IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KISANGA, J.A., MNZAVAS, J.A., And MFALILA, J.A.)

CRIMINAL APPEAL NO. 28 OF 1993

BETWEEN

AUGUST MAHIYO. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the conviction and Sentence of the High Court of Tanzania at Arusha)

(Munuo, J.)

dated the 9th day of August, 1991

in

Criminal Sessions Case No. 57 of 1989

JUDGMENT OF THE COURT

MNZAVAS, J.A.:

The appellant, Augusti Mahiyo, was charged with and convicted of murder and condemned to death by the High Court, (Munuo, J.), sitting at Moshi on 9/8/91.

Dissatisfied with the decision of the trial Court he has appealed to this Court. It was the prosecution case that the appellant on or about the 6th day of June, 1988 at Keni Mengeni, Rombo district, Kilimanjaro region, with malice aforethought killed one, Gudila w/o August, his wife.

In support of the prosecution case a relative of the appellant, Justice Ndemasa, PW.2, testified in the lower Court that on the fateful evening one, Jamila August, PW.1, daughter of the appellant, met him as he was returning home from a cooperative society (KNCU) and told him that her mother had sent her to call him because her parents were quarreling. He proceeded to deceased's house but found the kitchen padlocked with a "viro" lock. The door to the main house

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was also locked. As no one responded to his call of "hodi" he returned home. At about 9 a.m. on the same evening one, Focas, came to his house and told him that the deceased had fallen down and collapsed. The witness hurriedly proceeded to deceased's house where he met her husband, the appellant. On asking the appellant what had happened the appellant is said to have told him that his wife who was expectant had suddenly collapsed and that he had massaged her in an attempt to revive her to no avail and that the deceased died.

In the morning relatives and neighbours of the appellant gathered to the bereaved house and suggested that the deceased should not be buried before post-mortem examination was performed to find out the cause of death. The witness told the trial Court that at that juncture the appellant changed his story and told the gathering that the deceased had hanged herself in the kitchen; and showed to them a sweater which the deceased allegedly used in hanging herself.

Deceased's death was reported to the police and after investigations the appellant was charged with murder; and, after hearing evidence in support of the charge and appellant's defence that the deceased had hanged herself, the learned trial judge was satisfied that the charge of murder had been proved beyond reasonable doubt and proceeded to convict the appellant of the offence as charged.

Before us the appellant was represented by Mr. Makange, learned Counsel, while Mrs. Lyimo, learned Senior State Attorney appeared for the Republic.

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Mr. Makange, submitted that the learned judge did not consider appellant's defence that he was not at home at the time the deceased met her death and that he should have believed appellant's defence that it was when he returned home when he discovered that his wife had hanged herself. The learned defence Counsel finally argued that the alleged inconsistencies in appellant's story regarding the cause of deceased's death did not necessarily point to the guilt of the appellant.

In rebuttal Mrs. Lyimo supported the conviction on the ground that the circumstantial evidence against the appellant irresistibly pointed to the guilt of the appellant. In support of her submission regarding appellant's inconsistent stories the Court was referred to the evidence of PW.2, PW.3, PW.4 and PW.5.

We have considered the matter carefully; and, in our own view of the evidence and the submissions by learned Counsel, we are satisfied that the learned trial judge's finding that the appellant murdered his wife was amply warranted by the evidence.

When asked by his relative and neighbour, (PW.2), as to what had caused deceased's death he initially said that the deceased suddenly fell down and died. On suggestions by neighbours and relatives who had assemblied to the breaved home-stead that the deceased should not be buried till a post-mortem examination was performed to established deceased's cause of death the appellant prevaricated; changed his story and said that the deceased had hanged herself. That he prevaricated a good deal is evident from the testimony of not lesser a person than his close relative PW.2.

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Not to mention the evidence of PW.3, PW.4 and PW.5, the police constable.

Appellant's defence that the deceased had committed suicide by hanging was proved to be bogus by the neighbours who saw the place the appellant alleged that the deceased had hanged herself. In respect of this defence PW.6 Dt/Corp Jacob, told the Court in his evidence inter alia:

> ... "The accused told me his wife had stomach pains so she committed suicide. The accused showed me a small kitchen where she allegedly hanged herself. I surveyed the place and the height was just 5 ft. while the body appeared taller. ... I measured the height of the deceased; it measured 5 ft. 6".

On being cross-examined by Mr. Lyasenga, learned Counsel who represented the appellant in the High Court; the witness said inter alia:

> "The body was 5' 6" while the height at the hanging place was 5 ft.".

Medical report - exhibit P1 was to the effect that the deceased had injuries on her neck and that the cause of death was "severe assault".

Dealing with the question of circumstantial evidence the Eastern African Court of Appeal had this to say in RAFAEL MUMYA v R (1953) 20 EACA 226:

> "The force of suspicious circumstances is augmented whenever the person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation if disapproved, become of substantive inculpatory effect".

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Looking at the totality of the evidence we are satisfied in our own minds that the circumstantial evidence pointed irresistibly to the guilt of the appellant. On the evidence the learned trial judge had no alternative but to find that the prosecution had proved the charge against the appellant beyond reasonable doubt. The appeal is devoid of merit and we accordingly dismiss it.

DATED at ARUSHA this 21st day of May, 1993.

R.H. KISANGA
JUSTICE OF APPEAL

N.S. MFZAVAS
JUSTICE OF APPEAL

L.M. MPALILA
JUSTICE OF APPEAL.

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

(M.S. SAIGALI)
DEPUTY REGISTRAR