

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: RUTAKANGWA, J.A.; KIMARO, J.A. And MANDIA, J.A.)

CRIMINAL APPEAL NO. 52 OF 2008

OMARI JUMA SALUM SABURI APPELLANT

AND

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania
at Dar es Salaam)**

(Makaramba, J.)

**dated the 2nd day of November, 2007
in
Criminal Sessions Case No. 56 of 2005**

JUDGMENT OF THE COURT

12th May & 25th June 2009

MANDIA, J.A:

The appellant OMARI JUMA SALUM SABURI was convicted of Murder by the High Court of Tanzania, sitting at Dar es Salaam, and was sentenced to death. He has preferred an appeal against both conviction and sentence.

Mr. Obadiah Kameya, learned Senior State Attorney, represented the respondent/Republic in this appeal, while the appellant was represented by Ms Cresencia Rwechungura, counsel.

The background giving rise to this appeal shows that the appellant OMARI JUMA SALUM SABURI, the deceased KHALIFA s/o ALLY, PW1 RAMADHANI SEIF TIDO lived in the same house at Magomeni Kagera in Dar es Salaam City. The house in which the quartet lived belonged to one Mama Tito who is an aunt to PW1 Ramadhani Seif. According to PW1 Ramadhani Seif the only available sleeping place in the house was the verandah in which there is one mattress. At night the verandah was illuminated by an electric bulb from a neighbouring house, but the illumination was sufficient to make one see what was happening in the verandah. Within the verandah there was a "muarobaini" tree which had been cut down because, according to PW1 Ramadhani Seif, it had begun to lean onto the main house. The chopped up pieces of the "muarobaini" tree were kept in the verandah.

PW1 Ramadhani Seif told the trial High Court that on 14/9/2002 he went to sleep early at 8 p.m since he was sick. According to PW1 Ramadhani Seif, the appellant came back home at 3 a.m in the morning of 14/9/2002 while drunk and was followed by the deceased who also came home drunk. The time sequence means that PW1 Ramadhani Seif retired at 8 p.m on 13/9/2002 and the appellant and the deceased joined them at 3a.m on 14/9/2002. In his testimony, PW1 Ramadhani Seif said the appellant asked one TIDO, who was sleeping on the single mattress in the verandah, to give room so that the appellant could also sleep on the mattress. A brief while later, the appellant woke up and accused the deceased of stealing money Sh. 8000/= from him i.e. the appellant. PW1 testified that he verbally tried to dissuade the appellant from quarrelling with the deceased over the money because the deceased had not stolen any money from the appellant but the appellant all the same started a fight with the deceased. During the fight between the appellant and the deceased, the appellant picked up one of the chopped up sticks from the "muarobaini" tree lying about in the verandah and hit the deceased at the back of the head. The deceased fell down and

started to bleed from the back of the head and in both nostrils. The appellant then took the deceased by the hand and the two walked out of the verandah with the appellant saying he was taking the deceased to Ndugumbi Police Station.

Around the same time when the fight took place a vigilante (sungu sungu) patrol was around the area. One member of this nine-men patrol group, who was about twenty five paces away, PW2 Athumani Kondo, saw a person emerge from an alley (kichochoro) dragging something. The person who emerged from the alley dumped what he was dragging in a trench and walked away. PW2 Athumani Kondo alerted the other members of the vigilante group and these went over to see what had been thrown into the trench. On drawing closer to the trench he found the dead body of a person inside the trench. Other persons had already apprehended the appellant, but none of these persons were called to testify in the trial court. Even the police officer who visited the scene PW3 C9845 Detective Sergeant James testified that other persons, and not him, arrested the appellant, and he showed that the only role he played in

this case was to visit the scene and also to visit the mortuary at Muhimbili Hospital to view the body of the deceased. Surprisingly the witness claimed in the trial court that he was the investigator in the case, but the only role he played in court was to repeat the testimony of PW1 Ramadhani Seif and PW2 Athumani Kondo.

After fielding three witnesses, the Republic closed its case. The appellant's defence, given under affirmation, narrated his movements from 9.p.m to 2 a.m on 14/9/2002 which took him from Kigogo Luhanga to Madoto Bar Mburahati and later Luhanga where he engaged in drinking binges. The appellant testified that at 2 a.m he was approaching home when he was waylaid by thieves who robbed him, one of whom resembled the deceased. The appellant then gave his own version of his arrest but in his defence the appellant acknowledged his own presence at the scene where the body of the deceased was found. The appellant disputed the evidence of PW1 Ramadhani Seif that he was present inside the house where the alleged fight between him and the deceased took place.

The trial court analysed the facts before it and centred on the issue of credibility. The trial judge found the evidence of PW1 Ramadhani Seif to be more representative of the truth than that of the appellant and his story of a mugging on him, taking into account the fact that the appellant was at the scene where the body of the deceased was found dumped in a trench.

The memorandum of appeal filed by the appellant through his advocate has two grounds, namely:-

1. The trial Judge erred in law and fact in relying on the testimonies of PW1 and PW2 to convict the appellant for murder.
2. The trial Judge erred in law to convict the appellant with murder contrary to section 196 of the penal code cap 16 of the law (sic).

Arguing the appeal Ms Rwechungura, learned advocate, urged us to allow the appeal on the ground that the trial court failed to assess properly the credibility of PW1 who said after the deceased

was hit, he bled at the back of the head and from both nostrils, but the investigator who went to the scene did not see any blood at all. Ms. Rwechungura also urged this Court to find fault with the finding of the trial court on the credibility of PW2 who she alleged is not an eye witness to the event.

On his part, Mr. Kameya, learned Senior State Attorney, did not support the conviction for murder. He urged this Court to find, as did the trial court, that PW1 and PW2 were credible witnesses who witnessed a fight between the appellant and the deceased, and prayed that this Court finds the appellant guilty of manslaughter and convict him accordingly.

The record shows that the trial court relied heavily on the evidence of PW1 Ramadhani Seif who, though sick, was in the same verandah where the appellant allegedly picked a fight with the deceased over cash sh. 8000/= which the appellant accused the deceased of stealing, and where the appellant picked a near-lying "muarobaini" stick with which he hit the deceased at the

back of the head. This evidence also shows that soon after being hit the deceased bled from the wound caused by the blow to the back of the head and also from both nostrils. It is also in evidence from PW1 that the deceased fell after the blow and was picked up by the appellant, and the two left walking together with the appellant proclaiming loudly that he was taking the deceased to Ndugumbi Police Station. The trial court also evaluated the appellant's defence that he was mugged and found it to be preposterous because of the timing of the alleged mugging and the time when the appellant was found near the dead body of the deceased by the vigilante patrol as shown in the evidence of PW2. The evidence of PW 2 Athumani Kondo shows that at the same time that the appellant claimed he was mugged and cried out for help, the appellant was seen dumping "something" in the trench by Athumani Kondo (PW2) who was about twenty five paces away, and that the appellant did not cry out for help as alleged by him. The evidence of PW1 Ramadhani Seif on the fight between the appellant and the deceased over cash sh. 8,000/= is direct evidence, and so is the evidence of the appellant hitting the

deceased at the back of the head with a piece of "muarobaini" stick. The evidence of the appellant and the deceased walking out of the verandah, ostensibly to go to Ndugumbi Police Station is also direct evidence. The evidence of PW2 Athumain Kondo of him seeing a person dumping something in a ditch is also direct evidence. The dumped thing turned out to be the body of the deceased. There was no break in the claim of events from the time the appellant struck the fatal blow to the back of the head of the deceased to the time of his arrest by a night patrol of a vigilante group as he dumped the body in a trench. The cause of death as given in the report on post mortem examination, Exhibit P2, is "head injury" and tallies with the description of the head wound by PW1 Ramadhani Seif. In light of this evidence we are of the view that the trial court was right in relying heavily on the evidence of the two prosecution witnesses PW1 and PW2 respectively. It is established law that where there is no misdirection on the part of the trial court or where there is no perversity, an appellate court should not interfere with the findings of a trial court unless it is satisfied that any advantage enjoyed by

the trial judge, by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the conclusion of the trial court. This court has said so much in ***PATRICK JEREMIAH V R*** Criminal Appeal No. 34 of 2006 (unreported). We are of the view that the trial court made a sound evaluation of the evidence and came to a sound conclusion of fact. The first ground therefore lacks merit and is hereby dismissed.

As for the second ground it is common ground that both the appellant and the deceased went back home in the wee hours of the morning, and that both were drunk. It was during the course of their mutual drunken stupor that the appellant and the deceased started a fight over Sh. 8000/=. During the fight, the appellant picked a piece of "muarobaini" stick. This means the appellant picked the nearest weapon which came into view. The evidence on record does not show that there was animosity between the appellant and the deceased prior to their fatal encounter. We do not see evidence showing that the appellant formed the necessary intention to kill prior to the fight which led

to the death of the deceased. In the absence of malice a forethought, it was not open to the trial court to convict of murder. The law is now established that where death occurs as a result of a fight, an accused person should be found guilty of manslaughter, not murder see **JACKSON MWAKATOKA & 2 OTHERS VR (1990) TLR 17, MOSES MUNGASIANI LAISER ALIAS CHICHI VR (1994) TLR 222 and LIBERT s/o HUBERT VR** Criminal Appeal Number 28 of 1999 (Mwanza Registry – unreported)

The appeal is accordingly allowed. The conviction for murder contrary to section 196 of the Penal Code is quashed and the sentence of death is set aside. In substitution thereof the appellant is found guilty of manslaughter contrary to section 195 of the Penal, Code. He is sentenced to imprisonment for ten years from the date of conviction.

DATED at DAR ES SALAAM this 17th day of June, 2009.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

J.S. MGETTA
DEPUTY REGISTRAR