

IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 148 OF 2015

BUNDALA MAYALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Songoro, J.)

dated the 30th day of October, 2014

in

Criminal Session Case No. 117 of 2012

JUDGMENT OF THE COURT

1st & 2nd December, 2015

MASSATI, J.A.:

The appellant was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code by the High Court, of Tanzania sitting at Shinyanga. It was alleged that on the 26th July, 2011 around 20.00 hour, at Shambelendi – Solwe village within Shinyanga District and Region the appellant murdered one MONJI d/o SHINUKA.

The prosecution case was that the deceased was the appellant's aunt; his father's sister. On the material day and time, the deceased and

the appellant's father who were living together, were taking their dinner. The appellant then joined them. The appellant's father left to go out to smoke. Left alone, the appellant suddenly slashed the deceased on the head and cheek. The appellant's father yelled for help, but the appellant ran away. The people who had gathered to respond to the yells, began a manhunt and traced the appellant at Kakola village, at his uncle's place.

The deceased died due to severe haemorrhage from multiple cut wounds. After his arrest, the appellant was charged with this offence.

The prosecution fielded five witnesses, and the trial court received three documentary exhibits including the post mortem report, (Exhibit P1), the appellant's cautioned statement (Exhibit P2) and the statement of the appellant's father MAYALA SHINUKA (Exhibit P3). The witnesses included E. 3965 CPL. RESPICIOUS (PW1), LEONARD MASALU (PW2), JOHN IGOGO (PW3), LUKALA MASANJA (PW4) and MWANDU NKANDULWA (PW5).

At the end of the prosecution case, the trial court made a ruling under section 293(2) of the Criminal Procedure Act (Cap. 20 R.E. 2002) (the CPA). According to the record, the ruling is 11 pages long, and contains an

analysis and evaluation of the entire prosecution case. The ruling makes four findings of fact, and it concluded:

"the testimony of PW4 and PW5 established that, after killing and admission of the accused he killed the deceased, the accused is the one who lead (sic) PW5 into the house of LUKALA MASANJA PW4 at night and show (sic) a panga to PW4 and PW5 which he used to cut the deceased to death; the court is satisfied and decides that, the prosecution sides (sic) has established a prima facie case against the accused person on the charge of murder which is facing.

Unless and until the accused offers a defence, otherwise he stands to be convicted with offence charged."

It is after this, that the trial court then went on to address the appellant in terms of section 293(2) (a) (b) and (3) of the CPA. After hearing the defence, the trial court convicted the appellant and sentenced him to death. Dissatisfied, the appellant has taken an appeal before us.

Mr. Kamaliza Kayaga, learned counsel who appeared for the appellant at the hearing has presented three grounds of appeal namely: -

- "1. That the appellant was denied a fair trial as the Honorable trial judge in a ruling for a case to answer made remarks which amounted to convicting the appellant before he gave his defence.*
- 2. That the appellant's cautioned statement (Exh. P2) was wrongly admitted in evidence and wrongly relied upon by the Honourable trial judge in convicting the Appellant.*
- 3. That the statement of MAYALA s/o SHINUKA was wrongly admitted in evidence as Exhibit P4 and wrongly relied upon by the Honourable trial Judge in convicting the appellant."*

Of the three grounds, Mr. Kayaga argued only the first ground. After quoting the passage which we have quoted above, the learned counsel briefly submitted that it was wrong for the trial court to make findings of fact at that stage before hearing the defence case. The result is that the appellant did not get a fair trial, he argued citing the decisions of **KABULA LUHENDE v R**, Criminal Appeal No. 281 of 2014 (unreported) as authority. He therefore prayed that we nullify the trial and order a retrial before another judge and another set of assessors.

The respondent/Republic, which was represented by Mr. Miraji Kajiru learned State Attorney, supported the appeal on that ground. He briefly submitted that, it was wrong for the trial judge to have made findings of fact from the prosecution evidence alone, before hearing the defence. He also agreed that the appellant did not get a fair trial, and to the suggestion that there be a retrial before a new judge and another set of assessors.

There can be no dispute that before the appellant was called upon to give his defence, the trial court made findings of fact, as captured in the passage quoted above. We shall, however recapitulate the said findings here. According to the trial judge, the Court found that the evidence of PW1, PW2, PW3, PW4 and PW5 **established** that:

- "(1) that Monji Shinuka (the deceased) is dead and died a violent death after suffering cut wounds.*
- (2) going by Exhibit P4, the cautioned statement of MAYALA SHINUKA, the father of the accused, he saw his son, BUNDALA MAYALA, picking a panga and started to cut the deceased until she fell down.*

- (3) *the testimonies of the witnesses also established that separately they and interrogated the accused and he admitted that he cut the deceased by panga.*
- (4) *that the testimony of PW4 and PW5 established that after the killing and admission of the accused that he killed the deceased, the accused is the one who led PW5 into the house of LUKALA MASANJA pW4 at night and showed a panga to PW4 and PW5."*

With respect, such findings were expected to be found in a judgment, rather than in a ruling of a case to answer. This is because disputed findings of fact can only be legitimately **established** after a proper evaluation of both the prosecution and the defence cases. (See **HUSSEIN IDD AND ANOTHER v R** (1986) TLR 166). Since at that stage the trial court had only heard the prosecution case, it could not have **established** or made any findings of fact. This is, a rule of the thumb, which every presiding judge or magistrate ought to know. It has its roots in the rules of natural justice, which is the backbone of any fair trial.

In **KABULA LUHENDE v R**, (*supra*) cited by both learned counsel, a similar situation arose. This Court held that the statement:

"... I consider that the accused committed the offence of which he stands charged."

which the trial judge made at the end of the prosecution case was held to have been openly biased against the appellant and prejudicial to his intended defence. The Court went ahead and found this to be a violation of the principles of fair trial now enshrined in Article 13(6) (a) of the Constitution of the United Republic of Tanzania.

The above decision was followed in the next decisions of this Court in **JOSEPH LUSHIKA @ KUSAYA AND MAZIKU MPIGACHAI @ KIJIKI v R**, Criminal Appeal No. 18 of 2012, **NGASA KALULI @ SENGEREMA v R**, Criminal Appeal No. 160 "B" of 2014 and **NJILE MPEMBA v R**, Criminal Appeal No. 419 "B" of 2013 (all unreported).

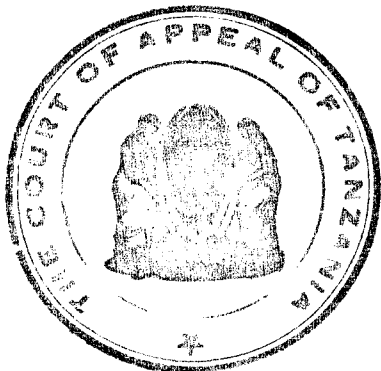
Based on the above authorities we agree with both counsel in this appeal that, to the extent that the trial judge purported to make and establish findings of facts at the close of the prosecution case and without

hearing the defence case, the appellant did not get a fair trial. Consequently the trial was a nullity.

We therefore allow this appeal, quash the proceedings and conviction, and set aside the sentence. We order that the appellant be retried as expeditiously as possible before a different judge and a different set of assessors.

It is so ordered.

DATED at **TABORA** this 1st day of December, 2015.



B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "P. W. Bampihya", written over a horizontal line.

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL