IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 12 OF 2002

BETWEEN

SHABAN MPUNZU @ ELISHA MPUNZU ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 27th day of October, 2000
in
Criminal Sessions Case No. 132 of 1992

JUDGMENT OF THE COURT

LUBUVA, J.A.:

In this appeal, Shaban Mpunzu @ Elisha Mpunzu, the appellant, is appealing against the decision of the High Court (Masanche, J.) convicting him of the murder of the deceased, Fulgence s/o Mpambije.

From the evidence on record, it was common ground that the appellant and the deceased were related. They lived in the Village of Igagala, Urambo District, Tabora Region. It is apparent that on

30/8/1991, the deceased and his son Denis Fulgence Mpambije (PW4), worked in his tobacco shamba from morning until 12.00 noon, when they returned home for lunch. According to PW4, in the afternoon, it would appear that the deceased went for a social outing somewhere within the vicinity of the village, the exact place he did not disclose. He did not return home for the night. The following day, 31/8/1991, at about 10 a.m., the body of the deceased was found lying somewhere along a path, a short distance away from the village houses. An alarm was raised and in response the villagers, including Edward Michael (PW3), set upon investigating the matter which was reported to the police. From the place where the body of the deceased was found, trail of blood was traced to some point about 20 paces from the house of the appellant. When the house of the appellant was searched, a pair of rubber shoes was retrieved hidden under the bed stained with blood.

The appellant was arrested together with Herbert John, Faida Juma and Mohamed Mpunzu with whom he was jointly charged with

the murder of the deceased. At the conclusion of the trial, the other co-accused were acquitted.

The case against the appellant was entirely based on circumstantial evidence. The learned trial judge was satisfied that such evidence was such that it irresistibly led to the conclusion that the appellant and that the other person killed the deceased. The circumstantial evidence consisted of two elements. One, the trail of blood leading to the house of the appellant and two, the exhibits retrieved from the house of the appellant including a pair of rubber shoes which were stained with blood. The Government Chemist's report showed that the blood found on the rubber shoes was human blood. On the basis of this circumstantial evidence, the appellant was convicted and sentenced to death for the murder of the deceased.

Before us in this appeal, the appellant was represented by Mr. Nasimire, learned counsel. He filed the following one ground of appeal. It reads as follows:

1. That the evidence against the appellant is too weak and contradictory to ground a conviction.

In elaboration of this ground, Mr. Nasimire submitted that as the case against the appellant was based on circumstantial evidence, such evidence should be such that it irresistibly points to the guilt of the accused, the appellant to the exclusion of everyone else. In this case, he strongly urged, the evidence did not pass the test. He said, since the evidence did not exclude every possibility that the death of the deceased could have been caused by somebody else, the doubts should have been resolved in favour of the appellant. The case against the appellant had not been proved beyond all reasonable doubt. For instance, he said one of the important elements in the circumstantial evidence which the learned trial judge relied on was the pair of rubber shoes which it was claimed was stained with human blood.

Furthermore, Mr. Nasimire submitted that the Government Chemist's report (Exhibit P.1) apart from showing that it was human blood, it did not specify it's blood group and the blood group of the deceased. In that situation, Mr. Nasimire went on in his submission, it was not possible to positively say that the blood found on the pair of shoes retrieved from the house of the appellant was the blood of the deceased. It could be that of somebody else, he submitted. If the blood on the pair of rubber shoes could not be linked with the deceased, then the circumstantial evidence based on the pair of rubber shoes could not link the appellant with the murder of the deceased, Mr. Nasimire urged. In support of his submission that the evidence regarding the blood on the rubber shoes did not link the appellant with the murder of the deceased, the Court was referred to the cases of **Nuhu Selemani v. Republic** (1984) TLR 93 and **Wildred Lukago v. Republic**, Criminal Appeal No. 75 of 1993, (unreported).

Mr. Nasimire also submitted that the trail of blood did not lead to the house of the appellant. He said according to the evidence,

the trail ended at about 20 paces away from the house of the appellant. In that case, he maintained that the trail of blood was not conclusive evidence that the appellant was involved in the killing of the deceased. This is particularly so, when there were several other houses around the area including the appellant's. It is difficult to tell for sure to which house the trail of blood led. He also said that there were inconsistencies in the evidence which weakened the circumstantial evidence for the prosecution even further.

Responding to these submissions, Mr. Mbago, learned Principal State Attorney stated that he did not support the conviction. Conceding to the submissions by Mr. Nasimire, he stated that the circumstantial evidence against the appellant was such that it did not irresistibly lead to the inference that it was the appellant who killed the deceased. This is so, Mr. Mbago further submitted, because the Government Chemist's report did not show the blood group of the human blood found in the blood stained rubber shoes. For this reason Mr. Mbago submitted that the appellant was not linked with the death of the deceased. He also observed that the other

circumstantial evidence based on the items retrieved from the house of the appellant was not reliable, it was characterized by inconsistencies. In the circumstances, Mr. Mbago said it was unsafe to sustain the conviction against the appellant

It is common ground that the case against the appellant was based entirely on circumstantial evidence. It is a settled trite principle of law that in a criminal case in which the evidence is based purely on circumstantial evidence, in order for the court to found a conviction on such evidence, it must be satisfied that the evidence irresistibly points to the guilt of the accused, the appellant in this case to the exclusion of any other person. In this case, as correctly stated by Mr. Nasimire, learned counsel for the appellant, supported by Mr. Mbago, learned Principal State Attorney, an important circumstantial evidence which was considered in linking the appellant with the death of the deceased is the blood found on the pair of rubber shoes. This, as counsel for the appellant and the respondent Republic submitted, is hardly of any useful evidential value in linking the appellant with the deceased. As seen from the Government

Chemist's report, (Exhibit P1) the examination of the various items recovered from the house of the appellant including the pair of rubber shoes, shows that the blood involved was human blood. In the absence of evidence showing the deceased's blood group which could be related to the blood, subject of the Government Chemist report, we are respectfully in agreement with Mr. Nasimire and Mr. Mbago that blood found on the rubber shoes recovered from the house of the appellant could not be linked with the deceased. Consequently, the appellant, the alleged owner of the shoes, is not linked with the death of the deceased. It cannot, with any element of certainty be said that the appellant caused the death of the deceased.

In the case of **Nuhu Selemani** (supra), in more or less similar circumstances, the Court allowed the appeal on the ground that the blood stained shirt of the appellant was not sufficiently proved to link the appellant. In that case, the appellant was charged with murder. The case against the appellant, was as in this case based on purely circumstantial evidence which included a blood stained shirt of the

appellant. The Government Chemist's report showed that the blood of the deceased, the appellant and the blood stains on the shirt belonged to the same group. However, as the shirt was seized in the absence of the appellant and that the shirt was not shown to the appellant, the Court held that the evidence linking the shirt to the appellant was insufficient. The appeal was allowed.

Likewise, in **Wilfred Lukago** (supra), in which the circumstantial evidence related to an axe which was recovered from the appellant's house with marks of human blood, the Court took a similar view. Allowing the appeal, the Court *inter alia* held that it was not shown whose blood it was, it could be that of the person or persons occupying the house who used the axe.

In the instant case, the situation is widely different. Unlike the case in **Nuhu**, (supra) it has not been shown what was the blood group of the deceased, the appellant and the blood stain on the shoes. As such, it is open to the possibility that the blood stain on the shoes may well have been that of the deceased or anybody else.

In the circumstances, it cannot be stated conclusively that it was the blood of the deceased. With such doubt, it follows that the circumstantial evidence did not, contrary to what the learned trial judge held, irresistibly lead to the inference that the appellant and nobody else killed the deceased.

Had the learned trial judge considered the evidence from this point of view, we think with respect, he would have come to the conclusion that the circumstantial evidence was insufficient to sustain the conviction against the appellant.

Admittedly, having regard to the fact that there was the trail of blood to about 20 paces from the appellant's house, the rubber shoes retrieved from the appellant's house hidden under the bed stained with blood, there was strong suspicion against the appellant. From where the trail of blood ended, it does not follow conclusively that it ended at or emanated from the house of the appellant. However, it is a settled principle of criminal justice that in a criminal charge, suspicion, however strong it may be, is not enough to ground a

conviction. Such was, unfortunately the position in this case, the prosecution case still left room for doubts which have to be resolved in favour of the appellant.

Finally, with regard to the complaint on inconsistencies in the prosecution evidence, we hardly need to be delayed on this. The discrepancies such as the colour of the shoes which Mr. Mbago touched upon, are with respect, not material, they do not go to the root of the evidence.

For the foregoing reasons, we think Mr. Mbago, learned Principal State Attorney properly declined to support the conviction in this case.

In the event, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be set free forthwith unless otherwise lawfully held.

DATED at MWANZA this 28th day of June, 2004.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR