

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: LUBUVA, J.A., MBAROUK, J.A. And OTHMAN, J.A.)

CRIMINAL APPEAL NO. 315 OF 2007

**JOHN PAUL KATELE APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the decision of the High Court
of Tanzania at Sumbawanga)**

(Mmilla, J.)

**dated the 14th day of May, 2007
in**

Criminal Session Case No. 40 of 2006

JUDGMENT OF THE COURT

4 & 14 July 2008

LUBUVA, J.A.

The High Court (Mmilla, J.) sitting at Sumbawanga convicted and sentenced the appellant of the offence of murder contrary to section 196 of the Penal Code. This appeal arises from that decision.

The facts giving rise to the case may briefly be stated. The appellant and the deceased who were acquaintances respectively, resided at the villages of Kamsanga and Kaelele, Mpanda District, Rukwa Region. The appellant and the deceased visited each other regularly. At the trial the facts as established were that on

16.5.2004, the deceased visited the appellant and spent the night together. The following day, the appellant left in the morning at about 4.00 a.m for his business leaving the deceased still sleeping. Later in the day on 17.5.2004, the accused returned to his residence when he found the deceased had left. He realized that his money, shillings 26,000/- which he hid in a tin within the house missing. He suspected the deceased to have stolen it. He reported the matter to the village Chairman and the Police Station at Mpanda. The appellant set about looking for the deceased at Sibwesa village unsuccessfully.

According to Lyaku d/o Maiko (PW1), on a day she does not remember the date, the deceased had visited her grand mother with whom she was staying. The appellant came there and started beating and kicking the deceased mercilessly. She also saw the appellant stabbing the deceased with a red – hot spear. PW 1 saw the appellant dragging the deceased towards a tree stump where the deceased was tossed. While beating the deceased, the appellant was heard uttering "nataka kuondoka na roho yako." People who came to the scene of the incident pleaded with the appellant to stop beating the deceased but he threatened to kill them, they were scarred.

Juma s/o Ismail (PW2), a resident of the village of Kamsanga also witnessed the appellant beating the deceased who was then in bad shape. He tried to stop the appellant from further beating the deceased but was pushed down. PW 2 left the scene and that he saw other people running away from the scene because the appellant was threatening them with a spear. Stella d/o Bomani (PW 6) was another eye witness who fully supported the evidence of PW 1 and PW 2.

The deceased died at Mpanda District Hospital following which the appellant was arrested and charged with the offence of murder. In his defence at the trial, the appellant vehemently denied any involvement in the beating of the deceased. His defence was that upon suspicion that the deceased had stolen his money, he reported the matter to the village chairman and the police at Mpanda. While still on the look out for the deceased, the suspect of his stolen money on 19.5.2004 he received information that the suspect (deceased) had been arrested, at a place called "Centre" near a pombe shop. He found the deceased lying down surrounded by many people. The appellant said that he was informed that the deceased was beaten by

the mob. He went on foot together with the deceased all the way to Mpanda Police Station.

The learned trial judge believed in the evidence of PW1 , PW 2 and PW 6, and rejected the defence of the appellant. Consequently, as already indicated, the appellant was convicted. From this decision the appellant has appealed to this Court.

Mr. Mwakolo, learned counsel for the appellant, who, incidentally, had also represented the appellant at the trial filed the following three grounds of appeal:

1. That the Honourable High Court Judge erred both in points of Law and facts when he found that the testimonials of PW1, PW2 and PW6 were reliable and based the conviction relying that evidence which were full of contradictions and unreliable.
2. That the Honourable High Court Judge erred both in points of Law and facts when he did not put any weight on the

testimonials of the appellant in his defence case.

3. That the Honourable High Court Judge erred both in points of law and facts when he failed to take into consideration the fact that if it was the appellant who killed the deceased, it would not have been possible for the deceased to have walked alone from the village to the Mpanda Government Hospital as per Exhibit "P1" the Postmortem Examination Report.

With regard to ground one, Mr. Mwakolo submitted to the following effect: He vigorously faulted the learned trial judge for relying on the evidence of PW1, PW2 and PW6 in convicting the appellant. The evidence of these witnesses was tainted with discrepancies and contradiction. While PW1, a child of tender age in respect of whom Mr. Mwakolo conceded that the voire dire examination was properly conducted, said in her evidence that she saw the appellant with a spear which was red-hot, PW 6 did not see the spear. It would therefore follow that PW 1 is not a reliable witness. Furthermore, PW1 also said in her evidence that there was

fire outside the house, the scene of the incident, but PW2 and PW 6 testified that they did not see the fire though it was dark. Because of these discrepancies in the evidence of these witnesses, it was improper for the trial judge to give any weight to the evidence of PW1, PW2 and PW6, Mr. Mwakolo submitted.

Mr. Mwenda, learned State Attorney for the respondent Republic, strongly resisted ground one. He conceded that the case against the appellant was dependant upon the evidence of PW1, PW2 and PW6. However, he was quick to observe that the case against the appellant had been proved beyond all reasonable doubt. He said the incident leading to the death of the deceased did not take place wholly in one place. It started at the house of the grand mother of PW1 when PW 6 was at the house of the co-wife nearby. PW 6 came to the scene a little later when she found the appellant assaulting the deceased. Meanwhile, PW1 had been at the scene seeing what was happening from the beginning. The State Attorney submitted that in that situation, it is not surprising that PW 6 may well have not seen some aspect of what PW1 had seen earlier. In any case, Mr. Mwenda added, the learned trial judge considered

these discrepancies and as a result, this aspect of the evidence, subject of complaint was not relied upon by the trial judge.

With respect, we think Mr. Mwenda is correct in his submission. From the record, it is clear that the learned trial judge was fully aware of the discrepancies alluded to by Mr. Mwakolo in this ground. The learned trial judge was categorical in his finding that PW1, PW2 and PW6 witnessed the incident at different times, angles and places. Consequently, it was the view of the learned trial judge that this aspect of the evidence of PW1 which had not been supported by PW 2 and PW 6 was unreliable. It would follow therefore that as the aspect of the evidence subject of the alleged discrepancy, was not the basis for the conviction against the appellant, Mr. Mwakolo's complaint in this ground has no foundation. It is accordingly dismissed.

The complaint in ground **two** is that the learned trial judge erred in law and fact in not putting any weight on the testimony of the appellant in his defence at the trial. Mr. Mwakolo firmly maintained that if the defence raised had been considered by the trial judge, it is doubtful that the appellant would be convicted. In his

defence, the appellant alleged that after receiving information that the deceased his suspected thief, had been apprehended at the place called **Centre**, he went there. He found the deceased lying down surrounded by many villagers. From the Centre, the appellant walked with the deceased to his (appellant) house and thereafter to Mpanda hospital. In that situation, Mr. Mwakolo argued that if the deceased died from injuries sustained from beating at the **Centre**, the possibility of the deceased being beaten by other people either at the **Centre** or in Mpanda could not be discounted. Had this line of defence been considered at the trial, the appellant would be given the benefit of doubt resulting in his acquittal. Unfortunately, the defence on this point was not considered.

On this ground, Mr. Mwenda, for the respondent, Republic also responded. In his view, the learned trial judge having considered the evidence of PW1, PW2 and PW6 who he found to be truthful, rejected the defence raised by the appellant. On the basis of what he considered as credible evidence of PW1, PW 2 and PW6, the trial judge did not accept the appellant's defence which in the trial judge's view was nothing but an afterthought, Mr. Mwenda retorted. So, in

the circumstances, the State Attorney urged the Court to dismiss this ground as it is untenable.

From the record, at page 105 of the typed script, it is glaringly obvious that the learned trial judge considered the fact that the appellant walked all the way to Mpanda town from the scene of the incident. The learned judge stated:

Having said that the Court believes to be true and reliable the evidence of PW1, PW2 and PW6 that they witnessed the accused beating the deceased with legs, it becomes clear that the fact that the deceased walked up to Mpanda town can not negate the truth that he was the person who perpetrated the assault which led to deceased's death. The Court therefore, joins issue with the gentleman and lady assessors that the prosecution has proved beyond reasonable doubt that the accused was the person who killed the deceased.

In this light, there is no doubt that such is a clear and unambiguous finding by the learned trial judge that the appellant beat the deceased at the scene of the incident. In that case only for the sake of argument, if it is accepted that some other persons from the villagers also beat the deceased at the **Centre** or at Mpanda as urged, that on the evidence, would not detract from the fact that the appellant beat the deceased.

Consequently, in view of the fact that the defence of the appellant in this regard was duly considered by the trial judge and was, for the reasons given rejected, it becomes increasingly clear that there is no merit in this ground as well.

Lastly, Mr. Mwakolo dealt with ground three. The issue raised in this ground is that it was an error on the part of the trial judge in not accepting the fact that if the deceased died from the beating by the appellant at Kamsanga village it would not be possible for the deceased to walk to Mpanda Hospital. From the summary of the Postmortem Examination Report Exh. P1, Mr. Mwakolo stated that it is shown 2 right and 4 left side ribs were fractured. He submitted

that, in his own opinion, a person who had sustained fracture of the ribs to this extent would not be able to walk the distance from the scene of the incident to Mpanda Hospital. In this case, Mr. Mwakolo went on in submission, as the deceased was found with such injuries at the Mpanda Hospital, it means that he sustained the injuries in Mpanda and not at Kamsanga village, the scene of the incident where it was alleged that the appellant beat the deceased.

Responding to these submissions in ground three, Mr. Mwenda dismissed the same as baseless. He said that the submission is based on nothing other than the learned advocate's personal opinion upon which to base the decision of the Court. At any rate, the learned State Attorney, further observed that this aspect was being raised for the first time at the appeal stage, it was not raised at the trial. During the trial, it was open for Mr. Mwakolo, who, also represented the appellant to raise it if it was so desired. The Doctor could be summoned to appear in court to give his expert opinion on the point, Mr. Mwenda, emphasized. As it is, on the evidence which was found credible by the trial judge, the case against the appellant was proved conclusively.

We need not be delayed in this issue. With respect, we think Mr. Mwenda, learned State Attorney is correct in his submission that the issue raised in this ground is based on the personal opinion of the learned counsel, Mr. Mwakolo. It is common knowledge that the Court cannot be moved to act on a personal opinion of any individual other than expert opinion. Here, the issue is being raised for the first time on appeal based on the personal opinion of the learned counsel Mr. Mwakolo. With respect, without in any way attempting to show disregard for the personal opinion of the learned counsel, the fact of the matter is that Mr. Mwakolo, learned counsel, is not an expert on the issue raised. Whether, a person as was the case with the deceased who sustained fractures in the ribs could walk from the scene of the incident to Mpanda hospital, is certainly within the domain of the doctor's expertise. In this case, in the absence of expert opinion by a doctor on the issue, we are unable to accept Mwakolo's submission on this point, which in any case, is being raised for the first time in this Court on appeal.

At this juncture, it is instructive to make the following observation in connection with doctor's expert opinion. In this case we hasten to state that even if medical expert opinion was forthcoming, depending on the particular circumstances of the case, the court is not bound to accept such medical expert's opinion. In **Hilda Abel V Republic** [1993] TLR 246 the Court addressed this position of the law and in part stated:

Courts are not bound to accept medical expert's opinion or evidence if there are good reasons for not doing so.

Earlier, in **Republic V. Agnes Doris Liundi** [1980] TLR 38 the Court also held a similar view. In this regard, even the provisions of section 47 of the Evidence Act, CAP 6 R.E. 2002, only state that the expert opinion is relevant. It does not provide that the courts shall be bound.

Beyond our jurisdiction the same principle of law on medical expert's opinion was discussed by the Court of Appeal of Malaysia in the case of **Pendakwa Raya V Muhamad Suhaimi b. Abdul Aziz**

[2003] MYCA 26 (12 December 2003). In that case it was stated

inter alia:

On this question medical evidence is, no doubt, important, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there are other material before them

In the circumstances of the case, we are constrained to agree with Mr. Mwenda, learned State Attorney, that there is no merit in this ground. As said before, once the evidence of PW 1, PW2 and PW6 is accepted as the trial judge did, it is abundantly clear that the appellant mercilessly and repeatedly assaulted, dragged and tossed the deceased to a tree stump. The fact that the deceased walked to Mpanda hospital, would not, as correctly held by the learned trial judge, detract from the fact that the appellant assaulted the deceased. The injuries sustained resulted in the death of the deceased.

All in all therefore, we are satisfied that the learned trial judge was entitled in convicting the appellant.

The appeal being devoid of any merit is accordingly dismissed.

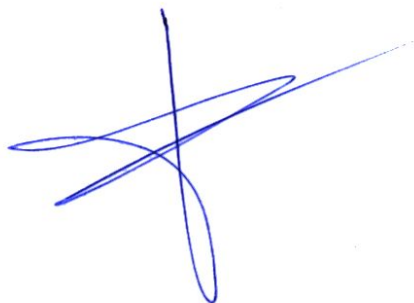
DATED at MBEYA this 14th day of July, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

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

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

DEPUTY REGISTRAR