IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 53 OF 2014

TABU PAULO.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated 15th day of November, 2013
in
Criminal Sess. Case No. 124 of 2005

JUDGMENT OF THE COURT

27th May & 2nd June, 2015

MUSSA, J.A.:

In the High Court of Tanzania, at Mwanza, the appellant and another were arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the revised laws. On the information laid at their door, the appellant stood as the first accused, whereas her co-accused, namely, Lushanga Manyakenda @ Zengo, was the second accused. We shall henceforth refer the said Zengo to simply as "the co-accused."

The particulars of the information alleged that on or about the 20th December 2003, at Bupandwamila Village, within Sengerema District, the appellant and the co-accused jointly murdered a certain James Sylivester.

They both refuted the accusation and, after a full trial, the High Court (Mwangesi, J.), found the co-accused not guilty and acquitted him. For her part, the appellant was found guilty, convicted and handed down the mandatory death sentence. Aggrieved, she presently seeks to impugn the verdict of the High Court in its entirety. Ahead of our consideration of the contentious issues in this appeal, it is necessary to explore, albeit briefly, the background giving rise to the arraignment, trial and the ultimate conviction of the appellant.

From a total of seven witnesses as well as five documentary exhibits, the prosecution version was to the effect that the deceased and the appellant were, respectively, husband and wife who used to reside under the same roof at the referred Bupandwamila Village. In that house, the couple used to stay with the deceased's young brother, aged 13, whose name was not disclosed at the trial just as he was not called to testimony.

The deceased had an uncle, namely, Shule Ndawuli Mwinamila (PW1), who resides in the same village. According to Mwinamila, the deceased and the accused used to lead a quarrelsome life. The witness further revealed that a few days prior to the fateful occurrence, the deceased called at his home and pronounced that he (deceased) had

quarreled with his wife (accused) the previous night. The deceased additionally told his uncle that he felt that his life was in imminent danger and that he wanted to sell some of his properties so that he goes fishing on the lake. On the evening preceding the fateful night, the deceased, again, visited his uncle to tell him that he had sold the properties but was yet to realise the proceeds of the sale.

A good deal later, in the dead of that same night, Mwinamila heard a tap at his window. As it turned out, the deceased's young brother was the one tapping and had actually gone there to inform his uncle that the deceased had been injured at his residence. Mwinamila promptly attended the scene, only to realise that his nephew was already dead. The deceased had sustained multiple cut wounds on the neck, right shoulder and the head. The appellant who had been sleeping with the deceased on the same bed told Mwinamila that she woke up to find the deceased already injured. To his surprise, Mwinamila checked and found the entrance door to the residence intact. A blood stained axe was retrieved from under the bed on which the couple were sleeping.

A little while later, the Village Executive Officer (VEO) and the hamlet chairperson, respectively, named Dollo Mateja (PW2) and Ndalahwa

Magundo (PW3), also attended the scene. It was said that upon being interrogated by the village authorities, the appellant confessed to the act of killing the deceased which, she claimed, was perpetrated with the assistance of the co-accused. Following her disclosure, the appellant and the co-accused were arrested and taken to Kalunda police station.

In the meantime, a postmortem examination was conducted on the deceased body according to which death resulted from severe multiple cut wounds which were secondary to neurogenic shock and a head injury. The autopsy report which was undisputed at the preliminary hearing was tendered into evidence at that stage of the trial (exhibit P1).

On the 23rd December 2003, whilst still in police custody, the appellant was interviewed by No. E 8866, Defective Staff Sergeant Masenga (PW1), whereupon she allegedly confessed the act of killing the deceased. On the 29th December 2003, the appellant was taken before a Principal Primary Court Magistrate, namely, Amina Mbawulo (PW5) where she just as well, allegedly, confessed the offence. The resultant cautioned and extra-judicial statements were tendered into evidence as exhibits P2 and P5, respectively, to fortify the prosecution version.

In her sworn defence, the appellant claimed that, on the fateful day, she was sleeping with her late husband, children and her brother-in-law. The latter was sleeping in the living room. She was awakened by her brother in law who saw a group of people roaming about outside their residence. The two of them raised an alarm but the intruders broke into the residence and killed the deceased. She did not, in particular, witness the actual killing. The appellant proceeded further to deny having killed her husband and disowned the confessional statements of which, she claimed, were forced unto her. The co-accused just as well completely disassociated himself from the prosecution accusation.

As hinted upon, on the whole of the evidence, the learned trial judge and the three assessors sitting with him were impressed by the version told by the prosecution witnesses as against the appellant. Accordingly, the appellant was found guilty, convicted and sentenced to the extent already indicated. She presently seeks to impugn the verdict upon three points of grievance, namely:-

> *"1. The Honourable Trial Judge erred in law and fact for admitting an extra-judicial statement in evidenced as Exh. P5 while same was not properly recorded.*

2. That the Honourable Trail Judge erred in law and fact for convicting the appellant relying on the evidence of PW1, PW2, PW3 PW4, PW5, PW6 and PW7 whose same was weak to sustain conviction of murder.

3. That the prosecution failed to establish the offence of murder against the appellant beyond reasonable doubt."

At the hearing before us, the appellant was represent by Mr. Bernard Kabonde, learned Advocate, whereas the respondent Republic had the services of Mr. Castus Ndamugoba, learned Senior State Attorney. Mr. Kabonde commenced his submission by fully adopting the memorandum of appeal which he amended in ground No. 1 by substituting the words "Exh. P2" for "Exh. P5." The learned counsel for the appellant then, painstakingly, sought to criticize the justice of the peace for recording the statement of the appellant who, as he put it, was not referred to her in writing by the police. With respect, we think that the material mishandling with respect to the confessional statements lies in the manner both statements were introduced and tendered into evidence.

Unfortunately, the learned presiding judge did not venture to ascertain, from the very outset when PW5 and PW8 were introduced into the witness box, whether or not there was going to be objections to the tendering of the alleged confessional statements. The procedure adopted by the trial court was, rather, to allow the two witnesses to freely refer and testify on the details of the statements in the presence and hearing of the assessors. Then, when the stage was reached at which the prosecuting attorney led the witnesses into tendering the respective statements, the learned counsels for the appellant and the co-accused rose to object to the admissibility of the statements. More particularly, the extra-judicial statement was objected to for three reasons: First, on account that the recording magistrate erased and then varied detail No. 9 comprised in the body of the statement; Second, that the magistrate did not indicate the time when she commenced the interview as well as the time when she was through; and Third, that throughout the interview, the magistrate was, admittedly, in the company of a court attendant. As regards the cautioned statement, the objection by the two counsels was on account that the police interviewer did not insert the time when he certified the statement at its foot. It is, perhaps, noteworthy that none of the objections dwelt on

the question of the voluntary nature of the statements and, thus, it was not opportune for the court to conduct a trial within trial.

As it were, the objections on the admissibility of both statements were overruled for reasons which are not quite of moment to us. But, to add salt to the unprecedented procedure, upon being tendered as exhibits, the contents of the alleged confessional statements were not read out in court for the benefit of the appellant, the co-accused and the assessors who were sitting with the judge. To appreciate the fallacy of the procedure adopted by the trial court, we think it is instructive to pay complete homage to the correct procedure as laid down by the defunct Court of Appeal for Eastern Africa in the celebrated case of **Kinyori s/o Karuditu vs. Reginum** 23 (1956) E.A.C.E. 480:-

> *"For the avoidance of doubt we now summarize the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies, equally of course, to a trial with a jury. If the defence is aware before the commencement of*

the trial that such an issue will arise the prosecution should then be informed of the fact. The latter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until it has been ruled admissible. When the stage is reached at which the issue must be tried the defence should mention to the Court that a point of law arise and submit that the assessors be asked to retire. It is important that that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness box until after the assessors have retired. The assessors having left the Court the Crown, upon whom the burden rests of proving the statement to be

admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The Judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible, the Crown witness to whom it was made will then produce it and put it in, if it is in writing, or will testify as to what was said, if it was oral. The defence will be entitled, and the Judge should make sure that the defence is aware of its rights, again to cross-examine that Crown witness as to the circumstances in which the statement was made and to have recalled, for similar cross-examination, the interpreter and any other Crown witness who has given evidence on the issue in the absence of the assessors. Both in the absence and again in the presence of the assessors the normal right to re-examine will arise out of any such cross-examination. When the time comes for the defence to present its

case on the general issue, if the accused elects either to testify or to make a statement from the dock thereon he will be entitled also to speak again to any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or to reaffirm any repudiation or retraction upon which he seeks to rely. Indeed, if the accused desires to be heard in his defence either in the witness-box or from the dock he will not be obliged to testify in chief or to speak, as the case may be, to anything more than the matters touching on the issue of admissibility; but, once he elects to testify, however much he then restricts his evidence in chief he will be liable to cross-examination not only to credit but also at large upon every matter in issue at the trial. The accused will also be entitled to recall and again to examine any witness of his who spoke to the issue in the

assessors' absence, and to examine any other defence witness thereon."

The principles underlying the foregoing Procedure are threefold: First, in order to avoid the assessors being possibly prejudiced by the hearing of evidence which is afterwards held to be inadmissible, it is important that the assessors retire before any witness is allowed to testify in any aspect which might suggest to assessors that the accused made a confessional statement.

Second, if the confessional statement is held to be admissible, it is imperative for the prosecution witness "*to produce it and put it in*" if it is in writing or, as the case may be, he/she will testify as to what was said, if it was oral. By the expression, "*to produce it and put it in*," we should suppose, their lordships meant to physically tender the written statement and exhibit it by reading its contents.

Thirdly, the unfolded procedure underscores the principle that a ruling by the presiding officer to the effect that a confessional statement is admissible is not an end in itself. On the contrary, in each case where the court makes such a ruling, it will still be open for the accused to persuade

the presiding officer, as well as the assessors, that he/she has good reasons to retract or to repudiate the statement concerned or any part of it. Conversely, the presiding judge and the assessors would still be enjoined to assess the value or weight to be attached to the confessional statement.

When all is said and done, it remains to be considered whether or not, in the situation under our consideration, the departure from the correct procedure occasioned a miscarriage of justice. When we posed this question to both counsel, Mr. Ndamugoba hesitated long but, he eventually conceded that the infraction was prejudicial to the appellant. On his part, Mr. Kabonde shared his friend's conclusion.

We have dispassionately pondered on the effect of the omission, by the trial court, to follow the correct procedure pertaining to the admissibility of confessional statements. It may be favourably assumed that the conceived prejudice to assessors was cured inasmuch as the statements were, after all, ultimately tendered in evidence. But the assumption is devastatingly riddled by the fact that the statements were not put in evidence in the sense that its details were not disclosed after

being tendered. As a result, it cannot be meaningfully asserted that the appellant had the benefit of the details with which to confront the confessional statements. Neither could it be said that the assessors had a detailed hindsight of the statements when they gave their respective opinions.

While still on this disquieting aspect of the proceedings below, it is noteworthy that without the two confessional statements, the prosecution case is left with a skeleton of evidence which falls short of proving its case. As we have already intimated, the omission to follow the correct procedure falls squarely on the shoulders of the trial court. Given the situation, a question crops out as to the fitting order of the Court to avoid a failure of justice. In this regard, we are mindful of what this Court observed in the unreported Criminal Appeal No. 141 of 2010 – **Marko Patrick Nzumila and Another vs. The Republic**:-

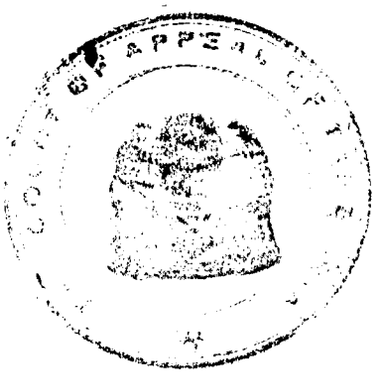
> *"The term "failure of justice "has eluded a precise definition, but in criminal law and practice, case law has mostly looked at it from an accused/appellant's point of view. But in our view the term is not designed to protect only the*

sides in the trial. Failure of justice or (sometimes referred as "miscarriage of justice") has, in more than one occasion been held to happen where an accused person is denied an opportunity of an acquittal...but in our considered view, it equally occurs where the prosecution is denied an opportunity of a conviction. This is because, while it is always safe to err in acquitting than in punishment it is also in the interests of the state that crimes do not go unpunished. So in deciding whether failure of justice has been occasioned, the interests of both sides of the scale have to be considered."

Thus, all things being equal, we are fully satisfied that the mishandling of the confessional statements did occasion a failure of justice. That being so, we are minded to invoke our revisional jurisdiction in terms of section 4 (2) of the Appellate Jurisdiction Act. The entire proceedings of the High Court are, accordingly, nullified with an order for a new trial as

against the appellant before another judge and a new set of assessors. In the meantime the appellant should remain in custody pending the resumption of her trial.

DATED at **MWANZA** this 1st day of June, 2015.



E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL