IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO 17 OF 2015

WILLY JENGELA.....APPELLANT

AND

THE REPUBLIC.....RESPONDENT

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

(Ngwala, J.)

dated the 1st day of July, 2014
in
Criminal Session Case No. 45 of 2012

JUDGMENT OF THE COURT

2nd & 3rd September, 2015

MUGASHA, J.A.:

The appellant Willy Jengela was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16. He denied the charge. Subsequently, he was convicted and sentenced to death. Dissatisfied, he has now appealed to this Court. It is alleged that, on 22nd May 2010, at Ilolo in Mbozi District the appellant murdered the one Lazaro Ngongo. According to the autopsy report, the cause of death was severe head injury.

The prosecution case was built up by two witnesses WP 3689 DET CPL HALIMA (PW1)and E. 1039 DET. CPL IRENGE (PW2) and statements of Mkwama Mwakatage (exhibit P5) and Stephen Jimu Bukuku (exhibit P6). According to PW1, on 22/05/2010, the police received information that a person was killed at Ilolo. PW1 and PW2 both went to the scene and found the deceased lying dead with cut wounds at the back of his head and windows and door of his house broken. While at the scene of crime they heard from the crowd gathered talking to have heard at night the deceased crying and lamenting as to why Willy Jengela was killing him. In that regard, the statements of Mkwama Mwakatage and Stephen Jimu Bukuku were recorded and they stated to have heard the deceased, before he died crying and lamenting as to why Willy Jengela was killing him. Mkwama Mwakatage was the land lord of the house where the deceased was residing. Also PW1 drew a sketch map of the scene of crime.

It is on record that, Mkwama Mwakatage and Stephen Jimu Bukuku died before the trial and thus could not make an oral account of what befell the deceased on the night of 22nd May, 2010. During trial their statements were admitted in evidence under section 34 B (2) of the Evidence Act [CAP 6 R.E.2002]. Citing the said provision, the trial

judge at page 53 of the record concluded that, the exhibits P5 and P6 were admitted in evidence having met the requirements of the law which was not objected by the accused and his learned counsel. She thus concluded that the makers of exhibits P5 and P6 properly identified the appellant at the scene of crime and that the exhibits give a true account of the deceased's dying declaration and thus , corroborating evidence of PW1 and PW2 who found the deceased already dead at the scene of crime. The trial Judge went ahead to convict the appellant.

The appellant is aggrieved and has basically raised four grounds of appeal namely:

> *"1. That the document which formed the basis of conviction was wrongly admitted.*
>
> *2. That, the trial Judge had erred in law for relying on the document which was inadmissible, thus conviction was improper.*
>
> *3. That, the learned trial judge erred in law for basing her findings and conviction on uncorroborated evidence.*
>
> *4. That, the learned trial judge erred in law and fact to convict the appellant while the side failed to prove a charge against the appellant."*

Ms. Mary Mgaya learned counsel, represented the appellant and Mr. Basilius Namkambe learned State Attorney represented the respondent Republic.

Addressing the first and second grounds of appeal, Ms. Mgaya learned counsel, submitted that exhibits P5 and P6 were wrongly admitted contrary to section 34 B (2) of the Evidence Act. She argued that, while the law requires all conditions to be cumulatively complied with, this was not the case. She added, exhibits P5 and P6 had several shortfalls including absence of notice by the prosecution of their intention to rely on the statements of Mkwama Mwakatage and Stephen Jimu Bukuku who are dead. Besides, exhibit P5 was not signed by the alleged maker and as such exhibits P5 and P6 were wrongly admitted in evidence and relied upon to convict the appellant.

On the third ground of appeal, she faulted the trial judge on relying on contradictory and uncorroborated evidence contained in exhibits P5 and P6. She was of the view that, Mkwama Mwakatage who was the first person to visit the scene of crime stated to have seen two people running but his version differs with Stephen Jimu Bukuku who claimed to have been told about the incident by Mkwama Mwakatage. As such, she argued that, exhibits P5 and P6 lack

corroborative value and cannot be corroborated by other evidence. Lastly, Ms. Mgaya learned counsel lastly submitted that, the prosecution did not prove the charge beyond reasonable doubt. She urged us to allow the appeal.

On the other hand, Mr. Basilius Namkambe learned State Attorney conceded to the appeal. He argued that, section 34 B (2) (a) to (f) of the Evidence Act was not complied with to the letter. As such, he urged us to expunge exhibits P5 and P6 and allow the appeal because the remaining evidence of PW1 and PW2 cannot sustain a conviction.

The issue for our consideration is whether there was sufficient evidence to convict the appellant. We are of considered view that, this is a suitable case for re-appraisal of evidence. Statements of Mkwama Mwakatage and Stephen Jimu Bukuku were admitted under section 34 B (1) and (2) of the Law of Evidence Act, which provides:

> *"(1) In any criminal proceedings where direct oral evidence of a relevant fact would be admissible, a written statement by any person who is, or may be, a witness shall subject to the following provisions of this section, be admissible in evidence as proof of the relevant fact contained in it in lieu of direct oral evidence.*

(2) A written statement may only be admissible under this section–

(a) Where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;

(b) if the statement is, or purports to be, signed by the person who made it;

(c) if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he willfully stated in it anything which he knew to be false or did not believe to be true;

(d) if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;

(e) if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the party proposing or objecting to the statement being so tendered in evidence;

(f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read."

It is a mandatory requirement of the law that, for a statement to be admitted in court in lieu of oral direct evidence, under section 34 B (1) all conditions stipulated in subsection 2(a) to (f) must cumulatively be complied with. (See **MHINA HAMIS VS REPUBLIC** CRIMINAL APPEAL NO 83 OF 2005(Unreported)**and FREDY STEPHANO VS REPUBLIC,** CRIMINAL APPEAL NO65 OF 2007 (Unreported)). In the case at hand, initially, the prosecution did not serve exhibits P5 and P6 as required under paragraph (d) before tendering as evidence and hence the appellant could not exercise the right conferred under paragraph (e) if he wished to object to the tendering of such statements. Another aspect watering down exhibits P5 and P6 is that, statements purporting to be made by Mkwama Mwakatage and Stephen Jimu Bukuku, lack a declaration required under paragraph (c) whereby the makers ought to have verified the truth of the statements to the best of their knowledge ,and if, while making the statements they knew that, if the statements are tendered in evidence they would be liable to prosecution for perjury. Apparently, the statements were verified by the police officers who were mere

recorders and not makers of the statements and thus not qualified to make the verification required by law.

In the premises, with due respect, the trial judge misdirected herself in admitting exhibits P5 and P6 because section 34 B (2) (a) to (f) was not complied to the letter. The law ought to have taken its course regardless of the failure by the learned defence counsel to raise objection against the tendering of the exhibits.

With these shortfalls, we are satisfied that exhibits P5 and P6 were wrongly admitted in evidence and they are accordingly expunged from the record. Having expunged exhibits P5 and P6, the remaining evidence of PW1 and PW2 who were not eye witnesses is not sufficient to sustain the conviction of the appellant. Whatever they were told about the commission of the offence is hearsay evidence which has no evidential value. As such, the prosecution evidence did not prove a charge against the appellant which renders the appeal meritorious.

In view of the aforesaid, this ground is sufficient to dispose the appeal. As such, we allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison forthwith unless otherwise lawfully held for other cause.

DATED at ABUJA 5th day of September, 2019.

S.A.MASSATI
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

S.MUGASHA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL