IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: RAMADHANI, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A

CRIMINAL APPEAL NO. 30 OF 1996

BETWEEN

EFRAIM LUTAMBI. . . . . APPELLANT

AND

THE REPUBLIC. . . . . RESPONDENT

(Appeal from the Conviction and Sentence of the High Court of Tanzania at Iringa)

(Kyando, J.)

dated the 27th day of February, 1995

in

Criminal Sessions Case No. 43 of 1993

JUDGMENT OF THE COURT

SAMATTA, J.A.:

This is an appeal from a judgment of the High Court (Kyando, J.) sitting at Iringa in its criminal jurisdiction. The Court convicted the appellant, Ephraim Lutambi, of the murder of Lodina d/o Kisangaika (the deceased) on November 26, 1991, at Mundwe Village in Mufindi District, and sentenced him to death.

The trial in this case was unusually short. There was only one witness on each side, a police investigator, D/Cpl. Mpenzwa (PW.1), and the appellant. As required by the provisions of s.192 of the Criminal Procedure Act, 1985 ("the Act"), the Court conducted a preliminary hearing. Mr. Shio, Senior State Attorney, outlined the following facts of the case against the appellant:

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"On 26/11/91 at Nundwe in Mufindi District the accused killed Lodina d/o Kisangaika. The accused confessed to the killing. He stated that he hacked her with a hoe and bill hook. He believed that the family of the deceased had killed his child through witchcraft. The cause of death was brain damage. The accused made statements to the police and J.P."

The appellant's response to that outline of facts was:

" All the facts are true but I did not intend to kill her."

The learned judge (Mapigano, J.) then prepared a memorandum of the undisputed matters. It reads as follows:

"Matters not in Dispute

1. The accused killed the woman Lodina d/o Kisangaika on 26/11/91.

2. He used a hoe and bill-hook to inflict the fatal blows.

3. Cause of death was brain damage.

4. Accused believed that the family of the deceased had killed his child through witchcraft.

5. Accused made statements to the police and J.P.

6. Contents of the autopsy report.

The appellant as well as both counsel appended their signatures to the Memorandum. Soon after this had been done, Mr. Shio tendered the postmortem report, extra-judicial and cautioned statements. The documents were put in and

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marked Exhibits P1, P2 and P3 respectively. This was followed by an order by the Court that the trial would commence on a date to be fixed by the District Registrar. The record of the case does not contain any statement by the Court showing that the contents of the Memorandum were read over and explained to the appellant as required by subsection (3) of s.192 of the Act.

The evidence of D/Cpl. Mpenzwa was as follows: on November 30, 1991, following a report of murder which been received at the Mafinga Police Station, he visited Nundwe Village. He was accompanied by one Dr. Mung'ong'o. In a bush in the village he saw a dead body which was identified as that of the deceased. The body had fresh wounds, on the head and neck. Lying next to it was a blood-stained bill-hook. The Village Chairman handed over to him a hoe which was alleged to have been used in killing the deceased. Dr. Mung'ong'o performed a postmortem on the dead body on the spot. When the policeman returned to the police station he discovered that the appellant had made a cautioned statement (Exh. P3) to one Insp. Paul Leonard. Later the witness escorted the appellant to a Justice of the Peace before whom he (the appellant) made Exh. P2.

On behalf of the appellant, Mr. Mkumbe, learned advocat has impeached the decision of the learned trial judge on the following grounds:

1. [T]he learned trial judge erred in law and fact in basing the conviction of the appellant on the matters not in dispute at

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the Preliminary Hearing when the provisions of s.192 (3) of the Criminal Procedure Act were not complied with.

2. /T/he exhibits P2 and P3 (i.e. the extra-judicial statement and cautioned statement respectively)were admitted in evidence contrary to procedure as provided in s.34 B (2) (c), (d) and (e) of the Tanzania Evidence Act as well as s.192 (3) of the CPA much to the prejudice of the appellant.

3. /T/he appellant should have been convicted of manslaughter in the circumstances of this case.

The learned advocate argued the first and second grounds of appeal together. We shall also deal with those grounds in the same way. The learned advocate submitted that, since there is nowhere on the record of the case where it is indicated that the Memorandum of Undisputed Matters was read over and explained to the appellant, the inescapable inference is that the requirements of the mandatory provisions of s.192 (3) of the Act were not complied with. That being so, the learned advocate went on to submit, the result of the non-compliance is that no fact or document agreed or admitted in the Memorandum could be deemed duly proved under the provisions of subsection (4) of the section. The cornerstone of the latter part of the learned advocate's argument was Mt. 7479 Sgt. Benjamin Holela v Republic /1992/ T.L.R. 121, a case in which it was held

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by this Court, among other things, that, firstly, subsection (3) of the section imposes a mandatory duty that the contents of the memorandum must be read and explained to the accused, and, secondly, where the requirements of subsection (3) of the section were not complied with, the provisions of subsection (4) of the section cannot apply. With regard to Exhibits P2 and P3, Mr. Mkumbe contended that when those documents were tendered by the Senior State Attorney the preliminary hearing had already been concluded and, therefore, at that stage they could properly be tendered before the Court only by those who recorded them, namely, the Justice of the Peace and Inspector Leonard. The learned advocate concluded his submission on the point by contending that, PW.1 having not been the recorder of those statements, his evidence relating to them was hearsay, making the statements inadmissible in evidence unless the provisions of s.34 B (2) (c), (d) and (e) of the Evidence Act, 1967, were brought into play, a step which was not taken.

We have given the most earnest consideration to counsel's rival arguments, and in the end we are of the opinion that Mr. Mkumbe's argument that the decision in Holela's case supra governs this case is incontrovertible. Contrary to Mr. Sengwaji's submission, there is nothing on the record of the case from which it can be irresistibly inferred that the Memorandum of Disputed Matters was read over and explained to the appellant. Before the accused and counsel are asked to append their signatures to a memorandum of undisputed matters the contents of the document should be read over and explained to the accused.

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This is important because, as was pointed out in Holela's case, it is the accused himself who must agree that he admits or does not dispute the listed matters. Unlike in Holela's case supra there was another serious irregularity in relation to the provisions of s.192 of the Act. While there was a reference in the Memorandum to the making of the cautioned and extra-judicial statements by the appellant, those documents were not incorporated into the Memorandum, with the result that while the making of those statements was, subject to the mandatory requirements of subsection (3) of s.192 of the Act, to be deemed, under subsection (4) of the section, to have been duly proved, the contents of the statements required to be proved in the ordinary manner. Since no such proof took place, we agree with Mr. Mkumbe that the two statements must be excluded from the case. Once that is done, it cannot be disputed that the appellant having introduced a defence of self-defence in his evidence, the remaining evidence cannot constitute a basis for holding that the appellant was criminally responsible for the deceased's death. The finding of the learned trial judge that the appellant's acts were unlawful cannot, therefore, be sustained. That opinion makes it unnecessary to consider the merits or otherwise of the third ground of appeal.

Before we consider what orders to make in this case, we wish to observe that the provisions of s.192 of the Act are very useful in the administration of criminal justice. They were intended by the legislature not only to reduce the costs of criminal trials in the country, but also to ensure that those trials are, without prejudice to the parties, conducted expeditiously. If the provisions are

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strictly complied with, there should occur no problems which this Court had to deal with in Holela's case supra or those we have had to deal with in the instant case. Any exhibits, including cautioned and extra-judicial statements, which are not in dispute should have them referred to and given exhibit numbers in the memorandum of undisputed matters. The contents of the memorandum, including the exhibited statements, if any, should be read over and explained to the accused (in a language he understands), and the fact that that has been done should be reflected on the record.

We have held that serious procedural irregularities occured at the beginning of the hearing of this case. What order or orders, then, should be made in the case? We have anxiously and carefully considered that question, and, in the upshot, we are of the settled opinion that, notwithstanding the fact that the appellant has been in custody for a very long period in connection with the charge he faced, the nature of the case compels us to order a retrial.

For the foregoing reasons, we allow the appeal, quash the conviction for murder and set aside the sentence of death. We order that the appellant be re-tried as expeditiously as possible by another judge and a new set of assessors.

DATED at DAR ES SALAAM this 11th day of June, 1999.

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A.S.L. RUHADHANI
JUSTICE OF APPEAL

B.A. SHATTA
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. KWARIJA)
DEPUTY REGISTRAR