IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPPEAL NO. 414 OF 2013

1. **ELIAS MWAITAMBILA**
2. **BARAKA DANIEL**
3. **EDSON MBUKWA** .....**APPELLANTS**
4. **LEONARD MKISI**

VERSUS

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

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

(Mmilla, J.)

dated the 28th day of December, 2012
in
Criminal Session Case No. 22 of 2009

JUDGMENT OF THE COURT

13th & 18th August, 2015

MASSATI, J.A.:

The appellants were arraigned before the High Court sitting at Mbeya for the offence of murder, contrary to sections 196 of the Penal Code. After a full trial they were convicted as charged and sentenced to death by hanging. They have now appealed to this Court.

It was alleged at the trial court that, on the 18th day of January, 2008, at Tunduma, within Mbozi District, Mbeya Region, the appellants murdered one ADAM s/o MKONDYA. They pleaded not guilty.

To prove their case, the prosecution produced and the trial court received the post mortem examination report as Exhibit P1, the identification parade register as Exhibit P2, and a report of search and seizure of a shot gun recovered from the third appellant EDSON s/o MBUKWA as Exhibit P3. Then, at the trial, six prosecution witnesses testified, and the cautioned statements of the appellants were admitted as Exhibit P4, P8, P9 and P11 respectively in that order, together with the gun and ammunition alleged to have been recovered from the third appellant, and the money recovered from the first appellant as Exhibit P5, P6, P10 and P12 respectively.

Briefly, PW1, **Judith Haule**, testified that on the 18th January, 2008 she was working as a cashier, and was at the cash counter at Lyamba Bar, in Tunduma township at 9.00 pm when the bar was raided by a group of bandits. Two of the bandits broke into the bar counter, and threatened her into surrendering all the proceeds of her sale. She was able to identify one of the bandits, the first appellant. After they had swooped the bar revelers

of their various properties, the bandits vanished, but she learnt that a security guard, one Adam Mkondya was killed in the process. Three days later, she was called at the identification parade where she identified the first appellant. **PW2** Asst. **Inspector Aden Asajile** recorded the cautioned statement of the first appellant and tendered it as Exhibit P4. PW3, EX. SP **STEPHEN MTENGETI**, was the OC CID of the respective area. He participated in the manhunt, and search of the suspects, zeroing down to the present appellants and exhibits. PW4 **INSP. CHARLES MAKUNJA** accompanied PW3 in the operation, and collected the deceased's body and sent it to the hospital. He then proceeded to arrest the 1st appellant and organized and conducted an identification parade, where PW1 identified him. He also tendered a shot gun Pump Action and three (3) ammunitions recovered from the third appellant as Exhibits P5 and P6 respectively. He searched, and recovered from the first appellant, the sum of shs. 1,836,000/= which he also tendered as Exhibit P10. PW5 **WP 1726 SGT BATISEBA** recorded the cautioned statement of the third appellant which she tendered as Exhibit P11. **PW6 E 6555 D/C Amos** went to the scene of the crime, and collected from where the deceased's body was lying, three empty cartridges of ammunitions. He tendered them as Exhibit P12. His

opinion was that they were fired from an AK 47 gun. He also identified the gun (Exhibit P5) from which the ammunitions were fired. He also explained and repeated what PW3 and PW4 told the trial court about the manhunt operation.

On their part, all the appellants gave evidence on oath. The first appellant (DW1) raised the defence of alibi, in that on the material day, he was at Vwawa. He also complained about the irregularities in the identification parade and said that he was tortured into signing the cautioned statement. DW2 the second appellant, denied any involvement in the commission of the offence, and also disowned the statement that the police produced as evidence. DW3 denied that he was a traditional medicine man or that he ever knew the suspects brought to him by the police, or to have been giving them charms to protect them from their criminal activities. He also denied that a gun was recovered from his house. He disowned the statement associated with him, as having been extracted under physical pain. DW4 also denied any involvement in the crime, or that he offered any statement voluntarily.

In his judgment, the trial court found that the appellants having voluntarily offered their confessions, which were corroborated by the evidence of PW1, were guilty as charged and accordingly convicted them.

The appellants, through the services of Mr. Justinian Mushokorwa, learned counsel, are challenging that finding in this Court. The learned counsel has filed a memorandum of appeal comprising two grounds; namely:

1. *The learned trial judge erred to hold that PW1 was a reliable and credible witness closely or at all addressing the horrifying scenario of the robbery incident and the effect thereof to PW1.*
2. *The learned trial judge erred to rely and act on the shaky lone testimony of PW1 as constituting corroboration to the four retracted alleged confessions of the four appellants which confessions themselves required independent corroboration as a matter of judicial prudence and which was lacking.*

Elaborating on each of the grounds, Mr. Mushokorwa submitted that, since there was gun fire at the scene of crime which must have horrified PW1, and since the witness did not disclose the intensity of the illumination from the electric bulb that was in her room, PW1, must have been too horrified to have been able to correctly observe and recount all that she said in her testimony. For this, he relied on the decision of **HASSAN**

KANENYERA v R (1992) TLR 100. It was therefore his opinion that the evidence of PW1 was neither credible nor reliable, to have been relied upon by the trial court. In the second ground, the learned counsel submitted that, while the trial court properly directed himself in law that retracted confessions required corroboration, he misdirected himself in holding that the appellants' retracted confessions were corroborated by the evidence of PW1, or that the confessions could corroborate each other. For these, he referred to us the decisions of **HASSAN KANENYERA v R** (supra) and **MKUMBWA SAID OMAR v SMZ** (1992) TLR 65. He therefore opined that the appellants' confessions were not corroborated and the trial judge did not warn himself against the danger of convicting without corroboration. It was for those reasons that Mr. Mushokorwa prayed that the appeals be allowed.

But the respondent was not impressed. Arguing against the appeal on behalf of Ms Catherine Gwaltu and Ms Lugano Mwakilasa, learned Senior State Attorneys, Mr. Francis Rogers, learned State Attorney, in a short but focused submission, argued against the first ground that the evidence of PW1 was unimpeachable, as all the favourable conditions for identification were present, the electric bulb light, the proximity, and the details she gave of what happened before and after the robbery. She was also able to

describe the appellant's complexion, height, and attire. For that, she referred us to the celebrated case of **WAZIRI AMANI v R** (1994) TLR 250 and **RAYMOND FRANCIS v R** (1994) TLR 100. He went on to distinguish **HASSAN KANENYERA v R's** case (supra), in that, there, the conditions were more horrifying physically, than in the present one. Lastly, he submitted that there was no possibility of mistaken identity in this case. Responding to the second ground of appeal, Mr. Rogers agreed with Mr. Mushokorwa, that, it was true that in practice, retracted confessions required corroboration, but that a conviction would not necessarily be invalid if there was no corroboration, if the trial court had warned itself of the danger of relying on the uncorroborated retracted confessions. He also agreed that in law, evidence which itself required corroboration, could not corroborate another. However, he took strong exception to Mr. Mushokorwa's submission regarding whether or not the appellants' retracted confessions in this case were corroborated. In his view, in the light of the position he had taken regarding the evidence of PW1, which is that, it was credible and reliable, it corroborated that of the appellants' retracted confessions. So in his opinion there was no need for the trial judge to warn himself against the danger of convicting without corroboration because PW1 provided such

evidence. Having said that, Mr. Rogers prayed to us to dismiss the appeals in their entirety.

In his reply submission, Mr. Mushokorwa insisted, that since PW1 did not disclose the intensity of the light emitted from the electric bulb, it was impossible to say that the conditions for identification were all that ideal. So he reiterated his prayer to the Court to allow the appeals.

After the learned counsel had closed their addresses, we asked them to address the Court on three issues which were apparent on the face of the record: -

(i) Whether, the learned trial judge directed the assessors on some crucial pieces of the prosecution and defence evidence; such as identification parade and the identification of the first appellant.

(ii) Whether, in the two trials within trial that were conducted, all the accused persons were allowed to participate by putting questions to the witnesses?

(iii) Whether the learned trial judge considered and evaluated the defence case in the judgment?

Depending on what opinion they had to the above issues, we also asked them to address us on the consequences, and remedies?

Both counsel readily conceded and answered all the three issues in the negative. They both submitted that there is nothing in the record to suggest that the learned judge brought to the attention of the assessors, the evidence regarding the results of the identification parade, and the 1st appellant's complaints about it. This they both agreed, was a crucial piece of evidence. They also agreed that the record does not reflect that in the course of the trials within trial, the co-accused persons were allowed to put in questions to any of the witnesses. This, they submitted, was also wrong, because it denied them of their right to be heard. Thirdly, the learned counsel, also conceded that although the trial judge did summarise the defence case, he did not evaluate the same; which again was wrong, they submitted. They went on to submit that the effect of these irregularities was to vitiate the trial, as it cannot be said that the appellants received a fair trial. They therefore asked the Court to exercise its revisional jurisdiction, and quash the proceedings and conviction and set aside the sentence and order a retrial, if it deems it in the interests of justice.

On the issue of assessors, we wish to begin by stating that in criminal trials before the High Court, sitting with assessors, is not an option, but a matter of law. It is entrenched in section 265 of the Criminal Procedure Act Cap. 20 – RE 2002 (the CPA). The purpose of sitting with assessors is to obtain their opinion on the evidence as a whole. In order to realize that goal section 298 (1) of the CPA provides for the judge to sum up the case to the assessors at the end of the trial, and before they give their opinions. If the opinion of the assessors is to be of any value it is important that the assessors fully understand the facts of the case before them and the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of such assessors' opinion diminishes. (See **WASHINGTON ODINDO v R** (1954) 24 EACA 392, followed in **HATIBU GHANDHI v R** (1996) TLR. 12, to mention just a few. From the above premises, it has been held that where assessors are not directed or misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors (See **TILUBUZYA BITURO v R** (1982) TLR 264.

Coming to the present case, one of the crucial evidence of identification for the prosecution, was that of the identification parade register, which, as might be recalled was admitted during the preliminary hearing as Exihibit

P2, and testified orally by PW3. In his defence, the first appellant who was affected by this piece of evidence attempted to challenge the legality of the parade. But, in his summing up notes to the assessors, the learned judge, did not refer to Exhibit P2, or to the testimony of PW3 on that aspect, or to the first appellant's defence about this piece of evidence. In our opinion, this omission denied him the chance to get the assessors' opinions on this piece of evidence, and its effect on the case as a whole.

The second issue on whether the co-accused persons were given a chance to participate in the trials within trial that were conducted before admitting Exhibit P4 and P11; should not detain us. First, we have no doubt that a trial within trial is, a trial like any other, and in a joint trial all accused persons have the right to put questions to any witnesses produced by either side. This is because the admission of such confession, as it was in the present case, might affect their own interests. In this case, the retracted confessions implicated each of the co-accused persons. So, as a rule of natural justice, that they should also have been given opportunity to cross examine.

But this is not what happened in this case. In the first trial within trial although all the accused persons were present, and represented by Mr.

Lwambano, the second to fourth accused persons could not put any questions to both the prosecution and defence witnesses, apparently because they were all represented by the same counsel, although the statement that was about to be admitted was injurious to their interests. Similarly, when Exhibit P11 was about to be admitted, the other accused persons could not put any questions across because they were represented by the same counsel, although that exhibit was injurious to their interests. This is where the questions of conflict of interests on the part of the defence counsel had worked injustice to the appellants. The learned counsel was partly to blame. But the trial court shouldered the heavier blame for two reasons. First, after the defence in the trial within trial had closed its case he did not ask or if he did, it is not on record, whether the other accused persons had anything to say to react to what had happened. Two, having admitted the confession of the first appellant he should have noted that there were conflicts of interests among the accused persons. So, it was not practicable for all the accused persons to be effectively represented by one counsel. In such a situation, the best the trial court could have done was to adjourn the trial, so that each accused could get a different counsel to realise their right to effective legal representation.

The last issue is lack of evaluation of the defence evidence in the judgment of the trial court. It cannot be gainsaid that failure to consider the defence is fatal and usually vitiates the conviction. See, for instance **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 283, **LUHEMEJA BUSWELU v R**, Criminal Appeal No. 164 of 212, **VENANCE NKUBA AND ANOTHER v R**, Criminal Appeal No. 425 of 2013, and **LEONARD MWANAHONGA v R**, Criminal Appeal No. 226 of 2014 (all unreported).

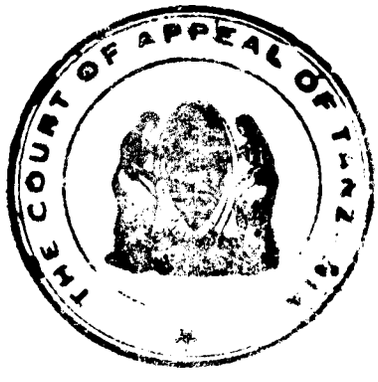
In the present case, the appellants had offered sworn testimonies in their defences. For instance, the first appellant testified that on the material day he was at Vwawa, while the offence was committed at Tunduma. He was thus raising the defence of alibi. The third appellant testified that no gun was recovered from his house. This called upon the trial court to make a specific finding whether or not he was found in possession, of any gun, actual or constructive. But nowhere in his judgment did the learned judge allude to any of the appellants' defences. All that he did was to heavily borrow extracts from the cautioned statements, which were not part of the defence, but of the prosecution case.

So, in view of the above trial irregularities, we are settled in our minds that the appellants did not get the benefit of a fair trial. This is enough to

dispose of this appeal without going into the substantive grounds of appeal. In exercise of our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act (Cap 141 – R.E. 2002), we quash all the proceedings and conviction and set aside the sentence. In view of the seriousness of the offence, we order that the appellants be retried with immediate dispatch before another judge and a different set of assessors. For the purpose of effective legal representation each of them be assigned a separate counsel. The appellants are to remain in remand custody pending retrial.

It is so ordered.

DATED at **MBEYA** this 14th day of August, 2015.



S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

P. W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL