IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MASSATI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 240 OF 2011

GHATI MWITA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Nyangarika, J.)

dated the 14th day of September, 2011
in
Criminal Session Case No. 94 of 2009

JUDGMENT OF THE COURT

5 & 12 March, 2013

MUSSA, J.A.:

In the High Court sitting at Mwanza, (Nyangarika, J.), the appellant was convicted of murder and sentenced to suffer death by hanging. She is aggrieved and presently seeks to impugn the verdict. The information laid before the trial court alleged that on the 4th day of February 2008, at Shadi Buchelele area, within Nyamagana District, Mwanza City, the appellant murdered a certain Medadi Aloyce.

The factual background may briefly be stated. Throughout the length and breadth of the trial, it was commonplace that the appellant's residence is situate at Shadi Buchelele on the shoreline of the lake. Also undisputed is the fact that she owned a fishing boat which was, at the material times managed and supervised by Posian Kihanga (PW2) and Mtoba Salum (PW3). The duties of Posian and Mtoba included hiring the boat to fishermen. Evidence was to the effect that, on the fateful day, the appellant's boat went missing and, according to Mtoba, the fishermen who had been assigned to it were the deceased and a certain Mrisho.

The appellant was informed, following which she drove on her Land Rover to deliberate the sad event with Mtoba and Posian at the latter's residence. She was accompanied by her two brothers, namely, Anthony and Paul. Later, the deceased and Mrisho were summoned to the Posian residence and evidence was to the effect that the former came with Hussein Said (PW1). It was there and then agreed that the boat incident be presented to the chairperson of the locality and, so the entire party boarded the appellants' Land Rover and headed towards the agreed destination. On the way, the

appellant who was behind the wheel pronounced that she was, instead, taking her passengers to the police station. A little while later, she complained about not having enough gasoline, whereupon she drove the car straight to her Buchelele residence. Upon disembarkation, according to Hussein, the appellant was said to immediately pronounce thus: -

> ***Nawapa dakika mbili nataka nione mtumbwi wangu la sivyo nitawachoma moto wote na kuwapeleka kuwatupa Serengeti.***

That is, in our translation: **I give you two minutes to produce my boat, or else I will burn all of you and throw you at the Serengeti**.

Soon after, Antony and Paul pulled the deceased out of the motor vehicle and immediately descended upon him with beatings whilst dragging him inside the house of residence. A little while later, one of the appellants' brothers ordered Hussein out of the car and started to beat him and also led him inside the house where the

deceased was. As to what transpired inside the house, it is best if we let Hussein pick the tale in his own words: -

> ***When I reached near the place where the deceased was I saw the accused with gallon containing petrol pouring the petrol to the deceased and she took a match box from one youth. I was about 4 steps from the place where the deceased was and thereafter the accused lit the match box and burned the shirt of the deceased and pushed him outside...***

Moments later, Posian and Mtoba who were still in the car heard someone miserably wailing from the appellants' house. They rushed there only to find that it was the deceased who was shouting and that he was, actually, burning. Posian found a bucket of water thereabouts and poured the water over the deceased body. The fire was extinguished and, no sooner, the deceased, Hussein, Posian and Mtoba ran to the residence of the village chairperson where they disclosed the episode. The police were informed following which Corporal Samson (PW4) immediately attended the scene. He found

the deceased seated with burn wounds on the head, neck, chest, face, stomach, hands and fingers. His shirt had been completely destroyed by fire. The corporal enquired of him as to what happened to which the deceased replied that it was the accused who burned him. The deceased was then taken to the police station where the corporal recorded his statement which was, however, refused admittance by the trial judge on account that it contravened the provisions of section 34B (2) (f) of the Evidence Act.

With respect, we should express at once that the statement was wrongly denied admittance much as the trial court relied upon a wrong provision of the law. To say the least, the statement qualified to a dying declaration and was, for that matter, admissible under the provisions of section 34(a). Fortunately, in his testimony, the corporal did express what he was told by the deceased and, much as a dying declaration may as well be oral, we shall, in due course, take the liberty to access the evidence. With so much for the dying declaration, it will suffice to conclude the prosecution version with the detail that the deceased was, soon after, hospitalized at Bugando hospital where he passed away on the 8th day of February, 2008. A

post-mortem examination was carried out and the report was adduced into evidence at the preliminary hearing stage (exhibit P1).

In reply to the prosecution damnation, the appellants' version was materially brief. On the fateful day, she had driven Posian and four others to her residence to deliberate on the missing boat occurrence. Upon arrival, she left her guests outside as she proceeded inside the house to attend domestic matters. The appellant then, apparently, moved outdoors where she lit her charcoal-burning stove by the use of kerosene that was in a plastic bottle container. As she walked back to return the kerosene residual, the deceased abruptly emerged from behind in a rush and bumped against her. In consequence, she lost grip of the container, following which the kerosene accidentally spilled unto the deceased body. As fate would have it, the deceased then stumbled over a burning candle from which his shirt was caught alight. In response the appellant poured a bucket of water on the deceased's body in an effort to extinguish the fire whilst wailing about. The appellant wanted to assist the deceased to hospital but was restrained by a hostile mob.

