IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 371 OF 2015

1. HAMISI CHUMA @ HANDO MHOJA
2. MANYERI KUYA ....APPELLANTS

VERSUS

THE REPUBLIC...RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania

at Tabora)

(Mgonya, J.)

Dated the 26th day of March, 2015

In

Criminal Sessions Case No. 134 of 2012

JUDGMENT OF THE COURT

8th & 13th April, 2016

MWARIJA, J.A.:

The appellants were charged in the High Court of Tanzania, at Tabora with the offence of murder contrary to Section 196 of the Penal Code, [Cap 16 R.E. 2002]. According to the information filed against them, they allegedly murdered one Shabani Bundala (the deceased) on 4/1/2012 at Mpera Village in Kahama District within Shinyanga Region.

It was not disputed during the preliminary hearing that the deceased died of an unnatural cause. According to the postmortem report (Exhibit P.1), his death was due to "Severe Head Injury & Excessive bleeding after [having been] beaten by a hard object."

The facts as adduced by the prosecution were that, on the material date of the offence, the deceased was found dead at a grazing land where he was looking after his goats. His body was found lying in a swamp with a severe injury on the head. The appellants were suspected of the offence on the account that a day after the deceased's death, his six goats were found in the possession of the 1st appellant, who was in the process of selling them to one Fimbo Mathias. The said Fimbo Mathias was suspicious following a hint from the brother of the appellant that he did not own goats. On being required to confirm ownership of animals, he confessed that he obtained them after he had killed the deceased in collaboration with the 2nd appellant. The appellants denied those facts.

After hearing the evidence of seven prosecution witnesses and the appellants' defence, the High Court found the appellants guilty as charged. They were accordingly convicted and sentenced to suffer death by hanging. They were aggrieved hence this appeal.

Each of the appellants filed his separate memorandum of appeal challenging the decision of the trial court on mainly three grounds; **Firstly**, that the prosecution did not prove its case beyond reasonable doubt, **Secondly** that the trial court erred in basing their conviction on the cautioned and extra-judicial statements which were improperly obtained and **thirdly**, that the trial court shifted to them the burden of proving their innocence.

After being assigned counsel however, through his learned counsel, the 1st appellant filed another memorandum of appeal raising therein two grounds of appeal as follows:-

"1.*That the learned trial judge erred in law in recording the evidence of witnesses without oath or affirmation.*

2. That in the totality of evidence on record the learned trial judge erred in law in holding that the prosecution had proved the case against the appellant beyond reasonable doubt."

At the hearing of the appeal, the 1st appellant was represented by Mr. Mugaya Mtaki, learned counsel while the 2nd appellant had the services of Mr. Mussa Kassim, learned counsel.

learned State Attorney.

In arguing the appeal, Mr. Mtaki abandoned the 2nd ground and argued only the first ground of appeal. Submitting in support of that ground, he pointed out that according to the record, the witnesses were not examined on oath or affirmation. He argued that according to the law, before their evidence was recorded, the witnesses must have been sworn or affirmed in accordance with section (4) (a) of the Oaths and Statutory Declarations Act, [Cap. 34 R.E 2002]. The learned counsel stated further that, since the evidence of the witnesses was taken without Oath or affirmation, the omission vitiated the proceedings because the appellants were denied the right of fair hearing. He cited as an authority, the case of **Kabula Luhende v. The Republic.,** Criminal Appeal No. 281 of 2014.

Apart from his stance that the proceedings are for the above stated reason irregular, Mr. Mtaki argued that there are yet, other two irregularities. First is that the learned trial judge failed to comply with the provisions of section 293 (2) of the CPA and second, that

the assessors were allowed to give a joint opinion contrary to section 298 (1) of the CPA. It was his submission that whereas under section 293 (1) of the CPA, the court is required to inform an accused person of his right to give his/her defence and to call witnesses, under section 298 (1) each of the assessors is supposed to give his/her opinion.

From the totality of the irregularities, the learned counsel argued, the court should consider to nullify the proceedings, quash the appellants' conviction and set aside the sentence. As for the way forward, he submitted that a retrial order will be appropriate under the circumstances of the case.

Mr. Kassim supported the arguments put forward by Mr. Mtaki in all aspects stating that, since the irregularities are fatal, they vitiated the proceedings. He therefore prayed that the same be nullified.

On his part, Mr. Deusdedit agreed also that indeed, the evidence was improperly recorded because the witnesses were examined without oath or affirmation. He conceded further that the

proceedings were irregular because of the irregularities as submitted by Mr. Mtaki.

It is an indisputable fact that except for the evidence of PW1, examination of other witnesses was done without oath or affirmation. The record depicts that only PW1 was sworn before his evidence was recorded. It is a mandatory requirement under section 198 (1) of the CPA that a witness must be sworn or affirmed before his evidence is recorded. The provision states as follows:-

> " *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 Oath and Statutory Declarations Act.*"

Since the record does not show that PW2 – PW7 were sworn or affirmed, recording of their evidence breached the above quoted provision of the law. The effect of the omission is to render their evidence invalid. The Court has had the opportunity of interpreting the provisions of s.198 (1) of the CPA in a number of its decisions. In **Mwami Ngura v. The Republic**, Criminal Appeal No. 63 of 2014

(unreported), the Court was dealing with the situation where a child of tender years who understood the nature of Oath was not examined under Oath. It stated as follows on the omission:

> *"...as a general rule every witness who is competent to testify, must do so under oath or affirmation, unless she falls under the exceptions provided in a written law...one such exception is section 127 (2) of the evidence Act. But once a trial Court, upon an inquiry under section 127 (2) of the Evidence Act finds that the witness understood the nature of oath, the witness must take an oath or affirmation. If this is not done, such evidence must be visited by the consequences of non compliance with section 198 (1) of the CPA. And, in several cases, this Court has held that* ***if in a criminal case, evidence is given without oath or affirmation in violation of section 198 (1) of the CPA such testimony amounts to no evidence in law*** *[see eg.* ***MWITA SIGORE @ OGOPA v. REPUBLIC,***

(Emphasis added).

The position was emphasized in the case of **Khamisi Samweli v. The Republic.,** Criminal Appeal No. 320 of 2010. The Court observed that "every witness in a Criminal Cause or matter shall be examined either on oath or affirmation subject to the provisions of any other written law to the contrary." It was further observed in that case that the only exception to the dictates of Section 198 (1) as provided under section 127 (2) of the Evidence Act is the evidence of a child of tender age, that is, a person below the age of 14 years who does not understood the nature of an oath.

In the present case therefore, since PW2 – PW7 who were competent witnesses were not, according to the record, examined on oath or affirmation, their testimony is of no evidential value. The same deserves to be expunged from the record, as we hereby do. Having done so, we remain only with the evidence of PW1 which, in our considered view, will not independently, advance the prosecution case anywhere.

On the basis of our finding above, we think it will not be necessary to consider the other irregularities argued by Mr. Mtaki, learned counsel. In the event, we hold that the irregularity vitiated the proceedings. As a result

we accordingly hereby nullify the same, quash the appellants' conviction and set aside the sentence.

On whether not we should order a retrial, we find that under the circumstances of the case, the interests of justice constrain us to make that order. We therefore order a retrial before another judge and a new set of assessors.

DATED at TABORA this 12th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL