IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A; And MASSATI, J.A.)

CRIMINAL APPEAL NO. 247 OF 2006

KANUDA NGASA@ KINGOLO MATHIAS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction/Judgment of the High Court of Tanzania at Geita)

(Rweyemamu, J.)

dated the 1st day of September, 2006
in
Criminal Sessions Case No. 98 of 2000

JUDGMENT OF THE COURT

7 & 15 FEBRUARY, 2011

RUTAKANGWA, J.A.:

This is a first appeal. The appellant was arraigned before the High Court sitting at Geita for the murder of one Joseph s/o Kayungiro. The said murder allegedly took place on 1st January, 1995 at Nyangomango village in Geita District, Mwanza Region. Although he denied the charge, he was convicted as charged and

sentenced to death by hanging. Aggrieved by the conviction and sentence, he has lodged this appeal.

The prosecution evidence upon which the conviction for murder was predicated was, briefly, as follows:-

On 2nd January, 1995, PW1 Jamal Abdalla, a small-scale miner residing at Nyarugusu, was sent by Tundu Rashid and Rajabu Safe to Nyangomango *"to check their mining sites."* On arriving there, he decided to report his presence to the Ward Executive Officer. Along the way, he came across a half-naked dead body. He reported the matter to the village authorities. An alarm was raised. Suspecting the dead body to be of one of the residents of the area, a number of miners were arrested on suspicion. A report was also made at Bukoli police post. PW2 No. C 1700 Det. Cpl. Henry was detailed to investigate the matter.

On 3rd January, 1995 PW2 D/Cpl. Henry, accompanied by an unidentified doctor, went to view the body. Nobody at the village

could identify the deceased, who was said to be about 30 years old. The doctor carried out a post-mortem examination on the body and thereafter, the villagers were directed to bury the unidentified body which they dutifully did.

After a week or so, PW4 Elias Kayungo @ Shilinde of Munze Bariadi District, reported at Bukoli police post the disappearance of his young brother, Joseph Kayungiro, on learning that a dead body had been found and buried at Nyangomango village. On producing a photograph of the said Joseph, PW4 Elias was told by some unidentified policeman that *"he was the one they buried."* Although PW4 Elias testified that they then "*remembered that he (Joseph) left with Kanuda"* and they immediately left for Mwansegela village looking for Kanuda, PW2 D/Cpl. Henry, said:-

> "...*Some relatives came after about a week. They had a photo of deceased. They then told us they knew the person who hired the deceased. We referred them to headquarters."*

The significance of this piece of evidence lies in the obvious fact that PW4 Elias never mentioned the appellant to the police. As a result the appellant was arrested by PW4 Elias in the company of PW3 Alex Julius, a militia man then living in Mwanza, at Mwansegela on **9th February, 1995**. The appellant was found putting on clothes which PW4 Elias claimed belonged to Joseph Kayungiro.

Although PW3 Alex claimed that the appellant was also found in possession of Joseph Kayungiro's bicycle, PW4 Elias claimed that the bicycle was found in the possession of the appellant's uncle in Meatu District. It was on the basis of this evidence, the appellant was indicted for the murder of one Joseph Kayungiro, in spite of the naked fact that PW4 Elias never saw the dead body of Joseph nor visited "*his grave.*"

In his affirmed evidence, the appellant unequivocally denied killing Joseph Kayungiro. He claimed that on 1st January, 1995 when the alleged murder took place at Nyangomango village in Geita District, he was at his home village, Mwansengela in Meatu District.

He told the trial High Court that he was arrested at the said village on 8th February, 1995 by PW3 Alex, who was accompanied by a group of people, on the allegation that he had murdered their relative one Joseph, who was unknown to him. He further claimed that the clothes he was found wearing and the bicycle, all alleged to be the properties of Joseph Kayungiro, were his properties.

In convicting the appellant as charged, the learned trial judge believed that the dead body that had been found along a pathway and buried at Nyangomango village on 3rd January, 1995 was that of Joseph Kayungiro. She so believed because the doctor who had performed the post-mortem examination, **but who never testified,** had indicated on the Report of Post-Mortem Examination (exh. P2) that the body had been identified to him by PW1 Jamal Abdalla and Mwininga Tama to be of Joseph Kayungiro. The said Mwininga Tama never testified at the trial of the appellant. Worse still, PW1 Jamal categorically told the trial High Court that the body he had seen was of a stranger to him. Twice while under cross-examination and while being questioned by the court, he had said:-

"It was my first time to see the deceased."

It is unfortunate that the learned trial judge did not direct her mind to this piece of crucial evidence which was belying the contents of exhibit P2, either in her summing up to the assessors or in her judgment. We shall revert to this seemingly vital evidence later.

The learned trial judge's belief was apparently augmented by her two findings. One, that the appellant had owned up to the murder of Joseph Kayungiro in his confessional extra-judicial statement (exh. P9) which he "*freely and voluntarily made,*" to a Justice of the Peace. Two, he was, within a short span of time, found in possession of Joseph Kayungiro's properties.

On whether the person whose dead body found at Nyangomango village had been murdered, the learned trial judge said:-

> *"... Further, from the nature of injury – serious blows on a vulnerable part of the body as indicated by the autopsy report P2, malice aforethought can safely be inferred.... I accordingly hold without further enquiry on the issue that whoever inflicted those wounds described in P2,* ***intended to cause Joseph's*** *death."* [Emphasis supplied].

It is obvious from the above extract that the learned trial judge found it as an established fact that the cause of death was *"head injury"* due to *"multiple contused scalp wounds, multiple skull fractures and damaged right and left cerebral hemisphere,"* as per Exh. P2.

In our evaluation of the prosecution evidence, however, we have not failed to notice that this latter finding of fact was in crying contradiction with the contents of exh. P9 (the extra-judicial

statement) which the same learned trial judge had found not only to have been freely and voluntarily made but a true version of how the deceased met his or her death. We have used the words "*his or her*" advisedly because from the admissible evidence on record, there is no clear indication as to whether that body was of a male or a female. In the alleged confessional statement, its alleged maker stated in no uncertain terms that he had killed Joseph Kayungiro by **strangling him to death**. These two versions on the cause of death, in our respectful opinion, could not be true or correct at the same time. Again, with respect, the learned trial judge did not address her mind to this glaring fatal contradiction in her judgment nor in her summing up to the assessors who aided her in the trial of the case. We are left wondering on what would have been her finding had she done so.

Having arrived at these findings of fact, the learned trial judge found the defence case to be a cooked-up story. She accordingly convicted him as charged. Hence this appeal.

In this appeal the appellant was represented by Mr. Salum Amani Magongo, learned advocate. Mr. David Kakwaya, learned State Attorney, appeared for the respondent Republic.

Five grounds of complaint were lodged by Mr. Magongo challenging the propriety and/or correctness of the trial of the appellant and the resultant decision. These are:-

> *"1. That the learned trial court erred both in law and fact by admitting the extra-judicial statement Exh. P9 under the provisions of section 34(B) of the Evidence Act as the statement therein was made by the appellant and not the intended witness and also for failing to comply with the cumulative mandatory provisions of the latter section.*
>
> *2. The trial court erred both in law and fact to hold that undisputed facts had been recorded during the preliminary hearing.*
>
> *3. That the post-mortem examination report, Exh.P2 was not worthy of belief and consideration by the trial court.*

4. That there was no evidence that the deceased body was that of Joseph Kayungiro.

5. That as a whole the evidence on record did not support the conviction for the offence charged or at all."

Mr. Magongo made brief but focused submissions on each ground and urged us to allow the appeal in its entirely by quashing the conviction of the appellant and setting aside the death sentence. Mr. Kakwaya forthrightly conceded the five grounds of appeal. He accordingly did not support the conviction of the appellant. In disposing of this appeal, we shall, where necessary, deal with the five grounds of appeal separately.

In the first ground of appeal, the learned trial judge is being reproached with misapprehending the true import of sections 34(b) and 34(B) of the Evidence Act. The short background to this criticism is as follows:-

At the trial of the appellant, the prosecuting State Attorney sought leave to tender in evidence the alleged extra-judicial statement (exh. P9), under sections *"34(b) & 34(A) (B) of TEA"* because the magistrate who recorded it had died. The defence counsel objected on a number of grounds. The main ground of objection was that the said statement was not one of the statements envisaged under those provisions and even if it were, the necessary prerequisite conditions stipulated in section 34B(2)(a) to (f) had not been met. The objection was overruled. The learned trial judge ruled that the statement was admissible under section 34(b), *"in view of the fact that the document was made by a person now dead..."* The learned judge further ruled that it was admissible under section 34B(1) and (2) because it had *"the necessary declarations and signature."* After so ruling the statement was admitted in evidence as exhibit P9 and immediately thereafter the prosecution closed its case.

We have noted one anomaly here worth mentioning. Although the statement was admitted in evidence as exhibit P9, it was not

tendered by any witness. As such the appellant was denied his statutory right of cross-examination in respect of this patently gravely incriminating piece of evidence. With all due respect to the learned trial judge, this was an incurable irregularity, in our considered opinion, regardless of whether or not it was rightly received under sections 34(b) and 34B(1) and (2) of the Evidence Act. It ought to have been tendered by a competent and compellable witness who thereafter would have been subjected to cross-examination.

Submitting in elaboration of this ground, Mr. Magongo, supported by Mr. Kakwaya, said that section 34 of the Evidence Act applies where the statement sought to be introduced in evidence was made by a potential witness who died before he/she could testify orally not where the statement was made by the appellant who is not only alive but was also physically present in court.

After studying the entire provisions of section 34, we have found ourselves in full agreement with the contentions of the two learned counsel. The provisions of this section were wrongly applied

to the facts and circumstances of this case. We accordingly hold that the learned trial judge wrongly admitted in evidence the alleged extra-judicial statement of the appellant. At best, in our considered view, what ought to have been properly put in evidence under this section, is the statement of the Justice of the Peace if he/she had made any, as correctly argued by Mr. Kakwaya. We find support for the position we have taken in the decision of this Court in the case of **MATHEI FIDOLINE HAULE v. R.** [1992] T.L.R. 148. In this latter case the Court faulted the trial judge for admitting in evidence the appellant's cautioned statement under similar facts and circumstances. We accordingly discount exhibit P9 in its totality.

In dealing with the second ground of appeal, we have found it convenient to look, first, at the requirements of the law on the issue. The best way is to reproduce in full the provisions of section 192(3) and (4) of the Criminal Procedure Act, Cap. 20, (or the Act hereafter).

Section 192(3) and (4) of the Act 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 and by the public prosecutor and then filed.

(4) Any fact or document admitted or agreed (whether such fact is mentioned in the summary of the evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved ...."

It is trite law that failure to prepare a memorandum of undisputed facts, or to read and explain the contents of the said memorandum to the accused is non-compliance with the mandatory provisions of the law. Where there is such non-compliance, as rightly argued by Mr. Magongo and Mr. Kakwaya, the provisions of sub-section (4) do not come into play. Nothing shall be deemed to have

been proved. The burden remains on the prosecution to prove beyond reasonable doubt every material fact necessary for establishing every ingredient of the offence in question. See, for instance **MT. 479 SGT. BENJAMINI HOLELA v. R** [1992] T.L.R. 121 and **SHABRACK S/O NG'HONGELA v. R.** Criminal Revision No. 3 of 2007 (CAT) (unreported), among others.

Coming to the facts of the case under scrutiny, after perusing the record of the proceedings of the trial High Court, we have respectfully found ourselves in agreement with the contentions of both counsel that there was total non-compliance with sub-section (4) of the Act, by the learned judge who conducted the preliminary hearing. No memorandum of undisputed facts was prepared at all. The learned judge admitted the Report on Post-Mortem Examination in evidence as exh. P2 not only without complying with sub-section (4) above but also without reading its contents to the appellant. It is this report which was relied on by the learned trial judge in establishing the "*death*" of Joseph and its cause. This Court in **MT. 479 SGT. B. HOLELA** (supra) held thus at page 124:-.

"... In case where matters (i.e agreed 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, 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."

In the instant case, a sketch plan was also admitted as exhibit P3. Unfortunately, however, like exhibit P2, it was neither shown nor explained to the appellant.

In view of the above established facts and the clear stance of the law, we hold without demur that exhibits P2 and P3 were improperly admitted. They could, therefore, not be relied on under section 192(4) of the Act, as proof, without more, of their contents. We accordingly expunge exhibits P2 and P3 from the evidence. Without exhibit P2 it could not be safely held that the cause of death

of that body the subject of the Report, on the evidence available was established.

We believe that our answer to the second ground of appeal, disposes of the third ground of appeal. We shall now direct our attention to the fourth ground of appeal.

The search for our answer to the fourth ground of appeal will be prefaced by this simple but pertinent question. What is murder? In law, murder is the killing of a live person with malice aforethought. In this case, therefore, the prosecution had to prove that the accused caused the death of a live person, **who was the subject of the charge** (i.e Joseph Kayungiro) with malice aforethought.

It was the contention of the defence in the trial High Court that the prosecution had abysmally failed to prove that Joseph Kayungiro was dead or that the appellant murdered him. Relying on exhibit P2, the learned trial judge dismissed this germane contention arguing that:-

"... it was made in oversight of the fact that the issue was admitted by the defence as a matter not in dispute at the PH stage..."

But she went further, and significantly held:-

"... And even if that had not been the position, it would be improper to introduce such an important line of defence at that stage of trial and this court would have been entitled to ignore it .... I take it that the fact of ***Joseph's*** *death is not disputed and I will make no further consideration of it....."* [Emphasis supplied].

The issue facing us is whether or not the learned trial judge was legally justified in dismissing this decisive issue so summarily. Both Mr. Magongo and Mr. Kakwaya are of the firm view that she was not. On our part, in view of the already established fact that there was no material fact which was agreed on by both sides at the stage of the preliminary hearing, we are respectfully in agreement with them.

At the trial of the appellant, the prosecution called four witnesses. PW1 Jamal, who was the first person to see the dead body, said the deceased was unknown to him. PW2 Det. Cpl. Henry saw the dead body and ordered its immediate burial because no one had come forward to identify it. He, too, never knew whose body it was. Although he was the investigator and the body had yet to decompose he took no steps to preserve it. Worse still, is the naked fact that no single photograph was taken of the dead body at all for purposes of use in subsequent identification processes. PW3 Alex who arrested the appellant at the instance of PW4 Elias, never saw the deceased body although Joseph Kayungiro was his villagemate. He was only told that Joseph had been killed in Nyangomango. As if all this was not damning enough, PW4 Elias, the elder brother of Joseph never saw the dead body of the person who was buried at Nyangomango village. What is beyond our ken is that although he allegedly travelled all the way to Nyangomango village in search of his brother, he not only never visited the scene where his alleged dead brother was buried but he never requested the exhumation of

the body. This is inconceivable and renders his story totally implausible.

While under cross-examination PW4 Elias stated that he did not even remember the person who gave them the information about his brother's burial. This means he never even met with PW2 Henry. Indeed PW2 Henry never mentioned PW4 Elias in his entire evidence. PW4 Elias, too, did not mention the person to whom he showed the photograph of Joseph and who in turn told him that it was the photo of the person they had earlier buried. In the absence of the photograph of the body of that deceased to be compared with the photograph which PW4 allegedly Elias had, assuming he was telling the truth, the only credible way to prove that the buried body was that of Joseph Kayungiro would have been to exhume the body. This was practicable as only a week had elapsed. This would have helped PW4 and the investigators in ascertaining whether that body was of Joseph or not. Since this was not done, it would be risk taking to assume, leave alone to hold without demur, that the body that was seen by PW1 Jamal and PW2 Henry and buried at

Nyangomango was that of Joseph Kayungiro. We are, therefore, of the decided opinion that the prosecution totally failed to prove that the said deceased body was that of Joseph Kayungiro. We accordingly allow the fourth ground of appeal too.

As matters stand, no iota of cogent evidence was proffered by the prosecution to prove that Joseph Kayungiro is dead, apart from mere surmises and suspicions. We agree, therefore, with the contentions of both counsel in this appeal, that the charge against the appellant for the murder of Joseph Kayungiro was not proved at all. He was entitled to an acquittal.

All said and done, we allow this appeal in its entirety. The conviction for murder and the sentence of death are hereby quashed and set aside. The appellant is to be released forthwith from prison unless he is otherwise lawfully held.

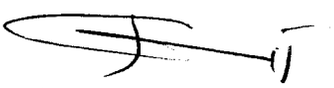
DATED at MWANZA this 11th day of February, 2011.

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
COURT OF APPEAL