IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RAMADHANI, C.J.; KIMARO, J.A; And MANDIA, J.A.)

CRIMINAL APPEAL NO. 2 OF 2007
BETWEEN
FELISTA THOBIAS .....APPELLANT
AND
THE REPUBLIC..... RESPONDENT

(An Appeal from the Decision of the High Court of Tanzania, at Biharamulo)

(Mussa, J.)

dated the 4th day of December, 2006
in
Criminal Session Case No. 18 of 2003
.....

JUDGMENT OF THE COURT

11th October & 18th October, 2010

RAMADHANI, C. J.:

Michael Nduruse Kasigara (PW 1), was a widower who was living with his three children at Mkarahe Village, Ngara District, Kagera Region. On the night of 14th May, 2000, his house was set on fire but they managed to squeeze themselves out into safety.

Kaburo Michael (PW 2), the eldest of the three children, claimed that while she was about to sleep she heard someone striking a match stick. She peeped out and saw a person setting the house on fire. She shot into PW 1's room, woke him up and broke the news. PW 1 rushed out and forced an exit through a wall and they escaped.

PW 1 led the way out and was attacked by the appellant, Felista Thobias, with a panga and sustained a number of injuries. PW 2, likewise, said that as she followed her father carrying the last born, Iddi Michael, the deceased, they were both attacked by the appellant who snatched away the deceased from her and threw him into the gnawing fire. PW 2 went further that the appellant also attacked her younger sister, Edna, who was the last out of the house.

Both PW1 and PW 2 were able to identify the appellant because there was a brilliant moonlight and also the blaze from the burning house. Both witnesses also identified the son of the appellant, George Thobias, who was the third accused person and died in remand while awaiting trial. PW 2 alone implicated Paschal Emmanuel, who was the second accused person and was acquitted.

Both witnesses described the attire of the appellant. PW 1 said she had "a gown and covered herself with a kitenge that had greenish and grayish dots". PW 2 said it was "a coloured gown and wrapped herself in a kitenge that had greenish and grayish dots".

There were also PW 3, Godoleva Elias, and PW 4, Elisha Ernest. Both of them turned out at the scene of the calamity answering the alarm that was raised and found PWs 1 and 2 and the deceased already harmed. They did not see who the attackers were.

PW 3 said PW 2 told them that the appellant was their assailant but did not mention any other person. PW 3 said that PW1 was lying in pain and did not say anything. PW 4, on the other hand, said that both PW 1 and PW 2 mentioned the appellant as the assailant. PW 4 was also in the team which went to arrest the appellant whom they found standing in front of her door. The appellant was wearing her usual "coloured and dotted dress".

The appellant repeated in court, almost verbatim, what she wrote in a police cautioned statement taken on 16th May, about the incident on midnight of 14th May. In that statement she implicated her son, George, who had gone to tell her that he was going to destroy PW 1 because he

(George) was told by a local medicine man that PW 1 was bewitching George's wife. The appellant said that she warned George against what he intended to do. Then George left and at the dead of the night she heard the alarm from PW 1's homestead.

The learned trial judge (MUSSA, J.) disbelieved PW 2 regarding the identity of the second accused person and acquitted him. However, he imbibed hook, line and sinker the remainder of her testimony and that of PW 1 regarding the appellant and convicted her of murder sentencing her to death. MUSSA, J. disregarded completely the consistent story of the appellant that it was "unusual and fib".

This appeal is against that decision where the appellant was advocated for by Mr. Bernard M. J. Kabonde, learned counsel, while Mr. Edgar Luoga, learned Senior State Attorney, represented the respondent/Republic.

Mr. Kabonde had a memorandum of appeal with three grounds but started with his supplementary memorandum of appeal containing one ground that s. 192 of the Criminal Procedure Act, [Cap 20 RE 2002] was not complied with. Briefly that section provides for preliminary hearing by a trial court when there is a plea of not guilty.

There is an issue of whether or not s. 192 of the Criminal Procedure Act applies to the High Court. But that has been tackled before us in this session in another appeal of **Israel Misezero V. R.** Criminal Appeal No. 117 of 2006. By using prospective annulment we have preserved preliminary hearing done previously and, so, what happened in this appeal has been preserved.

The prosecutor is required to prepare, as clearly as possible, the facts of the case which shall be read to the accused and explained in a language she understands. After that the court is required to ask the accused person to state which of those facts she admits and which she contests. The answers are required to be recorded by the trial court. Mr. Kabonde pointed out that these steps outlined by The Accelerated Trial and Disposal of Cases Rules, GN. No. 192 of 1988, were not taken and that the show was between the learned Judge, the State Attorney and the defence counsel. The appellant was just asked to append her signature to what she had not been a party.

Mr. Luoga pointed at a typed written script of the facts prepared by the State Attorney at the trial which Mr. Kabonde conceded but argued that it was not signed. We were not referred to any provision requiring

be signed. So, we find that facts were given as required and were received by the court to form part of the record just as it was recorded.

There is now the issue of the appellant's participation. S. 192(2) is very clear that the court has a duty to explain the nature of preliminary hearing to an accused person who is not represented. This is what it says:

> In ascertaining such matters that are not in dispute the **court shall explain to an accused who is not represented by an advocate** about the nature and purpose of the preliminary hearing ... (Emphasis is ours.)

It is abundantly clear to us, therefore, that where an accused person is represented then it is the counsel's duty to explain things to the accused person. It is Rule 5 of The Accelerated Trial and Disposal of Cases Rules, 1988, which imposes a duty on the court regardless of whether or not an accused person is represented in the following terms:

> 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. (Emphasis is ours)

It is our considered opinion that the spirit of s. 192 is that a represented accused person shall be under the guidance of his advocate, so, in our considered opinion, an overlook of Rule 5, so long as it has not

occasioned injustice to the accused person should not be a reason to nullify proceedings.

We may point out that this Court held in **Kulwa s/o Mwakajape & Two Others v. R.** Criminal Appeal No. 35 of 2005 (unreported):

> Where it is shown that failure to hold a preliminary hearing did not result in a miscarriage of justice or caused delay in the trial or extra costs to the appellant, the proceedings are not vitiated.

In this appeal preliminary hearing was held but only that a detail under Rule 5 was overlooked. We, therefore, dismiss the supplementary ground of appeal.

As for the two remaining grounds they boil down to one thing and that is that the prosecution has failed to prove its case beyond reasonable doubt.

We disagree with Mr. Luoga, and, therefore, agree with Mr. Kabonde that there were serious contradictions in the prosecution witnesses. One, PW 2 was not credible especially with respect to the second accused person and the learned judge found her so when he said:

> That Kaburo [PW 2] made no mention of the second accused at first opportunity throws doubt on her account about seeing the second accused at the scene of the attack.

The learned judge believed her with respect to the identification of the appellant, and he was entitled to do so but that is if she was supported by PW 1 as we shall point out shortly.

Then, two, there is grave doubt on whether PW 1 mentioned the appellant at first available opportunity. While PW 3 said that PW 1 did not mention any person and that he was groaning with pain, PW 4 claimed that PW 1 mentioned the appellant. Now, who is telling the truth?

Apart from all that the court has to take into account all the evidence in a trial: that tendered by the prosecution and that by the defence. The appellant since her police statement said that it was her son George who did it. The appellant said that she was told by George himself. If the appellant had said this after George's death then one could say that she was taking advantage of that death to save her skin by passing the buck. But she said that two days after the incident and then she repeated it, almost verbatim, six years later in the court room.

The trial judge gave no weight to that piece of evidence. He said:

> The first accused's defence was unusual and a fib. It was remarkably out of the ordinary for the self proclaimed "spiritually born again" to take a passive and the devil-may-care attitude upon cognizance of a plan to commit a devilish crime. Her claim that George was clad in a kitenge and that

> PW 1 and PW 2 mistook him for her due to their resemblance is, rather, theoretical and speculative. In so far as the adduced facts are concerned, the claim is neither here nor there and remains, at best, her own fanciful speculation. I reject her, apparently, ill-gotten effort to minimize her own participation to the crime.

Even in his summing up to the assessors the learned judge did not just recount the fact but gave his biased opinion when he said, for example:

> As it turned out, in her testimony, the first accused again, **poured heap scorn on PW 1** saying a year prior to the incident, the latter was declared a sorcerer by a majority of villagers' votes. The first accused, however, further testified that she had since forgiven PW 1 and harboured no ill feelings towards him and his family. (Emphasis is ours.)

That sort of summing up, in our opinion, was influencing the assessors from giving any weight to the defence story. Notwithstanding that, the second assessor found the appellant not guilty and gave the following opinion:

> The 1st accused's defence that it was her son who was involved alone is a possibility.

The learned judge did not consider the appellant's evidence for two reasons: One, he questioned why she did not report what her son told her. Two, she did not go to the scene of the crime when the alarm was raised.

The appellant was George's mother. Naturally it was not easy for her to go and report what George had told her. Besides, she had already warned George not to do what he was thinking. How would she have known that George was adamant? As for not responding to the alarm our reply would be simple: When she knew that PW 1's house was gutted by fire she obviously knew who did it while the other villagers went to find out what was the matter. She did not have to go to find out that.

Apart from that at the time of the trial the appellant was 64 and so, she was 58 at the time of the incident, while PW 1 was 55 at trial and so 49 at the time of the incident. Thus the appellant was older than PW 1 at the time of the incident by 9 years. One wonders whether a woman of that age would have been with that prowess in attacking a younger man as PW 1. From the narrative of PW 2 the assailant attacked four people one after another and was capable of snatching away the deceased and throwing him into the fire. That gives a ring of truth to her story that it was George clad like a woman who did it.

Mr. Luoga conceded that as they had access to the police statement they should have brought evidence to counter what was said but failed to do so.

It is our considered opinion that the appellant's story at least raises a reasonable doubt in the prosecution's case coupled with the contradictions of the prosecution witnesses.

We, therefore, give the appellant the benefit of doubt and allow her appeal. We, therefore, quash the conviction of murder, set aside the sentence of death and order her immediate release unless otherwise lawfully incarcerated. We so order.

DATED in MWANZA, this 18th day of October, 2010.

A. S. L. RAMADHANI
CHIEF JUSTICE

N. P. KIMARIO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

P. W. Bampikya
SENIOR DEPUTY REGISTRAR