IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUGASHA, J.A., KOROSSO, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL No. 188 OF 2020

TRAZIAS EVARISTA @ DEUSDEDIT ARON................................APPELLANT

VERSUS

THE REPUBLIC ....RESPONDENT

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

(Kairo, J.)

dated the 20th day of March, 2020
in
Criminal Session Case No. 1 OF 2017

....

JUDGMENT OF THE COURT

22nd & 29th November, 2021

KIHWELO, J.A.:

The appellant, Trazias Evarista @ Deusdedit Aron, was convicted and condemned to death by the High Court for the murder of Regina w/o Selestin on 22nd November, 2009 at Bumpande Village within Muleba District in Kagera Region.

It was common ground that the deceased died violently on 22/11/2009. According to the postmortem examination report on his body whose contents were read out in court and were undisputed, the death resulted from *"severe hemorrhage due to multiple cut wounds inflicted in*

the head and neck." The question at the trial was, therefore, whether the appellant was the murderer.

To establish its case, the prosecution featured eight witnesses: James Thomas (PW1), Rweyemamu Selestin Kalokora (PW2), Sebastian Selestin (PW3), E. 5219 Det. Cpl Ally (PW4), D. 6383 Det. Sgt Angelo (PW5), Simon Kakuru James (PW6), G. 902 Det. Cpl Hussein (PW7) and Dr. Florence Abdallah Kayungi (PW8). Apart from the postmortem examination report (exhibit P2), the prosecution tendered the sketch drawing of the scene of the crime (exhibit P1).

On the part of the appellant, he gave his evidence on oath and produced one documentary exhibit a letter written by the Village Executive Officer of Kilimilile (exhibit D1).

Before canvassing the points of grievance, we find it desirable first, to give essential factual background to the appeal as can be gleaned from the totality of the evidence on record.

Briefly, the prosecution case which was believed by the trial court shows that, on the fateful day in the afternoon hours the deceased paid a visit to his sick son, PW2 who by then was suffering from a broken arm.

As the conversation between the duo were going on, suddenly the appellant appeared from nowhere along with his son one Theophil Trazias and the appellant was holding a machete. He entered PW2's house, harshly and hastily grabbed the deceased, went outside with her and started stabbing her with the machete while complaining that the deceased testified against Theophil Trazias in a case in which the latter was suspected of stealing pieces of timber. PW2 started screaming for help whereupon his brother PW3 who had already heard from far someone pleading for life appeared and witnessed the appellant stabbing the deceased. PW3 frantically started screaming for help and immediately the appellant fled as people started gathering at the scene and their effort to arrest him proved futile as the appellant disappeared towards ngono river.

The appellant went at large until on 11/3/2016 when he was apprehended by PW7 at Kyerwa and on 15/3/2016 was sent back to Muleba where he was identified by PW2 and PW3. He distanced himself from the accusations made against him by the prosecution and relied on the defence of *alibi.* Consequently, the present charge was preferred against the appellant.

At the conclusion of the case for the prosecution and the defence, the learned trial Judge summed-up the case to the assessors who then returned a unanimous verdict of guilty against the appellant. Siding with the assessors, the learned trial Judge found it proven upon the evidence of the prosecution witnesses that the appellant was responsible for the murder of the deceased. Accordingly, he was convicted and sentenced as shown earlier.

Undeterred, the appellant lodged this appeal which was initially predicated on self-crafted seven- point memorandum of appeal lodged on 27th May, 2020. On 17th November, 2021, the appellant's counsel, Mr. Remidius Mbekomize, filed a two-point memorandum of appeal to supplement the earlier filed points of grievance. Generally, the appellant maintained that the trial judge wrongly convicted and sentenced him for the offence of murder while the prosecution did not prove the case against him beyond reasonable doubt.

On our part, we have found that the grounds of appeal raise only one point of grievance that the case against the appellant was not proved beyond reasonable doubt.

At the hearing of the appeal before us, Mr. Remidius Mbekomize, learned advocate represented the appellant. On the other hand, Mr. Emmanuel Kahigi, together with Mr. Amani Kilua, State Attorneys, represented the respondent Republic.

Submitting in support of the grounds of appeal Mr. Mbekomize prefaced his submission by arguing briefly that, it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt and cited the case of **Said Hemed v. Republic** [1987] TLR 117 to support his proposition. Mr. Mbekomize contended further that, the prosecution evidence was marred by contradictions and curiously argued that while both PW2 and PW3 testified to have witnessed the appellant stabbing the deceased to death, PW2 said that he saw the appellant who came along with his son Theophil Trazias but PW3 did not mention about the presence of Theophil Trazias in his testimony.

Mr. Mbekomize submitted further that the trial Judge did not properly address himself on the defence of *alibi* although the appellant brought DW2 to cement the appellant's evidence that on the fateful day he was not at the scene of crime as reflected in exhibit D1. Mr. Mbekomize

rounded up by praying that the appeal should be allowed and the appellant should be set free.

In reply Mr. Kilua who gallantly opposed the appeal, was fairly brief and contended that there was no contradiction in the testimonies of PW2 and PW3 and that, in any case there was no issue as regards to PW3 not mentioning that he saw Theophil Trazias at the scene of the crime when the appellant was stabbing to death the deceased.

In relation to the defence of *alibi,* Mr. Kilua submitted that the trial Judge sufficiently addressed the issue in the judgment from page 176 to page 178 of the record of appeal and finally, came to the conclusion that the defence of *alibi* was not solid and therefore disregarded it. Finally, Mr. Kilua insistently argued that the prosecution evidence on record was watertight and therefore the appeal be dismissed for being devoid of merit.

In his brief rejoinder submission, Mr. Mbekomize repeatedly argued that, the prosecution case was not proved to the hilt and therefore the appeal should be allowed and the appellant be released forthwith.

This is a first appeal. The appellant is therefore entitled to have our own re-evaluation of the entire evidence and come to our own conclusion bearing in mind that we never saw the witnesses as they testified. See, for instance **D.R. Pandya v R** [1957] EA 336 and **Maroma Slaa Hofu v Republic**, Criminal Appeal No. 246 of 2011 (unreported). However, we are precluded from questioning the findings of fact by the trial court as long as there was evidence to support the decision. See, **Rex v Gokaldas Kanji Karia and Another** [1949] EACA 116 and **Rex v. Hassan bin Saidi** [1942] EACA 62.

The prosecution case was mainly based on the evidence of two eye witnesses PW2 and PW3 who saw the appellant attacking and assaulting the deceased. Looking at the circumstances of this case the question that remains to be answered is whether PW2 and PW3 were credible witnesses. Credibility is an issue of fact, it is usually considered that the trial court is the best judge on this issue and that a trial court's findings as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for the re-assessment of their credibility. See, for example **Dickson Elia Nshamba Shapwata and Another v. Republic,** Criminal Appeal No. 92 of 2007

(unreported). It is a peremptory principle of law that every person, who is a competent witness in terms of the provisions of section 127 (1) of the Evidence Act, Cap 6 R.E 2019 is entitled to be believed and hence, a credible and reliable witness, unless there are cogent reasons as to why he/she should not be believed. See, for example **Goodluck Kyando v. Republic** [2006] TLR 363.

There are no rules of thumb in determining the credibility, truthfulness or reliability of a witness. It all depends on how the demeanour of the witness, has been assessed by the presiding Judge/Magistrate, and the assessment which is made to the evidence which he/she gives in court. This is because the assessment of demeanour is the monopoly of the trial court. This Court in **Yasin Ramadhani Chang'a v Republic** [1999] TLR 489, made a general observation that:

> *"Demeanour is exclusively for the trial court. However, demeanour is important in a situation where from the totality of the evidence adduced, an inference or inferences, can be made which would appear to contradict the spoken words."*

But, there are other ways in which the credibility of a witness can also be assessed as the Court held in **Shabani Daud v. Republic**, Criminal Appeal No. 28 of 2001(unreported) that:

> *"The credibility of a witness can also be determined in other two ways that is,* ***one****, by assessing the coherence of the testimony of the witness, and* ***two****, when the testimony of the witness is considered in relation to the evidence of other witnesses....."*

From the evidence on record, it is clear that PW2 and PW3 witnessed the appellant kill the deceased in broad daylight and that the appellant was a fellow villager well known to each of them and therefore the trial Judge rightly found that it was the appellant who stabbed the deceased to death. Furthermore, PW2 and PW3 mentioned the appellant at the very earliest opportunity. The ability of PW2 and PW3 to mention and describe the appellant at the earliest possible moment is an assurance of their reliability. There is, in this regard, a long and unbroken chain of decisions of the Court which underscores this well-established principle of law. One such decision is the case of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 in which we observed thus:

"The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."

The learned advocate for the appellant complained on the contradiction of the prosecution witnesses and in particular cited the evidence of PW2 and PW3, and argued that such evidence cannot be relied upon. Furthermore, the appellant complained that exhibit P1 mentioned Theofil Trazias as the suspect and not the appellant. Our cursory perusal of the record of appeal did not indicate to us any contradiction between the evidence of PW2 and PW3 as submitted by the learned counsel for the appellant but clearly, exhibit P1 mentions Theofil Trazias as the suspect and not the appellant. That apart, that argument has no merit because initially both the appellant and Theofil Trazias were suspects in the case. Even if we assume for the sake of argument that such contradiction did exist which we don't believe so, there are several principles that govern testimony of witnesses which contain inconsistences and contradictions. **One**, the court has a duty to address the inconsistences and try to resolve them where possible, or else the court has to decide whether the

inconsistences and contradictions are minor or whether they go to the root of the matter. See, for example **Mohamed Said Matula v. Republic** [1995] TLR 3. **Two**, it is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled. See, for example **Said Ally Ismail v. Republic**, Criminal Appeal No. 214 of 2008 (unreported). **Three**, in all trials, normal discrepancies are bound to occur in the testimonies of witnesses, due to normal errors of observations such as, errors in memory due to lapse of time or due to mental disposition such as shock and horror at the time of the occurrence. Minor contradictions or inconsistences on trivial matters which do not affect the case of the prosecution should not be made a ground on which the evidence can be rejected in its entirety. See, for example **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 (unreported).

In the instant appeal we did not find such contradictions and if any then, they are very minor and do not go to the root of the matter. We are therefore inclined to agree with the learned State Attorney that there were no contradictions on the prosecution evidence.

Next, we will consider the issue of defence of *alibi* which the appellant complained that it was not well addressed by the trial Judge. There is a considerable body of case laws to the effect that if a person charged with a serious offence alleges that at the time when it was committed he was at some other place where he is well known and he does not prove to the satisfaction of the court then the court must necessarily attach little if not no weight to his allegations. See, for example **Makala Kiula v. Republic**, Criminal Appeal No. 2 of 1983 (unreported). According to the testimonies of DW1 and DW2 the appellant was in Kyaka Kilimilile on the fateful day 22/11/2009 and the appellant produced in evidence exhibit D1 a letter from the Village Executive Officer of Kilimilile. Therefore the trial Judge rightly found out that the *alibi* was not solid.

We think, with respect, that, the argument by the appellant's advocate that the appellant had solid *alibi* and that the trial Judge did not consider that defence is unfounded because as rightly argued by the learned State Attorney the trial Judge considered at considerable lengthy that defence particularly from page 176 to 178 and came to the conclusions that the defence of *alibi* was not solid enough and did not shake the prosecution case. On our part, we are satisfied that the alleged

defence of *alibi* did not impeach the credible account of PW2 and PW3 who on the fateful day saw the appellant hacking the deceased to death.

We are alive to the time bound principle that on an indictment for murder, the burden is always on the prosecution to prove the case beyond reasonable doubt the link between the death of the deceased and the accused person. See, for example **Said Matula v. Republic** (supra) and **Enock Yasin v. Republic**, Criminal Appeal No. 12 of 2012 (unreported). In the earlier case it was held that:

> *"The burden of proof in a criminal case rests on the prosecution and it never shifts. The accused person has no duty of establishing his innocence."*

See also, **Aburaham Daniel v Republic**, Criminal Appeal No. 6 of 2007 (unreported).

On the totality of the evidence on record we are satisfied, as did the trial Judge, that there is overwhelming evidence indicating that it was the appellant who stabbed the deceased to death. Again, on the same evidence we are satisfied that the trial Judge was justified in holding that malice aforethought was proved beyond reasonable doubt. This was clearly demonstrated by the appellant's conduct and utterances during the

attack as well as vulnerable parts of the body of the deceased which were targeted by the appellant during the attack and the extent of the wounds inflicted.

In the case of **Obadia Kijalo v. Republic,** Criminal Appeal No. 95 of 2007 (unreported) it was stated that:

> *"It suffices to state that malice aforethought may be demonstrated **by looking at** the motive for the offence and the conduct of the suspect **immediately before and after** the act or omission."* [Emphasis supplied]

Corresponding observations were made in the cases of **Moses Michael @Tail v. Republic** [1994] TLR 195 and **Crospery Ntagalinda @ Koro v. Republic,** Criminal Appeal No. 312 of 2015 (unreported).

Looking at the evidence on record, it is conspicuously clear that the appellant had motive to kill or cause grievous harm to the deceased. However, we are fully aware of the fact that motive is not an ingredient for murder but its presence strengthens the prosecution case and its absence weakens it. See, for example **Republic v. Tindikawe** (1940) EACA 67 and **Stanley Antony Mrema v. Republic**, Criminal Appeal No. 180 of 2005 (unreported).

When all is said and done, we find that all these facts taken together are incompatible with the innocence of the appellant and incapable of any other reasonable explanation other than of the guilt of the appellant. We are therefore satisfied beyond reasonable doubt, like the learned trial judge, that the appellant murdered the deceased. For those reasons, we find the appeal is devoid of merit. We accordingly dismiss it.

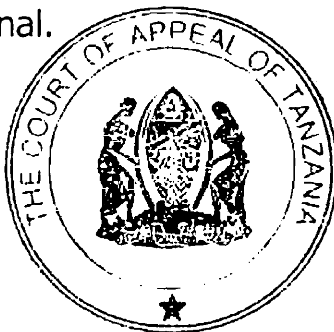
DATED at **BUKOBA** this 26th day of November, 2021.

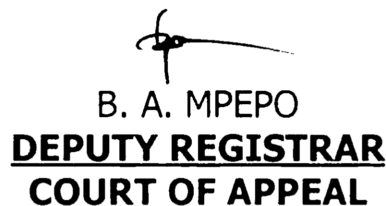
S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 29th day of November, 2021 in the presence of the appellant in person, Mr. Remedius Mbekomize, learned counsel for the appellant and Mr. Emmanuel Kahigi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.





B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL