IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., AND MASSATI, J.A.

CRIMINAL APPEAL NO. 118 OF 2006

BAHATI MAKEJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of High Court of Tanzania at Bukoba)

(Luanda, J.)
dated 9th day of March, 2006)
in
Criminal Sessions Case No. 5 of 1999

JUDGMENT OF THE COURT

23 & 28 FEBRUARY, 2011

RUTAKANGWA, J.A.:

The appellant was found guilty as charged of the murder of one Paulina d/o Anthony, c/s 196 of the Penal Code of Cap. 16 RE. 2002, on or about the 5th day of August, 1996 at Idosero Kachwamba village in Biharamulo District. He was convicted and sentenced to suffer death by hanging. Dissatisfied with the conviction and the mandatory sentence, he has lodged this appeal.

Through Mr. William Butambala, learned advocate, the appellant has come to us with only one ground of appeal. This sole ground reads as follows:-

> *"The prosecution evidence did not prove the case beyond reasonable doubt as required by law."*

The respondent Republic in the appeal was represented by Ms. Jacqueline Mrema, learned State Attorney.

Before canvassing what was said by both counsel in the appeal, we think it will be helpful to give first an accurate account of what led to the conviction of the appellant. The same is as follows:-

On 5th August, 1996 at around 8.00 p.m. PW1 Simon Ruhendeka, then a resident of Idosero village, heard an alarm being raised at the home of Antony Edward. The latter was the father of the deceased Paulina Anthony. He rushed there to ascertain what was amiss. On arrival, he learnt that Paulina, the erstwhile wife of

one Simon Ntwalane had been brutally killed. The body of Paulina which had visible cut wounds on her head, shoulder, back and a removed vagina, was lying by the side of a path, about 100 meters from the home of her father. The people who had responded to the alarm, including PW2 Simon, kept a night vigil at the spot where the body was.

On the morning of 6th August, 1996, the killing was reported to the Kachwamba village government Chairman, one Sailo Chamagaza (PW1). PW1 Sailo sent a report to the Village Executive Officer (V.E.O.), one Leornard Makaranga. As the V.E.O. was going to Biharamulo on that day, he directed PW1 Sailo to proceed immediately to Idosero sub-village. PW1 Sailo complied.

At Idosero, PW1 Sailo was informed that the previous evening some unknown people had arrived at the village. The people who were with the deceased ran away in panic but it was Paulina who was pursued and eventually killed. Unfortunately, none of those who witnessed this incident testified at the trial of the appellant.

All the same, on looking around they noted studded – shoe-prints. None of the people around was wearing shoes, leave alone shoes with studs. They decided to follow the shoeprints which led them to the homestead of the appellant's family at Chabulongo village. According to PW2 Simon, the shoeprints ended at the house of one Nkoyelwa Makeja. One of the houses was opened and searched at the instructions of that village's Chairman and Executive Officer. These latter village leaders never testified. Inside the house, two blood-stained pangas and a torch were found and seized. The appellant and his brothers, who included PW4 Daudi Makeja, were arrested and taken under the custody of sungusungu to the Chabulongo village office, where interrogations took place. As a result of the interrogations, the appellant allegedly confessed to have murdered Paulina jointly with one Magoma, after being hired by Simon Ntwalane for a reward of two head of cattle. The police were informed of the apparent murder, after a vagina had been allegedly retrieved from one of the houses.

On 7th August, 1996, PW3 No. C6608 D/Cpl. Didas, arrived at Idosero village. He was accompanied by a doctor. By that time both the appellant and Simon Ntwalane had already been formally arrested. The doctor examined the body of the deceased Paulina and his report was tendered in evidence at the preliminary hearing as exhibit P1. The cause of death was established to be acute circulatory failure due to severe head injury. The appellant was accordingly charged alone with the murder of Paulina d/o Anthony, as Simon Ntwalane died before being formally indicted.

The appellant denied killing Paulina d/o Anthony,. He claimed that on the evening of 5th August, 1996 when the death of Paulina occurred, he was at Mwangaza village at the home of his father-in-law where he had sent his wife for treatment. He had left on the same day at 3.00 p.m., he claimed. He returned to Chabulongo village where he was staying with his elder brother, Nkoleya Makeja, on the morning of 6th August, he said. At home, he found many people, among whom were PW2 Simon and PW4 Daudi Makeja. After he had eaten and his young brothers had taken cattle to the

field to graze, he was arrested together with some other members of his household. Their houses were searched. When they were taken at the village office he was shown two pangas allegedly found and taken from one of their houses. It was there also where he learnt of the death of Paulina Anthony. He was also shown a jug containing a vagina and he, together with Daudi and Bulanzwa Shija, were incessantly beaten by the people who were armed with a gun, spears, pangas, bows and arrows. He was subsequently sent to Biharamulo police station, leaving his collegues at Chato police station. He denied confessing to PW1 Sailo to have murdered Paulina.

In determining the case against the appellant, the learned trial judge relied on the agreed facts at the preliminary hearing and the testimonies of witnesses. From the totality of this evidence he held that indeed Paulina d/o Anthony was dead and further that given the nature of the wounds inflicted on her, she was murdered.

In his appreciation of the entire evidence before him, the learned trial judge, rightly in our view, held that there was no direct evidence going to implicate the appellant with the murder of Paulina. He was, again rightly, of the view that the prosecution relied instead, on circumstantial evidence, the appellant's confession to the murder and his "*leading a search party to collect the genital organ.*" We wish, all the same, to make it absolutely clear from the outset, that the said vagina is not part of the evidence as it was never tendered nor was it, apparently, shown to the doctor who performed the post-mortem examination.

In finding the appellant liable for the murder, the learned trial judge reasoned thus:-

> "*The evidence on record shows the incident occurred during night time. But when people assembled they saw some shoes prints. They followed. The shoes print ended at the accused's house. The people who were nearer to the said house were arrested. And when the house was searched, two pangas*

stained with blood were discovered. Of course the prosecution did not establish that the blood found on the pangas was of a human (sic) blood and of what group. But that was not the end of the story. When the accused was interrogated, he explained what took place and why he killed in collaboration with Magoma. Not only that the accused also led the search party to collect the genital organ in a jug. Basically that were the versions (sic) of PW1, PW2 and PW4 save some minor or irrelevant contradictions which are bound to occur after a lapse of time. It should be borne in mind that human minds are not computers."

He then proceeded to tackle the legal issue of alibi. Although the appellant had not issued any notice of it as is required under section 194(4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (henceforth the Act), the learned trial judge, correctly in our opinion, decided to *"take cognizance of it."* All the same he rejected it on the basis of the evidence of PW4 who claimed that on the evening of 5/8/1996 he saw him at the village talking with Magoma.

On the alleged confession, he said:-

> *"With regard to confession, the accused admitted before PW1 the village Chairman of Idosero, among others. In his defence the accused never raised any torture or threat. He claimed he was beaten after he had already confessed. So the accused neither retracted nor repudiated. The accused on his own volition confessed.*
>
> *Having said this, I am satisfied as gentleman assessors that the prosecution witnesses were credible. The prosecution has proved the charge of murder against the accused and his defence is a mere denial. I find the accused guilty of murder. I convict him forthwith."*

From the above extracts, it is clear that the determination of the case entirely depended on the credibility of the witnesses, and circumstantial evidence. But since it is the prosecution which carries the burden, throughout, of proving the guilt of an accused beyond reasonable doubt, the trial High Court had to satisfy itself that the four prosecution witnesses testified to nothing but the truth on what

they did, saw and heard. The appellant had no duty of proving his alibi.

We have accordingly studied the evidence on record, as well the judgment of the trial High Court. We have also carefully considered the submissions of both counsel before us. We are of the opinion, that for a proper determination of the appeal, the law governing the three crucial issues of credibility of witnesses, circumstantial evidence and confessions has to be closely examined first.

Under our Evidence Act, Cap. 6, R.E. 2002, an alleged fact, unless admitted or is the type of which a court is entitled to take judicial notice of, may be proved by oral evidence except the contents of documents: section 61. Oral evidence must always be direct: section 62(1). But whether a case is based exclusively on direct or circumstantial evidence, such evidence must always be subjected to an objective scrutiny in order to ascertain if it is true before a conclusive finding of fact is reached based on it. As this

Court aptly observed in **MATHIAS BUNDALA v. R.,** Criminal Appeal No. 62 of 2004 (unreported):-

> *"...[A]s in most cases even where witnesses purport to give direct evidence, there is always a common fear of manufactured evidence. As stated in ...* ***CROSS AND TAPER ON EVIDENCE,*** *9th edition (1999) at page 24, this fear, 'applies, perhaps even more strongly, to circumstancial evidence.' Hence the need for closely and critically examining such evidence."*

With this general observation in mind, we shall now give a bird's-eye view of what credibility of witnesses, circumstancial evidence and confessions in law entail. We shall begin with the issue of credibility.

It is generally agreed that in assessing the credibility of a witness, the court has to adopt a careful and dispassionate approach and critically evaluate the evidence in order to find out whether it is cogent, persuasive and credible. Relationship is not a factor to affect the credibility of a witness. On this, we cannot express ourselves

better than it was done by the Supreme Court of India in **MASALTI v. STATE OF UTTAR PRADESH** AIR 1965 SC 202. The Court held:-

> *"But it would, we think, be unreasonable to contend that evidence given by witness should be discarded only on the ground that it is an evidence of partisan or interested witnesses ... The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence...."*

We fully subscribe to the holding above. That was why this Court in **GOODLUCK KYANDO v. R.,** Criminal Appeal No. 118 of 2003 (unreported), held that:-

> *"... it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

This holding was adopted by the Court in **MATHIAS BUNDALA v. R.,** (supra) and has been consistently followed in subsequent cases, when the issue of credibility arose. We have always done so because we believe that witnesses *"are the eyes and ears of justice"*: See, **TAXMANN'S LAW DICTIONARY, by D.P. MITTAL,** 2nd edn. at page 1085.

In order to do substantive justice in a case, the court attempts *"to separate the grain from the chaff, truth from falsehood"*. Where this is not feasible because the grain and the chaff are inextricably mixed up, the only available course is to reject or discard the evidence in its totality. See, **BALAKA SINGH v. STATE OF PUNJAB** AIR 1975 SC 1962 and **MT. 38350 PTE LEDMAN MAREGESI v. R.,** (CAT) Criminal Appeal No. 93 of 1988 (unreported). In the latter case, the Court said:-

> *"We think that where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to be approached with great caution, and generally*

the court should not act on the evidence of such a witness unless it is supported by some other evidence."

The above holding was recently followed by the Court in **ABDALLA MUSA MOLLEL @ BANJOO v. THE D.P.P.** Criminal Appeal No. 31 of 2008, and **ANNES ALLEN v. R.,** Criminal Appeal No. 173 of 2007 (both unreported).

Another observation worth making here is that while normal discrepancies do not corrode the credibility of a witness, material discrepancies do. Normal discrepancies are those which are due to normal errors of observations, memory errors due to lapse of time, or due to mental disposition such as shock and horror at the time of the occurrence of the event. Material ones are those going to the root of the matter and/or not expected of a normal person.

The law on circumstancial evidence is well settled. "*In a case depending conclusively on circumstancial evidence the court must before deciding on a conviction, find that the inculpatory facts are*

incompatible with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis than of guilty", per the Court in **MATHIAS BUNDALA v. R.,** (supra). Earlier decisions by the Court on this are exhaustively discussed in **ELISHA NDATANGE v. R.,** Criminal Appeal No. 51 of 1991 (unreported).

All in all, a survey of decided cases on the issue in this country and outside jurisdictions, establishes that such evidence must satisfy these tests:-

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established beyond reasonable doubt;

(2) those circumstances should be of a definite or conclusive tendency unerringly pointing towards the guilt of the accused;

(3) the 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, and

(4) the circumstancial evidence in order to sustain a conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and should be inconsistent with his innocence.

Coming to confessions generally, we have this to say. Conventional wisdom has it that the very best of witnesses in any criminal trial is an accused, who confesses his guilt. Such a confession to bind the accused, however, must be proved beyond reasonable doubt by the prosecution to have been made freely and voluntarily. In short, **it should have been free from the remotest taint of suspicion, and free from the blemishes of compulsion, inducements, promises or even self – hallucinations**: See, **TWAHA ALI & 5 OTHERS v. R.,** (CAT) Criminal Appeal No. 78 of 2004, **PAULO MADUKA & 4 OTHERS v. R.,** (CAT) Criminal Appeal No. 11o of 2007, **DIAMON s/o MALEKELA @ MAUNGANYA v. R.,** (CAT) Criminal Appeal No. 205 of 2005 (all unreported), etc.

Furthermore, as this Court stressed in the case of **RHINO MIGERE v. R.,** Criminal Appeal No. 122 of 2002 (unreported):

> *"...for a statement to qualify for a confession, it must contain the admission of all the ingredients of the offence charged as provided for under section 3(c) of the Evidence Act, 1967..."*

This was repeated with emphasis by the Court in **DIAMON s/o MALEKELA @ MAUNGANYA v. R.,** (supra).

Since an admissible confession must be free of any taint of suspicion or blemishes of compulsion, etc, this Court in **BRASIUS MAONA AND GAITAN MGAO v. R.,** Criminal Appeal No. 215 of 1992 (unreported), unequivocally stated:-

> *"Once torture has been established, Courts should be very cautious in admitting such statement in evidence even under the provisions of section 29 of the Evidence Act, 1967 which in our considered opinion was not*

meant to be invoked in situations where the inducement involved is torture."

See also, **DOTTO NGASSA v. R.,** (CAT) Criminal Appeal No. 215 of 1992 and **INOTA GISHI & 3 OTHERS v. R.,** (CAT) Criminal Appeal No. 5 of 2008 (both unreported). In **DOTTO NGASSA v. R.,** (supra), the Court held thus:-

> *"... In our view, the crux of the matter was whether the appellant was a free agent when he made the caution statement to PW2.* ***Having regard to the undisputed evidence that the appellant was beaten by sungusungu and shortly thereafter he was taken to the police station where he made the caution statement we are inclined to accept Mr. Nasimire's contention that the appellant was still haunted with fear of torture."*** [Emphasis is ours].

The caution statement was accordingly discounted by the Court. The Court in **INOTA GISHI v. R.,** (supra) equally discarded the

appellants' confessional statements made "*in the presence of a large group of sungusungu*", as "such statements could not be said to have been free and voluntary." The same stance had earlier been taken by the Court in the case of **SONDA NGULUNGWA v. R.,** Criminal Appeal No. 6 of 2003 (unreported). In the latter case the Court categorically ruled that a confession made to a sungusungu commander is inadmissible by virtue section 27 of the Evidence Act, Cap. 6 read together with the provisions of the Peoples' Militia Act as amended by Act No. 9 of 1989.

Submitting in support of the sole ground of appeal, Mr. Butambala urged us to quash the conviction of the appellant and the death sentence.

This prayer was predicated on his conviction that the learned trial judge erred in law in predicating the conviction on the alleged appellant's confession to the murder whose voluntariness was not established at all. It was his submission that if the appellant made

such confession at all, the same was made under threat and fear because his interrogators, being mostly sungusungu, were armed.

Ms. Mrema, too, did not support the conviction of the appellant. She pressed us to overturn the guilty verdict for the following reasons. **One,** the alleged confession, going by the prosecution evidence, was made under threats of torture and so it was not voluntary. **Two,** the circumstantial evidence relied on by the learned trial judge was not conclusive and as such it did not irresistibly lead to the guilt of the appellant. **Three,** the four prosecution witnesses contradicted each other and/or themselves and this shook their credibility.

We have dispassionately read the whole evidence and the judgment of the trial High Court. After applying the law to the facts gathered from the patently contradictory evidence, we have found ourselves in full agreement with the contentions of both counsel. We shall elaborate why.

The evidence of the alleged confession came from PW1 Sailo, PW2 Simon and PW4 Daudi. These three witnesses are agreed that the appellant was arrested by the Chabulongo village authorities in collaboration with a large number of sungusungu or local vigilantes. It was common among these witnesses that at the time the appellant was being interrogated there were many people assembled at the village offices.

PW4 Daudi thus specifically said:-

> "... *Sungusungu were the ones who were searching . They seized the pangas. Then we went to the village office. The leaders of the village were around... At the office they queried Bahati.* ***They threatened him with spears...***" [Emphasis ours).

That was said under examination in chief. While under cross-examination, PW4 Daud said:-

"... All people in the search group threatened to spear him. He said because he was threatened..."

This tells it all. The prosecution was bound by its own evidence which it never discredited: See, **STANLEY WILLO v. R.,** Criminal Appeal No. 32 of 2009 (unreported). The appellant, therefore, was not a free agent when he allegedly confessed, assuming he did so. We are saying so deliberately because none of the mentioned village leaders and the sungusungus who interrogated the appellant testified. If the appellant actually confessed to them, why did the prosecution find it convenient not to call them? In our considered opinion, this is a fit case in which we are entitled to draw an adverse inference against the prosecution as we hereby do.

Even without drawing such an inference, on the evidence cited above we are settled in our minds, that the alleged confession not being free of any blemishes of compulsion and threats, was not free and voluntary. Had the learned trial judge considered this evidence in our respectful opinion, he would not have readily concluded that *"the accused on his own volition confessed."* On the authority of

BRASIUS & MGAO v. R., (supra), we discard in its totality the alleged involuntary confession.

Ms. Mrema also invited us to reject the evidence of PW1 Sailo and PW2 Simon as they were not witnesses of truth. She took us through the litany of contradictions, smacking of open lies, found in their respective testimonies. A few significant instances will suffice here.

PW1 Sailo testified that after seeing the studded-shoeprints, some people made a follow up until they reached the appellant's homestead. He then pointedly said:-

> *"... I did not go in that mission. Later I was told that the people who committed the murder were arrested at Chabulongo village. I then went to the said village ..."*

On this he was belied by PW2 Simon, who said:-

> *"... We followed the marks to Nkayelwa Makeja. There we four houses.* ***The house with iron sheet is where the marks ended.*** *We decided to send delegation to the*

village government. The Village Chairman one Deus and village Executive Officer one Samson. ***We were under the leadership of Sailo (PW1).*** *The door was locked. The village Chairman opened the door.* ***The house was of Bahati Makeja. Bahati was outside. Someone was inside ... The Chairman, the accused and other people entered inside ... They came up with one pair of shoes,*** *two pangas and torch of silver colour. The accused was taken to the village office...* " [Emphasisis is ours].

The evidence of PW2 Simon, was materially contradicted by PW3 D/Cpl.Didas who visited the village on 7th August, 1996. According to his evidence he never saw a single house which was roofed with iron sheets. He said, instead, that the appellant's house was grass-thatched. Furthermore, PW2 Simon was contradicted by PW4 Paulo who testified that when the houses were being searched, the appellant was not present as he was with him at the "*Kikome.*" That was not all. Contrary to the assertion by PW2 Simon, that the

appellant was outside the house, PW1 Sailo testified that the appellant was inside the house.

PW1 Sailo proved himself to be a liar. While under examination in chief he told the trial court that after the appellant had confessed, he then told them that the amputated vagina was in a jug on the ceiling of his house. He (PW1) then said:-

> *"... Daudi Samson, accused and other people went to the accused's home stead.* ***They came back with the female organ-vagina. It was in a Jug ...*** *"* [Emphasis is ours].

However, while responding to the 2nd assessor's question, he said:-

> *"I witnessed the jug when retrieved from the accused's house. No shoes were seized."*

Within the same breath, he not only contradicted himself but he equally contradicted PW2 Simon who testified that shoes were seized from the home of the appellant and were taken by the police.

We sincerely believe that PW1 Sailo was lying and his evidence ought not to have been believed. Contrary to his earlier assertions, while under cross-examination he had the effrontery of saying:-

> *"On arrival I met the accused arrested.* ***Also pangas torch and private parts.*** *There were about 3 houses.* ***They were not of the accused, all houses. The items were recovered from the accused's house. I saw."***

These were positive lies which destroyed his credibility. Lastly, but not least in importance. While PW1 Sailo testified that he saw blood stains on the appellant's pair of trousers, PW2 Simon was insistent that the only visible blood stain was on the appellant's jacket. The two were contradicted by PW3 D/Cpl. Didas, who testified that none of the appellant's clothes had blood stains on it. No evidence was given to show that the appellant had washed or changed clothes.

We share the learned trial judge's observation that *"human minds are not computers."* That's why, out of respect, we took the

pains of enumerating some of the salient contradictions enumerated by Ms. Mrema, going to discredit these key prosecution witnesses. As a result, we have respectfully found ourselves constrained to side with Ms. Mrema in her contention that by any standards these were not minor or irrelevant contradictions. In our considered judgment they were not normal discrepancies. Cumulatively, we take them to be irreconcilable material discrepancies, which rendered the evidence of these key prosecution witnesses totally incredible. That's why we had earlier expressed our doubts on whether the appellant made any confession at all.

Ms. Mrema has also urged us to put no weight on the alleged fact that the appellant's confession led to the discovery of the deceased's vagina. She was of this view because the so called organ, which was not part of the evidence, was not even proved scientifically to be of a human being and if it was, that it was of the deceased Paulina. As authority in support of her submission, she referred us to the decision of this Court in the case of **KABATE KACHOCHOBA v. R.,** [1986] TLR 170.

We have found the **KABATE** decision relevant to the issue of proof of the alleged recovered vagina. Whether or not it was so recovered, now a claim of doubted validity, there was no proof that it was a human organ and if it was, whether it was the one which had been 'amputated' from the deceased Paulina.

In **KABATE'S** case (supra), the Court held:-

> *"It may well be that the heart and kidney were human remains, as found by the judge. But that evidence is not conclusive ... We are not prepared to accept a layman's view that the kidney and heart and part of the skull were human remains in the circumstances. And naturally we cannot therefore conclude that those remains were without doubt those of Ali Malela who had been killed and burnt..."*

Unlike in the **KATABE** case, where those remains were tendered in evidence, in the instant case that much spoken of "*vagina in a jug*" was never tendered. No account was given of its disposal or disappearance. We are accordingly loath to confirm the

in a jug that, may be, never was. This fear is strengthened by the fact that the evidence of it came from witnesses of doubted credibility.

Having doubted the truthfulness of PW1 Sailo, PW2 Simon and partly of PW3 D/Cpl. Didas, we are left with no definite or conclusive inculpatory facts which could be safely held to be unerringly pointing to the guilt of the appellant. The only credible evidence on record is that which is compatible with the innocence of the appellant rather than his guilt.

For the reasons given above, we hold that the appellant's guilt was not established even *"on a balance of probabilities"* as Ms. Mrema aptly put it. We are accordingly enjoined to allow this appeal in its entirety. The conviction for murder is hereby quashed and set aside as well as the death sentence. The appellant should be released forthwith from prison, unless he is otherwise lawfully held.

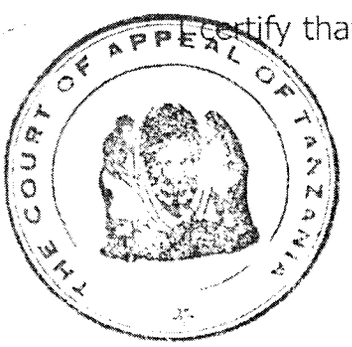
DATED at MWANZA this 25th day of February, 2011.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL