IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI J.A., MWAMBEGELE J.A, And LEVIRA J.A.)

CRIMINAL APPEAL NO. 12 OF 2018

PASCHAL KITEU .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Morogoro)

(Kihio, J.)

dated the 21st day of November, 2016

in

HC Criminal Sessions Case No. 73 of 2014

JUDGMENT OF THE COURT

14th July & 7th August, 2020

MWANGESI J.A.:

According to the information which was put to the appellant on the 17th day of March, 2015 he stood indicted for trial with the offence of murder contrary to the provisions of section 196 of the Penal Code Cap 16 R.E 2002 (now R.E. 2019) **(the Code**). It was the case for the prosecution that on the 14th day of October, 2011 at Msolla village within the District and Region of Morogoro, the appellant murdered one Mohamed Ally. Following the protest of his innocence by the appellant, the

respondent/Republic, paraded three witnesses and tendered two exhibits to establish the guilt of the appellant. The prosecution witnesses were Omari Ali Mfaume (PW1), E. 9123 Detective Corporal Juma (PW2) and Ismail Abdalla (PW3), while the exhibits were a post mortem examination report (exhibit PE1) and a spear (exhibit PE2). On his part in defence, the appellant relied on his lonely sworn testimony and did not tender any exhibit.

The finding of the trial Judge who was assisted by assessors after analyzing the evidence placed before him, was that the guilt of the appellant had been established to the hilt. He therefore convicted the appellant as charged and sentenced him to the statutory penalty of death by hanging. Aggrieved by the decision of the trial Judge, the appellant preferred the current appeal to the Court premising his grievance on five grounds namely: -

1. *That, the trial Court erred in law and fact in convicting the appellant while there was no proof of malice aforethought against the appellant.*
2. *That, the trial Judge erred in law and fact in convicting the appellant without corroboration evidence from necessary*

witnesses such as the wife of the deceased and other people who responded to the alarm which was raised.

3. *That, the trial Judge erred in law and fact in convicting the appellant without addressing himself on the issue of identification of the murderer regard being had to the act that the incident occurred during night time.*

4. *That, the trial Court abdicated its duty by failing to subject the entire evidence to an objective scrutiny and as a result, ending up in failing to adequately consider the defence evidence.*

Later, when Mr. Imam Hassan Daffa learned counsel, was assigned by the Court the dock brief to represent the appellant in this appeal, lodged a supplementary memorandum of appeal consisting of five grounds which read: -

1. *That, the Honourable trial Judge erred in law and in fact by convicting the appellant for such a serious offence of murder on the basis of highly shaken evidence.*
2. *That, the Honourable trial Judge erred in law and in fact by convicting the appellant without taking into consideration the appellant's testimony in defence given under oath in Court.*
3. *That, the Honourable trial Judge erred in law and in fact by failure to take into consideration the contradicting testimonies between*

PW1 and PW3 on the one hand against that of PW2 on the other hand.

4. *That, the Honourable trial Judge erred in law and in fact for failure to hold that the failure by the prosecution to bring the deceased's wife as a witness draws negative inference that she would have testified against the prosecution.*

5. *That, the Honourable Judge erred in law in sentencing the appellant to death by hanging on the basis of illegal conviction.*

At the hearing of the appeal whereby the appellant was linked to the Court from Ukonga Central Prison by video conference, he was ably represented by Mr. Imam Hassan Daffa learned counsel, whereas the respondent/Republic, had the joint services of Ms. Gloria Mwenda and Ms. Grace Lwila, both learned State Attorneys.

Before we embark on considering the merits and/or demerits of the appeal, we think it is apposite albeit in brief, to give the background facts leading to the decision which is being impugned. Fortunately, it is just straight forward. The deceased in this appeal was a person with disability who at the material time was residing at Msongola village within the District and Region of Morogoro, where he owned a retail merchandise shop. On the 14th October, 2011 at about 17:00 hours, while PW1 and PW3

were at the shop of the deceased, the appellant arrived in the company of a colleague, and ordered for some soft drinks which they were served by the wife of the deceased, and drank them at very place. Upon having quenched their thirsts and cleared the bill, they ordered for two more bottled juices, which they moved with to their home.

Nonetheless, before the appellant and his colleague left, for no apparent reason he took a spear which had been in the possession of his colleague and stabbed the deceased on the neck and took to his heels. Having witnessed the incident, PW1 and PW3 who had been at the scene of crime, gave a chase to the appellant whom they managed to arrest after some distance. An alarm was then raised and people from the vicinity responded to. Policemen were informed whom upon their arrival, the appellant and the spear which had been used to stab the deceased were handed over to them. Eventually, the appellant was charged with the offence of murder which he was convicted of.

On his part in defence, the appellant admitted to have visited a certain grocery in the village of Msongola while in the company of a friend and found other people having some drinks which were being sold there. They also ordered for some soft drinks which they mixed with a local hard

drink *(gongo)*, which was also being sold in the grocery. He stated further that the one who served them with the drinks was one going by the name of Mohamed.

The appellant told the court further that after he was done with the drinking and left the place retiring to his home, he heard an alarm from behind. In no time three people one of them being PW1, invaded him and PW1 stabbed him with a spear on the back. As a result, he became unconscious until when he found himself at the Police Station of Mkuyuni, where to his surprise it was alleged that he had killed a person. He was subsequently charged and convicted of the offence of murder. The appellant strongly resisted the claim levelled against him before the trial court, arguing that he knew nothing about it. As it happened, the story by the appellant was not believed by the trial Judge who instead, convicted him as charged and sentenced him, resulting to the appeal under scrutiny.

Prior to arguing the appeal, Mr. Daffa presented before us a prayer which was granted, to abandon the second and fifth grounds of appeal in the supplementary memorandum of appeal, as well as grounds number 1 and 3 in the memorandum of appeal which was lodged by the appellant. With regard to the remaining grounds of appeal in the two sets of the

memoranda of appeal, the learned counsel combined grounds number 1 in the supplementary memorandum of appeal with ground number 4 in the memorandum of appeal and referred them as the first ground, while ground number 4 in the supplementary memorandum of appeal was combined with ground number 2 in the memorandum of appeal, constituting a ground he named the second ground and lastly, he argued ground number 3 in the supplementary memorandum of appeal alone as the third ground.

In amplification of the first ground of appeal, Mr. Daffa faulted the trial Judge for failing to adequately analyze the defence evidence. According to him, the trial Judge made his finding that the prosecution witnesses were credible, before he even considered the evidence of the appellant as clearly reflected on page 98 of the record of appeal. The learned counsel complained that in so doing, injustice was occasioned to the appellant whose evidence strongly contradicted the prosecution evidence. He pointed out as an example the testimonies of PW1 and PW3, which was to the effect that the one who served the appellant and his colleague with drinks at the grocery on the fateful date, was the wife of the

deceased, while the averment by the appellant was that it was the deceased.

Mr. Daffa submitted further that, while PW1 and PW3 testified to the effect that the appellant stabbed the deceased on the neck by using a spear which was tendered as exhibit P2, the appellant's version was that exhibit P2 (the spear) was used by PW1 to stab him on his back at the time when they invaded him with his colleagues, when he was retiring to his home. In the view of Mr. Daffa, under such situation, it would have been expected to find the issue of the contradicting versions on the spear, being resolved by invoking the test of DNA to clarify if the blood contained in the spear came from the deceased or the appellant.

Placing reliance on the decisions in **Hussein Idd and Another Vs Republic** [1986] TLR 166 and **Mussa Jumanne Mtandika Vs Republic,** Criminal Appeal No. 349 of 2017 (unreported), Mr. Daffa faulted the learned trial Judge for not subjecting the entire evidence to an objective scrutiny, which would have enabled him to note that there were serious contradictions that had to benefit the appellant. He therefore implored us to do the needful by intervening with the holding of the trial court and sustain the first ground of appeal.

With regard to the second ground of appeal, the complaint by the appellant was pegged on the failure by the prosecution to summon the wife of the deceased to appear in Court and testify. It was submitted by Mr. Daffa that the wife of the deceased that is, Tausi Hamis of Kibungo Kungwe, was listed during the preliminary hearing as reflected on page 44 of the record of appeal, that she would be among the witnesses to give their evidence during trial of the appellant. In his opinion, she was indeed a crucial witness. Nonetheless, without advancing any reasons the prosecution did not call her to appear and testify in Court and thereby, making one to raise eyebrows as to why. Had the trial Judge seriously considered this omission, in the view of Mr. Daffa, he would have un-doubtfully, drawn an adverse inference against the prosecution. He urged us to do so.

The complaint in the third ground of appeal, is in respect of the contradiction between the testimonies of PW1 and PW3 with that of PW2. While on the one hand PW1 and PW3 testified to the effect that beer was not among the items which were being sold at the kiosk of the deceased, the testimony of PW2, a Police officer who visited the kiosk on the other hand, was that beer was among the items which were being sold at the

kiosk of the deceased. With such discrepancies, it was difficult to tell as to who between the two blocks of the prosecution witnesses, was telling the truth. The said discrepancies in the view of the learned counsel, ought to have benefitted the appellant. He concluded his submission by requesting the Court to find merit in the entire appeal of which we were urged to and set the appellant at liberty.

The response by Ms. Mwenda to the first ground of appeal was that the complaint was baseless for the reason that, the evidence of the appellant was considered by the trial Judge only that it was found to be wanting in merit. According to her, the conclusion which was made by the trial Judge as reflected on page 99 of the record of appeal referred to by her learned friend, was made after the entire evidence from both sides had been analyzed. She therefore urged us to dismiss the first ground of appeal for want of merit.

With regard to the second ground of appeal that the prosecution failed to summon a crucial witness, Ms. Mwenda countered it by arguing that the failure was not fatal. Basing her argument on the provisions of section 143 of the Evidence Act, Cap 6 R.E. 2019 **(the TEA**), she argued that the law does not demand any number of witnesses to a prove a case.

What mattered in this appeal was the evidential value of the testimonies given by the witnesses summoned and not their number. She was positive that the testimony of the wife of the deceased was not crucial as what she would have testified in court, was given by PW1 and PW3 both of which were at the scene of the incident on the fateful date. To that end, she asked us to dismiss this ground of appeal.

The learned State Attorney was at one with her learned friend on the contradictions in the evidence given by the prosecution witnesses and in particular; between the testimonies of PW1 and PW3 on the one hand and that of PW2, which constituted the third ground of appeal. She however, hastened to submit that the alleged contradiction was inconsequential in that, it did not go to the root of the matter. Without being referred to any law, we were asked to disregard the alleged discrepancies. She concluded by urging us to dismiss the entire appeal and uphold the finding of the trial court as well as the sentence which was meted out to the appellant.

The germane issue which stands for our determination in the light of the submissions from either side above, is whether the appeal by the appellant is founded. In resolving the issue, we are going to consider the grounds of appeal which were raised by the appellant, by adopting the

procedure which was applied by both learned counsel in dealing with them seriatim. At the very outset, we wish to point out some salutary principles which this Court has cherished for quite long, which we will apply in our discussion that is; **one,** that when dealing with a first appeal, the Court is enjoined whenever necessary to re-appraise the evidence on record and come out with its own conclusion. See: the decisions in **Pandya Vs Republic** [1957] EA 336 and **Khamis Said Bakari vs Republic**, Criminal Appeal No.359 of 2017 (unreported).

Two, where the issue under scrutiny concerns the credibility of a witness, it is always the monopoly of the trial Court in so far as his/her *demeanour* is concerned. The Court is however entitled to assess the credibility of the witness in respect of the coherence of his/her evidence or its relationship with other evidence on record. See: **Omary Ahamed Vs Republic** [1983] TLR 32 and **Bakiri Said Mahuru Vs Republic,** Criminal Appeal No. 107 of 2012 (unreported).

Guided by the foregoing principles, we begin to consider the first ground of appeal wherein, the procedure which was applied by the learned trial Judge in analyzing the evidence was challenged. Upon revisiting page 98 of the record of appeal as asked by Mr. Daffa, and closely observing the

proceedings contained therein, we are inclined to agree with him. It is on record as reflected on page 98 referred to us by Mr. Daffa, as well as page 99 of the record of appeal, that after the trial Judge had summarized the evidence of the three witnesses who testified for the prosecution, made the following statement: -

> *"The evidence of PW1 and PW3 is clear and straight forward and I find no reason which could have led PW1 and PW3 to tell lies against the accused person. Thus, I find that PW1 and PW3 are witnesses who are telling the truth."*

After the learned trial Judge had made the above finding, he proceeded to comment on the testimony of the appellant in defence and made a statement to that effect that, it did not raise any doubt to the prosecution evidence. What is apparent to us in the light of the excerpt quoted above, is the fact that the trial Judge did turn a blind eye to whatever was said by the appellant in his defence. The purported consideration of the evidence of the appellant in his defence was nothing but a mere mockery of justice. We fully subscribe to what was submitted by Mr.Daffa; this was an improper procedure. We held in **Hussein Idd**

and Another (supra) after noting a similar error to the one under discussion that: -

> *"It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

See also: **Mussa Jumanne Mtandika Vs Republic** (supra), **Leonard Mwanashoka Vs Republic,** Criminal Appeal No. 226 of 2014 and **Prince Charles Junior Vs Republic,** Criminal Appeal No. 250 of 2014 (all unreported). We therefore find merit in the first ground of appeal which we accordingly allow.

Connected with the evaluation of the evidence of one side only being made by the learned trial Judge, was the validity of the said evaluation, which was said not to have been made objectively. It is to be noted as pointed out by Mr. Daffa, that there was contradiction between the testimonies of PW1 and PW3 on the one hand with that of PW2 on the other with regard to the items which were being sold at the shop of the deceased. This fact was conceded by Ms. Mwenda, who however was of the view that the said discrepancies were inconsequential.

The procedure where there are discrepancies or inconsistencies in the prosecution evidence, is for the trial Judge to make an inquiry and come out a finding as to whether the contradictions/inconsistencies go to the root of the matter or not. See: **Said Ally Vs Republic**, Criminal Appeal No. 249 of 2008 and **Dickson Elia Shapwata Vs Republic,** Criminal Appeal No. 97 of 2007 (both unreported). It was held by the Court in **Said Ally's** case that: -

> *"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

This procedure was not pursued by the learned trial Judge in the instant appeal.

On our part, upon considering the discrepancies/inconsistencies noted on the prosecution evidence as evidenced by the testimonies of PW1 and PW3 on the one hand, and that of PW2 on the other, we are of the settled mind that they were fatal for the reason that, they tainted the credibility of the witnesses whose evidence was the only one used to convict the appellant. The way it stood, it was difficult to judge as to which side between the two, was stating the truth. Minded by the cardinal

principle in the administration of criminal justice that, for an accused person to be held culpable to an offence and in particular, a serious one as the one faced by the appellant, the threshold of establishing his guilt beyond reasonable doubt has to bet met. In the instant appeal, the said threshold was not met. We therefore reject the submission by the learned State Attorney, that the discrepancies/inconsistencies were inconsequential. To that end, we sustain the second ground of appeal.

The third ground of appeal is with regard to the failure by the prosecution to summon the wife of the deceased to appear and testify in Court. In the view of the learned counsel for the appellant, this witness was a crucial one whose testimony would have resolved a number of questions which remained with no clear answers. On the other hand, the submission of the learned State Attorney which was based on the stipulation under the provision of section 143 of **the TEA,** was that this witness was not important as what she would have told the Court, had already been testified by the other witnesses who had been with her at the scene of crime on the fateful date.

On our part, while we concur with Ms. Mwenda that a witness is summoned to appear and testify in court depending on the relevance of

his/her evidence and that, it is not necessary to summon every witness listed, we think the situation of the matter at hand necessitated the summoning of the wife of the deceased to appear and testify. As we have pointed out in the second ground above, the testimonies of PW1, PW3 both of which had been at the scene at the incident, and that of PW2 who visited the scene of crime, left some questions with no clear answers. Had the wife of the deceased appeared in court to testify, undoubtedly she would have ironed out those contradictions and thereby, cement the prosecution evidence.

Whether the omission to summon the wife of the deceased as a witness was occasioned deliberately or inadvertently, it occasioned serious discrepancies on the prosecution evidence and had the trial Judge been vigilant enough, he would, as it was submitted by Mr. Daffa, drawn an adverse inference against the prosecution for such failure. We therefore find merit in the third ground of appeal, and we accordingly allow it.

Consequently, in the light of what we have endeavoured to highlight above, we answer the germane issue which we posed at the beginning in the affirmative; that the appeal is founded. We allow it by quashing the

conviction which was entered by the trial Court; set aside the sentence of death by hanging which was meted out to the appellant, and direct for his immediate release from prison unless he is lawfully held for some other reasons.

Order accordingly.

DATED at **DAR ES SALAAM** this 5th day of August, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

J. C.M. MWAMBEGELE
JUSTICE OF APPEAL

DR. M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered on 7th day of August, 2020 in the presence of the appellant in person-linked via video conference and Ms. Tully Helela, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL