IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO.128 OF 2008

LUTAMLA BASU @ IVINZI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Mwita, J.)

dated the 14th day of May, 20
in
Criminal Sessions Case No. 117 2002

.....

JUDGMENT OF THE COURT

23 & 28 June, 2011

KIMARO, J.A.:

The High Court of Tanzania sitting at Tabora convicted the appellant of the offence of murder contrary to section 196 of the Penal Code, [CAP 16, and R.E.2002] and sentenced him to suffer death by hanging. The appellant was alleged to have on 19th February, 2000 at Kisanga Village, Sikonge District, murdered one Maulid Ramadhan Mpalasinge. The only evidence that incriminated the appellant was his own confession made to Police, which was held to be admissible in evidence in the trial court after a

trial within trial was conducted and the voluntariness of the statement established.

Aggrieved by the conviction and the sentence, the appellant has lodged a three- point memorandum of appeal in which he is faulting the trial court: First, for an improper summing up to the assessors, hence preventing them from making an assesment of the evidence. Second, conducting the trial within trial without following the proper procedure laid down, and thirdly, failure to take into account the fact that the confession of the appellant had no evidential value after the appellant retracted it.

Before the Court the appellant was represented by Mr. Kamaliza Kayaga, learned advocate. The respondent Republic enjoyed legal services of Mr. Jackson Bulashi, learned Senior State Attorney and he supported the appeal.

In the trial court the evidence of confession led against the appellant was that he admitted killing the deceased after being hired by one Isanzule Mayeka who was jointly charged with him but was acquitted. According to the confession which was admitted in court as exhibit P2, the deceased was a father - in -law of Isanzule Mayeka. He married his daughter but the

deceased did not bless the marriage. The marriage subsequently broke down, and the deceased returned the dowry that was paid to him. The daughter of the deceased then got married to another man. This disappointed Mayeka, and that was the reason given by the appellant for being hired by Mayeka to kill the deceased. As the sole evidence against Mayeka was that of the appellant who was an accomplice, he was acquitted.

Submitting in support of ground one of the appeal, the learned advocate for the appellant said that, in summing up to the assessors the learned trial judge made it point blank that there was no evidence to base the conviction of Isanzule Mayeka and so they had to enter a verdict of not guilty on Isanzule Mayeka because the charge was not proved against him. This manner of summing up, contended the learned advocate, occasioned a miscarriage of justice on the appellant because by implication, the learned trial judge showed the assessors that the appellant was guilty.

In response to this ground of appeal the learned Senior State Attorney agreed that the learned trial judge made an error in the manner in which he made the summing up to the assessors because he indicated his decision in respect of Isanzule Mayeka that he was going to acquit him.

However, the learned Senior State Attorney said that despite the error committed by the learned trial judge, the appellant was not in any way prejudiced as all the assessors returned a verdicts of not quilty to both the appellant and Isanzule Mayeka. He said this ground of appeal has no merit and it should be dismissed.

On our part, this ground need not detain us at all. We agree with both the learned advocate and the learned Senior State Attorney that the learned trial judge made an error in summing up to the assessors as he made his decision in respect of Isanzule Mayeka known to the assessors. The record of appeal at page 87 shows that the learned trial judge guided the assessors as follows:

> "***In the instant case, as there was no evidence apart from the confession of the 1st accused connecting the 2nd accused with the offence charged the prosecution have, not proved the charge against the 2nd accused to the required standard."*** (Emphasis added.)

It is obvious that from the way in which the learned trial judge made the summing up to the assessors, he made his decision in respect of Isanzule Mayeka known. With respect to the learned trial judge, this was

an improper way of summing up. In the case of **Ally Juma Mawera Vs R** [1993] T.L.R.231 the Court held that:

> *"1. When summing up to the assessors, the trial judge should as far as possible desist from disclosing his own views or make remarks or comments which might influence the Assessors one way or another in making up their own minds about the issue or issues being left with them for consideration.*
>
> *2. The assessors should be made to give their opinion independently based on their own perception and understanding of the case after the summing up ; the judge makes his views known only after receiving the opinion of the assessors and in the course of considering his judgment in the case."*

We also agree with the learned Senior State Attorney that notwithstanding the error committed by the learned judge, no miscarriage of justice was occasioned to the appellant as all assessors returned verdicts of not guilty for Isanzule Mayeka and the appellant. In the same case of **Ally Juma Mawera**, (supra) the Court further held that:

> "3. *Even though the judge committed the error by commenting on the appellant's credibility, this did not*

really affect the opinion of the assessors; had it influenced their opinion the trial would have been a nullity."

In this respect, notwithstanding the improper summing up to the assessors, so long as that did not affect the assessors in making an independent opinion on the case, this ground has no merit.

On the second ground of appeal, the learned advocate for the appellant said the procedure for conducting a trial within trial was not followed. It was the contention of the learned advocate that the practice was to discharge the assessors when in the process of giving evidence for the prosecution, a stage was reached where the defence objects to an admission of a confession made by accused person on the allegation of the confession being made involuntarily by the accused. He said the trial within trial is carried out at the instance of the defence objecting to such a statement being admitted in evidence, until it is established that the confession was made voluntarily. Contrary to this procedure, said the advocate, the learned trial judge discharged the assessors immediately after their selection, and started to conduct a trial within trial without first the prosecution giving evidence in support of the main trial, and reaching a stage where the defence objected to the tendering of the confession on the ground that it was not made voluntarily. The learned advocate said

that this was an improper procedure and it occasioned a failure of justice on the part of the appellant as the assessors were denied the opportunity to assess the value of the confession. To bolster his argument, he cited the case of **Kinyori Karadutu Vs Reginam** (1956) 23 EACA 480, cited with approval by this Court in **George Michael Rajabu & Another Vs R** Criminal Appeal No. 18 of 1991 (unreported).

The learned Senior State Attorney also conceded that the manner and the stage at which the trial within trial was conducted were irregular. Like the learned Advocate for the appellant, the learned Senior State Attorney said the practice in conducting a trial within trial is to discharge the assessors when a statement is introduced in evidence by a prosecution witness and objected to by the defence. It is at that stage that the assessors are retired with a view of conducting a trial within trial to establish the voluntariness or otherwise of the confession before admitting it in evidence.

The record of appeal at page 10 shows that after the selection of assessors they were discharged, and a trial within trial was started at the instance of the prosecution. The evidence that was led in the trial within trial did not limit itself to the aspect of establishing whether or not the

confession of the appellant was obtained voluntarily, but it went beyond by the witnesses giving other evidence not related to the statement of the appellant as if the trial judge was conducting the main trial. After the trial within trial the learned judge in a long ruling not confined only to the voluntariness of the statement of the appellant made a finding that the statement was made voluntarily. It was then the trial started and proceeded in the usual practice of conducting trials. The confession of the appellant was admitted in evidence as exhibit P2. The gentlemen assessors also had the opportunity to cross examine the witness who recorded the statement.

On our part, and with respect to the learned trial judge, we entirely agree that the manner and the stage at which the trial within trial was conducting was improper. The practice of conducting a trial within trial stems from section 27 of the Evidence Act [CAP 6 R.E. 2002]. In terms of section 27(1) of CAP 6, it is only confessions made voluntarily to a police officer which are admissible in evidence. Section 27(2) imposes the burden on the prosecution to prove that the confession was made voluntarily. Section 27 (3) indicates what factors make a confession to be not voluntary. It is when it is obtained by threat, promise, or other prejudice held out by the police officer to whom it was made. This means that a trial

within trial is conducted purposely to establish whether or not the confession was made voluntarily. The onus of proving that the confession was made voluntarily lies on the prosecution.

The problem we find in the trial within trial conducted by the learned judge is the stage at which he conducted the trial within trial and the manner in which it was conducted. The learned judge apart from missing the gist of the evidence relevant in the trial within trial also erred on the stage at which he was supposed to conduct the same. As the term **trial within trial** suggests, a trial within trial does not come before the main trial. It is conducted within the main trial. Now at what stage the trial within trial is supposed to be conducted? In the case of **George Michael Rajabu & Another V R** Criminal Appeal No. 18 of 1994 (Unreported) The court remarked as follows:

> "...*we wish to dispose of a matter which came to our attention but to which neither counsel referred. This is particularly in connection with the first appellant's caution statement (exhibit P7) and to some extent the second appellant's extra-judicial statement (exhibit P16).* ***In both instances the existence of the statement and the defence's objection thereto was made known in the presence of the assessors. The assessors were then discharged and trials within trials***

within a trial were held."

The purpose of citing the above quotation from the judgment is to show at what stage a trial within trial should be conducted. It is conducted after the main trial has started and where the defence objects to an admission of a caution statement of the accused for being made involuntarily. What follows after the trial within trial we find guidance in the case of **Kinyori Karadutu Vs Reginum** (supra) where their Lordships held:

> *"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 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 of its right, again to cross-examine the Crown witness as to the circumstances in which the statement was made... 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."***

From what we have said, the learned trial judge misdirected himself on the stage, at whose instance, and the manner of conducting a trial within trial. This however did not occasion any miscarriage of justice because as we have shown above, and the record of appeal at page 47

supports us, the main trial continued in the usual manner and the assessors were given the right to cross-examine the witness on the confession of the appellant. With respect to the learned trial judge he wasted time and energy to do extra work which would have been avoided had he observed and complied with the proper procedure of conducting a trial within trial. This ground lacks merit and it is dismissed.

Regarding the third ground of appeal, the learned advocate for the appellant said that, after the acquittal of Isanzule Mayeka who was implicated in the confession by the appellant to have engineered the killing of the deceased, the evidential weight of the confession, the sole evidence that implicated him, was not sufficient to base the conviction. The learned advocate said corroborative evidence was required, but in this case it is missing. He prayed that the appeal be allowed.

The learned Senior State Attorney supported this ground of appeal. He said even if the Court orders a re-trial it will be a useless exercise because they will have no evidence to corroborate the confession of the appellant. He also prayed that the appeal by the appellant be allowed.

After going through the record of appeal, and given the shortfall pointed out by the learned Senior State Attorney, we agree that this is not a fit case for ordering a re-trial. We thus allow the appeal, quash the conviction and set aside the sentence of death by hanging. We order the appellant's release from prison unless he is lawfully held therein. It is so ordered.

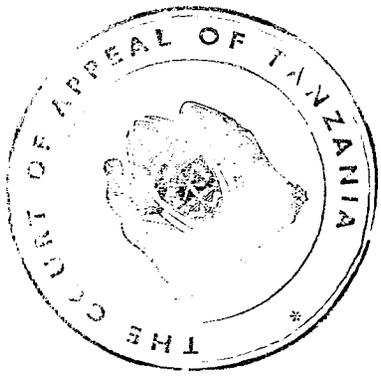
DATED at **TABORA** this 27th day of June, 2011.

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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



(E. Y. Mkwizu)
DEPUTY REGISTRAR
COURT OF APPEAL