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

**(CORAM: NSEKELA, J.A., RUTAKANGWA, J.A., And MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 215 OF 2007**

**FRANCIS MASHARA MAKEWA..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Conviction of the High Court of Tanzania at Moshi)**

**(Munuo, J.)**

**dated the 25th day of June,1996**
**in**
**Criminal Sessions No. 50 of 1996**

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**JUDGMENT OF THE COURT**

**15th &25th February,2010**

**RUTAKANGWA, J.A.**

The appellant was convicted of the murder of his mother MAGDALENA W/O MASHARA MAKEWA (the deceased) by the High Court sitting at Moshi. The evidence going to show how the murder was committed was afforded by a single eye-witness, PWI Renalda Sebastian.

At the trial of the appellant, PW1 Renalda testified that the appellant was her partenal uncle, being the young brother of her father one Sebastian. PW1 Renalda, her father and the deceased lived in a one-roomed house. However, each one had his/her own bed. The appellant lived in his own house with his family but within the same compound.

PW1 Renalda told the trial High Court that on the night of 27th January, 1995 by 10.00 p.m the trio had gone to bed. At that hour the appellant went to their house and requested the deceased to open the door. The deceased opened the door. The appellant, who had a torch, then ordered the deceased to let him sleep on her bed. The deceased complied and seated herself on the floor. While lying on the bed, the appellant asked the deceased why she had not closed the door and for no apparent reason, the appellant abruptly clubbed the deceased on the neck. The deceased ran out of the house and collapsed. PW1 Renalda raised an alarm which was responded to by her step mother PW2 Severina Pantaleo, John Lemunge, Stambuli Saiyale among others. It was PW2 Severina's

evidence that they found the deceased already dead and that PW2 Renalda had told them that the appellant had killed her with a club. The death was reported to the local authorities, who included PW3 Dickson Njau, a Ward Executive Officer, whose portifolio clothed him with powers of a Justice of the Peace. PW3 Dickson detailed some militia men to patrol the area to make sure the appellant did not escape. He then went to report the matter to the police.

PW4 No. C 7796 Detective Cpl. Ally, visited the scene of the crime the following morning. He drew a sketch map of the scene. He was also, allegedly, handed over by the relatives of the deceased, a blood stained knife and a club. Both weapons and the map, however, were not tendered as evidence. PW4 further testified that on the same day he recorded a cautioned statement of the appellant (exhibit P3) in which he confessed to the murder of the deceased but in the circumstances totally different from the version of PW1 Renalda. It was PW4 Ally's evidence that on 1st February, 1995, the appellant was sent to a Justice of the Peace, where his extra-judicial statement was recorded. It appears as the appellant denied

murdering the deceased in this latter statement, the prosecution did not see any reason of tendering it in evidence. Instead, it was tendered by the defence as exhibit D2.

It is not clear from the evidence on record as to who took the deceased body to hospital for Post-mortem examination. But it is not disputed that the body was so examined and a Report on it (exhibit P1) issued. According to exhibit P1, the cause of death was severe bleeding due to severe cut wounds. The appellant was then charged accordingly.

In his sworn evidence the appellant denied murdering the deceased. He claimed that on the material night Sebastian, who had returned home drunk, picked a quarrel with him over the deceased's decision to give him a piece of land. During the course of the quarrel they managed to pick up a knife which was "struck in the banana thatch of the house". As they struggled for control of the knife, the deceased decided to intervene to separate them and in the process she was accidentally injured by the knife. He categorically denied

having made exhibit P3 voluntarily. He said he was beaten by the people who arrested him and on this he had support from PW3 Dickson and later by the police who forced him to sign it. He urged the trial High Court not to take PW1 Renalda as a truthful witness at all. Indeed the prosecution tendered in evidence the appellant's PF3 (exh. P2) showing that he had sustained dangerous bodily harm.

The two assessors who assisted the learned trial judge were unanimous in their verdict. The appellant killed the deceased with malice aforethought, they opined, taking into account the cut wounds inflicted and the evidence of PW1. They accordingly advised that he be convicted of murder as charged.

The learned trial judge agreed with the assessors' opinions. She was of the view that the appellant "inflicted multiple wounds on the deceased", and subsequently confessed to the murder in his cautioned statement (exhibit P3). She rejected the appellant's defence as an afterthought, because that "story did not appear in the caution statement Exhibit P3". Consequently, she convicted him as

charged and sentenced him to "death by hanging". Aggrieved by the conviction and sentence the appellant has lodged this appeal.

Through the services of M/s Loomu Ojare & Company, Advocates, he has come to this Court with four grievances against his trial and the judgment of the trial High Court. These can be conveniently summarized as follows. **One**, the learned trial judge erred in law in admitting the cautioned statement without conducting a proper trial within a trial. **Two**, the learned trial judge erred in finding PW1 to be a credible witness. **Three,** the learned judge erred in law in rejecting the extra-judicial statement. **Four**, the learned judge erred in holding that his guilt had been proved beyond reasonable doubt.

Mr. Loomu Ojare, learned advocate, appeared before us to prosecute this appeal. The respondent Republic was represented by Ms. Veritas Mlay, learned Senior State Attorney, who resisted this appeal.

Arguing in elaboration of the first ground of appeal, Mr. Ojare said the reception of exhibit P3 in evidence was objected to by the defence on the basis that it was not voluntarily made. This objection, he stressed, was raised as PW4 Ally was about to tender it and in the presence of assessors. Secondly, when the learned trial judge decided to conduct trial within a trial the main trial was not halted, but the witness continued with his evidence in chief by being examined on the voluntariness of the statement. Thirdly, after a witness labeled as XD. 5243 D/C Paulo had testified, the trial judge made a short ruling overruling the objection and admitting the statement in evidence without hearing the defence side. It was Mr. Ojare's strong contention, that in view of these glaring irregularities exhibit P3 was wrongly admitted in evidence and ought not to have been considered at all in determining the guilt of the appellant. He accordingly urged us to expunge it from the record.

Responding to Mr. Ojare's submission, Ms. Mlay candidly admitted that indeed exhibit P3 was received in evidence without the appellant being heard. She accordingly agreed with Mr. Ojare that it

should be expunged from the record. All the same, she was quick to point out that this would not adversely affect the prosecution case as the evidence of PW1 and exhibit P1 proved the appellant's guilt to the hilt.

We have recognized that exhibit P3 was very crucial in the determination of the appellant's guilt. We have therefore found it convenient to first dispose of this ground of appeal. Having gone through the proceedings in the High Court we have, with due respect, found out that they bear out the appellant on his complaints. To say the least, in our respectful opinion, no proper trial within a trial was conducted to determine the voluntariness or otherwise of exhibit P3. In our considered opinion, since the voluntariness or otherwise of this statement was vehemently opposed by the defence, it was incumbent upon the trial judge to hold a full trial within a trial. The accepted procedure to be adopted in holding such a trial in all trial courts was settled by the Court of Appeal for Eastern Africa in the case of ***KINYORI s/o KARUDITI v. REGINAM 23 EACA 480***. This was the case relied on by Mr. Ojare. For the benefit of all trial

courts, we shall reproduce here, ***in extenso***, what the Court held therein, even at the risk of making this judgement long. The benefits for so doing, we believe, outweigh the risks, if any.

In ***Kinyori's case*** (supra), at page 483, the Court said:-

> " For the avoidance of doubt, we now summarize the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement or part thereof, made by the accused either in writing or orally.... If the defence is aware before the commencement of the trial that such an issue will arise the prosecution should then be informed of that fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made,

unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the court that a point of law arises and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement ... ***The assessors having left the court the crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make.*** The judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible the crown witness to whom it was

made will then produce it and put it in if it is in writing or will testify as to what was said if it was oral. ***The defence will be entitled, and the judge should make sure that the defence is aware of its right, again to cross-examine that crown witness as to the circumstances in which the statement was made and have recalled for similar cross-examination the interpreter and any other crown witness who has given evidence on the issue in the absence of the assessors.*** Both in the absence and again in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination. When the time comes for the defence to present its case on the general issue, if the accused elects to testify or to make a statement from the dock thereon he will be

> entitled to speak again to any questionable circumstance which he alleges attended the making of his extra-judicial statement and to affirm or to re-affirm any repudiation or retraction upon which he seeks to rely... The accused will also be entitled to recall and again to examine any witness of his who spoke on the issue in the assessor's absence and to examine any other defence witness thereon." [Emphasis is ours].

We have closely studied the trial court's record of proceedings. We were, unfortunately, unable to discern therefrom at what stage during PW4 Ally's testimony, the assessors were asked to retire. Secondly, and more fundamental in our settled view, after the prosecution had called its witnesses, the defence was not afforded opportunity to call any evidence in rebuttal. The statement was admitted and marked exhibit P3 by the trial court in its ruling without being put in evidence by any witness, or before the assessors were

recalled. Thirdly, the defence was not made aware of its right to cross examine the two prosecution witnesses on the issue in the presence of the assessors. In the face of all these incurable irregularities, we have found ourselves in full agreement with both counsel's submission that the trial within a trial was fundamentally flawed. We, therefore, uphold the first ground of appeal and discount exhibit P3 in its totality, as its voluntariness was not proved at all in accordance with the requirements of the law.

We shall discuss grounds of appeal two, three and four together. As we endeavoured to show briefly earlier on, the conviction of the appellant was premised on exhibits P1 and P3 and the evidence of PW1. There is no gainsaying that the learned judge believed the version of PW1 to the effect that the appellant went to the deceased house on the fateful night. On meeting the deceased the appellant, with malice aforethought, inflicted fatal cut wounds on her body leading to severe haemorrhage as exhibit P1 shows. She found support for these findings in exhibit P3. Since exhibit P3 has already been discounted, we are left only with the evidence of PW1

Renalda on how the deceased met her death. The burning question here is whether or not PW1 Renalda was a witness whose word could be taken at its face value. Mr Ojare has urged us to hold that PW1 Renalda was not a credible witness because she belied herself on many aspects and her evidence is diametrically opposed to the findings of the doctor who examined the deceased's body. That is, the manner of the killing as described by PW1 Renalda was not corroborated by medical evidence (i.e exhibit P1). On her part, as already alluded to, Ms. Mlay strenuously argued that PW1 Renalda was a witness of truth. PW1 Renalda's evidence, she pressed, was not inconsistent with exhibit P1.

Of course we have already discounted exhibit P3. But since it was relied on by the learned trial judge, we are not precluded from observing that in our respectful opinion, the learned judge erred on the facts before her in believing both PW1 and exhibit P3. This is because the evidence of PW1 and the alleged appellant's confession could not be true at the same time. While PW1 testified that she only saw the appellant clubbing the deceased to death for no

apparent reason, in exhibit P3 it was shown that the appellant confessed to have murdered his mother by slashing her neck with a knife, after she had described him as, "mpumbavu, mbwa". PW1 in her entire evidence never mentioned witnessing the appellant knifing the deceased at all.

The cause of the deceased's death was not disputed at the trial of the appellant. It was not disputed before us. Accepted medical evidence is to the effect that the deceased died of severe bleeding as a result of multiple cut wounds inflicted on her, which included the extraction of her eye balls. It goes without saying, therefore, that PW1 Renalda blatantly lied when the testified that it was the appellant who caused the death of the deceased by hitting her once on the rear part of her neck. The nagging question which, with due respect, the learned trial judge did not address herself and the assessors to, is why did PW1 Renald have to lie on this crucial issue? Whom was she seeking to protect? We have also been left wondering as to why Sebastian, who was with the deceased and PW1 Renalda and was also allegedly clubbed by the appellant never testified at all.

Was he in any way connected with the death of his mother as can be gleaned from the evidence of the appellant? In view of the lies told by PW1 Renalda, it was his evidence which would probably have negated the appellant's defence. The evidence of PW1 Renalda apart from being inconsistent with her statement to the police dated 29th January, 1995 (exhibit D1), bristles with self contradictions on the number of blows the appellant allegedly inflicted on the deceased with the club. For all these reasons, unlike the learned trial judge, we have found it unsafe to give any credence to her evidence.

Having discounted exhibit P3 and the evidence of PW1 Renalda, we are left with the evidence of PW2 Severina and PW3 Dickson. These two witnesses never witnessed the assault on the deceased at all, leave alone her murder. That was why the learned trial judge in determining the guilt of the appellant did not mention PW3 Dickson at all. We have studied the evidence of PW2 Severina. Her evidence regarding the events on the night of 27th January, 1995 was a recount of what she was told by PW1 Renalda. While such evidence would prove helpful in showing PW1 Renalda's consistency even

though she was lying it could not, on its own, prove the guilt of the appellant.

With all these considerations in mind, we have found ourselves constrained to hold that the guilt of the appellant was not proved at all. Indeed, had a proper trial within a trial been held and exhibit PW3 found inadmissible, the appellant, in our respectful opinion, would have been entitled to an acquittal under section 293 of the Criminal Procedure Act, Cap 20, Vol. 1 R.E. 2002.

To recapitulate briefly, we have found and concluded that there was no proof that the appellant freely and voluntarily confessed to the murder of the deceased. The alleged confession was, therefore, irregularly admitted in evidence. It was an error of law to have considered it in determining the guilt of the appellant. The evidence of PW1 Renalda contained palpable lies and self contradictions. It ought to have been disbelieved. The evidence of PW2 Severina and PW1 Dickson, did not establish the identity of the murderer even on a balance of probabilities.

In view of the above findings, we hold without demur that the appellant was wrongly convicted of the murder of his mother Magdalena Mashara Makewa. We accordingly allow this appeal in its entirety. The conviction for murder is hereby quashed and set aside as well as the death sentence. We order for the immediate release of the appellant from prison unless he is otherwise lawfully held.

DATED at ARUSHA this 24th day of February, 2010

H.R. NSEKELA
**JUSTICE OF APPEAL**

E.M.K. RUTAKANGWA
**JUSTICE OF APPEAL**

W.S. MANDIA
**JUSTICE OF APPEAL**

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

M.A. MALEWO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**