IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: BWANA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 256 OF 2009

MPEMBA MPONEJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mgaya – PRM Ext. Juris)

dated 18th day of July, 2008
in

Criminal Sessions Case No. 146 of 2002

JUDGMENT OF THE COURT

5th & 10th September, 2012

BWANA, J.A.:

The appellant, Mpemba Mponeja, was charged with and convicted of the offence of Murder contrary to Section 196 of the Penal Code. It was alleged that on or about the 3rd day of September 2001 at about 18.00 hrs at Kamekamo Village of Kwimba District, the appellant murdered one Ndallo Mponeja. He was sentenced to the mandatory sentence of death by hanging

The deceased, Ndallo Mponeja was his sister. The two, it is alleged, were not in good terms. According to the evidence of PW1, Alphonce Ruhumbika, the Village Executive Officer (the VEO), the appellant reported to him on the 3rd September, 2001 that his sister, the deceased, has gone missing. She disappeared mysteriously. PW1 advised the appellant to go searching for her and report back. He never complied with that advice. Meanwhile upon learning of the disappearance of the deceased, people started gathering at the deceased's house. The appellant, was, however, not amongst them. He went on drinking local brew. That conduct arose some suspicion.

At the deceased's house, there were vivid drag marks from the said house to a nearby farm, about 300 metres away where a freshly dug trench was seen. The villagers decided to unearth the buried object. Therein was the deceased's remains. Steps were taken, including reporting the matter to the police. A medical doctor was called to the scene and post mortem examination was conducted.

Because of his conduct at those crucial moments of investigation, the appellant was a prime suspect for the murder of the deceased. He was therefore arrested and when interrogated by the VEO, it is alleged that he confessed that he is the one who killed his sister because of a quarrel over a piece of land and some money left over by their deceased brother, some months earlier.

PW2, Hollo Luhumbika, confirmed what PW1 had deponed but much of her evidence appears to be hearsay. She was not at the scene when the remains of the deceased were unearthed. She just heard that the appellant confessed to PW1 about the killing. She claims the appellant's conduct was suspicious because of his non involvement in the unearthing of the remains of the deceased. Likewise, PW3, C. 329 D/Cpl. Joseph's evidence is hearsay. He claims to have recorded the cautioned statement of the appellant but that is strenuously disputed and the said statement was never tendered in court. An Extra Judicial Statement was tendered but the procedure used in recording it, is challenged.

Before us the appellant was represented by Mr. Bernad Kabonde, counsel, while the respondent Republic was represented by Jacquilline Evaristus Mrema, learned Senior State Attorney, assisted by Angelina Mathias Nchalla, learned State Attorney.

Four grounds of appeal were argued before us namely:-

1. That the trial court erred in law and fact for convicting the appellant on the offence of murder while the prosecution evidence was not water tight to irresistibly establish the guilt of the appellant.

2. That the trial court erred in law and fact by believing PW1, PW2 and PW3 without evaluation of their hearsay evidence.

3. That the trial court erred in law and fact by denying the accused a fair trial.

4. That the trial court erred in law and fact for believing Exh. P4 (the extra judicial statement) which was not sufficiently corroborated.

The respondent Republic did not support the conviction of the appellant due to the following main reasons namely:-

1. That the prosecution case hinges mainly on hearsay evidence.

2. That Exh. P4 was tendered contrary to law.

3. That appellant was not given a fair hearing for lack of being provided with an interpreter as provided for under section 211 (1) of Cap 20.

We start by considering the issue of denial of a fair hearing. This claim originates from claims that the appellant, who did not understand Kiswahili or could not speak it well, was at times during the trial, not provided with an interpreter from Kisukuma to Kiswahili and vise versa. We have perused the record and noted with concern that at times an interpreter was provided and at times not. We consider this to be a fundamental breach of the appellant's rights to understand and follow up proceedings of the case against him. It was a fatal omission.

Important however, is the fact that the trial High Court judge relied mainly on the evidence of PW1 and PW2 in convicting the appellant. Pw1, the VEO, claimed to have received a confession from the appellant. However, it is on record that the said "confession" was obtained after the appellant had been "quizzed" by relatives of the deceased. None of those relatives testified as witness in this case. Section 27 (1) and (3) of the Tanzania Evidence Act, Cap. 6, clearly stipulate that a confession made to a person in authority is inadmissible unless its voluntary nature is ascertained first. This was not done in this case. The rest of PW1's evidence appears to be hearsay. We discard it.

Likewise, PW2's evidence is hearsay. She was told of the recovery of the remains of the deceased. She was also told about the poor relationship that existed between the deceased and the appellant. On the material day, she never went to the scene, as she was ill. The rest of what she testified was what she was told. Her evidence therefore, is discarded for being hearsay.

PW3, deponed that he took the appellant to the Justice of the Peace to record the appellant's statement. Further, that in the room there were only two people – the appellant and Justice of the Peace. However, Exh. P4, the said extra judicial statement, shows that the appellant was taken there by one D. 4848, PC Simon. That raises important questions of fact such as were there more than one statement recorded; or was there a third person involved? These doubts would have been cleared had one N.S. Kattanga, a justice of the peace, who recorded Exh. P4, been called to testify during the trial. He was not called.

Nowhere in the extrajudicial statement is shown that it was read over to and signed by the appellant. That was a fatal omission.

In the case of **MT 7479 Sgt. Benjamini Holela v Republic** (1992) TLR 121, it was stated:-

> *"Section 192 (3) of the Criminal Procedure Act, 1985, imposes mandatory duty that the contents of the memorandum must be read and explained to the accused. Since the requirements under section 192 (3)*

were not complied with ***the provisions of section 192(4) of the Criminal Procedure Act cannot apply..."*** (Emphasis provided).

Therefore, all the above considered, we allow the appeal. We quash the conviction and set aside the sentence imposed by the High Court. We further order that unless the appellant, Mpemba Mponeja, is lawfully held, he be set free forthwith.

DATED at **MWANZA**, this 10th day of September, 2012.

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL