IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK,J.A.,LUANDA,J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 269 OF 2016

JANEROZA D/O PETRO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Utamwa, J)

dated 30th day of April, 2015
in
Criminal Session Case No. 79 of 2014

JUDGMENT OF THE COURT

17th & 24th October, 2016

LUANDA, J.A.:

The appellant JANEROZA D/O PETRO was charged, convicted and sentenced to death by hanging for murdering her husband one SHUKURU S/O HUSSEIN. The prosecution relied on the cautioned and extra- judicial statements of the appellant along with other circumstantial corroborative evidence.

Briefly the prosecution case was that, following her secret conversation she had with Mlanjiwa and Musa, who were friends of the deceased and who were said to have killed the deceased, the appellant appeared to have agreed to those two to enable them get the deceased testicle for rituals purpose, on payment. So, when on the fateful day night time while the deceased and the appellant were asleep, Mlanjiwa and Musa forced open the door of the house in which the deceased and the appellant were sleeping and entered. They roughed the deceased, fell him down and eventually killed him after they had removed one testicle from the body of the deceased. The two then vanished. The appellant was not paid as she was promised. Later the body of the deceased was burnt.

Hussein s/o Salum (PW1) the father of the deceased paid a visit to his son (the deceased) because he had not seen him for some several months. He asked the appellant the whereabouts of the deceased. The appellant told him that the deceased had gone to Mwesa Village in Rukwa Region. The deceased and his family

were residing at Lubalisi Village, Uvinza District Kigoma Region. PW1 could not see the deceased, for three consecutive days, he decided to report to the Village Executive Officer one Juma Ramadhani Shihundo (PW2) who ordered for the search of the deceased after the appellant had been keeping on changing stories as to the exact place where the deceased was.

The search party managed to discover a skull and bones of a human being in a bush, a place not far from the house of the deceased. The matter was reported to police. The skull, bones, a net which had blood stain and blood were sent to the Chief Government Chemist who opined that all exhibits, save net, were of a human being. However, the record is silent as how they were parked. Further it does not also show who collected the samples and from whom WP. Felister who appeared in the report of the Chief Government Chemist as the person who sent there, had received the samples.

Whatever the position, with that evidence, the appellant was charged. In her defence, the appellant denied to have caused the death of the deceased with malice aforethought.

In this appeal, Mr. Musa Kassim learned advocate defended the appellant. Mr. Musa has raised four grounds of appeal. He started with those touching procedure which are the 1st and 2nd grounds. The first complaint was that the learned trial judge was biased when he made a finding after closing of the prosecution's case to have found her guilty of the offence she was charged with. Two, the learned trial judge erred in law when he allowed the assessors to cross – examined witnesses.

Submitting the 1st ground of appeal of which Mr. Miraji Kajiru learned State Attorney for the represented/Republic agreed, Mr. Mussa informed the Court that page 87 of the record shows that the appellant was found guilty with the offence she was charged while she was yet to give her defence. He went on to say that, for those words of the trial judge, the trial was not fairly conducted. He referred us to the decision of the Court in **Kabula d/o Luhende V R,** Criminal Appeal No. 281 of 2014 (unreported), where we said that if it is shown that the learned trial judge in the High Court when he reaches a stage to determine whether or not the accused has a

case to answer instead of making such finding he go further and make a finding to the effect that the accused committed the offence of murder then that is a clear indication of bias on the part of the learned trial judge. Indeed a judge when adjudicating any case must always seen to be impartial. This is because, the function of dispensing justice is rooted in confidence.

We entirely agree with Mr. Musa that the finding made by the learned trial judge gives the impression to the public at large that the appellant had committed the offence. We wish to point out that the learned trial judge misinterpreted S. 293(2) of the Criminal Procedure Act Cap. 20 RE 2002 (the CPA) which reads:

The section reads:-

> " *293 (2). When the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing Court had been given in evidence, the court, if* ***it considers that there is evidence that the accused person committed the offence*** *or any other offence of which, under the provisions*

of Section 300 to 309 he is liable to be convicted, shall inform the accused person of his right:-

(a) to give evidence on his own behalf; and

(b) *to call witnesses in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the Court shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights"* [Emphasis is ours].

The catch words here are "it considers". The word consider according to **Oxford Advanced learner's Dictionary,** Fourth Edition means, think about in order to make a decision. It is clear that at that stage, the Court should not have made a decision as to the accused to have committed the offence. Rather it should have been made a ruling that a *prima facie* case had been made and

require the accused to make his defence. In that context therefore to consider is synonymous with *prima facie*.

Turning to the second ground, which again Mr. Miraji also agreed, Mr. Musa said, the learned trial judge allowed the assessors to cross – examine some witnesses instead of putting questions as permitted by S. 177 of the Tanzania Evidence Act, Cap. 6 R.E 2002 (the TEA). He gave instances as follows: -

Page 35, Pages 45 – 46 and page 66. He said by doing so, the assessors were testing the accuracy of the evidence given by witnesses.

We have read the pages mentioned above, we are satisfied that the assessors cross – examined the witnesses. For example, page 35 of the record of appeal indicate the assessor going by the name John cross – examined PW2 thus: We reproduce:-

> *"XD BY ASSESSORS*
>
> *BY JOHN:- The skull was (sic) saw a mere skull without any skin an heat (sic).*

- *The burns were burnt but they were not burnt to asks, (sic) they remained with their on (sic) shapes.*

- *When I put Janeroza under (sic) after noting that her statements were doubt full.*

- *I did not take the statement of the boy Hussein.*

- *I doubled (sic) Janeroza because he could give contradicting statements of that Shukuru had gone to Mwese, but then she said he had gone to Mpanda but latter she said she could took (sic) to one Abel, but when I talked to the alleged Abel he was not the one.*

- *I had not received any complain (sic) or quarrel both Shukuru and the accused".*

S. 177 of the TEA allows the assessors to put questions to witnesses in a trial. On the other hand s. 146 (2) of the TEA allows an adverse party to a trial to cross-examine a witness who was called by the other after he gave his evidence. So, cross-examination is the exclusive domain of an adverse party to a trial; it is not of the assessors.

In **Mathayo Mwalimu and Another V R,** Criminal Appeal No. 174 of 2008 (CAT – unreported) the Court said:

> *"...the position of cross – examination is essentially to contradict. By the nature of their functions assessors in criminal trial are not there to contradict. Assessors should not therefore assume the function of contradicting of a witness in the case they are there to aid the Court in a fair dispensation of justice"*

(See also ***Kulwa Makomelo and Another V R,*** *Criminal Appeal No. 15 of 2014* (unreported).

Apart from these two procedural irregularities pointed out by Mr. Mussa, the Court also added the following procedural irregularities of which both Mr. Musa and Mr. Kajiru agreed to be fatal. One, Sijapata Makwaya (PW5) a Justice of Peace who took the extra judicial statement of the appellant which the prosecution relied on so much, gave evidence without first her statement or substance of her evidence was read during the conduct of committal proceedings nor the prosecution has given a reasonable notice in writing to the appellant or her advocate of the intention to

call such witness. This goes contrary to S. 289 of the CPA. The section reads:-

> *"289- (1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness.*
>
> *(2) The notice shall state the name and address of the witness and the substance of the evidence which he intends to give.*
>
> *(3) The court shall determine what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and determined to call him as a witness; but no such notice need be given if the prosecution first became aware of the evidence which the witness would give on the date on which he is called".*

In **Hamisi Meure V R** [1993] TLR 213 the facts were similar with our present case in that a Justice of peace gave evidence without his statement was read at the committal proceedings nor notice was given to the accused or his advocate.

The Court said:-

> *"It having been accepted by the prosecution and the judge himself that PW2 did not feature in the record of committal proceedings, he should have not been allowed to give evidence in contravention of the provisions of Section 289 which are mandatory."*

Two, the cautioned statement which was taken by Insp. Maro (PW4) and tendered as ext. P2 after a conduct of "*a trial within a trial*" was taken beyond the prescribed time of 4 hours after arrest of the appellant contrary to section 50(1)(a) of the CPA. The appellant was arrested on unspecified time but on 16/2/2012 and her statement was taken on 17/2/2012 from 12:10 hours. The statement is in admissible in evidence.

Three, even *"the trial within a trial"* was not properly taken in the following areas. Firstly, Insp. Maro who testified as the only prosecution witness was not sworn in. This is what the record shows:-

> ***"TRIAL WITHIN TRIAL CONDUCTED MS. ANITA JULIUS*** *State Attorney - We have one witness police. PW4 –Reminded of her oath. XD BY ANITA JULIUS – STATE ATTORNEY On 17/2/2012. I took the statement ....."*.

We wish to point out that a trial within a trial is a separate trial from the main trial as such the procedure of conducting trials should be observed. One of such condition is that the evidence of any witness must be given on oath or affirmation as provided under Section 198 (1) of the CPA.

The section provides:-

> *" 198 (1) Every witness in a criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be*

examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act".

In **Mwita Sigore @Ogora v. Republic,** Criminal Appeal No. 54 of 2008 (unreported), the Court was faced with a similar situation as to what are the consequences of evidence of witness who gave evidence without being sworn. The Court said:

".... failure to administer oath or affirmation on a witness in a criminal trial, excepting cases under section 127(2) of the TEA, would go against public policy, and is a threat to the liberty of the persons facing criminal charges. For that reason, we think the provision of section 198 (1) of the CPA is mandatory and its noncompliance entails fatal consequences."

The evidence of PW4 in a trial within trial was taken without oath. The same has no evidential value. Second, after the advocate for the appellant had closed the defence case in a trial within trial, the learned trial judge asked the appellant some

questions (see page 58 of the record). The procedure adapted by the learned trial judge is quite new.

Be that as it may, Mr. Kajiru intended to ask the Court to nullify the proceedings, quash the sentence and order a retrial. But because the extra judicial statement and cautioned statement are not admissible in evidence, he reluctantly asked the Court to release the appellant. That is the only option available, he lamented.

Had the two irregularities pointed out by Mr. Musa were the only defects in the record of appeal, we would have ordered a retrial. But the irregularities pointed out by the Court are fundamental and go to the admissibility of evidence which the prosecution relied upon. The prosecution has no evidence to prove its case once the cautioned and extra judicial statements were expunged. We have no option but to make the following order.

In the exercise of our revisional powers as provided under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, we nullify the proceedings, quash the conviction and set aside the sentence. The appellant to be released from prison forthwith unless otherwise detained in connection with another matter.

Order accordingly.

DATED at **TABORA** this 22nd day of October, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL