IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 178 OF 2012

CHRISTINA d/o DAMIANO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

dated 2nd day of December, 2011
in
Criminal Sess. Case No. 140 of 2007

JUDGMENT OF THE COURT

3rd & 7th May, 2013

KAIJAGE, J.A.:

In Criminal Session Case No. 140 of 2007, the High Court sitting at Tabora, found the appellant, CHRISTINA d/o DAMIANO, guilty of murder. She was, therefore, convicted and sentenced to death. The information laid before the trial Court alleged that on 25th day of November, 2005 at Mtegowanoti Village, Nguruka, within the District and Region of Kigoma, the appellant murdered SIYAWEZI d/o BUNDALA.

At the trial, it was common ground that the appellant and the deceased were both married women and residents in the same village. The appellant, however, had a perennial problem of not conceiving a child. Because of this situation, she was increasingly in desperate need of having a child. The fact that sometimes before the fateful day, the appellant consulted one doctor Kingi about her situation, was not disputed. She was advised to procure any pregnant woman from whom the said doctor could remove the child for her. Appellant readily acceded to this advice. She thus hatched up a plan which was executed with her knowledge, participation and approval on 25/11/2005. Her victim against whom the plan was executed was Siyawezi d/o Bundala, the deceased. The deceased was by then pregnant.

As to what happened before the said plan was executed, the prosecution led evidence to the effect that on 25/11/2005 during the morning hours, the deceased and her husband, Simon Ngaye (PW7), left their matrimonial home to work in their shamba. Isabela Joseph (PW1), a Senior co-wife of the deceased, was left behind. PW7 and the deceased returned home at about 12.00 noon. They were told by PW1 that during their absence, the appellant came twice looking for the deceased.

The evidence of PW1 and PW7 has it that the appellant appeared once again, in their presence, at about 3.00 pm on the same day. This time around, the appellant met the deceased. What exactly took place and what subsequently transpired is better told by the appellant herself. In her sworn defence, the appellant is recorded to have told the trial Court thus:-

> *".....I returned to Siyawezi Bundala (the deceased) at 3.00 pm. I met her and told her that I had a matter with her. I did not disclose the matter. Siyawezi Bundala turned up at my home at about 6.00 pm. Dr. King, told me that when the pregnant woman comes, he will remove the baby from her and give it to me. When Siyawezi Bundala came, doctor Kingi had already arrived at my home, with a man whom he told me that he was called Dr. Bwire. I did not know Bwire before.*
>
> *After the deceased had turned up, I invited her in my room. Dr. Kingi told me to go out of*

the house. I went to sit in a semi finished house when the operation was carried out by the doctors. Later on, the doctors called me and they gave me a baby. It was night then."

Following the invitation extended to her by the appellant, the deceased sought and was accordingly granted permission by her husband, PW7. This was at about 6.00 pm. By 7.30 pm, the deceased had not yet reported back home. PW7 had to send his son to go and look for her mother at the home of the appellant. His son found the appellant with a baby. His mother, the deceased, was not there. Futile attempts were also made by PW7 and other members of his family to trace the deceased in the neighbourhood. At 9.00 pm, the deceased was still no where to be found. At this juncture, PW7 decided to report the matter to the Village Chairman and later to the police.

Police investigations were superintended by Inspector Elisante Mmari (PW2), the then OCS of Nguruka Police Station. In the course of investigations, he was led to the house of the appellant by one Asajile Peter (PW4), a village militiaman. According to these witnesses, the appellant was found in possession of a child she claimed to be hers. When

asked about the umbilical cord, appellant retorted that she had thrown same in a pit latrine. At the same time, PW2 notice blood in one of the appellant's room. PW4 was also hit by a bad smell emanating from the vicinity of the appellant's house. It did not take long before the said witnesses stumbled on a fresh dug pit covered with soil from which the deceased body was recovered. The pit in which the body was recovered was at an estimated distance of about five (5) metres from the appellant's dwelling house.

The postmortem examination on the body of the deceased was conducted by PW3, Stafford Chamgeni, an Assistant Medical Officer, then stationed at Nguruka Health Centre. According to the report on Postmortem Examination (Exh. P2), the deceased abdomen was found: opened with a sharp instrument starting from the diaphragm to the sphisis pubis, all her intestines protruding out of the stomach and her uterus was separated into two portions. PW7 had earlier identified the dead body to be that of his wife.

In the course of investigations, PW2 obtained and recorded a cautioned statement (Exh.P1) from the appellant in which details of who, when and how the deceased met her untimely death are disclosed.

In her sworn defence, the appellant did not dispute material facts linking her to the death of the deceased. She however maintained that her interest was to have the baby, but not to kill the deceased.

The learned trial judge was satisfied that the charge against the appellant was proved beyond reasonable doubt. Appellant was consequently convicted as charged. Nonetheless, the assessors who sat with him, returned a verdict of not guilty. The appellant was aggrieved, hence the present appeal grounded on the following grievances:-

1. That, the Honourable trial Judge erred in law in convicting the appellant relying on the caution statement that was wrongly admitted in evidence as EXHIBIT-P1.
2. That, the learned Judge erred in law and in fact in holding that the prosecution proved the case against the appellant beyond reasonable doubt.

Before us, the appellant had the services of Mr. Kamaliza Kayaga, learned advocate, while M/S Maria Mdulugu, learned State Attorney represented the respondent/Republic.

On the first ground of appeal, learned counsel for the appellant criticized the trial Court for admitting, in evidence, appellant's cautioned statement (Exh. P1) obtained and recorded in contravention of section 57 (2) (e) and subsection (3) (a) (i) and (iii) of the Criminal Procedure Act, Cap.20 R.E. 2002 (the CPA) which provides:-

> *"S.57 (2) Where a person who is being interviewed by a police officer for the purpose of ascertaining whether he has committed an offence makes, during the interview, either orally or in writing, a confession relating to an offence, the police officer* ***shall make, or cause to be made,*** *while the interview is being held or as soon as practicable after the interview is completed,* ***a record in writing,*** *setting out:-*
>
> *(a)-(d) N/A*
>
> *(e)* ***the times when the interview was commenced and completed;***
>
> *(3) A police officer who makes a record of an interview with a person in accordance with*

subsection (2) ***shall write, or cause to be written****, at the end of the record* ***a form of certificate*** *in accordance with a prescribed form* ***and shall then****, unless the person is unable to read:-*

(a) Show the record to the person and ask him-

(i) to ***read the record and make any alteration or correction*** *to it he wishes to make and add to it any further statement that he wishes to make;*

(ii).....

(iii) if the record extends to over more than one page, ***to initial each page that is not signed by him****." (emphasis supplied).*

Focusing on the provisions of section 57 of the CPA, learned counsel for the appellant outlined the shortcomings surrounding Exh. P1. **First,** he pointed out that, the said cautioned statement does not show when the interview was completed, a fact which is violative of the mandatory provisions under subsection 2 (e) of section 57 of the CPA. **Secondly,**

that at the end of the recorded statement, PW2 did not make a certificate as mandatorily required under subsection (3). **Thirdly,** that the appellant was not asked to read the recorded statement and make any alterations or corrections in accordance with the provisions of subsection (3) (a) and **Lastly,** that pages 4, 6 and 8 of the statement were not initialed by PW2 in accordance with subsection (3).

In the light of the foregoing shortcomings, learned counsel for the appellant urged us to expunge Exh. P1 from the record. In this regard, he cited to us the decision of this Court in **IBRAHIM ISSA AND TWO OTHERS V. R,** Criminal Appeal No. 159 of 2006 (unreported). Learned State Attorney who appeared for the respondent Republic conceded the shortcomings, but urged us to treat them as being minor, incapable of occasioning any miscarriage of justice.

On our part, we think that the first ground of appeal should not detain us. We are of the settled view that non compliance with the mandatory provisions of section 57 of the CPA quoted herein above, affected the fair trial of the appellant. We accordingly hereby expunge the cautioned statement (Exh.P1) from the record. (See; **TAUTA KIKORIS V.**

R, Criminal Appeal No. 94 of 2009, **MEREJI LOGORI V. R**, Criminal Appeal No. 273 of 2011 (both unreported).

The next question for consideration and determination is whether the case for the prosecution was proved beyond reasonable doubt. There is no gainsaying here that in a Criminal trial the burden of proving the guilt of the accused beyond reasonable doubt lies on the shoulders of the prosecution. We are to be satisfied, therefore, that the prosecution, in this case, discharged that burden through the evidence adduced by its witnesses.

On this aspect of the case, learned counsel for the appellant submitted that once the cautioned statement (Exh.P1) is expunged from the record, what is left is shaky evidence insufficient to sustain conviction on a charge of murder. Learned State Attorney for the respondent/Republic submitted, in response, that the evidence on record independent of Exh. P1 is overwhelming and fully implicates the appellant with the offence of murdering the deceased.

We have carefully gone through the record of proceedings and judgment of the trial Court. This being the first appeal, this Court is

entitled to re-evaluate the evidence and come to its own conclusions. Upon the uncontroverted evidence on record, we are, with respect, inclined to agree with the learned State Attorney and the conclusion arrived at by the learned trial judge in his judgment thus:-

> *"In the case at hand,* ***apart from the retracted confession, there are other sufficient evidence*** *which prove beyond reasonable doubt that the accused had aided and abetted the commission of the offence of murder which she stands charged." (emphasis supplied).*

There is ample evidence on record showing that appellant admitted having hatched up a plan and lured the deceased into a secret agreement made between the former and the so called doctor Kingi. Evidence on record further points to the fact that the operation on the deceased's body was performed secretly without the victim's consent. That the plan was meant to be executed secretly, is evident in the appellant's own testimony in defence, where she is recorded to have stated the following, among other things:-

"I returned to Siyawezi Bundala (the deceased) at 3.00pm. ***I met her and told her that I had a matter with her. I did not disclose the matter****. Siyawezi Bundala turned up at my home at 6.00 pm. The doctor told me when the pregnant woman comes, he would remove the baby from her and give it to me." (emphasis supplied).*

Appellant's testimony in defence further reveals that she invited the deceased in the room where doctor Kingi and his colleague were kept secretly in wait. Appellant's own evidence further confirms that the operation on the deceased body was performed secretly as planned and the baby was removed alive from the deceased's womb. The undisputed evidence of PW2 and PW4 is clear that following that sad incident, the appellant was found in possession of the baby she claimed to be hers. In this regard, the appellant is recorded to have told the trial Court thus:-

"Policemen asked me whether the baby belonged to me. I replied that the baby belongs to me. I

knew that the baby did not belong to me, but has been given to me by Dr. Kingi."

Upon being cross-examined, the appellant is on record to have further stated the following:-

"Dr. Kingi did not know the late Siyawezi Bundala. It is me who looked for Siyawezi Bundala. The operation was carried in my house....I know that it is illegal to take a baby belonging to another woman."

In his judgment, the learned trial judge addressed his mind to the provisions of section 23 of the Penal Code, Cap. 16 R.E. 2002, to establish common intention between the appellant and the doctors who performed the operation. That section provides:-

"S.23 When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission

was a probable consequences of the prosecution of such purpose, each of them is deemed to have committed the offence."

The appellant and doctor Kingi formed a common intention to prosecute an unlawful purpose namely; getting a child from the deceased who was pregnant by use of crude unconventional ways and means. A child is either born through normal delivery or through caesarean operation for a woman who is unable to deliver normally. Under normal circumstances, caesarean operations are performed in established medical institutions with qualified doctors and appropriate medical facilities.

From the evidence on record, it is clear that the deceased was procured for an operation upon the advice of doctor Kingi to the appellant. The operation was performed secretly outside the recognized and established medical institutions. It was performed in the house of the appellant. No wonder she died. The deceased having been lured into a secret plan hatched by the appellant, the operation could not have been performed without inflicting grave bodily injuries on the former. This is

evident from the unchallenged evidence of PW3 who carried out the Postmortem Examination. He said;

> *"The operation was not properly done. It appeared that no apethies was employed. There was no effort to control blood."*

From the foregoing brief observation, we are in agreement with the learned trial judge that doctor Kingi and the appellant had formed common intention to prosecute an unlawful purpose. It has not been disputed that the operation which was crudely performed on the deceased caused her untimely death. It is provided under section 203 of the Penal Code thus:-

> *"S.203. A person is deemed to have caused the death of another person , although his act is not the immediate or sole cause of death, in any of the following cases-*
>
> *(a).....*
>
> *(b) if he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or*

medical treatment or had observed proper precautions as to his mode of living."

(emphasis supplied).

The evidence of PW2 has it that the so called 'doctor' Kingi was not a doctor, but a nurse. Be that as it may, we are satisfied that under the doctrine of common intention, the appellant and the doctors who have not been brought to Justice, caused the death of the deceased. Section 195 of the Penal Code provides:-

"Any person who by an unlawful act or omission causes the death of another person is guilty of manslaughter."

Manslaughter is distinguished from murder by a lack of intention to kill or to cause bodily harm. It is available where defences like provocation and diminished responsibility are put forward by the defence side in a trial involving a murder charge. The appellant herein did not raise these defences. Her only defence as amplified by her learned counsel before us is that she intended to get a child, but not to kill the deceased.

The offence of murder is proved where malice aforethought is established. The remaining pivotal question to be determined is whether the appellant could be said to have killed the deceased with malice aforethought. Section 200 of the Penal Code defines **malice aforethought** as follows:-

> *(a) An intention to cause the death of or to do grevious harm to any person, whether that person actually killed or not*
>
> ***(b) Knowledge that the act or omission causing death will probably cause the death of or grevious harm to some person, whether that person is the person actually killed or not, although that knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, by 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 the flight or escape from custody of any person who has committed or attempted to commit an offence.

From the evidence on record, we are of the consider view that the appellant is caught in a web provided for under section 200 (b) of the Penal Code. On this aspect of the case, the appellant is on record to have told the trial Court the following:-

"I asked the doctor whether the woman was alive, he replied that she was alive, and she will gain her consciousness, and leave to her home."

It is, therefore, clear that appellant's own testimony confirms her knowledge that the operation would have probably killed the deceased or caused grievious harm. Notwithstanding the fact that the appellant may not have wished the deceased to die, we are satisfied that malice afore thought was established. We are equally satisfied, though on a slightly different approach, that the learned trial judge after properly directing himself to the evidence and the law applicable, he correctly made a finding that the case for the prosecution was proved beyond reasonable doubt. His

finding cannot be faulted. To this end, we accordingly hereby dismiss this appeal in its entirety.

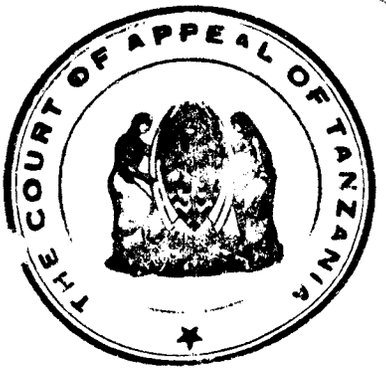
DATED at **TABORA** this 6th day of May, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL