IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 214 OF 2010.

1. JAMES @SHADRACK MKUNGILWA
2. LAZARO MKUNGILWA } **..... APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Uzia, J.)

dated 28th day of July, 2010
in
Criminal Session Case No. 4 of 2009.

JUDGMENT OF THE COURT

19th & 26th March, 2012.

MASSATI, J.A.:

The appellants are brothers. They were charged with and convicted of the offence of murder of Norman Mbwanji, contrary to section 196 of the Penal Code by the High Court sitting at

Iringa (Uzia, J.) and condemned to suffer death by hanging. Still protesting their innocence, they have appealed to this Court.

In this appeal, like in the trial court, the first appellant was represented by Mr. Onesmo Francis, learned counsel, while the second appellant was represented by Mr. Alfred Kingwe. Mr. Edson Mwavanda, learned State Attorney represented the respondent/Republic.

The facts are not complicated. The deceased was running a business of a barber shop at Igwachanya village in Njombe District. He used to keep his tools of trade at the house of a neighbouring business associate, one AIDAN S/O KILAMLYA, (PW1). On 18th March, 2005, PW1's house was broken into and a number of properties were stolen therefrom; including those of the deceased. Next morning, they got information that, those properties were taken to Ikelu village. A good samaritan took them to Ikelu and showed them the house in which the stolen properties could be found. That house happened to be that of

the 1st appellant. They knocked the door, and were answered by a lady who introduced herself as the 1st appellant's wife. In the sitting room they recognized a radio, one of the items stolen from the deceased's barber shop. PW1 decided to report the matter to Makambako Police Station, leaving the deceased behind to guard the house and the stolen items. After reporting, PW1 left the matter with the police, and returned to where he had left the deceased.

The deceased, however, was nowhere to be found. He, (PW1), reported about the missing person again to the police on 20/3/2005. The police accompanied him to the 1st appellant's house. The 1st appellant however escaped by jumping over the fence of his house, but on a search, the police recovered from the 1st appellant's house a blood stained club (rungu) and bush knife (panga). The police collected those items, and PW1 was allowed to go back to the village to look for the deceased; only to be told by his wife (PW2) that he had not yet returned. This

was reported to the village office, and later to Makambako police station. In the company of the police, the party went back to the 1st appellant's house. A search at the appellant's house surroundings led to the discovery of a belt, which the deceased's wife (PW2), recognized as that of her husband. Also nearby, a piece of clothing that was identified as the deceased's trousers was found.

On 7th July, 2005, nearly four months later, the deceased body was recovered in Igandu forest. According to PW4, Dr. Patrick Msigwa, the cause of death was due to a cut wound with the aid of a sharp weapon. This was contained in the Post-mortem examination report (exhibit P2). PW5, ASP Joseph Salvatory took the 1st appellant's cautioned statement and tendered it as Exh.P4. PW6, arrested the 2nd appellant and took his cautioned statement and tendered it as Exh.P7. He also tendered the Government Chemist's report on the blood sample found in the club and the belt as Exhibit P6. PW7, the Igandu

Village Executive Officer witnessed how the 1st appellant led the police to the discovery of the remains of the dead body of the deceased in Igandu Village forest. The dead body was identified by PW2, the wife of the deceased as that of the missing deceased. PW8 is the police officer who searched the 1st appellant's premises and recovered the club ("rungu").

In their respective defences, the 1st appellant told the trial court that on 19/3/2005 he had to run away from his house when people thronged it, because he suspected them to be thieves. When people came to his aid, the strangers ran away leaving two of them behind, including the deceased. He arrested him and sent him to the pombe shop; where they started beating him using a "rungu" (club). He rescued him and took him to his house, but after a while, released him. He was arrested on 6.7.2005, but he had nothing to do with the death of the deceased, and did not know whether he was dead. He never showed to the police the remains of the deceased body,

but it was the police who did so; and he never made any statement to the police. The deceased must have died from mob justice; he concluded.

The 2nd appellant said that on 19th March, 2005, he had gone to Makambako on his business errands. When he came back, he saw a mob of people assaulting a certain person, but did not see his brother, first appellant. What the first appellant said in the statements about him were not true. As for his own statement he was tortured into signing it, but he did not kill anybody.

It was on the basis of this evidence that the appellants were convicted.

For the first appellant, Mr. Francis, learned counsel, filed and argued three grounds of appeal. In his first ground, it was contended that the trial court misdirected itself in not considering that part of the prosecution evidence that, prior to

his death the deceased was beaten by a mob, thereby making it a real possibility that he was the victim of mob justice. He referred us to the finding of the medical report that the cause of death was by a sharp object, contrary to the blunt "rungu" that was found in the appellant's possession. As for the 2nd appellant's cautioned statement, the law required that it be corroborated and there was none in this case. In his second ground, Mr. Francis, briefly submitted that there was no evidence of malice aforethought considering that the appellant did not inflict the fatal wound as per the post-mortem examination report. The third ground was that the trial court was unduly influenced by words allegedly spoken by the 1st appellant that, "*Niachieni huyo ni mwizi wangu*", which were capable of an innocent interpretation. He therefore prayed that the appeal be allowed.

On his part, Mr. Alfred Kingwe, learned counsel, who had initially filed five grounds, abandoned two of them and argued

only the 1st, the 2nd and the 4th grounds. In the first ground, the learned counsel submitted that, there was no evidence of malice aforethought, as there was no evidence that the 2nd appellant ever beat the deceased. In the second ground, it was contended that it was wrong for the trial court to have based the conviction of the appellant on the retracted/uncorroborated statements of himself and the 1st appellant; and that even going by these statements no evidence of murder was brought forth, save for minor offences such as failing to report the death of the deceased etc. The last, 4th ground was not different from the previous one. Learned counsel submitted that, even if we go by the 1st appellant's cautioned statement, the 2nd appellant's role was, only in assisting in burying and hiding the body of the deceased. Common intention between the two appellants was therefore not established. It was therefore his view that the case against the second appellant had not been proved beyond reasonable doubt. He asked us to allow the appeal.

Mr. Mwavanda, learned State Attorney, opted to argue against each set of grounds of appeal generally. Against the 1st appellant, he submitted that, the case against him was proved beyond reasonable doubt, first by his own cautioned statement (Ex P4) and secondly that this was amply corroborated by his having been found in possession of a blood stained club ("rungu") a shallow grave near his home, a piece of the deceased's clothing and belt in his surroundings; and lastly, his conduct before, during, and after the death of the deceased, that eventually led him to take the police to show them where he had dumped the deceased's body. Briefly, Mr. Mwavanda, said that, if we are to go by his own cautioned statement; the 1st appellant left with the deceased when he was alive; he was the last person to be seen with the deceased; but immediately thereafter he fled from the village and away from justice, but pricked by guilty conscience, he eventually had to show where he had hidden the body. In his view, this was sufficient corroboration to sustain the conviction of the 1st appellant.

As for the second appellant, Mr. Mwavanda, submitted that his conviction was also well founded. First, he was implicated in the 1st appellant's cautioned statement (Exh P4). In there, the second appellant is mentioned as one of those youths who participated in beating the deceased to death, dubbed "vijana wa kazi". Secondly, his own cautioned statement (Exh P7) also lends credence to the prosecution case. Thirdly, his own conduct also gave him away, in that, he also ran away from the village soon after the killing; he concealed his own real name to the police, and lastly he failed to report the killing/death to the authorities. It was the learned counsel's view that the second appellant is netted in the web of section 22(1)(c) of the Penal Code (Cap.16 R.E.2002) and so he was equally a principal offender. He therefore also urged the Court to dismiss the appeal by the second appellant.

In a brief rejoinder, Mr. Francis, learned counsel, referred us to the decision of **JUMANNE SALUM PAZI v R,** (1981)

TLR.246 in which it was held that where there are several accused persons and it cannot be established who killed the deceased, all must be acquitted. So, section 22 of the Penal Code would not apply. He reiterated his earlier argument that if the weapon found with the first appellant was a "rungu", which was a blunt object, and according to the medical report the death was caused by a sharp object it was difficult to link the 1st appellant with the cause of death. So he reiterated his prayer that the appeal be allowed as the case had not been proved beyond reasonable doubt.

After, and in the course of their submissions, the Court asked all the learned counsel to address it on the propriety of the manner in which the cautioned statements of the appellants (Exhs P4 and P7) were received in evidence; and their effect. Exhibit P4 was produced by PW5. Strangely, before he produced it, the prosecuting State Attorney and not the defence counsel, as is the practice, asked the trial court to discharge the

assessors, because "an important point of law" was about to be made. Without even consulting the counsel for the accused persons, if they intended to object to the admissibility of the statement, the trial court ordered that the assessors be discharged. PW5 then proceeded to give all his evidence and tendered Exh.P4 without any objection from any defence counsel. In between, a push cart was also admitted as Exhibit P3. It was only after the admission of the cautioned statement (Exh.P4) that the assessors were recalled and PW5 was allowed to "continue to adduce evidence" in which another Exh.P5 was admitted but the contents of Exh.P4 were also read over "for the benefit of the assessors". It is then that the assessors were allowed to put some questions to PW5. It must first be noted that PW5 gave some other evidence that had nothing to do with the admissibility of Exhibit P4, in the absence of the assessors.

Both learned counsel for the appellants were at one, that, in the absence of the need for a trial within trial, it was improper

to exclude the assessors from that point of the trial, and that therefore, Exh.P4 was improperly received, and should be expunged from the record. Learned counsel did not address us on the admissibility of exhibits P3, P4, P6 and P7 possibly because there was a trial within trial in respect of Exh.P7. But Mr. Mwavanda, while conceding that this was an irregularity, was of the view that it was curable, since in the end, th e cautioned statements were read over to the assessors.

There is no rational dispute that the conviction of the appellants rests on two pieces of evidence. The first is, the appellants' own confessions (Exh.P4 and P7). The second is, circumstantial evidence which consists of recent possessions of the deceased's properties, the appellants' own conduct, and lastly the first appellant leading to the discovery of the body of the deceased.

With regard to the confessional evidence, we first have to decide, whether, the appellants' cautioned statements were

properly admitted. We have already given above the background. It is obvious that the assessors were excluded from the trial in which not only Exh.P4 but also Exh.P3 and other pieces of evidence were received from PW5. It is also obvious that even though there was a trial within trial before admitting Exh.P7, the assessors were excluded from hearing and during the reception of both Exhibits P6 and P7 tendered by PW6. There once again after PW6 was called to the stand and sworn, the prosecuting State Attorney informed the Court that there was "a point of law" to be discussed, and so asked the assessors to be discharged. The usual practice is that before the assessors are discharged; it is the defence counsel and not the prosecuting attorney who informs the Court that he intends to object to the admissibility of such evidence presumably because he would have consulted his client and so instructed. Be that as it may, the court ordered the assessors discharged. PW6 then went on to testify, and as he was about to tender the Government Chemist's report, counsel for the defence objected. The

objection was overruled, and the report on blood sample found in the club and the belt, was admitted as Exh.P6. PW6 then proceeded to give evidence. There was another objection to the admissibility of the second appellant's cautioned statement under section 50(1) of the Criminal Procedure Act. The trial court overruled the objection. Strangely, counsel still protested to the admissibility of the statement, and strangely still, now the trial court ordered a trial within trial to "clear doubts". So, a trial within trial was held, and the statement was ruled admissible. It was after this, that the assessors were allowed back in the court room where PW6 is recorded to have "continued with the evidence;" and was ordered to tender the statement as Exhibit P7 and was then ordered to read the statement "for the benefit of the assessors".

After a few sentences, PW6 finished his evidence by tendering a sketch map as Exh.P8; and the 1st appellant's extra

judicial statement as Exh.P9 because the magistrate who recorded it was dead.

The question is; what is the effect of the absence of the assessors during the reception of those exhibits? That calls for a brief examination of the role of assessors in criminal trials in the High Court, and the purpose and manner of conducting a trial within a trial.

Section 265 of the Criminal Procedure Act (CPA) requires that all criminal trials in the High Court, be held with the aid of assessors. Section 288 of the CPA requires the prosecution to present its witnesses and adduce evidence in the presence of assessors. Similar provisions exist in the Criminal Procedure Codes of Uganda and Kenya. So, interpretations of those provisions by courts of records in those countries have persuasive value to our courts.

But perhaps the basic principles on trial with assessors were restated by the Court of Appeal of East Africa in **NDAGIZIMANA AND ANOTHER v UGANDA,** (1967) I E.A. 35 at 37. In that case the appellants were charged with murder. The trial judge held a trial within trial in the absence of assessors, to determine the admissibility of the statements made by the appellants to the police. After ruling them admissible, the assessors were recalled, but the evidence on how and before the statements were admitted was never repeated after the recall of the assessors. The Court of Appeal went on to hold that in such a case, evidence should have been given again before the assessors to show that the statements were admissible, and that in such a case sufficient evidence had not therefore been led before the court as fully constituted, to warrant the admission of the statements in evidence. The Court of Appeal then went on to state that:-

> *"Under the Criminal Procedure Code of Uganda all criminal trials shall be with assessors. Assessors are*

therefore part of the court and it is essential that all the evidence, and proceedings at the trial should be in their presence except when a dispute arises as to the admissibility of the evidence. In this case in order to avoid the assessors being possibly prejudiced by the hearing of evidence which is afterwards held to be inadmissible, the practice is that a trial judge hears arguments, and if necessary, evidence, as to the admissibility of the disputed evidence in the absence of the assessors, ***but if he decides that the evidence is legally admissible then the assessors have to be recalled and the disputed evidence is led as if there had never been a "trial within a trial". It is necessary that all the evidence on which the prosecution rely is given before the assessors and the prosecution cannot rely on the evidence given in the trial within a trial 'in the absence of the assessors to establish any of the essential facts of their case' ".*** (emphasis supplied)

We are persuaded and entirely agree with this exposition of the law regarding trial with assessors. This position has also

been reiterated by this Court in a number of decisions. **(See ABDALLAH BAZAMIYE AND OTHERS v R,** (1990) TLR. 42; **MASANJA MAZAMBI v R,** (1991) TLR 200, and **JACKSON @ MABEYO FRANCIS v R,** Criminal Appeal No.55 of 1994 (unreported).

So, the only exception to the assessors' full participation in a criminal trial, is where there is a dispute to the admissibility of evidence. We must emphasise that, before the assessors are discharged, it is the defence counsel who should inform the court that he intends to object, because he is the one who has all instructions from the accused person, and will have read the deposition. But once its admissibility is determined, the whole evidence of its foundation for its admissibility has to be repeated, and the evidence itself actually admitted in the presence of the assessors. Where there is no such objection, exclusion of assessors is illegal, and where such evidence is

admitted in their absence, their admission is not legally warranted.

Mr. Mwavanda has submitted that the irregularity is curable, because in the case of Exhibits P4 and P7, their contents were read over to the assessors when they resumed in the trial, and so the appellants were not prejudiced. It is true that, generally, for an irregularity in procedure to be fatal, it must be shown to have prejudiced the accused and occasioned a failure of justice. But, these rules of procedure differ in importance. Some are minor and do not go to the root of justice. These can be ignored. But some are so fundamental, that they cannot be ignored. Rules that affect an accused's right to be heard, or to a fair hearing, are fundamental, and cannot be ignored. Trial with assessors or by jury (as in other jurisdictions) who were presumed to be best placed to evaluate the facts has its origins from the medieval times in England in the cherished idea of trial by peers, and has since been regarded

as part of the process of fair trial in all serious offences in our jurisdiction. It is also hailed as promoting transparency in the administration of criminal justice. So this Court, has invariably taken a strict approach to any slight infringement to the rules on trial with assessors. Examples include, where a trial court misdirects the assessors on a vital point of law; (See **ALPHONCE PHILIBERT v R,** Criminal Appeal No.27 of 1979 (unreported) or where a new assessor is recruited to replace another after the hearing has started (See **NYAHESE CHEHU v R,** (1980) TLR.140.

In the present case, Exhibits P3, P4, P6 and P7 were admitted in the absence of assessors; so no sufficient evidence had been led before the court as fully constituted, to warrant their admission. Since they were not properly admitted in evidence, reading the contents of Exh.P4 and P7 after the assessors had resumed their positions in the trial and giving them opportunity to ask questions did not cure this deficiency,

because if the questions were in respect of those exhibits, these exhibits were not before them. In the end therefore, we find and hold that, on account of their improper admission in evidence, Exhibits P3, P4, P6 and P7 are hereby expunged from the record; and so hold that those exhibits were improperly acted upon by the trial court.

Having so held, however, we are not prepared to go the whole length to declare the whole trial, a nullity. This is because in our view, the irregularity only affected the testimonies of PW5, PW6, and Exhibits P3, P4, P6, and P7. In such a situation our next task is to see whether there is any other evidence against the appellants which is untainted by the irregularity. This approach was adopted in **JACKSON @ MABEYO FRANCIS v R,** Criminal Appeal NO. 55 of 1994 (unreported). We are satisfied that there is.

There is overwhelming circumstantial evidence, connecting the 1st appellant with the offence. First, according to PW1 he

left the deceased at the 1st appellant's house. And PW2 confirmed that the deceased did not return home that day. In his own sworn testimony, the 1st appellant admits that the deceased was left behind at his house and he then took him to a "pombe shop", then back to his home. So the 1st appellant was the last person to be seen with the deceased alive. In the trial he did not give a satisfactory account of the deceased's whereabouts. This laid a strong basis for the inference that the appellant knew where the deceased was. This was sufficient to cast a very good suspicion on him, though of course it was not in itself conclusive proof that he killed the deceased (See **RICHARD MATANDULA AND ANOTHER v R,** (1992) TLR.5., **ADAM SHABANI v R,** Criminal Appeal No. 4 of 1981 (unreported).

But then, a search team led by PW8 found a blood stained "rungu" from his house. According to PW1 and PW2, apart from a belt, there was also a piece of the deceased's trousers and an

empty shallow grave. These were incriminating circumstances against the 1st appellant and were properly taken into account by the trial court (See **MAKUNONE MTANI v R,** (1983) TLR 179.

Then, there was also evidence of conduct. The 1st appellant not only jumped over his own fence when he was about to be apprehended, but also immediately thereafter went into hiding for nearly four months. He also, lied about his real name. Evasions, lies and suspicious conduct strengthened the prosecution case (See **MASUMBUKO S/O MATATA @MADATA AND 2 OTHERS v R,** Consolidated Criminal Appeals No.318, 319 and 320 of 2009 (unreported).

The last, but the strongest piece of evidence that, works heavily against him is that, according to PW7, an independent witness, it was the appellant who led the search team and discovered the remains of the body of the deceased in Igandu forest. This is relevant under section 31 of the Evidence Act (See **R v TOMU s/o NGULOMBE,** (1943) 10 E.A.C.A 54. PW7

also heard the appellant, in answering to a question, why he killed the deceased, replying "ask the deceased why I killed him". This was an admission.

Mr. Francis has forcefully submitted that the deceased might have been beaten by a mob and that the 1st appellant had only used a "rungu" which was a blunt object as opposed to a sharp object diagnosed to have caused the death of the deceased. We do not agree; First, it has also been proved that the 1st appellant had a 'panga'. But secondly, he admitted the killing in the presence and hearing of PW7 an independent witness. Thirdly, the 1st appellant said in his testimony that he left with deceased when he was alive. The deceased has since mysteriously disappeared. Furthermore, if he witnessed the beating of the deceased and rescued him from mob justice, why did he not take the deceased to the authorities. Besides, why did he attempt to bury him and hide his body or else how did he

know where the body was, as testified by PW7? In the light of all this evidence we cannot accept Mr. Francis's argument.

We therefore agree with Mr. Mwavanda that the case against the 1st appellant was proved to the tilt. We accordingly dismiss his appeal.

As for the second appellant, the first piece of evidence is his own sworn testimony in which he admits to have witnessed the beating of the deceased to death. Mr. Kingwe has submitted that this did not amount to murder. But Mr. Mwavanda submitted that the 2nd appellant was covered under section 22(1)(c) of the Penal Code.

Section 22(1)(c) of the Penal Code provides as follows:

"22(1) – When an offence is committed each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, namely:-

(c) every person who aids or abets another

person in committing the offence."

The leading authority in East Africa on the true import of this provision is **ZUBERI S/O RASHID v R,** (1957) 1 EA.455. In that case the appellant had hired some people to kill his wife, and stood within an earshot from where the real killers went about to execute the deceased. He was charged with murder. The question was whether his presence, and conduct in the circumstances amounted to countenancing the offence. It was held among others:-

> *"the question whether or not the appellant's conduct amounted to "countenancing" was a question of fact:- the antecedent conduct of the appellant had been such as to induce a reasonable belief in Faison and Abdi that the appellant actively desired his wife's death and was willing, short of direct participation, to encourage and assist them in her murder, it was therefore, incumbent on the appellant, actively to dissociate himself from the final plan to murder if he wished to avoid complicity, and that since he*

did not do so, he rendered himself a party to the crime as principal in the second degree."

It is true that under ordinary circumstances mere presence at the scene of crime, is not enough to constitute a person an aider and abettor. (See **DAMIAN PETRO AND ANOTHER v R,** [1980] TLR.260). In the present case, however, the 2nd appellant was not only present during the beating of the deceased, but he did not dissociate himself from the beatings and his conduct showed all signs that he desired the deceased's death. In our view he cannot avoid complicity.

There was, in our view corroboration in the 2nd appellant's conduct. First, after the deceased's death, he and his brother fled away to Dar es salaam. When he came back and was arrested, in connection with another offence, he concealed his common name of LAZARO, instead he introduced himself as Chesco Yohana. Besides, he did not report about the beating. We think, this was more than sufficient evidence of his

participation in the commission of the offence. We accordingly also find that the case against him too, was proved beyond reasonable doubt.

In the event, we think that the appeal is devoid of substance. We accordingly dismiss it in its entirety.

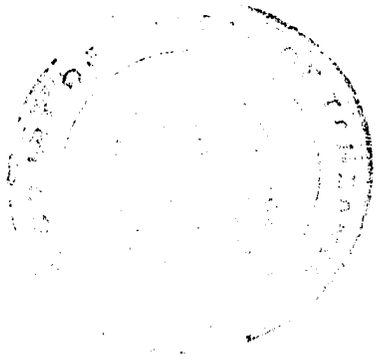
DATED at **IRINGA** this 26th day of March, 2012.

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.



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