On the whole of the evidence, the three assessors who sat with the trial Judge were unanimous in returning a verdict of not guilty. Nonetheless, the trial Judge was disinclined and, as already intimated, he found the case for the prosecution proved to the hilt, whereupon a conviction was had.

As, again, already hinted, the appellant is aggrieved and, at the hearing before us, she had the services of two learned advocates, namely, Mr. Salum Amani Magongo and Mr. James Andrew Bwana. The respondent Republic was represented by Mr. Lukelo Samwel, learned Senior State Attorney, who was fully supportive of the conviction and sentence. Whereas, Mr. Magongo was assigned to the appeal pursuant to Rule 31(1), Mr. Bwana was privately hired by the appellant. Thus, on account of the different modes of their assignments, either counsel filed his own memorandum of appeal. At the hearing, both learned counsel were agreed and allowed to consolidate the two memoranda into one. In the result, some of the grounds of appeal were dropped and some were merged, following which the consolidated memorandum of appeal run thus: -

1. *That the trial court erred in law to take into account Exhibit P1.*

2. *That the trial Judge erred in law and fact in convicting the Appellant based on testimony of PW1 whose credibility and integrity as a witness were highly questionable.*

3. *(i) The trial Judge erred in law and fact in convicting the Appellant without consideration of the poor lightining circumstances that surrounded the scene of the crime impairing proper sight.*

   (ii) The trial Judge erred in law and fact in not recognizing that the inconsistencies and contradictions in prosecution testimonies went to the root of the prosecution's case.

   (iii) The trial Judge erred in law and fact in his evaluation of malice afterthought (sic) on the part of the Appellant.

4. *The trial Judge erred in shifting the burden of proof to the Appellant, thereby*

neglecting giving weight to the Appellant's testimony.

5. *The trial Judge erred in law and fact in finding that the cause of death of the deceased could not be attributable to inhalation pneumonia without testimony of a medical expert.*

Pursuant to their own arrangement, Mr. Magongo argued the first ground of appeal, whereas Mr. Bwana canvassed the remainder grounds. The first ground of appeal was directed against the admittance into evidence of the report on post-mortem examination (exhibit P1). As hinted upon, exhibit P1 was adduced at the preliminary hearing stage. According to the record, at the end of the statement of facts read by the learned State Attorney, was a prayer to have the report tendered in court and; as there was no objection from the defence counsel, the document was admitted without more. Thereafter, the court proceeded in the following manner: -

MEMORANDUM OF FACTS NOT IN DISPUTE

1. *Names of the accused person are Ghati d/o Mwita*
2. *That Medadi Aloyce is dead and died unnatural death as stated in the post-mortem (Exhibit P1)*

All other facts are disputed

Sgd: A. N. M. Sumari

Judge

15/02/2010

Court: *Accused explained of the memorandum of facts not in dispute and replied: -*

Accused: *I understand and admit those are facts not in dispute*

Mr. Magongo attacked the trial court's approach towards the admittance of the document on two fronts: First, he complained that it is not apparent from the record that the contents of the autopsy report were read and explained to the appellant so as to meet the requirements of section 192 (3) of the CPA and the accompanying Rules comprised in GN 192 of 1988. To bolster his submission,

learned counsel referred us the unreported Court of Appeal Criminal Appeal No. 135 of 1991 – **Bahati Masebu Vs Republic**. In this regard, we feel it is pertinent to reiterate what was said in this case with reference to the GN 192 Rules: -

> *We desire to make four brief observations about these Rules. First, there can hardly be any doubt that they are couched in mandatory terms. Secondly, we consider that in that context "the facts of the case" include the materials contained in documents like extra-judicial statements, autopsy reports and sketch plans.* ***Thirdly, it is thus essential that the materials in such documents also to be read and explained to the accused.*** *And lastly, it is the accused, and not his advocate, who should be asked to state the facts which he admits.* (Emphasis ours).

The third observation tells it all, in that it is imperative to have the accused posted on the contents of materials accompanying the facts, such as an autopsy report. In response, Mr. Samwel sought to impress that the procedure was properly heeded to but, with respect,

in the situation at hand, whilst it is beyond question that the report on post-mortem examination was mentioned as amongst the undisputed facts, it is not quite apparent from the record that its contents were read and explained to the appellant. To this end, an essential attribute was not heeded and the report was wrongly accorded the status of an undisputed matter.

Unfortunately, that was not the only ailment befalling on the document. On the second front, Mr. Magongo criticized the trial court for non-directing itself on the provisions of section 291 (3) of the CPA. We entirely agree and, to observe the least, often times it is forgotten that just as is the case with section 240 (3) of the CPA, its kith, section 291 (3) also carries with it the requirement for the court to inform the accused of his/her right to require the medical officer summoned for examination. In **Dawido Qumunga v R** [1993] TLR 120 this Court held thus: -

> *The provisions of section 291 of the Criminal Procedure Code are mandatory and require the court to inform the accused about his right to decide whether or not he wants the*

doctor who performed the postmortem called to testify.

To this end, both concerns raised by Mr. Magongo were well taken and we are, therefore, satisfied that on account of the non-compliance with the provisions of sections 192 (3) and 291 (3) of the CPA, the report on post-mortem examination was improperly adduced into evidence. We are, in the result, left with no option than to expunge Exhibit P1 from the record of the evidence.

In the absence of the autopsy report, three main issues arise, all of which are necessary for the determination of this appeal. The first is whether or not there is sufficient material to establish the fact of death of the deceased to the required degree of certainty. If so, the second issue would be whether or not such material leads to the conclusion that the death was unnatural and; if positively so found, the last question would be whether or not the evidence sufficiently implicates the appellant as the causer of death. All these are questions of fact that may be established and proved by circumstantial evidence. But, as has previously been held, although the fact of death may be proved by circumstantial evidence, that

evidence must be such as to compel the inference of death and must be such as to be inconsistent with any theory of the alleged deceased being alive, with the result that taken as a whole, the evidence leaves no doubt whatsoever that the person in question is dead. (See **Kimweri v R** [1968] EA 452). In our view, the same principle applies with respect to proof of cause of death and the causer of the death. As we confront the foregoing issues, we will also reflect on the submissions by learned counsels, that is, whenever relevant.

We need not detain ourselves on the issue respecting proof of the fact of death, much as, we think, there are sufficient pointers on the evidence to establish beyond doubt that Medadi Aloyce, the alleged deceased, is, indeed, dead. All the prosecution witness told of his death, beginning with Hussein, his uncle; Posian and Mtoba, his workmates and; finally, the corporal who took him to hospital. As regards the issue whether or not his was an unnatural death, evidence was to the effect that on the 4th February, 2008. The deceased sustained severe burn wounds. The corporal, in particular, described the location of these wounds from which the deceased was hospitalized and died on the 8th February, 2008. Taken as a whole,

we so find, the evidence compels no other inference than that the death of the deceased resulted from the sustained burn wounds. The most contested issue was as to who was the author of the fatal wounds which terminated the deceased's' life? The answer to this question depended, to a great extent, on the evidence of Hussein.

Mr. Bwana vigorously criticized the trial court for its reliance on the evidence of Hussein whose credibility and integrity were, according to him, highly questionable. In relation to the other witnesses, it was learned counsel's further submission that their testimonies were fraught with inconsistencies and contradictions that went to the root of the prosecution case. More particularly, Mr. Bwana had reference to Hussein's claim about the appellant's threat to burn her guests, which detail was not mentioned in the testimonies of Posian and Mtoba. On the premises, it was learned counsel's imputation that Hussein was a personality given to exaggeration. With respect, it might have been that Posian and Mtoba were not led on the detail in the course of their examination in chief. On the whole, the learned Judge dealt at length both the issues of the credibility of the witness Hussein as well as the alleged

inconsistencies on the case for the prosecution. Upon our own consideration of the whole of the evidence, we entirely agree with the findings and conclusions drawn by the trial court with respect to the credibility of Hussein and the alleged inconsistencies which the court found innocuous.

Mr. Bwana additionally complained that the trial Judge shifted the burden of proof and placed it on the accused's shoulders and, thereby not according her defence due consideration. With respect, we think that the trial Judge properly directed himself on the burden of proof when he stated: -

> *I am aware that upon a charge of murder being preferred, the onus is always on the prosecution to prove not only the death but also to link between the said death and the accused. The onus never shifts away from the prosecution and no duty is casted on the accused to establish his or her innocence, even if she or he tells lies further down the judgment.*

True, further down the judgment, the trial Judge did comment about the appellant not putting her defence to the prosecution witnesses in the course of her cross-examination. We think that it was not intended by this remark to shift the burden and place it on the accused, rather, it was a statement of fact to simply reflect that the appellants' defence might have been an afterthought.

To this end, on the whole of the evidence, we fully associate ourselves with the trial court's finding that it was the appellant who authored the burn wounds on the deceased. Quite significantly, we note that Hussein's telling corroborates the deceased's dying declaration which was to the same effect. Section 203 (a) of the penal code provides in part: -

> **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) if he inflicts bodily injury on another person in consequence of which that other undergoes surgical or medical treatment which causes death;...**

The unbroken chain of evidence was to the effect that the deceased was hospitalized soon after the attack and did not recover up until he met his demise four days later. The irresistible inference, in the circumstances, is that the bodily injuries inflicted upon him by the appellant were the operating cause of death. To this end, we have found no cause to fault the decision of the trial court and, accordingly, this appeal is dismissed in its entirety.

DATED at MWANZA this 11th day of March, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. M. MUSSA
JUSITCE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL