IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 119 OF 2015

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

1. **SEIF SALUM**
2. **ALLY MUSSA @ SILENCER ..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Makuru, J.)

dated the 25th day of September, 2013
in
Criminal Sessions Case No. 92 of 2003

JUDGMENT OF THE COURT

09/06/ & 11/06/2015

KILEO, J.A.:

Before the High Court of Tanzania sitting at Dodoma in Criminal Sessions Case No. 92 of 2003 the two appellants were prosecuted for murder contrary to sections 196 and 197 of the Penal Code, Cap 16 R. E. 2002. It was alleged that on or about the 21st day of April, 2003 at Area "A" within the Municipality, District and Region of Dodoma jointly and together they did murder one Faruku Omari Bura. There was no dispute as to the fact

that the deceased met a violent death. According to the postmortem examination report which was tendered in court the cause of death was severe peritonitis which was the result of multiple perforation in small and large intestine. It was the prosecution case that the deceased was killed in the course of an armed robbery. The crime was committed at night. The only eye witness in the case (PW1) who was the deceased's wife was unable to identify the bandits and the case for the prosecution was purely circumstantial. The prosecution led evidence which tended to suggest that the second appellant was found in possession of a pistol from which two spent cartridges (which were allegedly found at the scene) were fired. In arriving at a conviction of the appellants the learned trial judge relied heavily on a cautioned statement of the 1st appellant which she had however declined to admit after a trial within trial was conducted.

At the hearing of the appeal the 1st appellant was represented by Mr. Paul Nyangarika, learned advocate. The second appellant was represented by Mr. Cheapson Kidumage. Each of the counsel filed a memorandum of appeal on behalf of his client. The following grounds emerge from the two memoranda:

1. That, Hon. trial Judge erred in law and in facts in not holding that the circumstantial evidence adduced by the prosecution side in this case did not prove any case against the appellant at the standard required in law.
2. That, the Hon. trial Judge erred in law and in facts in not making adverse inferences against the prosecution's case regarding their withdrawal of the key witnesses and their withholding of key exhibits.
3. That, the Hon. trial Judge erred in law and in facts in considering matters which were not part of the evidence properly admitted during the trial of the case.
4. That, the Hon. trial Judge erred in law and in facts as she misdirected the assessors while summing up the case to them and thereby improperly influencing their verdicts on the case.
5. That, the learned Hon. trial Judge erred both in law and in fact in taking the evidence of a witness whose statement was not read over to the accused persons during committal proceedings.

The grounds above comprise of both procedural and merit issues.

The matter need not detain us. As we will soon show, there were serious procedural irregularities which when taken in their totality vitiated the whole trial.

In ground no. 4 of the memorandum filed by Mr. Nyangarika the learned trial judge is faulted for misdirecting the assessors when summing up and thereby improperly influencing their verdict. Both defence counsel, as well as Mr. Marcelino Mwamnyange, learned Senior State Attorney for the respondent Republic were in agreement that the assessors were not properly directed and that the reference to the cautioned statement in the course of addressing the assessors was a serious flaw in the trial of the case. We subscribe to the contentions of the learned advocates and the Senior State counsel. At the conclusion of the trial within trial on the cautioned statement that the 1st appellant was alleged to have made to PW5 Mashauri Kowe, the learned trial judge reached a conclusion (at page 126 of the record), that the statement was inadmissible. Yet, when she was addressing the assessors she made reference to the cautioned statement that was not no longer on record. At page 163 the learned judge addressed the assessors in the following words:

"If you believe that the 1st accused person confessed to have committed the offence in collaboration with the second accused person, you may find the accused persons guilty of the offence."

