decision, the appellant filed an appeal to this court on five grounds of appeal, however, at the hearing Mr. Rwezaula Kaijage, learned counsel who represented the appellant sought and leave was granted to abandon it and argue the only ground of appeal contained in the supplementary memorandum of appeal filed on 25th April 2019 to the following effect:-

> *" That, the trial court erred in law and fact by failing to evaluate the evidence on record as a result convicted the appellant wrongly for murder instead of manslaughter".*

The respondent Republic was represented by Mr. Shaban Mwegole, learned Senior State Attorney.

Submitting in support of the appeal, Mr. Kaijage prefaced by pointing out that there are contradictions and doubts which, he said, had the trial judge considered them, she would not have reached to the decision she made. Elaborating his contention, he said, **one,** though the appellant was alleged to have hacked the deceased with an axe and the postmortem examination was conducted, no exhibit whatsoever was produced in court.

Two, as PW4 testified at page 29 of the record of appeal that PW2 had an axe, any of them could have hit the deceased with it. **Three**, the appellant could not have killed the deceased (his father) as all family members were in good terms as per the testimony of PW4 (page 27 of the record of appeal). **Four,** the evidence in the High Court was contradictory, an example being that while PW2 said appellant came panting but PW4 said that PW2 told him that the appellant came straight away panting. **Five,** PW3 was not trustworthy as he said that the appellant had an axe in the remand and even in court. **Six**, the appellant was incriminated with the offence because he used to smoke bhang and that as bhang has some elements of addiction, and hence, the trial court ought to warn itself on the possibility of the appellant having been influenced by drug to kill the deceased. For those reasons, he urged the Court to find that the appellant did not commit the offence and allow the appeal.

Alternatively, Mr. Kaijage contended, should the Court find that the appellant killed the deceased, it be taken that the appellant did it under the influence of drug addiction and convict him with a lesser offence of manslaughter.

In response, Mr. Mwegole prefaced by declaring his position of supporting both the conviction and sentence. From the outset he stated that according to the lone ground of appeal the appellant does not object to have killed the deceased but he resists to have killed with malice afore thought. According to the learned Senior State Attorney this is reflected in the manner the sole ground of appeal is couched *"...failing to evaluate the evidence on record as a result convicted the appellant wrongly for murder instead of manslaughter."* He said, the issue here is whether or not he killed with malice aforethought.

Mr. Mwegole contended that the trial judge evaluated the entire evidence and found that the appellant killed the deceased. In addition to that the trial judge relied on the case of **Enock Kipela v. Republic**, Criminal Appeal No. 150 of 1994 (unreported), and found that the appellant murdered the deceased. While citing the case of **Charles Bode v. Republic**, Criminal Appeal No. 4 of 2016 the learned Senior State Attorney contended that malice aforethought was proved. He also referred us to the case of **Elias Paulo v. Republic**, Criminal Appeal No. 7 of 2004 (Mz) (unreported) and stressed that the appellant ought to know that hitting the deceased with the axe could cause death.

The learned Senior State Attorney further countered the appellant's counsel argument that the appellant was under the influence of drugs arguing that the trial judge had considered it and found that the appellant contradicted himself as he said he stopped smoking it since 2008. At most she said that it was aforethought. Mr. Mwegole added that PW2 explained the whole scenario on how the appellant tracked his father but she did not say that they had quarreled or that the appellant was under the influence of drug.

As regards the contradictions raised by Mr. Kaijage, Mr. Mwegole generally argued that they have no merit. He countered the claim that PW2 said the appellant had an axe all through. On the issue that members of the family were in good terms, he said, even PW2 did not know the reason why appellant hacked the deceased with an axe. Mr. Mwegole went on to submit that though the axe was not produced in Court, that did not vitiate the prosecution evidence that the appellant hacked the deceased with axe.

On the argument that all other witnesses were informed by PW2, he conceded said that it was true since PW2 was the only eye witness to the incident. He, however, argued that no specific number of witnesses is

required to prove a fact in issue. He cited the case of **Yohanis Msigwa v. Republic**, (1990) TLR 150 in support. In the end, he prayed to the Court to find the appeal has no merit and dismiss it.

In rejoinder, Mr. Kaijage urged the Court to find that though the ground of appeal shows the appellant's admission in killing the deceased, such admission could be under the influence of drugs.

Having considered the rival submissions we agree with Mr. Mwegole that what can be gathered from the sole ground of appeal is that the appellant admits to kill the deceased. Clearly, this shows that, that the appellant killed the deceased is not at issue. This is so because of PW2, the eye witness, whose testimony proved *actus reas*.

PW2 testified that on the fateful date, the appellant went at her home at about 8.00 a.m and asked for the deceased. On being told that he had gone to the appellant's mother, he left a message that he must got to his mother's home in the evening. PW2 testified further that the appellant came again at about 4.00 p.m and on finding his father he reminded him if he got a message. And that appellant came for the third time at 5.30 p.m

claiming he would leave after having supper. Lastly, the appellant came again at about 8.00 p.m while panting and he went straight to the deceased and hacked him on his head with an axe and took to his heels.

It is on record that immediately thereafter, PW2 started crying while calling Mustafa Ajili (PW3). She mentioned appellant to him to be the assailant. She also mentioned him to PW4 and other witnesses.

We are aware that the evidence implicating the appellant came from PW2 alone. The other witnesses such as PW3 and PW4 were told by PW2 as was rightly argued by Mr. Kaijage. However, PW2's evidence cannot be vitiated. This is so, because as was rightly argued by Mr. Mwegole, under section 143 of the Evidence Act, no specific number of witnesses is required to prove any fact in issue. What is important is the credibility of the witness. This position was also emphasized in the case of **Yohanis Msigwa** (supra) where it was held that:-

> *"As provided under section 143 of the Evidence Act, 1976, no particular number of witnesses is required for the proof of any fact. What is important is the*

witness's opportunity to see what he/she claimed to have seen, and his/her credibility."

In this case PW2 was a credible and reliable witness.

We also wish to add that PW2 informed other witnesses such as PW3, PW4 and PW5 immediately after the incident that it was the appellant who hacked the deceased. It is a settled principle of law that the ability of the witness to mention the suspect at the earliest possible time is an important assurance of his reliability. (See **Marwa Wangiti Mwita and Another** v. **Republic,** Criminal Appeal No. 6 of 1995 (unreported); **Edimo Shabani** v. **Republic**, Criminal Appeal No. 333 of 2009 (unreported). Even in this case, since PW2 mentioned the appellant to PW3 and PW4 it is a clear indication that she was a reliable witness in this regard.

As regards the issue of malice aforethought, we agree with Mr. Mwegole that the case of **Enock Kipela** (supra) is pertinent. It sets out guiding principles for ascertaining whether the person who killed did so with malice aforethought or not. In that case the Court stated as follows:-

"Usually an attacker will not declare his intention to cause death or grievous bodily harm, whether or not he

had the intention must be ascertained from various factors, including the following:

(i) The type and size of weapon which was used in the attack leading to the death of the deceased;

(ii) The amount of force which was used by the attacker in assaulting the deceased;

(iii) The part or parts of the body of the deceased where the blow of the attacker were directed at or inflicted;

(iv) The number of blows which were made by the attacker, although one blow may be enough depending of the nature and circumstances of each particular case;

(v) The kind of injuries inflicted on the deceased's body;

(vi) The utterances made by the attacker if any, during, before or after the incident of the attack".

Applying the above principles in the case at hand, we agree with Mr. Mwegole that the tests were met. We find that the evidence available on record clearly established that the killing was perpetrated by malice aforethought. The appellant made several visits to PW2's home in search of the deceased and all the time he was holding an axe. He killed the deceased using an axe which is a lethal weapon which he come with it. The deceased was hacked by the axe on his head which was a vulnerable part of the body as per the postmortem examination report (Exh P1); and the appellant flee away after killing. In the circumstances of this case, we also agree with the leaned Senior State Attorney that the appellant ought to know that hitting the deceased with an exe would cause death.(See **Elias Paulo's** case (supra). In this regard, we find that the trial judge properly reached to the conclusion she made.

We have considered the contradictions and doubts raised by Mr. Kaijage. On the argument that the appellant could have killed while under

the influence of drug, we think, it is not consistent with his conduct of tracking the deceased on the date of incident for four times. At most it depicts that he knew what he was doing. At any rate, this issue was properly dealt with by the trial court and found it to be contradictory as the appellant said he stopped using drugs since 2008 and rather the court found it to be a mere afterthought. We, thus, do not see a reason to fault it. That, the appellant was a person of good behavior or in harmony with the family members and that even PW2 wondered as why he killed his father, in our view, did not prevent the appellant to behave the manner he behaved. On the issue that PW2 had an axe, as per the evidence of PW4, we find it to be a mere hearsay evidence as PW2 did not testify to that effect. According to PW2 it was the appellant who visited his house while wielding an axe all the time.

We also agree with Mr. Kaijage that neither the axe nor the postmortem examination report were produced in court as exhibits. This, however, does not vitiate the credible evidence that the axe was used to kill the deceased. And, in any case, when the appellant was cross-

examined by Mr. Mwegole at page 43 of the record of appeal he said "*I am the one who hacked my father with the axe.*" This was the best evidence to prove that the axe was used in killing the deceased.

Consequently, looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the trial court properly held that malice aforethought was proved beyond reasonable doubt. Hence, we find the appeal to be devoid of merit. We accordingly dismiss it.

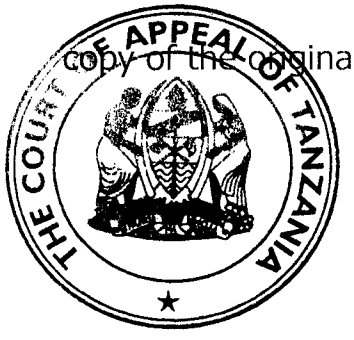
DATED at **IRINGA** this 23rd day of August, 2019

R.E.S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 23rd day of August, 2019 in the presence of Mr. Rwezaura Mwijage, counsel for the Appellant, Mr. Alex Mwita assisted by Hope Massangu learned State Attorney, for Respondent/Republic and in the presence of the Respondent in person, is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL