IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 115 OF 2015

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

1. **EZRA MKOTA**
2. **MAJUTO ISMAIL ..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Dodoma at Dodoma)

(Mkuye, J.)

dated the 22nd day of December, 2014
in
Criminal Sessions Case No. 5 of 2006

JUDGMENT OF THE COURT

4th & 9th June, 2015

MASSATI, J.A.:

The deceased, PETER MKWAWA was a resident of Mlima Village, in Dodoma Rural District. On 9/8/2005, the deceased, his sister THERESIA LUWAHA (PW1) and his nephew, SUNDAY MKWAWA (PW3), left for Dodoma. The deceased had gone to sell some groundnuts while his sister had gone to attend to a toothache at the hospital. After selling the groundnuts, the deceased made some shopping and remained with about

Tshs.346,000/=. On 11/8/2005 they decided to return home. They boarded a bus christened SAAB BUS, destined for Ng'halehezi village. They boarded the bus at 13.00 hours and arrived at Ng'hahelezi at around 16.00 hrs.

No sooner had they alighted from the bus than they were approached by two youths, who offered to convey them to their village by bicycles. They did not agree on the hire price. So they decided to walk to Mlima. However they decided to stop at a village called Chinoje, where the deceased and PW3 bought some juice and water to quench their thirsts, while PW2, attended to her seven month baby. Then they left, for the final leg of their journey.

Somewhere in between, they were ambushed by two youths, one brandishing a bush knife, and the other a pen knife. The one with the bush knife attacked the deceased, while the pen knife brandishing one attempted to strangle PW1. The attack turned out to be fatal to the deceased who lay unconscious on the ground, while, PW2 scuttled into the nearby bush and PW3 ran to the nearest village called Makambi for assistance. When the villagers came to the scene, it was too late. The

deceased succumbed to the brutal attack, a few minutes later at Edward Malecela's (PW3) homestead, while both the money and the organ meant for the deceased's church, were gone.

The prosecution case was that these appellants were the ones who unlawfully killed PETER MKWAWA, and with malice aforethought. They were accordingly charged with the offence of murder contrary to sections 196 and 197 of the Penal Code.

To prove their case they fielded THERESIA (PW1) SUNDAY (PW2) EDWARD MALECELA @ HAMIS (PW3) and INSP. ZACHARIA (PW4) as witnesses. In essence, the evidence of PW1 and PW2, was to the effect that the appellants were known to them as bus conductors in the SAAB BUS, which they had boarded from Dodoma; that they were the ones who approached to offer them a ride to their village by bicycles; that they were the ones who ambushed them in the bush and with a bush knife and pen knife, and they were the ones who attacked the deceased to death. PW1 testified that she knew the appellants by name. PW3 confirmed that PW1 mentioned the names of the appellants when she reported the incident to him; before it was reported to Chamwino Police. PW4, was stationed at

Chamwino Police Station. He was assigned to take the cautioned statement of MAJUTO ISMAIL, the second appellant which after a trial within trial was admitted as Exhibit P2.

On the other hand, giving their evidence on oath both appellants raised the defences of alibi. The first appellant, EZRA MKOTA, said that on the material date, he was at Zoisa village where he went to build his mother in law's house. The second appellant, MAJUTO ISMAIL, told the trial court that on the material date, he was at Kihonda – Maghorofani, Morogoro visiting, a sick sister.

The trial court found that the prosecution case was too strong to be shaken by the appellants' alibis. So it rejected their defences and found that the case against the appellants was proved beyond reasonable doubt. They were accordingly convicted as charged and sentenced to suffer death by hanging.

The appellants have now come to this Court to challenge their convictions and sentences.

At the hearing of the appeal, both appellants were represented by Mr. Godfrey Wasonga, learned counsel, who argued a total of three

grounds of appeal together; borrowing the additional one from the memoranda filed by the appellants themselves. Mr. Wasonga, argued, **firstly,** that the postmortem examination report (Exh. P1) was admitted at the preliminary hearing without the trial court informing the accused persons of their right to call the medical expert for cross examination. He said that this was contrary to section 291 (3) of the Criminal Procedure Act (Cap. 20 – R.E. 2002) (the CPA). **Secondly,** he submitted at length, that the prosecution evidence was too weak and inconsistent to sustain the conviction. He branded the evidence of PW3 and PW4 as hearsay, and the inconsistencies in the description of the assailants' attire by PW1 and PW2, as an illustration.

He hammered home, the inconsistency in the different times mentioned by the witnesses as to when the offence was committed, which varied from the one shown in the information as the weak part of the prosecution case. **Thirdly,** Mr. Wasonga submitted that as the offence was committed at dusk, the witnesses' vision must have been too impaired for proper identification giving room for mistaken identity. For those reasons he prayed that the appeal be allowed.

However Ms. Lina Magoma, learned State Attorney, who represented the respondent/Republic was not impressed by Mr. Wasonga's submissions. She came out with full force in support of the conviction and sentence. Starting with the issue of identification, Ms. Magoma, submitted that, PW1 and PW2, had ample opportunity, closeness, and time to properly observe and so identify the appellants. They saw them when they alighted from the bus and offered them a ride home in their bicycles. They were close enough when they bargained for the hire price with the deceased. They saw them again at the bush when they were ambushed and one of them, the first appellant attempted to strangle PW1 and so offered a close encounter for her to get to know him even closer. Then, PW2 mentioned their names to PW3, which led to their arrest. Referring us to the decision of this Court in **ISMAIL SELEMANI NOLE v. REPUBLIC** Criminal Appeal No. 117 of 2013 (unreported) for inspiration, the learned counsel concluded that the appellants were without doubt identified and placed at the scene of crime at the time it was committed. With regard to the inconsistencies and weaknesses of the prosecution case, Ms. Magoma, briefly submitted that there were no inconsistencies in the prosecution case, which was, to a large extent supported by the 2nd appellant's

retracted cautioned statement (Exh. P11). On the last ground, the learned counsel, argued that the post mortem report was admitted during the preliminary hearing without any objection. But even without Exh P1, since the fact of the death was among matters not in dispute and so taken as proved, there was plenty of other evidence, to prove the appellant's guilt without leaving a shadow of doubt, she argued. So, she concluded, that the appeal be dismissed.

In his rebuttal submission, Mr. Wasonga, insisted that the post mortem examination report (Exh. P1) was admitted contrary to section 291 of the CPA. He also reminded the Court on the variance between the time of the commission of the offence shown in the information, and the one given by the witnesses saying that it could be prejudicial. He went to say that the evidence of identification was weak and that even the cautioned statement (Exh.P11) was not a confession because it mentioned other names. Then he went on to remind the Court of the inconsistent descriptions by PW1 and PW3 of the attires that the assailants had put on and argued that this rendered the prosecution case weak. Therefore, he urged the Court to allow the appeal.

From the submissions of the learned counsel, we think that the appeal raises two basic issues. The first issue arises from the contentions on whether the post mortem examination report was properly admitted in evidence. We shall first deal with that issue.

It is true that Exh. P1 was admitted during the preliminary objection after the trial court had asked the advocate for the accused, who replied that he had no objection. The report was then admitted there and then and marked P1. We think that this was wrong. Why?

First, according to section 192 of the CPA and Rules 4 and 6 of the Accelerated Trial and Disposal of Cases Rules, 1988 made under section 192 (6), of the CPA, the facts of the case, including all the materials in documents, like autopsy report, must be read and explained to the accused; and it is the accused and not his advocate who should be asked to state the facts which he admits (See **MT 7479 SGT BENJAMIN HOLELA v. R** (1992, TLR 121 (CAT), **BAHATI MASEBU v. R** Criminal Appeal No. 135 of 1991 (unreported).

In the present case, it was the appellants' advocate who said he had no objection, not the appellants. Furthermore, there is nothing in the

record to show that the contents of the autopsy report (Exh. P1) were read over to the appellants. However, we are satisfied that this non compliance alone did not occasion a failure of justice, because the defence have not substantially disputed the fact that PETER MKWAWA is dead.

But secondly, and this is where Mr. Wasonga has complained very bitterly, section 291 of the CPA was not complied with. The relevant section 291 (3) of the CPA reads as follows:

> *(3) Where the evidence is received by the court the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for cross-examination the person who made the report,* ***and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection****. (emphasis supplied).*

Mr. Wasonga's complaint, and we think rightly so, is that the appellants were not informed of that right in the present case after the autopsy report had been admitted. Was it fatal?

In **DAWIDO QUIMUNGA v. R** (1993) TLR, 120 this Court considered a similar situation and came to the conclusion that;

> *"The provisions of section 291 Criminal Procedure Code are mandatory and require that an accused be informed about his right to have a doctor who performed the post mortem* ***report*** *called to testify in order to enable him decide whether or not he wants the doctor to be called."*

With due respect to Ms. Magoma, we agree with Mr. Wasonga here, that non-compliance with section 291 of the CPA was fatal, and calls for the expulsion of the post mortem report (Exh. P1) from the record (See also **AMINI JUMA v. R.** Criminal Appeal No. 303 of 2008 (unreported).

That takes care of the first issue in this appeal.

But the expulsion of Exh. P1 does not necessarily render the prosecution case naked. Which takes us to the second issue. Were the appellants impeccably identified by the prosecution witnesses? This calls for a closer scrutiny of the testimonies of PW1 and PW2, who claimed to have identified the appellants.

Of the two, the evidence of PW1 was the most telling. One may discern several strong strands in her evidence. **First** she identified the appellants as conductors in SAAB BUS which they boarded from Dodoma on 11/8/2005. This is supported in part by Exh. P11, the cautioned statement of the second appellant. The bus left at 13.00 hrs and the appellants rode in the same bus. **Second** she met them again at "Ngh'ahelezi" when the bus reached its destination. It was 16.00hrs. **Third,** after disembarking from the bus, the appellants approached the deceased. She saw and heard them negotiate the bicycle fare to their village. **Fourth,** she met them again at Chinoje, as they rode their bicycles and stopped near where she was left attending to her baby and then also saw them stop at the shop where the deceased and PW3 were buying some juice. She described their attire as black coats. **Fifth**, she met them again at the time of the attack. Although it was sunset she could clearly witness the second appellant attacking the deceased, while the first appellant came to closer contact with her as he tried to strangle her. This was the sixth time she was seeing them. The point is that PW1's case was not that of a fleeting glance of people she had never seen before. It was evidence from a person who has seen the same people so many times over

and over again, that we think there was little, if any possibility, of mistaken identity. Her credibility is vouchsafed by her report and naming of the suspect to PW3 which later enabled the arrest of the appellant.

PW2's evidence is really in the nature of corroborating that of PW1. He was 12 years old by then. Although he did not remember the culprits by name, he remembered them by face; and described their attire.

As said earlier Exh. P11, the second appellant's retracted cautioned statement, to a large extent supports the evidence of PW1, about what happened on that day and that indeed the appellants used to work with SAAB BUS.

After subjecting the prosecution evidence to a close scrutiny we are satisfied as was the trial court, that the appellants were squarely identified and placed at the scene of crime at the time it was committed, and that their defences of alibi were justifiably rejected. If there were any discrepancies such as those that Mr. Wasonga has pointed, they are immaterial, and do not deflect the substance of the prosecution case.

This appeal was therefore lodged without sufficient reason. It is accordingly dismissed in its entirety.

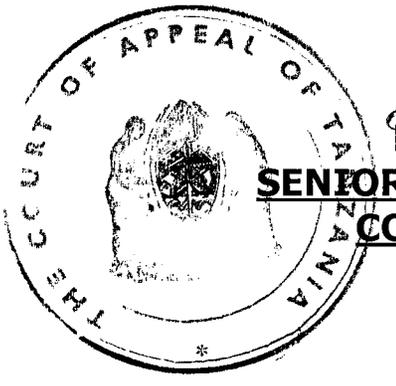
It is so ordered.

DATED at **DODOMA** this 8th day of June, 2015.

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
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