

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 212 OF 2023 KHASIMU ZUBERY NJUGU VS THE REPUBLIC

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT SONGEA (CORAM: MWARIJA, 3.A.. KEREFU. J.A.. And MAKUNGU. J.A.^ CRIMINAL APPEAL NO. 212 OF 2023 KHASIMU ZUBERY @ NJUGU.....APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Decision of the High Court of Tanzania at Songea) (Luvanda, J/l dated the 21st day of March, 2023 in Criminal Sessions Case No. 37 of 2022 JUDGMENT OF THE COURT 7* & 13th August, 2024 KEREFU. 3.A.: Khasimu Zubery @ Njugu, the appellant herein, was charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 (the Penal Code). His trial at the High Court was vide Criminal Sessions Case No. 37 of 2022. The information laid by the prosecution alleged that, on 13th June, 2021, at Suluti Village within Namtumbo District in Ruvuma Region, the appellant did murder one Adam Rajab @ Twende (the deceased). The appellant pleaded not guilty i to the charge. However, after a full trial, he was convicted and sentenced to suffer death by hanging. In a nutshell, the events leading to the appellant's arrest and subsequent conviction began around 03:00 hours to 04:00 hours in the morning of 13th June, 2021. At that particular time, Kassim Faraj Mchumke (PW3) and his wife Ziada Said (PW4) were sleeping in their main house and their children (the deceased and one Ramesh, a young kid who was in STD IV), were sleeping in the rear hut at the backyard of the same house. Suddenly, PW3 and PW4 heard their children shouting for help ' father we are dying.' It was the testimony of PW3 that, when he went out to see what was happening, he saw the main entrance door broken and the appellant was coming from the children's room running while holding a knife which was splattered with blood trying to escape. PW3 managed to intercept him and they started fighting as PW3 could not let him escape from the scene of crime. While there, PW4 joined in the fight but the appellant slashed her with the knife on her left hand and she sustained injuries which caused her to retreat from the battlefield. PW3 continued to fight with the appellant while shouting for help. Subsequently, SaJum Athuman (PW6) and Rashid Faraj (PW7), the neighbours, arrived at the scene and joined forces and thereby managed to apprehend the appellant and tied him with ropes on his legs and hands along with his knife. A moment later, other neighbours responded to the alarm and assembled there to assist PW3 and PW4. Meanwhile, the deceased came out from

the room while bleeding heading to the main door of the house but he fell down and became unconscious. PW3 asked one Vumi Rajabu, the sister of the deceased to look for bodaboda and rush the deceased to Namtumbo Hospital for treatment. Thereafter, the matter was reported to Rashid Ally Kinundumi (PW5), the hamlet chairperson who came to the scene of crime and informed Zuberi Kinjanga, the acting Village Executive Officer (VEO), who reported the matter to the police. In their testimonies, PW4, PW5, PW6 and PW7 supported the narration by PW3. Specifically, PW4 added that, she took the deceased to Namtumbo Hospital together with Vumi Rajabu but in the evening of the same day, the deceased passed away. No. G.4181 D/CPL Meek (PW2), the investigation officer, testified that, on 13th June, 2021 at 08:00 hours, while at Namtumbo Police Station, he was informed about the incident. PW2 together with other police officers went to the scene of crime and found the appellant tied by ropes by civilians at the backyard of PW3's house and aside there was a knife which was used to injure the deceased. It was the further testimony of PW2 that upon inquiry, the appellant told him that the knife belonged to him. PW2 untied the appellant, seized the knife and prepared a certificate of seizure which was signed by the appellant, PW3, PW5 and one Rashid Hassan Malokotana. The said knife together with the certificate of seizure were admitted in evidence as exhibits PI and P4 respectively. PW2 stated further that, he handed the said knife to No. PF 24591 PG George Elias Nkingwa (PW1), the exhibit keeper, who filled a handing over form which was admitted in evidence as exhibit P2. PW2 went on to state that, on 14th June, 2021, after the death of the deceased, he revisited the scene of crime together with other police officers and prepared a sketch map of the scene of crime which was admitted in evidence as exhibit P3. An autopsy on the deceased's body was conducted by Dr. Joseph John Huba (PW8), who concluded that the cause of death was haemorrhage due to big cut wounds on the deceased's scalp. A postmortem report to that effect was admitted in evidence as exhibit P5. In his defence, the appellant dissociated himself from the accusations levelled against him by raising a defence of alibi. He contended that, on the fateful date, he was at Mwambao Street where he went to attend a ceremony and there was a disco. On his way back, at around 05:00 hours, he met some people who started to beat him alleging that he was a thief. He stated that he lost conscious. That, upon regaining his consciousness, he found himself at the hospital under police observation. He thus denied to have been arrested by the civilian at the scene of crime. At the end of the trial, the learned trial Judge was convinced that the case against the appellant was proved to the required standard. Specifically, the learned trial Judge places much reliance on the evidence of PW3 who saw the appellant coming from the deceased's room trying to escape. That, the evidence of PW3 was corroborated by the evidence of PW4, PW6 and PW7 who assisted PW3 to apprehend the appellant at the scene of crime. Thus, the appellant was convicted and sentenced as indicated above. Aggrieved by both, the conviction and sentence, the appellant has come to this Court armed with seven grounds of appeal. 5 i When the appeal was placed before us for hearing, Mr. Kitara Mgendi Mugwe, learned counsel who entered appearance for the appellant prayed to abandon the fifth and seventh grounds of appeal. He thus intimated that he would argue the following three grounds:

1. That, the trial court erred in law and fact for failure to draw adverse inference on the prosecution for failure to summon Lamesha Twende who was said to be at the scene of the crime;
2. That, the trial court erred in law and fact in relying on exhibit P1 to convict the appellant while the evidence of PW1 was tainted with contradictions on how the said exhibit was labelled, thus unreliable; and
3. That, the trial court erred in law and fact in relying on exhibit P2 to convict the appellant while the prosecution evidence was uncorroborated and doubtful. On the adversary side, the respondent Republic was represented by Ms. Hellen Martin Chuma, learned Senior State Attorney who at the outset, declared the respondent's stance of opposing the appeal and intimated that, she would argue the grounds of appeal in the manner proposed by his learned friend. Submitting in support of the first ground, Mr. Mugwe faulted the learned trial Judge for failure to draw adverse inference on the prosecution for failure to summon Lamesha Rajabu Twende who was said to be in the same room with the deceased on that fateful date. To clarify, Mr. Mugwe referred us to page 26 of the record of appeal and argued that during committal proceedings, the prosecution listed the said witness as one of their witnesses but he was not summoned to testify during the trial court to shed light on what transpired inside the said room. It was his argument that, failure by the prosecution to field such an important witness without explanation had weakened the prosecution case, as among the eight witnesses summoned, there was no single witness who testified to have seen the appellant attacking the deceased. He contended that PW3, apart from testifying that he saw the appellant coming from the deceased's room carrying a knife, he did not see him attacking the deceased. That, since what was testified by prosecution witnesses had raised serious doubts, the same should be resolved in favour of the appellant. In response to this ground, although, Ms. Chuma readily conceded that Lamesha Rajabu Twende was not summoned to testify before the trial court, she cited section 143 of the Evidence Act and argued that, the said law does not require a specific number of witnesses to prove a fact as what is required is the quality of evidence and credibility of witnesses. She thus insisted that, in the instant appeal, the prosecution case was proved beyond reasonable doubt by the evidence of PW3 and PW4 who clearly narrated what transpired at the scene of crime and their evidence was corroborated by the evidence of PW5, PW6 and PW7 the neighbours who responded to the alarm, went to the scene and assisted PW3 to apprehend the appellant. That, having established its case against the appellant, the prosecution found it unnecessary to summon other witnesses. She thus urged us to find that the first ground is devoid of merit. Having considered the submissions advanced by the learned counsel for the parties and perused the record of appeal, we wish to state that, the burden of proof in criminal cases lies on the prosecution shoulders and the standard is proof beyond reasonable doubt. Therefore, in terms of section 143 of the Evidence Act cited to us by Ms. Chuma, the prosecution is at liberty to bring only those witnesses who could advance their case regardless of the number. What is required is the quality of evidence and the credibility of the witnesses. This position has been emphasized in several decisions of this Court. See for

instance, the cases of *Yohanis Msigwa v. Republic* [1990] T.L.R. 148, *Hassan Juma Kanenyera v. Republic* [1992] T.L.R. 100 and *Mwita Kigumbe Mwita & Another v. Republic*, Criminal Appeal No. 63 of 2015 [2016] TZCA 276: [18 October 2016: TanzLII], In the latter case, the Court stated that: "In each case, the court looks for quality, not quantity of the evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine which witness should prove whatever fact it wanted." Likewise, in the instant appeal, being guided by the above authorities, we go along with Ms. Chuma's submission and thus find the first ground of appeal devoid of merit. On the second ground, Mr. Mugwe faulted the learned trial Judge for relying on exhibit PI while the evidence of PW1 was tainted with contradictions on how he labelled the said exhibit. To amplify on this point, he referred us to page 43 of the record of appeal where PW1 testified that he registered exhibit PI in the exhibit register with No. 31/2021 but upon being shown the said exhibit he mentioned No. 21/2021. Mr. Mugwe argued further that, during examination in chief, PW1 described the colour of exhibit PI as dark green but during cross examination he stated that the said colour has changed. According to him, the pointed-out contradictions created doubts in the prosecution case which, again, should be resolved in favour of the appellant. In her response, Ms. Chuma argued that the pointed-out contradictions are minor defect which do not go to the root of the matter and dispute the fact that the appellant was seen by PW3 coming from the deceased's room running with the knife and arrested at the scene of crime. To support her proposition, she cited the case of *Dickson Elia Nsamba Shapwata & Another v. Republic*, Criminal Appeal No. 92 of 2007 [2008] TZCA 17: [30 May 2008: TanzLII] and urged us to find that the second ground is unmerited. Having revisited the evidence of PW1 in respect of the contradictions complained of, we do not, with respect, consider them to be material to the extent of affecting PW1's credibility. It has been the position of this Court that contradictions by a witness or between witnesses is something which cannot be avoided in any particular case. See for instance the cases of *Dickson Elia Nsamba Shapwata and Another* (supra) and *Marmo Slaa @ Hofu & 3 Others v. Republic*, Criminal Appeal No. 246 of 2011 (both unreported). The same position was also stated in the case of *Issa Hassan Uki v. Republic*, Criminal Appeal No. 129 of 2017 [2018] TZCA 361: [10 May 2018: TanzLII], while citing with approval the High Court's decision in *Evarist Kachembeho and Others v. Republic* [1978] L.R.T 70 where it was observed, rightly so, that: "Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story." Therefore, in the light of the above position of the law, and taking into account the contradictions pointed out, in this appeal by Mr. Mugwe, we agree with Ms. Chuma that the same are minor defect which do not go to the root of the matter and or corrode the evidence of PW1. Accordingly, the second ground of appeal fails. As for the third ground, Mr. Mugwe faulted the learned trial Judge by relying on exhibit P2 (the handing over form) to convict the appellant while PW1 did not tender the exhibit register to prove its chain of custody. He added that, PW2, the seizing officer of exhibit PI, did not issue any receipt to the appellant to prove that the said exhibit was seized from him. According to him, the said omission has weakened the prosecution case as exhibit PI was not availed to the Government Chemist for DNA test to prove that the alleged bloodstains were from the

deceased's body and not otherwise. That, it was improper for the learned trial Judge to connect the appellant with that exhibit since there were more than one person who were injured at the scene of crime. As such, Mr. Mugwe contended that the case against the appellant was not proved to the required standard. Finally, and based on his submission, he urged us to allow the appeal, quash the conviction, set aside the sentence imposed on the appellant and set him free. In response to this ground, Ms. Chuma challenged the submission made by arguing that, since exhibit P2 (handing over form) is a document which establishes the movements of exhibit PI, on how the said exhibit moved from PW2 to PW1, it is sufficient to establish the chain of custody on that aspect. She clarified that exhibit register and the handing over form (exhibit P2) have different functions depending on the circumstances of each case and both can be used to prove chain of custody of a particular item. It was her further argument that, since there is sufficient evidence by PW1 and PW2 proving on how exhibit PI moved from one person to another, the appellant's complaint is baseless. She thus insisted that, since in this appeal, the certificate of seizure (exhibit P4) was issued and properly signed by the appellant, the same is sufficient evidence to prove that exhibit PI was seized from him. The learned Senior State Attorney added that, the said fact was corroborated by the evidence of PW3, PW4, PW5, PW6 and PW7 who apprehended the appellant at the scene of crime together with exhibit PI. That, PW2, in his evidence testified that, when he arrived at the scene of the crime, he found the appellant apprehended by the civilian and when he asked him about exhibit PI, he responded that it belonged to him. She thus argued that the case against the appellant was proved beyond reasonable doubt. To support her argument, she cited the cases 12 of Marwa Wangiti Mwita & Another v. Republic [2002] T.L.R. 39 and Enock Kipela v. Republic, Criminal Appeal No. 150 of 1994

[1999] TZCA 7: [10 June 1999: TanzUI]. In conclusion, she urged us to find the appellant's appeal unmerited and dismiss it in its entirety. In his brief rejoinder, Mr. Mugwe reiterated his earlier submission and stressed that the prosecution case was not proved to the hilt. He thus, once again, urged us to allow the appeal and set the appellant at liberty. In considering the rival arguments made by the learned counsel for the parties in this ground, we must re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted, to arrive at its our own conclusion of fact as we stated in the cases of D.R. Pandya v. Republic [1957] EA 336 and Reuben Mhangwa and Another v. Republic, Criminal Appeal No. 99 of 2007

[2019] TZCA 341: [30 September 2019: TanzLII]. There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed the appellant committing the offence. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of Jimmy 13 Runangaza v. Republic, Criminal Appeal No. 159B of 2017 [2018] TZCA 188: [27 August 2018: TanzLII], when this Court remarked that: "In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See Simon Musoke v. Republic [1958] EA 715). Sarkar on Evidence, 15th

Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

- 1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;
- 2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and
- 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." In determining this appeal therefore, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellant. 14 In the instant appeal, the evidence on record which the learned trial Judge used to convict the appellant is, first, the oral account of PW3 and PW4 who clearly narrated on how they heard their children shouting for help and PW3 went out and saw the appellant who was coming from the children's room running while holding a knife which was splattered with blood trying to escape; second, the evidence of PW3 and PW4 was ably corroborated by the evidence of PW5, PW6 and PW7, the neighbours who responded to the alarm raised by PW3, went to the scene of crime and assisted to apprehend the appellant and tied him with ropes together with his knife; third, the evidence of PW2, the investigation officer, who went to the scene of crime and found the appellant apprehended by the civilian and when he asked him about the knife (exhibit PI), he responded that it belonged to him and he signed exhibit P4; and fourth, the nature of weapon used, the amount of force applied to injure the deceased and the part of the body where the harm was inflicted together with the conduct of the appellant after the incident. It is our considered view, and as rightly found by the trial court that, all these facts provide overwhelming evidence of the appellant's involvement in the commission of the offence. The incriminating circumstances are irresistible inference that the appellant killed the 15 deceased. We thus even find the issues of chain of custody and DNA tests raised by Mr. Mugwe to challenge the evidential value of exhibits PI and P2, at this stage of an appeal, to have no basis. It is on record that during the trial, the appellant did not cross examine PW1 and PW2 on those aspects. It is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted the same and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. See our previous decisions in Cyprian Athanas Kibogoyo v. Republic, Criminal Appeal No. 88 of 1992 and Hassan Mohamed Ngoya v. Republic, Criminal Appeal No. 134 of 2012 (both unreported). We are therefore, in agreement with Ms. Chuma that, since the appellant did not utilize that opportunity during the trial, challenging the said exhibits at this stage of an appeal, is nothing but an afterthought. That said, we equally find the third ground of appeal devoid of merit. Consequently, and looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the learned trial Judge properly held that the case against the appellant was proved beyond reasonable doubt. For the foregoing reasons,

we find the appeal devoid of merit and it is hereby dismissed in its entirety. DATED at SONGEA this 13th day of August, 2024. A. G. MWARIJA JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL

0. 0. MAKUNGU JUSTICE OF APPEAL The Judgment delivered this 13th day of August, 2024 in the presence of the appellant in person and Ms. Tulibake Juntwa, learned Senior State Attorney for the Respondent/Republic is hereby certified as 17

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