At page 168 of the record it is shown further that the trial judge addressed the assessors in the following words:

"…. Like PW3, he said that they managed to apprehend Seif at his place of residence and took him to Dodoma Central Police Station where he was interrogated regarding the incident which took place on 21/4/2003. According to him, the 1st accused volunteered to tell them the truth. He even mentioned his partners in crime as Said Muhamba, Issa Babu and Ally Mussa (Silencer). As stated by PW3, this witness also told the court that the 1st accused told them that while going to commit the offence Said Muhamba had a gun and the 2nd accused, Silencer had a pistol, Issa Babu had a Panga and himself was carrying a stick. As a result of the information they started tracing the others. On 10/06/2003 an informer told them that the second accused was at Chinangali Area. They managed to arrest the 2nd accused on 10/06/2003 while he was hiding under the bed. According to him, they searched him and managed to discover a pistol from his body, on his waist. He said that the said pistol had a bullet at the chamber.

"Ladies assessors, the last prosecution witness was Mashauri Kowe (PW6). This witness informed this court that he is a retired police officer. Prior to his retirement he worked with the Police Force with a rank of a Detective

Sergeant (D/SGT). Before his retirement he was referred to as D/SGT Mashauri. He said that in 2003 he was working in the Criminal Investigation Department, Dodoma Central Police Station. He remembered that on 09/05/2003 he was summoned by the OC-CID and informed that there was a suspect who has been arrested in connection with a murder case. The suspect's name was Seif, who was at the material time placed in the lock up. He was assigned the duty of interrogating him. Ladies Assessors, you heard this witness saying that he went to the charge room officer (RCO) and informed the In-charge that he was assigned the duty of interrogating Seif. He took Seif to his office and after following the usual procedure before interrogation, such as telling the other police officer to vacate the room, inspecting him, introducing himself, informing him of his rights and that he was facing a murder case, he started interrogating him. According to him, the accused admitted to have committed the offence in the company of other three. The first accused, Seif further told him that at the scene, two of them entered into the house. He told him that it was the 2nd accused who entered into the house with another while he remained outside with another. After interrogating he took back the 1st accused person to RCO.

Ladies Assessors, you heard this witness testifying in court that the 1st accused confessed that they were armed with a gun and a pistol and when cross examined by the 2nd assessor he further said that the 1st accused told him that the deceased was also shot outside the house when he was trying to run."

It should be noted that the assessors had been discharged when the trial within trial was conducted therefore they could not have heard about the 1st appellant's confession to PW5. Once the cautioned statement had been declined there ought not to have been made any further reference to it. It would appear that the trial judge considered the cautioned statement as a repudiated confession but this was wrong as the confession was not in record after it had been declined.

Mr. Nyangarika cited **Danford Chizuwa versus Republic**. - Criminal Appeal No. 202 of 2006 (unreported) in support of his contention that from the very beginning the learned trial judge, knowing that the case rested on circumstantial evidence failed to properly direct the assessors on the principles underlying circumstantial evidence. In this case the Court stated that in summing up to assessors in cases of this nature a trial judge has to direct assessors on the issue of the legal burden which lies throughout on the prosecution and that such direction should always be given at the beginning of the summing up. When summing up to assessors on the question of circumstantial evidence the learned trial judge merely told the assessors that circumstantial evidence can prove the case if taken together in points (sic!) irresistibly to the accused persons, that they are the ones

who caused the death of the deceased. We think the learned trial judge ought to have done more than that. She had a duty to inform the assessors that before the accused persons could be convicted on circumstantial evidence the prosecution had a burden of proving that the circumstances led to the only reasonable inference that the accused persons took part in the commission of the crime they stood charged with and that the circumstantial evidence led to an irresistible conclusion that they committed the crime. The learned trial judge also ought to have explained to the assessors that each of the inculpatory facts or set of inculpatory facts, adduced against the accused considered singly must justify the drawing of the inference that the accused committed the crime in question. Likewise when considered together it must justify the drawing of such inference. (See: **Abdu Muganyizi V. R. 1990 TLR 263** where it was held:

> *"in a case depending purely upon circumstantial evidence, the inclulpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that guilty."*

Also **John Magula Mdongo v. R.** Criminal Appeal No. 18 of 2004 (unreported) where the Court held:

> *"it is necessary before drawing the inference of guilty from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*)

Looking at the opinion that was given by one of the assessors it becomes clear that they were not properly directed. What she said at page 176 of the record bears this out:

> *"Madam Judge, I am of the opinion that the prosecution proved its case beyond reasonable doubt. According to PW1, although she did not identify the accused person, but heard a gunshot outside after deceased has escaped and gone outside. I am of the opinion the accused be convicted accordingly."*

We do not think that a properly directed assessor would have given such advice on a matter as serious as this one. We agree with the learned advocates that if the assessors had been properly directed different verdicts might have been arrived at.

Another disturbing aspect of the conduct of the trial is the flouting of procedure with respect to the summoning of witnesses. PW2 was summoned but his name did not appear at the committal proceedings. The defence was not given notice of the prosecution's intention to call him nor was the substance of his evidence served upon them. Section 246 (2) of the Criminal Procedure Act, Cap 20 R. E. 2002 (CPA) provides:

> **(2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.**

And section 289 of the CPA states:

> **289. Additional witnesses for prosecution**
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> **(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.**
>
> **(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.**
>
> **(3) The court shall determine what notice is reasonable,**

regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called.

It cannot by any means be said that the prosecution became aware of the evidence which PW2 was going to give on the date that he was called. The prosecution knew, as early as on the Plea and Preliminary Hearing stage, that they would call him as their witness. They should therefore, before the hearing have given notice of their intention to call him and also availed the defence of the substance of the evidence that he was going to tender. The absence of his name in the list of witnesses which was given at the committal proceedings and the lack of notice before he was called rendered the reception of his evidence highly irregular and in fact, under the circumstances of this case amounted to a miscarriage of justice.

We invited the learned advocates to advise us on what course of action we should take after it was apparent that there were such serious procedural irregularities. The learned advocates advised us to allow the appeal in view of the circumstances of the case and set the appellants free.

In **Charles Lyatii @ Sadala vs. the Republic,** Criminal Appeal No. 290 of 2011 (unreported) the Court cited **Tulubuzya Bituro v R.** (1992) TLR 264 which stated:

> *"...in criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with aid of assessors. The position would be the same where there is non-direction of assessors on a vital point."*

Section 265 of the CPA requires that all trials before the High Court be held with the aid of assessors. It provides:

> **265. Trial before High Court to be with aid of assessors**
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> **All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the as the court thinks fit.**

A trial without the aid of assessors would be a nullity in terms of the above provision.

The Court went further in **Charles Lyatii** (supra) by citing **Fatehali Manji v. R.** (1966) 341 which stated:

> *"in general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and*

circumstances and an order of retrial should only be made when the interests of justice require."

In the present case we are settled in our minds that given the circumstances of the case a retrial would be against the interests of justice. The prosecution case was so deficient to the extent that a retrial would only end up in enabling the prosecution to fill up gaps in their case. A retrial would amount to a persecution of the appellant. For example, a glance at the circumstantial evidence that was tendered at the trial shows that there was no linkage between the evidence and the culpability of the appellants. Moreover, though the cautioned statement was rejected yet the trial court considered it. Further, there was no evidence that there were any spent cartridges that were picked up at the scene of crime and even if for academic purposes it was assumed that such cartridges were picked up there was no linkage between them and the pistol that the 2nd appellant was allegedly found with. And, the evidence of PW2 having been irregularly taken was of no consequence.

In the end we find that the appeals by Seif Salum Ally Mussa @ Silencer were filed with sufficient cause for complaint. We, in the event allow their appeals. Their convictions are quashed and sentences set aside. We direct

that they be set at liberty forthwith unless otherwise held for some lawful cause.

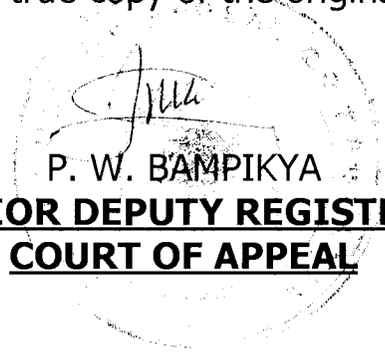
DATED at **DODOMA** this 10th day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL