

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



(CORAM: MSOFFE, J.A., KILEO, J.A. And KALEGEYA, J.A.)

CRIMINAL APPEAL NO. 132 OF 2005

ISSACK VICENT APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High
Court of Tanzania at Tanga)**

(Longway, J.)

**dated the 8th day of July, 2005
in**

Criminal Sessions Case No. 3 of 1996

JUDGMENT OF THE COURT

28 June & 10 July 2007

KILEO, J.A.:

The appellant Issack Vicent was charged with, and convicted of the murder of Veronica d/o Luka contrary to section 196 of the Penal Code by the High of Tanzania sitting at Tanga in Criminal Sessions Case No. 3 of 1996.

He was aggrieved by the decision of the High Court, (Longway, J.) hence this appeal.

The memorandum of appeal filed by the appellant contains five grounds of appeal but his complaint is mainly twofold:-

One, that the learned trial judge should have found that the delay in the trial which took place 10 years after the crime was committed occasioned a failure of justice, and **two**, that it was wrong to rely on the evidence of PW1 who testified 10 years after the incident and who was below 10 years of age when the incident took place. Mr. Joshua Msakamari, learned counsel represented the appellant. The respondent Republic was represented by Mr. Biswalo Mganga.

The facts leading to the conviction of the appellant can be briefly stated as follows:-

The deceased Veronica d/o Luka and the accused who were both residents of Kwamdolwa village in Korogwe District had a concubinage relationship. Each lived in his/her homestead but they visited each other occasionally. Between 2/8/1993 and 4/8/1993, which is the day that Veronica met her death there developed some

misunderstanding between the deceased and the accused over the paternity of the child Upendo whom the deceased claimed did not belong to the appellant, while on the other hand the appellant believed that he had sired the child.

PW1, Anjelina John was the key witness in this case. When she testified in 2003 she gave her age as 20 years which would make her about 10 years at the time the incident occurred. According to Anjelina on the fateful day, which was 4/8/1993 the appellant went to their home with a maize cob, which he asked the deceased to roast. The deceased was not ready to roast it immediately. She went into her room followed by the appellant who locked the door behind him. Anjelina testified further that she peeped through a window and she saw the appellant fell her mother on the bed and made her drink some liquid he had brought. When Anjelina saw what had happened she ran outside. She met with her grandmother Dorcas Yohana (PW4) but she did not tell her anything.

Shortly thereafter, the deceased was seen staggering out of the house. She fell down and in no time her earthly life had come to

an end. Poisoning was suspected. Some specimen from the deceased's internal organs were taken to the Government Chemist for investigation. According to a report of one Ninyisaël Yesaya tendered in court by Gloria Machuve, a Senior Chemist, the organs were found to contain a chemical known as '**gramaxone**' used for killing weeds. The report stated that the chemical is fatal to human beings depending on the amount consumed.

In his denial of the charge against him the appellant pointed out that the child Anjelina John was too young to know exactly what took place. He also pointed out that the non-production in court of the bottle containing the liquid believed to be **gramaxone** weakened the case for the prosecution.

Arguing the appeal on behalf of the appellant Mr. Msakamari submitted that the learned trial judge erred in failing to take into account the long time which passed between the time of the incident and the time the trial took place. He contended that the delay not only occasioned a failure of justice, but also might have resulted in the diminishing of the recollection of witnesses. It was argued

further that extra caution should have been taken before accepting the testimony of PW1 as being an accurate account of the circumstances obtaining on the material date.

Mr. Mganga did not support conviction. He pointed that the key witness, Anjelina John was 10 years or less when the incident occurred which would make her a child of tender years by then. When she testified, 10 years later, she was an adult. The learned State Attorney was of the opinion that the trial judge failed to address herself to the effect of the long period of time that had passed between the time of the incident and the trial. He further submitted that the trial judge did not show that she appreciated the fact that the witness was barely 10 years old when the incident occurred.

In addition to the above, Mr. Mganga submitted that there were some discrepancies in the testimonies of the prosecution witnesses which ought to have been resolved in favour of the appellant.

The learned State Attorney was also of the view that the fact that the bottle with the poison that the appellant is said to have administered on the deceased was never seen and the fact that the chemist's

report did not show the amount of poison in the deceased's body and if it could have caused death threw some doubt on the case for the prosecution.

The key witness in this case was Anjelina John. The incident occurred some 10 years before she gave her testimony and it occurred at a time when she was barely 10 years old. If she had testified at the time when she was 10 years old, then being a child of tender age, a *voire dire* examination would have been conducted in terms of Section 127 (2) of the Evidence Act, 1967 to ascertain whether she was possessed of sufficient intelligence to justify the reception of her evidence, and understood the duty of telling the truth. When she testified she was already an adult and the question of a *voire dire* did not arise. We think, however, that there was a necessity of putting her testimony to serious test before acting on it especially considering the lapse of time that had passed between the incident and the trial. There is no doubt that passage of time sometimes diminishes recollection.

Further to that, as pointed out by Mr. Mganga, there were some discrepancies in the testimonies of the prosecution witnesses, which if they had been properly addressed, a benefit of doubt would have been accorded to the appellant. For example, PW2, Allen Mbelwa, claimed that Anjelina told him that her mother had been poisoned, however Anjelina stated in her testimony that she told Allen nothing. PW4 Dorcas Yohana, also stated that Anjelina told her that the appellant had given her mother some liquid, yet Anjelina stated in her testimony that she did not tell PW4 anything.

The testimony of PW1 should have been treated with extreme caution on another account. She claimed that she saw what took place in the room by peeping through a window. Mr. Madege, one of the assessors at the trial expressed uncertainty on the guilt of the appellant. Among the things he was doubtful about was PW1's description of how she saw her mother being given something. This is how the gentleman assessor put it;

"PW1's description of seeing her mother being given something are creating suspicion to me. It has not been said if the

window referred to was glass or what material. If the window is like windows we know one cannot see inside. It is not stated how much light there was inside for PW1 to see clearly".

We are satisfied that the doubt which the gentleman assessor expressed was justified. The learned trial judge failed to address herself to this aspect of the case. Had the learned judge properly addressed herself to the question whether PW1 in the circumstances of the case, was in a position to take an accurate account of the things taking place in that room, she would have probably found that the conditions obtaining at the scene raised some doubt as to whether PW1 was able to see exactly what took place in that room.

In his submission Mr. Mganga also pointed out that though the postmortem report gave the cause of death as suspected poisoning, the chemist's report did not show the amount of poison in the deceased's body and if it could have caused death. We agree with Mr. Mganga that any drug, even aspirin is a potential poison if taken in large amounts. The chemist, Gloria Machuve who testified as PW5 at

the trial informed the court that fatality of the chemical would depend on the amount taken and body weight. We are of the view that the prosecution case fell short of proving beyond reasonable doubt that the cause of death of the deceased was the intake of '**gramaxone**'.

The inconsistencies in the case for the prosecution, the fact that PW1 who gave her testimony at 20 years of age was barely 10 years old when the incident occurred, the fact that the conditions under which PW1 witnessed the incident were not favourable for certainty of occurrences, and the fact that it was not established that the amount of poison found in the deceased's body was enough to cause her death were all circumstances, which were sufficient to raise some doubt in the mind of the trial judge as to the guilt of the appellant. Such doubt should have been resolved in favour of the appellant.

Having considered the matter as above, we find merit in the appeal, which we hereby allow. The appellant is to be released from custody unless held therein for some lawful cause.

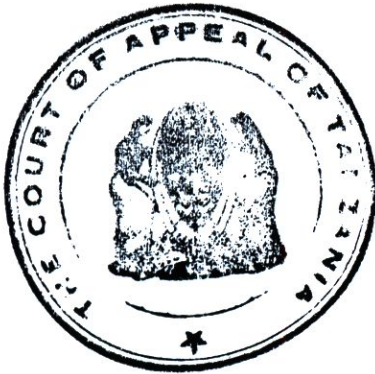
DATED at TANGA this 3rd day of July, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

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




(I. P. KITUSI)
DEPUTY REGISTRAR