IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

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

CRIMINAL APPEAL NO. 121 OF 2015

SILVERY ADRIANO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makuru, J.)

dated the 16th day of March, 2015
in
Criminal Sessions Case No. 68 of 2010

JUDGMENT OF THE COURT

10th & 11th June, 2015

MASSATI, J.A.:

Having been arraigned for the murder of his father ADRIANO s/o MICHAEL, on the 24th April, 2008, at Samaka village within Singida District and Region, the appellant, who pleaded not guilty, was convicted and sentenced to death by the High Court, sitting at Dodoma (Makuru, J). He has now appealed to this Court.

The prosecution case was built up by six witnesses. PW1 JOSEPHINA JOHN who was married to the appellant's younger brother, told the trial court that, as she was coming from drawing water from a well, she heard alarms from her house. There, one Daudi (PW5) informed her of the deceased's attack by the appellant. She went to inform her mother in law who ordered that her son ELIAS (PW2) be traced and informed. ELIAS ADRIANO testified as PW2. He said, that on that morning, he was working in his garden when PAULO came looking for him and informed him that he was required by his mother. When he met his mother, she referred him to one DAUDI (PW5). The latter told him that his father had been attacked by the appellant and had fallen down. He went to the scene and found a pool of blood, and a bucket of water beside it. There were also scratches and blood stains leading to a nearby farm. They traced the scratches only to find the deceased hanging from a tree, his body tied with a rope. When he went back home, he found that the appellant had already been placed under arrest by the villagers. PW3 ANTHONY PETRO, was one of the villagers who responded to the alarm, and accompanied PW2 to find the deceased hanging from a tree. PW4 SILVESTA SALVII, the CCM Chairman for Damanki Branch, also responded to the alarm, and he and his secretary

joined the other villagers at the scene of crime and ordered the militiamen to arrest the appellant. PW5, DAUDI SIMON, was the main link in this case. He was 11 years old when he testified on 26/2/2015. This means he was about 7 years old in 2008 when the incident happened. After some *voire dire* test, the trial court found that although he did not understand the nature of an oath, he had sufficient intelligence and understood the duty of telling the truth. So his evidence was taken without oath. The essence of his testimony was that he saw the appellant attack the deceased who was also his grandfather, with a stick. The deceased was on his way from the well, with a bucket full of water on his head. He ran home to inform his grandmother, who instructed him to inform PW1, and he took the latter to where the deceased was attacked. He also told the trial court that apart from seeing his grandfather's body hanging from a tree, he also saw his body bleeding from a wound in the head; and that he was dead. The last witness for the prosecution, WILLIAM HENERICO, (PW6) told the Court that at around 9.30 am, the morning of 24/4/2008, he saw the appellant with a wet shirt and trying to squeeze water from it. He also noticed that his shirt was blood stained, and he looked restless.

Apart from the oral evidence, the prosecution also presented several pieces of documentary evidence, which include the sketch plan (Exh. P1) and the post mortem examination report (Exh. P2) which was admitted under section 34B (2) of the Evidence Act. Curiously these exhibits were tendered after the last witness for the prosecution had testified, and not by any witness, but by the prosecuting attorney. Curiously still, there was no objection from the defence attorney and with the authority of the trial court.

In his sworn testimony, the appellant denied to have killed the deceased and raised a defence of alibi. He told the trial court that on the material date, between 7.00 am to 11.00 am. He was working in his farm, and from there, he went to a pombe shop, where he met PW6. From the pombe shop, he heard the alarms. When he went there he was arrested in connection with the death of the deceased. He explained that the stains on his shirt were from the plantain not blood. After all, the shirt was taken by the police.

It was on this evidence that the appellant was convicted.

In this Court, the appellant was represented by Mr. Paul Nyangarika learned counsel. Both the appellant and Mr. Nyangarika had earlier on filed separate memoranda of appeal, but the learned counsel decided to argue the grounds which he had raised, and if necessary, conjunctively with the ones raised by the appellant himself. The grounds raised by the learned advocate were as follows:

1. *That the Hon. Trial Judge erred in law and in fact in failing to properly evaluate the evidence on record.*
2. *That the Hon. trial judge erred in law and in facts in not holding that there was no corroborative evidence in Daudi Simon's testimony (PW5) as required by law.*
3. *That, the Hon. Trial Judge erred in law and in facts in not holding that the prosecution failed to prove their case at the required standard.*

Arguing the second ground first, Mr. Nyangarika submitted that, the only eyewitness(s) account connecting the appellant with the offence was that of PW5, who was a child of 11 years of age. Taken without oath, such evidence required corroboration, and there was no such evidence. He

referred to us, the decision of the High Court in **MARCO s/o GERVAS v. R** (2002) TLR 27.

Furthermore, the trial court did not direct the assessors on this requirement and it erred in finding that the evidence of PW1, PW2, PW3 and PW4 supplied the needed corroboration. Neither did the appellant's conduct, after the incident, he argued.

Then, the learned counsel submitted on the first and third grounds together. Briefly, he submitted that the postmortem report was not properly admitted, it having been received from the bench and not from a witness, and contrary to section 293 (2) of the Criminal Procedure Act, (Cap. 20 R.E 2002) (the CPA) and section 34B (2) of the Evidence Act. So it should be expunged. Once expunged and in the absence of corroboration of PW5's evidence, there is very little or no other evidence left to connect the appellant with the offence. The stick used to beat the deceased was not produced. The results of the alleged blood stained shirt, taken from the appellant by the police for further investigation are not known, as the investigator was not called to testify. So, the prosecution

case fell a short of being proved, let alone, proved beyond reasonable doubt. He therefore prayed that the appeal be allowed.

On his part, the respondent/Republic, which was represented by Mr. Evordy Kyando, learned State Attorney, felt constrained not to support the conviction and sentence. In his brief submission Mr. Kyando readily conceded that the trial was beset with several irregularities, especially the tendering of the exhibits in court; giving as an example, the reception of Exh. P2, the postmortem examination report. He further agreed that, failure to call the investigator to testify and to disclose the results of the blood tests found in the appellant's shirt was a serious omission. Finally, he agreed with Mr. Nyangarika that the evidence of PW5, required corroboration but, not as a matter of law, but of practice. So the learned counsel had no qualms if the appeal was allowed; although he had serious reservations on the conduct of the trial as a whole.

In his rebuttal submission, Mr. Nyangarika argued by quoting a passage from a book title *"Burden of Proof"* by Prof. A.A.F. Masawe, which was also quoted by the defence counsel in his submission in the trial court, as it appears at page 100 of the record to the effect that evidence taken

under section 127 (2) of the Evidence Act required corroboration. He went on by repeating that, what the trial court found as corroboration did not amount as one in law. So, he reiterated his prayer for the appeal to be allowed.

We would like to begin by picking a cue from Mr. Kyando's concern about the irregularities that had beset the trial in this case. In **MUSSA MWAIKUNDA v R** Criminal Appeal No. 174 of 2006 (unreported) this Court adopted the principles developed in the decision from NEW SOUTH WALES COURT OF CRIMINAL APPEALS, of **R V PROSSER** (1958) **v. R** 45 which set down what were termed as minimum standards of a fair trial in a criminal case. Those in the list, include:

1. *to understand the nature of the charge*
2. *to plead to the charge and to exercise the right of challenge*
3. *to understand the nature of the pleadings, namely, that it is an inquiry as to whether the accused committed the offence charged.*
4. *to follow the course of the proceedings*

5. *to understand the substantial effect of any evidence that may be given in support of the prosecution; and lastly*
6. *to make a defence or to answer to the charge.*

Of particular relevance in the present case are standards (2) (5) and (6), especially if taken together. In the 5th standard, it is the right of the accused person to understand the substantial effect of any evidence that may be given in support of the prosecution, so that he may exercise his right to challenge it (standard number 2), in order to effectively defend himself to the charge (standard number 6).

It is in view of the above that we agree with both Mr. Nyangarika and Mr. Kyando, that the procedure adopted by the trial court in receiving such important exhibits as the postmortem report (Exh. P2) was strange and left a lot to be desired. **First,** the exhibit was tendered by the prosecuting attorney from the bar, at the end of the trial, which was illegal because he was not a witness and could not be cross-examined. (See **THOMAS ERNEST MSUNGU @ NYOKA MKENGA v. R** Criminal Appeal No. 78 of 2012 (unreported). **Secondly,** it was admitted under section 34B (2) of the Evidence Act. This provision applies to "statements" of witnesses who

could not be available to testify. A postmortem report was not such statement, but a report by an expert. Even then, it could only be received after complying with all the conditions precedent set in section 34 (B) (2) of the Evidence Act. **Thirdly,** being a medical report, it could only be received and acted upon after complying with section 291 (3) of the CPA (See **DAWIDO QUMUNGA v. R** (1993) TLR. 120. This, notwithstanding that the defence counsel did not object to its admissibility. Just as we held in **THOMAS MLAMBIVU v. R** Criminal Appeal No. 134 of 2009 (unreported), the fact that the appellant did not object to the production of the PF.3, the trial court was not exempted from its duty to inform the accused of his right to summon the doctor for cross examination, so even if in this case the defence counsel did not object to the production of the post mortem report, the trial judge was still duty bound to comply with section 291 (3) of the CPA. The irregularity in the reception of Exh. P2 deprived the appellant and the assessors of the right not only to know the contents of Exh. P2, but also for the appellant to summon the doctor who prepared it for cross examination which goes to the root of the minimum standards of fair trial.

But there was another irregularity which relates to the summing up to the assessors. Learned counsel have submitted that the evidence of PW5 required corroboration. In her judgment the learned judge found that, there was such corroboration; but in the summing up she did not direct the assessors on the need or otherwise for such evidence. This amounts to failure to sum up to the assessors and renders the trial a nullity. (See **ALLY JUMA MAWERA v R** (1993) TLR. 231.

The total effect of these two irregularities, in our view, leads us to the conclusion that, as a consequence, of the inept prosecution and carelessness of the defence counsel, and the laxity of the trial judge, there was a miscarriage of justice, not only to the appellant, but also to the prosecution. Here, it is justice which has suffered. This was a typical case of a mistrial. It was a travesty of justice.

We have seriously thought about what to do next. There are two options; either to acquit the appellant or to order a retrial.

In view of the nature and the circumstances in which the offence was committed, the irregularities committed by the trial court and the time the appellant has already been in custody and the principles set out in

FATEHALI MANJI v. R (1966) EA 343, we think that it would be in the interests of justice to order a retrial. So, we order that the appellant be retried by a different judge sitting with a different set of assessors, as expeditiously as possible.

It is accordingly ordered.

DATED at **DODOMA** this 11th 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