

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



(CORAM: LUBUVA, J.A., MROSO, J.A., And RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 194 OF 2004

MARTIN MANGUKU APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction of the High
Court of Tanzania at Tabora)**

(Mwita, J.)

**dated the 7th day of November, 2003
in
Criminal Sessions Case No. 10 of 1993**

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JUDGMENT OF THE COURT**

28 February & 16 March 2007

MROSO, J.A.:

A woman, Koleta Thadeo, and her young child, Lucia Martin, met violent death together during the night of 6th October, 1991. The husband of the woman, Martin Manguku, was believed to have murdered them. So, he was arrested, prosecuted and convicted for

the murders. He was sentenced to the mandatory death sentence. He was convinced, however, that the law went for the wrong person and has sought to vindicate himself by appealing to this Court. His advocates, Kabonde and Magoiga Law Firm (Advocates), filed for him six grounds of appeal. At the hearing of the appeal Mr. Kabonde, learned advocate from the Law firm, appeared for him. The respondent Republic was represented by Mr. Rweyongeza, learned State Attorney.

In urging the appeal Mr. Kabonde abandoned the second ground and dealt with the remaining five grounds. He addressed the Court on each of those grounds. But before allowing Mr. Kabonde to take us through these grounds of appeal, it may be helpful to give a resumé of the evidence which led to the appellant being convicted for the double murders.

One Bombo Nyamweri, PW1, claimed in his evidence that at about 9 p.m. on 6th October, 1991 he and one Emmanuel were going home when they met the appellant who was with his wife – the deceased, and his child, the second deceased. The appellant greeted

Bombo and Emmanuel and the two proceeded to their respective homes. The appellant and Bombo were familiar with each other. That was the last time the appellant's wife and child were seen alive. The following day the bodies of the appellant's wife and child were seen in a field about 200 paces from where Bombo (PW1) claimed to have met the appellant and his family the previous night.

A ten-cell leader and neighbour of the appellant, one Ramadhani Tofiki – PW2 – claimed he saw the police at the home of the appellant and went there. That was on 12/10/1991. He claimed he heard the appellant say in the presence of the police - *"the knife I used to slaughter the deceased is inside"* and then produced from his house a knife with a white handle. The appellant further allegedly said he had washed off blood from the knife. The police were said by the witness to have seized the appellant's clothes which were stained with blood.

A Detective Station Sergeant Raphael Kitambala – PW3 – who was the investigating officer, visited the scene where the dead bodies lay. That was on the day after the killings. The place, a cassava

field, was about 50 to 60 paces from the home of the appellant and that that was the place where the killing was done. The deceased wife had four "knife wounds" and the deceased child had its throat cut. About 70 paces away from that scene PW3 claimed he saw a bloody knife which had been buried with its tip facing upwards. This witness also said he took a caution statement from the appellant on that same day, 7/10/1991, and that the appellant denied to have killed his wife and child. In another statement which PW3 took from the appellant he was then said to have admitted killing the two deceased persons. Apparently, in this later statement caution was not administered on the appellant. When objection was raised, PW3 retracted his intention to tender it as evidence.

This witness also said in his evidence that when he went to the house of the appellant and Tofiki (PW2) was present, the appellant produced a knife with a white handle and said he had used the knife to "slaughter" the deceased persons. Appellant's jacket and sandals both of which were said "to have blood" were some of the things which were seized from appellant's house. This witness said in his evidence – "*At the scene there was blood*". He meant in the cassava

shamba. Then he said again, referring to the house of the deceased, *"There was blood in the accused's home"*. He did not elaborate on whether in either place there was a lot of blood or just a few drops of blood.

Apparently, the bloody knife which was found in the field, appellant's jacket, sandals, blood sample taken from one of the deceased (not indicated which of the two deceased), were some of the things which were taken to the Government Chemist for scientific opinion. Appellant's jacket was found to have no blood stains on it; the knife had human blood of unknown blood group; one of two pairs of sandals was found to have blood of group 'O' type and the blood sample alleged to have been taken from one of the deceased persons was found to be of group 'O'. But appellant's sandals had group 'O' blood stains. Apparently, according to the Government Chemist's report, Exhibit 'D' which was tendered in evidence by a Dr. Magembe (PW5), no blood sample was taken from the appellant for chemical analysis. But PW6 – Abenja Paulo, a Health Laboratory technician, took blood samples from the appellant and on analysis found it to

belong to group 'A'. The report on appellant's blood group was tendered in evidence as Exh. 'E'.

In his defence before the trial court the appellant denied killing his wife and daughter. He admitted drinking *pombe* with his wife on the fateful night but denied going home with her and their daughter. He said that as his late wife was engaged in the petty business of selling fish at pombe shops they parted company when she went to other pombe shops to sell fish and he went to a different pombe shop for more drinks. He returned home without his wife and daughter and until the following morning they had not returned home. It was not unusual for the wife to spend nights at the home of one Agnes if it was too late for her to return home. But when on the following morning his brother in law came to tell him his wife and daughter had been killed he went to make a report to the police and that was when he was arrested. He said no sandals belonging to the deceased wife were found in his house but they were found at the scene where the dead bodies lay.

It is queried in the first ground of appeal whether PW1 really identified the person he claimed was the appellant on the fateful night and whether PW3 corroborated PW1 on that evidence. Mr. Kabonde argued the trial judge erred in believing that the evidence of PW1 (Bombo) was corroborated by PW3 – Detective Station Sergeant Raphael.

Mr. Rweyongeza conceded that PW3 did not corroborate the evidence of PW1 on his claim that he met the appellant accompanied by the two deceased persons before they were killed on the same night.

The trial court had said that because of moonlight PW1 who was quite familiar with the appellant recognized him. But the learned judge proceeded to say –

“Where identification is done under unfavourable conditions corroboration is required before such evidence can be acted upon. In the instant case corroborative evidence is to be found in the testimony by PW3”

Apparently, the learned judge found that conditions for reliable identification did not obtain. That was why he looked for corroborative evidence and believed he found it in the testimony of PW3. But following the position which the learned State Attorney took regarding the evidence of PW3, that it did not corroborate PW1, the doubt which the trial judge had, that the conditions for reliable identification were unfavourable, remained.

After the second ground of appeal was abandoned, Mr. Kabonde argued the third ground, that the trial judge misdirected himself in law when he believed that the oral statement which the appellant was alleged to have made before PW2 and PW3 amounted to a voluntary confession. It is Mr. Kabonde's argument that nowhere did the appellant confess to murdering the two deceased persons. The statement imputed to the appellant that he said in the presence of PW2 and PW3 that the knife with a white handle which was produced from under the bed was "the knife I used to slaughter the deceased" could not be voluntary. He had been under police custody from 7th October, 1991 till 12/10/1991, which was six days. A ten-cell leader had been called and other people were also present.

In such circumstances the appellant could not be said to have been a free agent. Therefore, such piece of evidence should not have been admitted.

Mr. Rweyongeza countered that the appellant made no claims that he had been tortured or forced in any way to make that statement and that a person could make a confession before or in the presence of civilians. He cited the case **The DPP v. Nuru Mohamed Gulamrasul**, [1988] TLR 82 as authority.

We think the issue posed here is not that a suspect could not make a confession before or to civilians. Rather the issue is whether the appellant was a free agent when he said the words imputed to him. As Mr. Kabonde argued, the appellant had been in police custody for six days. There is no explanation from the police why they kept him in police custody for all those six days without taking him to court. Section 32 (2) of the Criminal Procedure Act, 1985 requires that where a person has been taken into custody without a warrant for an offence punishable with death, he shall be brought to court as soon as practicable. It is noted that in the case of other

offences, such a person must be taken to court within twenty four hours. It is appreciated that offences which are punishable with death are more serious and the police may need more time to make basic investigations before taking the suspect to court, hence the leeway that the police will take such a suspect to court within reasonable time. "Reasonable time" will depend on the circumstances of each individual case.

In the case under discussion, even in those six days the appellant had not been taken to court. In the absence of acceptable reasons for keeping the appellant in custody for the six days up to the time he made the statement about the knife it must be taken that the police were holding the appellant unlawfully in custody. It does not need extra-ordinary thinking to know that the appellant must have been under very stressful condition. It will be recalled that PW3 said that when on 7/10/1991 he took a statement from the appellant, he denied to have killed the two deceased persons. Why would he suddenly say on 12/10/1991 that he used the knife found in his house to kill the deceased unless some kind of undue influence was used to induce the making of such a statement.

On 12/10/1991 when the appellant made the admission of killing there was a whole array of police officers present, the Regional Crime Officer (RCO), the Officer Commanding District (OCD), the officer commanding CID in the district "and other police officer" of unknown rank or description. No caution was administered on the appellant before he made the incriminating statement. We agree with Mr. Kabonde and we are of the considered opinion that the appellant was not a free agent at the time he made the impugned statement on 12/10/1991. That statement ought not to have been used as evidence against the appellant.

There is another reason in our view why we consider the appellant's statement about the knife with a white handle of doubtful truthfulness. The impression being created is that the appellant killed his wife and child in the house. That was why blood stained sandals alleged to belong to the deceased wife and her skirt which was thought to be stained with her blood were among the things which were taken from the house and taken to the Government Chemist. However, it must not be forgotten that in the cassava field near where the dead bodies were found a bloodied knife was found

buried in the ground with its sharp tip protruding and facing upwards. Was that knife used in the killing of the deceased persons? In other words, what explanation did the prosecution have about that knife? Was it proper for the prosecution and the trial court to gloss over that significant evidence by conveniently avoiding to give explanation regarding it. When this Court asked Mr. Rweyongeza about the relevance or otherwise of the knife in the cassava field, he was candid enough to say there was no explanation regarding it.

With respect, there are still some important unanswered questions, first whether in fact it was known with assurance who killed the deceased persons or even exactly where the killing was committed. There is no assurance that the statement by the appellant that he used the small knife with a white handle which was picked from under the bed was voluntary and true. If it was the appellant who killed the deceased persons using the knife found in the house, then who used the knife found in the cassava field? Did the appellant use both knives? If so, why would he confess in respect of a knife which had no telltale marks and leave the knife with blood stains in the field?

The post-mortem examination reports on the wife of the appellant and also the one on the infant girl both show that there were cut wounds through the neck involving the oesophagus and the carotid artery and the trachea. Both died from bleeding. Surely in such slaughter blood would have gushed out heavily staining the clothes of the appellant and flooding the floor. But there was no such evidence. Appellant's jacket which was believed to have blood stains was found by the Government Chemist to have had no blood stains at all. Even the evidence of PW3 that there was blood in the house did not give the impression that a person or persons had bled to death in the house.

We think those are some of the things to which the trial court should have given very careful consideration instead of jumping into hasty conclusion that the appellant had confessed to murdering his wife and infant daughter.

With respect, with such circumstances and questions begging for answers the trial court should have found that the guilt of the appellant had not been demonstrated beyond a reasonable doubt and should have acquitted him.

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

DATED AT MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

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



(S. M. ROMANYIKA)
DEPUTY REGISTRAR