

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



(CORAM: RAMADHANI, J.A., MROSO, J.A., And NSEKELA, J.A.)

CRIMINAL APPEAL NO. 74 OF 2002

**ANDREW THOMAS @ ZONDO APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

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

(Ihema, J.)

**dated the 12th day of December, 2001
in
HC Criminal Sessions Case No. 34 of 1996**

JUDGMENT OF THE COURT

MROSO, J.A.:

This is an appeal against conviction and a death sentence for murder by the High Court of Tanzania at Dar es Salaam. The appellant was said to have murdered one Mussa Mwarami on 24th December, 1994 at Kiwalani – Kigilagila in Ilala District, Dar es Salaam.

In this appeal the appellant was at first represented by Sabas Kiwango and Co. Advocates who filed the memorandum of appeal but because of certain problems regarding Mr. Kiwango the appeal

was argued by Mr. Kashumbugu, learned advocate. The Respondent Republic was represented by Ms Maganga, learned State Attorney.

The memorandum of appeal contains five grounds but Mr. Kashumbugu chose to argue the first ground only. In that ground the complaint is that the learned trial judge not only failed to examine and evaluate properly the adduced evidence, he also erred in finding that there was sufficient circumstantial evidence on which he could convict the appellant.

The trial High Court, Ihema, J., was clear in his judgment that the prosecution case was all circumstantial. On the basis of that evidence he found the charge of murder which the appellant faced was proved beyond a reasonable doubt. The evidence was provided by PW1, - Mwanahamisi Ali, a woman of about 40 years who then lived with the appellant, and PW4 – Ally Salum Machinja – a friend of the deceased and who was in the company of the deceased on the night when he was killed.

The appellant, the deceased and PW4 engaged in excavation of sand which, presumably, they sold to earn a living. According to

PW1, on the fateful day the appellant returned home at about 6 pm and complained that he had been beaten but did not disclose who did it. He asked for water so that he could take a wash but changed his mind and left home until 10 pm when he returned home again. This time he was accompanied by another person and, again, complained that he had been beaten. Half an hour later he went out yet again and the person who was with him carried a screwdriver. The appellant finally returned home at 2.00 hours and took a bath outside rather than in the bathroom. At that late hour he asked PW1 to wash his clothes. He left home early at 5.00 hours to go to work but at 9.00 hours he returned home and informed PW1 that a person he called Rasta was dead after being stabbed with a knife. He was arrested in connection with the death of the deceased about a week later.

PW4 said he was with the deceased at Gogo Hotel on the evening when the latter was killed. The appellant who was "in the company of his friends armed with a knife and screwdriver threatened" to kill PW4 and the deceased. The words which are quoted are not quite clear who was armed with a knife and

screwdriver or who threatened to kill the witness and the deceased. The trial judge in his judgment appears to have been able to ascertain that it was the appellant who had the screwdriver at Gogo Hotel. Also although the Postmortem Report merely stated that a "penetrating wound (on) left neck area (which went) through the soft tissue" was observed on the body of the deceased, the trial judge was able to know that the screwdriver which, according to him, the appellant was wielding, was "such instrument which was found to have been used in killing the deceased."

Ms Maganga supported the decision of the trial judge that the circumstances as given by PW1 and PW4 showed that it was the appellant and no one else who caused the death of the deceased.

We think, with respect, that the evidence of PW1 and PW4 at best merely succeeded to show that the appellant was a strong suspect in the murder of the deceased. It did not meet the test that it was irresistible in demonstrating that no one else could have murdered the deceased.

The appellant had not disclosed the person who had beaten him. If one says it was the deceased, that would be mere surmise. The person who PW1 saw with a screwdriver was not the appellant but the one who was with him. The choice by the appellant to wash himself outside rather than inside his bathroom is neither here nor there. The appellant may have decided to do so for a myriad of reasons. If he was trying to wash off blood stains on his body which he did not want PW1 to see, then why would he ask her to wash his clothes which would necessarily be blood stained if the body had blood stains which needed to be washed away?

The evidence of PW4 regarding the Gogo Hotel incident does not point at the appellant as the only person who could have killed the deceased.

As mentioned earlier in this judgment the evidence of PW4 regarding the person who held the screwdriver and the knife is ambiguous. It is capable of being understood that it was the appellant who had them. It is also capable of being understood that his friends had the knife and screwdriver, just like when the appellant

was at home, according to PW1, it was appellant's companion who had the screwdriver.

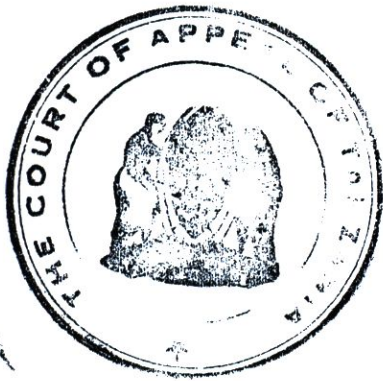
At Gogo Hotel, when PW4 and the deceased were threatened with death, PW4 ran away, leaving the deceased behind. It is not said in the evidence if the dead body of the deceased was later found at Gogo Hotel or away from it. Assuming it was found at Gogo Hotel the killing may have been done by the appellant or by his friends

The trial judge said "the accused and the deceased had a claim to settle thus establishing the motive behind the murder of the deceased." But it is by no means known who owed who the money. The evidence about the debt was given by PW4 who said "I know the deceased and accused owed each other some money. I do not know who owed what." It was only during cross-examination and after it was put to him that he may have been the one who killed the deceased when PW4 said - "It is not true that I killed Mussa Mwarami." So, it would appear that to save himself from incrimination, PW4 had second thoughts and imputed a motive on appellant by now claiming that it was the deceased who was indebted to the appellant.

We are satisfied that the inculpatory facts against the appellant were equivocal and, therefore, insufficient to found a conviction for murder against him. Had the trial judge considered the evidence critically he would not have convicted the appellant of murder as he did.

We, therefore, allow the appeal by quashing the conviction and setting aside the sentence of death. The appellant is to be set free forthwith unless held for some other lawful cause.

DATED at DAR ES SALAAM this 17th day of October, 2005.



A.S.L. RAMADHANI
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

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

(S. A. N. WAMBURA)
SENIOR DEPUTY REGISTRAR