IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MASSATI, J.A.

CRIMINAL APPEAL NO. 63 OF 2007

ATHUMANI NDAGALA @ MIKINGAMO.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)
(Mihayo, J.)

Dated the 2nd day of June, 2004

in
Criminal Sessions Case No. 73 of 2003

JUDGMENT OF THE COURT

24th June, 2009 & 2nd July, 2009
RUTAKANGWA, J.A:.

In Criminal Sessions case No. 73 of 2003, in the High Court at Dar es Salaam, the appellant stood charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002. He was being accused of murdering one Selemani Halidi, henceforth the deceased, on 27th September, 1998 at Visezi Village in Bagamoyo

District. He was, at the end of the day, convicted as charged. Hence this appeal.

In the determination of this appeal, we have found it unnecessary to detail the alleged full facts upon which the arraignment and subsequent conviction of the appellant were predicated. The reasons justifying this course will soon become apparent.

All the same, suffice it to say here that it was claimed that on the evening of 27th September, 1998 a "Maasai man" had called at the business stall of one Asha Juma Kitala and demanded to be given Tshs 100/=. Asha was unable to help him. Almost at the same time the deceased also arrived at the stall intending to buy cigarettes. The Maasai made a similar request to the deceased which the latter turned down. Thereafter the deceased and the Maasai left the stall. Shortly later, the deceased was attacked and stabbed with a "sime", on the upper right arm. The assailant then disappeared. The deceased died subsequently between 27th and 29th September, 1998. A Clinical Officer stationed at Chalinze Health Centre performed an

autopsy on 29th September. He opined the cause of death to be severe bleeding. The people who allegedly witnessed the incident told the police that the assailant was the appellant. The appellant was apprehended and arraigned accordingly.

The appellant was formally arraigned in the trial High Court on 28th February, 2001. A plea of not guilty was entered and a preliminary hearing, in accordance with the requirements of section 192 of the Criminal Procedure Act, Cap 20 R.E. 2002 (henceforth the Act) followed immediately.

The proceedings at the preliminary hearing were as follows:

> ***"PRELIMINARY HEARING***
> ***Facts by the State Attorney***
>
> *"The accused is charged with murder of Selemani Halid on 22.09.98 (sic) at Visezi Village, Bagamoyo District, Coast Region. On the date of the commission of the offence, the deceased went to a shop belonging to Asha Juma Kitaio. The deceased met the accused at the shop. The accused requested the deceased to give him one hundred shillings. The deceased refused to give him the one hundred shillings. The accused then threatened to do a bad thing to the deceased. There was an exchange of words between them*

and then later the accused stabbed the deceased with a knife. The deceased got first aid and deceased was later taken to hospital at Chalinze but he died on 27/09/98. Post mortem Examination was done and a report issued which showed that the deceased died of haemorrhage occasioned by a big wound on his upper side of his arm. I tender the post mortem Examination Report as exhibit.

***Miss Gama** – I have no objection t o the admissibility of the report.*

A sketch plan was also prepared on 27/09/98. I tender the same as exhibit.

***Miss Gama** – No objection to admissibility.*

***State Attorney continued** – The accused was later arrested and charged with murder. That is all.*

***Defence Council (sic) – Miss Gama –** Your Ladyship Judge, we have no dispute that the deceased Selemani Halid died on 27/09/98. However we dispute that it is the accused who caused the death of the deceased. That is all.*

Memorandum of Matters not in dispute.

1. Seleman Halid is dead and he died on 27.09.98.

Signed accused

Signed State Attorney

Signed Defence Council (sic)

Signed Judge

28.02.2001

Exhibits admitted

1. Post mortem Examination – Exh. P. 1

2. Sketch Plan – Exh P2

[Then a list of 8 prosecution witnesses follows].

Order: Trial on a session to be fixed later by the Registrar. In the meantime the accused is remanded in custody till then.

Sgn. Judge
28.02.2001"

It is worth noting at this stage that the preliminary hearing was, with due respect, not conducted in accordance with the mandatory provisions of section 192 (3) and (4) of the Act and Rule 6 of the Accelerated Trial and Disposal of Cases Rules, 1988. To facilitate an easy appreciation of our assertion, we have found it apposite to reproduce these provisions here. They provide as follows:-

"(3) At the conclusion of a preliminary hearing held under this section, the court ***shall*** *prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed .*

(4) ***Any fact or document admitted or agreed*** *(whether such fact or document is mentioned in the summary of the evidence* ***shall be deemed to have been duly proved;*****.....***"*

[Emphasis is ours.]

Rule 6 of the Rules reads thus:-

> *"When the facts of the case are read and explained to the accused, the Court **shall** ask him to state which of those facts he admits and the trial magistrate or judge shall record the same".*

That the steps and/or procedure demanded by these provisions must be strictly followed, was underscored by this Court in the case of ***MT.7479 SGT. BENJAMIN HOLELA v. R*** [1992] T.L.R. 121. The Court said thus at page 123:

> *"It is obvious from those provisions that the contents of the memorandum have to be read and explained to the accused, and **the duty is mandatory**. The record of the trial proceedings however does not indicate compliance with this duty. We take it that there was non – compliance"*

The Court went on to hold that where there is such "non – compliance", the provisions of the sub – section do not apply.

Regarding the application of Rule 6, the Court, at page 124, held:-

> *"It is apparent that a statement by counsel or advocate for the accused to the effect that the matters raised are admitted is not sufficient under the law.* ***It is the accused himself who must indicate what matters he or she admits."***
> *[Emphasis is ours].*

Concerning documents, the Court said:-

> *"In cases where the matters comprise documents, the contents of the documents must be read and explained to the accused, in the event of a sketch plan or such like documents,* ***the sketch plan must be explained and shown to the accused*** *to ensure that he or she is in a position to give an informed response" (ibid). [Emphasis is ours].*

This stance was echoed by the Court in the case of ***EFRAIM LUTAMBI v. R,*** Criminal Appeal No. 30 of 1996 (unreported) and is now settled law.

Coming back to the preliminary hearing conducted in this case, it is evident from the extract of the proceedings that the appellant, only participated by appending his signature on the so called ***"memorandum of matters not in dispute,"*** the contents of which were not even read and explained to him. We wish to make it

absolutely clear that the rationale behind the Court's insistence on strict compliance with all these statutory provisions is to ensure a fair trial to the accused because he or she is the one on trial and not his or her advocate. An accused, therefore, cannot be bound by the admissions of his advocate at the preliminary hearing who, as was the case here, may not be the one appearing at the main trial.

Not by a strange twist of fate, the main trial of the appellant was conducted by another judge. The Republic and appellant were represented by a new set of counsel. Counting on the "exhibits" tendered in evidence at the preliminary hearing, the Republic called only four out of the earlier listed eight witnesses. These were Zulfa Mkomola (PW1), Imani Jayeka (PW2), No. B 9418 D/Sgt. Abdalla (PW3) and Kambi S. Kambi (PW4). Although it was PW3 who prepared exhibit P2, all he said on it in his evidence was:-

> *".....I drew a sketch and took some of the statements....."*

Worse still, the same was not shown to him (PW3) even for the purposes of identification.

Furthermore, the prosecuting State Attorney tendered Asha's statement to the Police in evidence as exhibit P4 under section 34 B (1) of the Evidence Act, Cap 6 R.E. 2002 asserting that Asha was dead. Then the prosecution rested its case. This was on 2nd March, 2004.

After the closing of the prosecution case, the learned trial judge adjourned the case for "Hearing on 3/3/2004 at 1.00 pm." The appellant was remanded in custody. On the adjourned date the learned judge, without informing the appellant of his right "to call witnesses in his defence" under section 293(2) of the Act, called upon him to enter on his defence. After testifying in person, the trial judge closed the defence case. The trial was adjourned to 8th March, 2004 for submissions, and judgment was delivered on 2nd June, 2004 wherein the appellant was convicted as charged.

Before us, the appellant was represented by Mr. Samson Mbamba, learned advocate. For the respondent Republic, Mr. Edgar Luoga, learned State Attorney appeared.

Mr. Mbamba had two grounds of complaint against the judgment of the trial High Court. The thrust of the first ground of appeal was that the learned trial judge erred in law and on the facts in grounding a conviction for murder on the contradictory evidence of PW1, and PW4 and exhibit P4 which was improperly admitted in evidence.

It was the submission of Mr. Mbamba that PW1, and PW4 gave contradictory evidence which dented their credibility. More tellingly, he contended, that the trial judge erred in law in relying on exhibit P4 (Asha's statement) which he had irregularly admitted as evidence without the mandatory provisions of section 34 B (1) of the Evidence Act being complied with. He also argued that the appellant was not only denied his right to call witnesses, but further that even the cause of death of the deceased was not proved at all as the report on post-mortem examination, relied on by the trial judge, was improperly admitted in evidence. He accordingly urged us to nullify the appellant's trial, quash the conviction and set aside the death sentence.

At first, Mr. Luoga was inclined to support the conviction of the appellant. However, after addressing his mind to the provisions of section 192 (3) and (4) of the Act, Rule 6 of the Rules and section 34 B (1) and (2) of the Evidence, he became convinced that exhibits P1,P2 and P4 were improperly admitted in evidence. Furthermore, he was satisfied that the appellant was not afforded opportunity to call witnesses contrary to the mandatory provisions of section 293 (2) of the Act. The cumulative effect of these patent irregularities, he said, was to vitiate the entire trial. He accordingly pressed us to declare the appellant's trial a nullity and order a re – trial.

We have applied our minds to these glaring irregularities at the trial of the appellant. We are of the firm view that having regard to the adversarial nature of our criminal justice system wherein equality of rights must be steadfastly observed and enforced, these irregularities are incurable. This stance is reinforced by the obvious fact that in finding the appellant guilty as charged the learned trial judge was very much influenced by the contents of exhibits P1 and P4. The former was relied on heavily in establishing the cause of death and malice aforethought. The latter was given prominence in

his attempts to establish that the assailant was the appellant, as he had claimed in his defence that he never went to Asha's stall on 27/09/1998.

We have already shown in sufficient details that the Report on Post – Mortem Examination (exhibit P1) was not properly admitted during the preliminary hearing. On the basis of settled law, we discount this piece of evidence as well as the sketch map (exhibit P2).

As we alluded to above, the prosecuting Sate Attorney casually told the learned trial judge that Asha was dead. He accordingly tendered her statement, recorded by an unidentified police officer on 28th September, 1998 in evidence (exhibit P4). Both counsel in this appeal are as one that this procedure was highly irregular. It violated the mandatory provisions of section 34 B (1) and (2) of the Evidence Act, they stressed. They, therefore, urged us to exclude exhibit P4 from the case.

On our part, we are in agreement with both counsel that exhibit P4 was admitted in evidence by the trial judge without the

conditions precedent set out in section 34 B (2) (a), (b),(d) and (e) of the Evidence Act for its admission, being satisfied first. We accordingly expunge it from the evidence.

The exclusion of the exhibits P1 and P4 from the case, in our considered opinion, cannot be said with certitude not to have adversely affected both parties to this appeal. This has, unfortunately, come about because of the serious procedural irregularities committed by the trial High Court. In the circumstances, given the nature of the case, the interests of justice demand that notwithstanding the fact that the appellant has been in custody for nearly eleven years now, a retrial be ordered. This Court has constistently subscribed to the holding in the case of **FATEHALI MANJI v. R** [1966] E.A.343 to the effect that:

> *"In general, a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

See for instance:-

(i) TWAHA s/o ALI (d) 5 OTHERS v. R, Criminal Appeal No.78 of 2004,

(ii) SULTAN MOHAMED v. R, Criminal Appeal No.176 of 2003, and

(iii) RAHIM MOHAMED v. R, Criminal Appeal No. 234 of 2004.

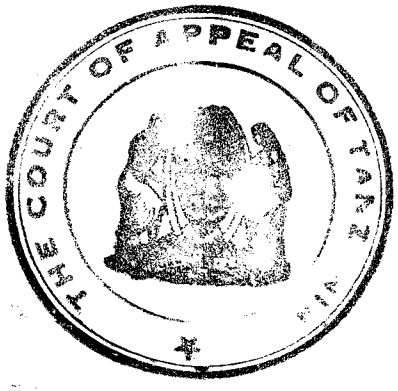
In this case, we are convinced the appellant's trial was defective for the reasons given above.

Before we conclude our discussion, however, we have two pertinent observations to make. ***One***, we are aware that it is trite law that failure to hear an accused and/or afford him opportunity to call witnesses fundamentally impairs his right to a fair trial. In appropriate cases, this might lead to a trial being nullified, as was indeed urged by both counsel in this appeal. But in view of the position we have already taken, we see no compelling reason to canvass this point further. ***Two,*** since the appellant never called any witness in his defence, in terms of sections 201 and 296 of the

Act, the Republic did not have a right of reply in the final submissions.

All said, we allow this appeal, quash the conviction of the appellant for murder and set aside the death sentence. We order a re-trial which must be conducted as expeditiously as possible. The re-trial should be before another judge and new assessors.

DATED at DAR ES SALAAM this 30th day of June, 2009.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

J. S. MGETTA
DEPUTY REGISTRAR