IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., ORIYO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 268 OF 2015

MAPAMBANO MICHAEL @ MAYANGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a decision of the High Court of Tanzania at Kongwa)

(Sehel, J.)

dated the 10th March, 2015
in
Criminal Session Case No. 101 of 2011

JUDGMENT OF THE COURT

22nd & 25th April, 2016

JUMA, J.A.:

This is an appeal by the Appellant Mapambano Michael @ Mayanga against the decision of the High Court Dodoma at Kongwa in which he was found guilty and convicted by Sehel, J. for the offence of murder contrary to section 196 of the Penal Code, Cap. 16. The particulars of the offence alleged that at about 2 a.m. on 4/9/2008 at Ndaribo village in Kongwa District (Dodoma Region) he murdered Rose d/o Yusuph. The appellant was sentenced to suffer death by hanging under section 197 of the Penal Code.

The deceased Rose Yusuf was only a year old child when she met an unlawful death. She died from "*big cut wound on the head deep to the brain tissue*," according to the post-mortem report which was tendered during the Preliminary Hearing as exhibit P1. The deceased's mother Stamili Mbogoni (PW1) gave the prosecution's version of evidence on how the deceased died that night. PW1 was asleep, with her children Bilali and Rose in the house. At around 1 a.m. she saw torchlight, shining in the direction of her sitting room. She lit a kerosene lamp (*kibatari*) and walked to her sitting room where she asked who the [person behind the torchlight was. "*I am Mapambano*," he replied. The man behind the voice asked to be allowed in, or else he would kill her. They had few exchanges, where the man indicated that he wanted sex, while PW1 responded that she was not up to the sexual intercourse because she was at the time nursing her one year old baby. He continued to harangue her with accusation that PW1 had killed his mother by witchcraft. Sensing danger, PW1 carried her daughter Rose and decided to go out taking her children with her.

With Rose tucked on her back, PW1 pushed her way past the man who was standing at her door. It was at this moment when the man used his machete to slash PW1's face. Bleeding, PW1 ran away while shouting

"Mapa ananipiga, Mapa ananiua" (Mapa is assaulting me, Mapa is killing me). Shortly thereafter, she tripped down and the baby who she was carrying on her back, fell down in front of her. That was when, according to PW1, the appellant slashed the baby on her head, causing her brain material and her tongue to protrude out.

PW1's elder sister Theresia Mbogoni (PW2) recalled the material night when she heard her sister crying *"Mapambano ananipiga mapanga"* (Mapambano is attacking me with a machete). PW2 rushed outside where she saw PW1 on the ground while Mapambano was attacking her with a machete. According to PW1, the appellant ran away when he saw her. Soon, other people joined them and transferred PW1 to hospital where she remained for two months.

It took slightly over two years for the appellant to be arrested after a bizarre incident when a woman visited Zoisa Police Station to report to E. 9910 S/SGT Anthony (PW3) that Mapambano, who was her husband, had abducted her child by another man. Mapambano was traced to Songambele village where he was arrested and returned to Zoisa police

station. On 3/10/2010 Mapambano was sent to the Police at Kongwa to face a charge of murder.

When put to his defence, the appellant testified that by 27/7/2007 that is almost a month before the deceased died, he had already left the village of Ndaribo and moved on to Laitimi in Kiteto district where he was preparing his farm for cultivation. He denied the allegation made by a woman who reported to PW3 about the alleged abduction of the child. He explained that the child was working at a cafeteria making buns. He insisted that when the deceased died he was already at Laitimi village in Kiteto. He testified that his trouble with the police began when he paid compensation of Tshs. 250,000/- through the police, to the woman who had accused him of abducting her daughter. Because the police decided to keep the money, there developed misunderstandings between himself, the police and the woman. He blames the police for fabricating the murder case in order to steal the money.

At the hearing of this appeal before us Mr. Cheapson Kidumage, learned advocate, appeared for the appellant. The respondent Republic was represented by Ms. Judith Mwakyusa learned State Attorney.

The memorandum of appeal which Mr. Kidumage filed on 1/4/2016 contains four grounds of appeal. In the **first** ground of appeal, the appellant faults the trial Judge for holding that the identification evidence was watertight and as such eliminated the possibility of mistaken identity. The **second** ground blames the trial court for failing to properly analyze evidence about the name of the person who actually caused the death of the deceased. In the **third** ground of appeal the appellant cites the failure of the trial High Court to take into account the appellant's evidence. The **final** ground of appeal relates to the discrepancies in the story of PW1 and PW2.

Mr. Kidumage submitted that the learned Judge failed to evaluate the evidence regarding several parts of the record where the appellant is referred to variously as *"Mapambano s/o Michael"*, *"Mapambano Michael @ MAYANGA"* and *"Mapambano Michael Mbinyima Mayanga"*. He submitted further that these names raise the possibility that there is another person out there who carries the same name and who could have committed the offence. He argued that although during the Preliminary Hearing the name of the appellant (Mapambano Michael @ Mayanga) was placed amongst those facts that were not in dispute, because the record of what transpired

was not read out to the accused, the name should not be regarded as undisputed.

Moving on to the identification evidence of the two sisters, PW1 and PW2 whose evidence Mr. Kidumage considered as the mainstay of the appellant's conviction, he submitted that their evidence had unresolved contradictions which rendered the entire evidence that was adduced by the prosecution unreliable and incapable of sustaining the conviction of the appellant. The learned Counsel expressed several reasons why he thinks that it is highly probable that PW2 was not anywhere near the scene of crime as she claimed in her evidence but was couched to say what she had to say.

He asserted, the death of the deceased occurred on 4/9/2008 around 1 a.m. and PW2 recorded her first statement to the police three months later on 17/12/2008. If at all PW2 was the first person at the scene of crime and saw the appellant attacking PW1, the police should have contacted her almost immediately to record her statement, Mr. Kidumage argued. He further submitted that although PW2 must have witnessed when villagers arrived to help and transport the injured PW1 to hospital,

yet, when under cross examination PW2 failed to mention even a single villager who had assisted PW1 at the scene of crime.

Mr. Kidumage highlighted the discrepancy between PW2 and PW1 on what PW1 said in distress when she was under attack that night. The learned Counsel pointed out that in her testimony, PW1 said that she cried out in distress calling out the following words: "*Mapa ananipiga, Mapa ananiua*" (Mapa is assaulting me, Mapa is killing me). But when PW2 testified, she claimed that she heard her sister (PW1) cry out: "*Mapambano ananipiga mapanga*" (Mapambano is attacking me with a bush knife).

Even the way PW2 claimed to have identified the appellant creates doubt in her evidence, Mr. Kidumage submitted. He referred to her evidence where PW2 was being re-examined in chief by the learned State Attorney when she claimed that after the appellant had seen her, he ran away and PW2 managed to see the appellant's back only as he was running away. Mr. Kidumage urged us to find that identification of the appellant by PW2 while he was running away cannot be said to be free of mistaken identity. He further saw contradiction between the evidence of PW2 and that of PW1 regarding the clothes which the appellant wore.

While PW2 claimed that with the assistance of bright moonlight she saw the accused clad in a shirt (she could not remember the colour) and trouser, PW1 claimed that the appellant "wore grey jacket, blue trouser and blue sandals" which she saw with assistance of bright moonlight. The learned Counsel submitted that this glaring discrepancy within the evidence of PW2 and between the evidence of PW1 and PW2, make the visual identification evidence of these two witnesses highly suspect and unsafe to base a conviction of murder on.

Mr. Kidumage submitted that there is also discrepancy on true distance that separated PW2 from the appellant. At one stage in her testimony PW2 claimed five paces separated them. At another stage the paces had increased to 15, he pointed out. The learned Counsel similarly questioned the veracity of the evidence of PW2 in so far as source of light from the moonlight was concerned. During the cross examination, the learned Counsel wondered why in her first police statement which was recorded in 2008, she did not mention the source of light but did so when she wrote her second statement in 2010, that was after the appellant had been arrested.

The identification evidence of the complainant, PW1 was similarly riddled with contradictions, Mr. Kidumage submitted. Like her sister PW2, PW1 also recorded two statements at the police station over the same incident. According to the learned Counsel, evidence on source of lights which facilitated her identification of the appellant was not in her first statement but was introduced in her second. He urged us to find that the identification evidence of PW1 is unreliable and it is more likely than not that PW1 did not know her assailant but only framed up the appellant during her second statement.

Concluding his submissions, Mr. Kidumage expressed his concern that the trial court failed to consider the appellant's defence, specifically where he testified that the police who arrested him over the incident of abduction of the girl, wanted to confiscate the money he had intended as compensation to the girl's mother.

Initially, Ms. Mwakyusa, the learned State Attorney began her address by taking a stand of supporting the conviction of the appellant. She first submitted on the second ground, and contended that the charge sheet and letter of committal both refer to the appellant as Mapambano

Michael @ Mayanga. Similarly, she submitted, PW1 knew the appellant under the names Mapambano Michael Mbinyima Mayanga, and PW2 referred him as Mapambano Michael Mayanga. Names of the appellant, she submitted, has never been an issue, and should not be now.

Ms. Mwakyusa moved on to the identification evidence. She submitted that the appellant was properly identified by PW1 and PW2 and there were no possibilities of mistaken identity. But when we urged the learned State Attorney to address the contradictions which Mr. Kidumage had earlier highlighted, she came round to finally support the appeal conceding that contradictions in the evidence of PW1 and PW2 rendered their evidence unsafe to base a conviction on.

The duty of first appellate court is to subject the entire evidence on record to a fresh re-evaluation in order to arrive at decision which may coincide with the trial court's decision or may be different altogether. We agree with the two learned Counsel who submitted before us that conviction of the appellant was based on identification evidence of PW1 and PW2. Just as pointed out by the two learned Counsel, the evidence of PW1 and PW2 are riddled with contradictions which go to the root of their

credibility. Although Mr Kidumage has meticulously highlighted to us those areas of contradictions, unfortunately, the trial Judge glossed over these material contradictions by such generalizations as:

> *"It was the defence case that the two statements are contradictory.* ***I have gone through the statements, and did not find any contradiction but rather a detailed account on the favourable conditions that enabled the witnesses to identify the accused. These favourable conditions are*** *the ones that these witnesses detailed before this Court....*
>
> *...As I have said before* ***the statement of PW1 given at the police neither suggest that the incident occurred inside the house nor outside the house. While I accept that her statement does not give a clear picture as to where exactly the incident occurred*** *but the evidence given before this Court made the whole saga clear as a blue sky."* [Emphasis added].

On our part, we do not think that failure on the part of the complainant (PW1) to indicate in her statement whether she was attacked by the appellant while she was inside her house or outside is a minor omission that does not go into her credibility. The evidence of PW1clearly

brings out the contradiction. On page 49 during examination in chief, PW1 stated:

> *"He was standing at the door so I took my children and I carried Rose at my back because she was still small. I pushed him and went out that is when he hit me within his panga...."...*

On page 53 whilst under cross examination, PW1 stated:

> *"The accused forcefully opened the door and entered in my house"...—*

On page 55 during cross examination, PW1 stated:-

> *"I found the door was opened but I do not know how..."...*

On page 58, while answering questions that were put across by the 3rd assessors, PW1 stated:

> *"I woke up after dreaming that somebody is at my house and that is when I saw the accused in my sitting room. I asked who are you and he replied 'mimi mapambano'. I did not raise any alarm after seeing the accused inside my house..."*

The learned trial Judge should also have wondered why the two main witnesses had to record second statements all over again when the appellant was arrested over an incident of abduction. The trial Judge has tried to minimize the discrepancy on the distance that separated PW2 from the appellant, taking into account how this witness had contradicted herself. The trial Judge observed:

> *"...PW2 observed the accused from **a distance of about 10 to 5 paces**. PW2 was able to identify the accused through the bright moonlight..."* [Emphasis added].

The record does not bear out the trial Judge finding on *"a distance of about 10 to 5 paces".* Instead, the record highlights how PW2 was contradicting herself on pages 61 and 62 of the record. On page while under cross examination, PW2 stated:

> *"The distance from where I was to where the accused was about 5 paces..."*

But when the statement which PW2 had recorded to police was read out, she gave a different distance:

"...At the police I mentioned that the accused was about 15 paces from where I was standing"—page 62.

This Court has on several occasions stated that that every witness is entitled to credence and whoever questions the credibility of a witness must bring cogent reasons beyond mere allegations:–see **Goodluck Kyando V R.,** Criminal Appeal No. 118 of 2003; **Ally Hussein Katua vs. R.**, Criminal Appeal No. 99 of 2010; and **Machela Magesa vs. R.,** Criminal Appeal No. 265 of 2010 (all unreported). But in the instant appeal before us, the identification evidence of PW1 and PW2 is so much beset with contradictions, that we cannot give these two witnesses credence.

It seems to us that the trial court did address the details of contradictions in the identification evidence of two prosecution witnesses, PW1 and PW2. The Court in **John Joseph @Pimbi vs. R.,** Criminal Appeal No. 262 of 2009 (unreported) referred to its earlier decision in **Mohamed Said Matula v. Republic** (1995) TLR 3 to underscore the duty of the trial and first appellate courts to deal with contradictions whenever these are apparent from evidence. Courts are enjoined to either resolve contradictions or explain them away. The seriousness with which this Court views contradictions was reflected in **Munziru Amri Mujibu and Dionizi**

Rwehabura Kyakaylo vs. R., Criminal Appeal No. 151 of 2012 (unreported) wherein the Court regarded contradictions in evidence so material to the integrity of the conviction of the appellant that it did not wish to engage other grounds of appeal:

> *"...In the present case credibility of the witnesses was highly suspect. There were several contradictions in the testimonies of the witnesses. For example while the key witness (PW9) said that the bandits entered her shop at 07.45 pm and left at 11pm another witness (PW11) testified that the whole incident took only 10 minutes. There was also a contradiction as to the 2nd appellant's attire between PW1 and PW9. PW9 said he was wearing a Kaunda suit while PW1 said he was wearing a long coat. PW9 gave evidence purportedly to show that she had ample time to identify the second appellant. She said that as between 12:00 noon and the time they were invaded the 2nd appellant had been in and out of her shop six times. We found it difficult to buy her story. Firstly, she did not record in her statement to the police that she had identified the appellant at the scene of crime. Secondly, it was inconceivable that someone intending to commit such a serious crime as robbery would present himself to the*

victim several times as if to make sure that he is marked. As the witnesses were not credible conviction ought not to have been sustained.

The above considerations suffice to dispose of this appeal and there is no need for us to engage ourselves on the other complaints raised in the memoranda of appeal."

In our re-evaluation of evidence as a first appellate court, the material contradictions in the identification evidence of the two main prosecution witnesses casts doubt in the case of the prosecution.

After taking credence away from the contradictory evidence of PW1 and PW2; and in the absence of any other evidence placing the appellant at the scene of crime, conviction of the appellant can no longer be regarded as safe.

Apart from contradictions and inconsistencies in the identification evidence of PW1 and PW2, Mr. Kidumage has justifiable reasons to complain that the trial Judge, in convicting the appellant, failed to take his defence into consideration. Apart from the dispute over the correct name of the appellant which the trial Judge sufficiently considered and found to

be settled, she dismissed off the other aspects of the defence in the following way:

> *"...Having believed the prosecution evidences, then I have out rightly disregarded the defence of alibi raised by the accused person in terms of section 194 (5) of the Criminal Procedure Act, Cap. 20 R.E. 2002. In that regard, the accused defence of alibi did not raise any doubt on the prosecution case. This is further fortified by the evidence of PW4 who testified that the accused person was at Ndaribo village at the time of the commission of the crime."*

We re-evaluated the evidence offered by the defence in order to guard against unwarranted conviction and miscarriage of justice. It seems to us, the above excerpt in the judgment of the trial court is more about roundly brushing off the defence evidence than it is about the duty of a trial court to take up the evidence offered by the defence, evaluate it and reaching the above conclusion. Defence evidence should not be brushed off that way without evaluation.

Circumstances of this case demanded a more prominent evaluation of the defence evidence than was done. First of all, despite the trial Judge

believing the evidence of PW4 stating that the appellant was living at Ndaribo village when the deceased died, she did not relate the same with evidence by Police Sergeant Anthony (PW3) that for two years after the death of the deceased, there had been no warrant for the arrest of the appellant till 26/9/2010 when a woman from Songambele village went to complain that the appellant had abducted her daughter.

The trial Judge did not explore other aspects of the defence evidence which could have exposed the prosecution evidence to some doubts. These aspects of the defence evidence includes the complaint that even PW3 who had brought him from Zoisa Police Station to face the charge of murder, was amongst the officers who swindled his Tshs. 250,000/= he had given the police as compensation to the woman who had filed a report on abduction. Similarly, the trial Judge did not evaluate the evidence why the two main identification witnesses, PW1 and PW2, recorded their police statements twice against the appellant, with the second statement when the appellant was arrested and filling-up more evidential gaps that were missing in the first statement.

The position of the Court has always been that, failure to consider the defence evidence vitiates the resulting conviction: see for example– **Moshi Hamisi Kapwacha vs. R.,** Criminal Appeal No 143 of 2015 (unreported).

In the upshot of our findings, we shall allow this appeal, quash the conviction and set aside the sentence of death by hanging. The appellant is to be released from prison unless he is otherwise lawfully held.

DATED at **DODOMA** this 23rd day of April, 2016.

E.A.KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL