

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

**(CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.)**

**CRIMINAL APPEAL NO. 213 OF 2010**

**ONESMO S/O MLWILO ..... APPELLANT**

**VERSUS**

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

**(Appeal from the decision of the High Court of Tanzania at Njombe  
(Iringa Registry)**

**(Uzia, J.)**

**dated 14<sup>th</sup> day of July, 2010.**

**in**

**Criminal Session Case No. 8 of 2009**

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**JUDGMENT OF THE COURT**

19<sup>th</sup> & 23<sup>rd</sup> March, 2012.

**MBAROUK, J.A.:**

The appellant, Onesmo s/o Mlwilo was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. The High Court of Tanzania at Njombe (Iringa Registry) convicted and sentenced him to suffer death by hanging. Aggrieved, the appellant has preferred this appeal.

A brief account of the facts at the trial court were as follows. Early in the morning on 2<sup>nd</sup> January, 2006, one Bonifasia Mgimba (PW4) went to visit her father who was living in a makeshift shelter at a farm area – “*mashambani*”. Upon her arrival, she sounded a word “*hodi*” as the makeshift shelter had no door. There was no reply, hence she decided to enter inside where she unexpectedly found her father lying still, dead. PW4 immediately reported to her brother one Hilman Mgimba (PW2) about the death of their father. Upon receiving those shocking news, PW2 collapsed. When he regained his consciousness PW2 reported the matter to the Village Office at Lugalawa and later to the Police Station. The Village Executive Officer (VEO) and police went to see the body of the deceased. Thereafter, a doctor came and examined the body of the deceased. Then, the police allowed the relatives to take the body for burial. A doctor who examined the dead body reported that death was due to multiple body wounds which bled severely.

About three to four months later Ernesto s/o Mgina boasted himself before PW4 and others at a "pombe shop" of the killing of the deceased. Ernesto was arrested in connection with that statement and sent to the Police Station. The police widened the scope of their investigation by conducting wide-range interrogations which resulted in the arrest of the appellant. The appellant was implicated in the murder of the deceased when his house was searched on 9<sup>th</sup> August, 2006 where some of the deceased's properties were found. The items found were one pair of reddish boots and a knife with special mark K.K.M which according to PW2 was an acronym for Karlo Kasulumecha Mchimba, the name of the deceased. Thereafter, E. 7657 Detective Constable John (PW5) arrested the appellant and sent him to the Justice of the Peace one Syprian Joseph Mwanamzuni, a Primary Court Magistrate of Ludewa where on 14<sup>th</sup> August, 2006 he recorded an Extra Judicial Statement of the appellant (Exhibit P.2).

In his defence, the appellant categorically denied to have committed the offence charged against him. He directed a blame to PW2 who after being harassed by policeman about the death of his father found a solution by cooking the case against him. However, when cross-examined, he said he didn't know the reason behind PW2 pointing him out among others that he killed his father. As to the shoes found at his house, the appellant said they were his property bought at a second hand shop and once put on them when he went to have a drink at a "*pombe shop*".

In this appeal, Mr. Alfred Kingwe, learned advocate, represented the appellant, whereas Ms. Andikalo Msabila, learned Principal State Attorney, represented the respondent/Republic. Mr. Kingwe raised two grounds of appeal namely:-

1. That the learned trial Judge erred in law and fact when he convicted the appellant

with the offence of murder in the absence of malice afore thought.

2. That the Honourable learned Judge misdirected himself by not considering the evidence of PW4 who adduced evidence to the effect that Ernesto s/o Mgina boasted that he killed the deceased.

At the hearing, Mr. Kingwe withdrew the 1<sup>st</sup> ground of appeal and remained with the 2<sup>nd</sup> ground of appeal. Submitting on the 2<sup>nd</sup> ground of appeal, Mr. Kingwe submitted that it was not the appellant who was supposed to be charged with murder in this case, but it was Ernesto s/o Mgina. This is because he said, the evidence was not sufficient to implicate the appellant. He further submitted that, even if items like shoes and knife were found in the appellant's house, he was absent when the search was conducted. He directed the blame to PW2 as the one who might have planted those items in the appellant's house. In support of

his submission, he cited to us the decision in the case of **The Republic v. Onesmo Mwililo** [2003] TLR 84.

When he was asked by the Court as to the correctness of the procedure used by the trial Judge when he admitted the Extra Judicial Statement, Mr. Kingwe submitted that as the assessors were not fully involved when the Extra Judicial Statement was admitted, the procedure was a nullity. He then urged us to expunge Exhibit P2.

For those reasons, he prayed for the appeal to be allowed, set aside conviction and sentence and set free the appellant.

On her part, from the outset, Ms. Msabila supported the conviction and sentence imposed on the appellant. She submitted that the 2<sup>nd</sup> ground of appeal is without merit, because the fact that Ernesto was not charged, that point alone cannot avoid the appellant to be charged. In support of her

submission, she cited to us section 23 of the Criminal Procedure Act which refers to common intention.

As on the issue of the search conducted at the appellant's house in his absence, Ms. Msabila was of view that even if there was no search warrant issued and on the point that the search was conducted in the absence of the appellant, she said, PW3 witnessed the search. Hence that was enough to make the search proper. Apart from that, Ms. Msabila contended that PW2, the son of the deceased identified the shoes and the knife after giving special marks.

Reacting on the propriety of the procedure used when the Extra Judicial Statement was admitted at the trial court, Ms. Msabila submitted that, even if the assessors were not involved fully in the admission of Exhibit P2, the trial was fairly conducted as the statement was read over to them at some point. All in all, Ms. Msabila urged us to find the appeal with no merit.

To some extent, we agree with Ms. Msabila to the effect that even if Ernesto was not charged with murder in this case, that alone was no reason why the appellant should not have been charged. It was upon the prosecution's discretion to choose the one to be charged according to the evidence collected by them which will enable them to prove the case. The prosecution were at liberty and cannot be forced to charge a person in a case which they think they cannot prove against that person.

As on the point of propriety of search conducted at the appellant's house in his absence, the record is clear that when search was conducted, the appellant was not there. To some extent, similar facts were found in the case of **Nuhu Selemani v. Republic** [1984] TLR 93 where search was conducted in the absence of the appellant. This Court stated that:-



*"There was insufficient evidence to link the shirt to the appellant on the evidence adduced by the prosecution.*

*.....In our view the circumstantial evidence in this case does not irresistibly lead to the inevitable inference that it was the appellant and nobody else who killed the deceased, in view of the lacunae in the evidence adduced by the prosecution."*

In the instant case, apart from the fact that the appellant was absent when search was conducted at his house there were several other lacunae which created doubt on the circumstantial evidence relied by the trial court. **Firstly**, there was no search warrant issued to legalise that search. **Secondly**, the record shows that the door of the house was not under lock and key when the appellant was absent, hence anybody could have entered into the appellant's house and planted those items. **Thirdly**, there is no proof of the chain of custody of the items

found (shoes and knife) as to who took care of them from where they were found at the house of the appellant, up to a point when they were tendered as Exhibits P3 and P4 at the trial court by PW2. In the absence of proper explanation of the custody of those exhibits, we find that there was no cogent evidence to prove the authenticity of such evidence.

In the case of **Iluminatus Mkoka v. Republic** [2003] TLR 245, this Court emphasized at some point the point of custody of exhibits and a trial court should know in whose custody those exhibits were kept.

(Also See, **DPP v Shirazi Mohammed Sharif** [2000] TLR 427 and **Maliki Hassan Suleiman v. SMZ** [2005] TLR 236.)

In view of those missing links in the instant case, we are of considered opinion that the improper or absence of a proper account of the chain of custody of Exhibits P3 and P4 leaves

*number of whom shall be two or more as  
the Court thinks fit.”(Emphasis added).*

The cited provision of the law emphasizes that it is mandatory for all criminal trials before the High Court to involve assessors.

More emphasis was put in the case of **Republic v. Assa Singh** (1937) 4 EACA 41, where the erstwhile Court of Appeal of East Africa stated as follows:-

**“Where an assessor is absent during  
one day’s hearing of the trial** and is  
allowed to resume and give an opinion  
on the case, the trial is a nullity.”  
(Emphasis added).

Even in the case of **Jackson @ Mabeyo Francis v. Republic**,  
Criminal Appeal No. 55 of 1994 (unreported) it was stated that:

**“....It is inconceivable that the  
assessors could have asked**

**meaningful questions without being aware of the contents of confession.** It follows therefore, that since the confession is crucial in this case we so find that the trial was conducted without aid of assessors contrary to Section 265 of the Criminal Procedure Act, 1985 and the trial is a nullity. A new trial be conducted."

(Emphasis added).

The law therefore demands that assessors be present throughout a trial, except during a trial within a trial. In this case, there was no trial within trial. Therefore the exclusion of the assessors during the admission of the appellant's extra judicial statement was illegal, and renders the reception of the exhibit incurably defective. The extra Judicial Statement (Exhibit P2) is accordingly expunged from the record. In the absence of

Exhibit P2, there is no other evidence to support the appellant's conviction.

In the circumstances and for the reasons stated herein above, we allow the appeal, quash conviction and set aside the sentence. The appellant is to be released from prison forthwith unless otherwise he is lawfully held therein.

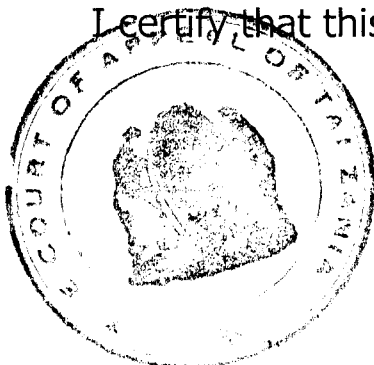
**DATED** at **IRINGA** this 22<sup>nd</sup> day of March, 2012.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

K. K. ORIYO  
**JUSTICE OF APPEAL**

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



A handwritten signature in black ink, appearing to read "J. S. Mgetta".

(J. S. Mgetta)  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**