IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 376 OF 2015

LAZARO DAUDI @ MANUEL.....APPELLANT

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 Session No. 170 of 2012

JUDGMENT OF THE COURT

18th & 29th April, 2016

MWARIJA, J.A.:

The appellant was arraigned before the High Court of Tanzania at Tabora on information for murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Laws. It was alleged that on 9/2/2011 at Iponya village in Bukombe district within Shinyanga region, the appellant murdered one Sada Athumani.

The facts giving rise to this appeal are brief and simple. Sometime in February, 2011, a certain godown in Masumbwi village was broken into and unspecified properties were stolen. The appellant was suspected of being the offender. As a result, he was arrested and locked up at police station. Prior to his arrest, another incident had taken place at another village known as Iponya. On 9/2/2011 in the night, one Sada Athumani (the deceased) was killed while she was asleep at her home.

According to the prosecution, when the appellant was interrogated about the offence for which he was arrested, that of breaking and stealing from the godown, he admitted that he committed the offence adding that he was involved in other crimes including the murder of the deceased. Following the appellant's oral confession, police officer No.D.6356 Detective Sergeant Morris (PW1) was directed to record the appellant's cautioned statement. The statement was admitted in evidence as Exhibit P.2 after the trial court had overruled the objection challenging the document's admissibility.

In his defence, the appellant admitted that he was arrested on suspicion that he was involved in breaking and stealing from the godown.

He however denied having confessed to the murder of the deceased. He said that after his arrest, he was charged in court together with other four persons who were later discharged by a *nolle prosequi*

Having considered the prosecution evidence which was anchored on the testimony of a single witness, the said No 6356 Detective Sergeant Morris and the appellant's defence, the learned trial judge was satisfied that the prosecution had proved the case against the appellant beyond reasonable doubt. She thus convicted and consequently sentenced the appellant to the mandatory sentence of death by hanging. The appellant was aggrieved hence this appeal.

At the hearing of the appeal, the appellant was represented by Mr. Mugaya Mtaki, learned counsel while Mr. Rwegira Deusdedit, learned State Attorney represented the respondent Republic. The appellant had initially filed his memorandum of appeal consisting of five grounds. Later on however, his learned counsel filed another memorandum consisting also of five grounds as follows:-

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

2. *That in view of the objection raised by the defence during the trial of the case, the learned trial judge erred in law in admitting the cautioned statement as evidence in Court without conducting a trial within a trial to test it's voluntariness.*

3. *That the learned trial judge erred in law in holding that a prima facie case had been established by the prosecution against the appellant.*

4. *That the learned trial judge erred in law and in fact in summing up the case to assessors by referring to "facts of the case" which was not part of evidence adduced before the Court during the trial of the case.*

5. *That the learned trial Judge erred in law in relying on the Appellant's repudiated cautioned statement to conviction him in of the offence murder c/s 196 of the Penal Code Cap. 16 R.E. 2002.*

Mr. Mtaki opted to argue only the first ground of appeal and abandoned the rest of grounds of appeal. He argued that since, from the

record, the evidence of the only witness for the prosecution, was taken without oath, the omission breached the provisions of section 198 (1) of the Criminal Procedure Act, Cap.20 of the Revised Laws which requires every witness in a criminal cause to be sworn or affirmed before his evidence is recorded. The learned counsel argued that as a result of non-compliance with that requirement of the law, the evidence of PW1 should be expunged from the record. In support of his argument, he cited a recent decision of the Court in **Hamisi Chuma @ Hando Mhoja v. The Republic**, Criminal Appeal No. 371 of 2015 (unreported).

Mr. Mtaki argued further that from the nature of the evidence which was tendered by the prosecution, the Court should consider not to order a retrial. According to the learned counsel, when properly evaluated, PW1's evidence would lead to a conclusion that the same does not support the appellant's conviction.

Mr. Deusdedit supported Mr. Mtaki's submission arguing that since, according to the record, the evidence of the witness was not taken on oath, that evidence is invalid for breach of S. 198 (1) of the CPA. The learned State Attorney went on however, to submit on another point. He

argued that the appellant's cautioned statement was wrongly acted upon because the same was improperly admitted. According to the learned State Attorney, the statement was recorded out of the period of four hours prescribed under section 50(1) of the CPA for interviewing a person who is in restraint in respect of the offence. When asked however, whether it would be appropriate to consider on merit, the evidence after a finding that the same was recorded contrary to the law, the learned State Attorney argued that being a separate piece of evidence, the cautioned statement can be looked at and if found to have been wrongly admitted, can be expunged from the record.

Having gone through the record of appeal, we agree with the learned counsel for the parties that the evidence of PW1 was improperly recorded. It is imminently correct that the record does not show that the witness was sworn before he gave his evidence. The relevant part of the record which is at page 13 reads as follows:

> *"PW1 D. 6356 Detective Sgt. Morris, 47 years, Christian:"*

After recording the particulars of the witness as quoted above, the learned trial judge proceeded to record the evidence.

As submitted by the learned counsel for the parties, it is a mandatory requirement under S. 198 (1) of the CPA for every witness in a criminal matter to give his/her evidence on oath or affirmation. The section provides as follows:

> *"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 Declarations Act."*

Under the law referred to above, that is, the Oaths and Statutory Declarations Act, Cap. 34 of the Revised Laws, the applicable provision is section 4 (a) and (b). The effect of that section was considered by the Court in the case of **Marko Patrick Nzumila & Anr. v. The Republic**, Criminal Appeal No. 141 of 2010 (unreported). The court stated as follows:-

"The effect of section 4 of this law, is that in all judicial proceedings, all witnesses who are Christians must take oath, and all other witnesses (including those without religious beliefs) have to be affirmed. The evidence of children of twelve years is one of the recognized exceptions under section 198 (1) of the CPA because, subject to certain conditions, their evidence may be accepted without oath or affirmation...."

In this case, the record shows that the witness was a Christian. He ought therefore to have been sworn before he gave his evidence. Since therefore as stated above, the record is silent as regards compliance with that requirement, recoding of PW1's evidence was done in breach of section 198 (1) of the CPA. The effect of that breach is to render the witness's evidence invalid and thus liable to be expunged from the record – See **Hamisi Chuma @ Hando Mhoja** (supra) cited by Mr. Mtaki, **Marko Patric Nzumila** (supra), and **Thomas Makoye v. The Republic**,

Criminal Appeal No. 66 of 2011 (unreported). In **Marko Patrick Nzumila case**, the Court stated as follows:-

> *"The effect of non-compliance with section 198 (1) of the CPA is that such evidence must be discarded from the record (See – **MWITA SIGORE** @ **OGORA** v. R, Criminal Appeal No. 54 of 2008 (unreported)."*

It is obvious therefore that, since the recording of PW1's evidence breached the provisions of S.198 (1) of the CPA, that evidence cannot stand. The same is hereby expunged from the record. Having done so, the need for considering the point raised by Mr. Deusdedit concerning the time of recording the appellant's cautioned statement does not arise.

What then, after we have expunged the evidence of the only witness for the prosecution, is the appropriate remedy? To answer this question, it is apposite to state here that since the irregularity which has led to the decision arrived at above, was caused by the trial Court, the prosecution is not to blame for what has befell its case. The prosecution case has been

as a result, left without any evidence to support it. There is no gain saying that the trial court's mistake has prejudiced the prosecution side. As stated in the **Marko Patrick Nzumila case,** in which a similar situation occurred;

> *"... by unwittingly allowing PW1, PW2 and PW7 to give an unaffirmed testimony, the trial court certainly prejudiced the prosecution case substantially as those were crucial witnesses for its case but for which they were not to blame for giving of their evidence in violation of the law. To that extent, we think, there was a failure of justice."*

As to what a failure of justice entails under the circumstances similar to the present case, the Court went on to state as follows:-

> *"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 interests of the accused. It encompasses both sides on the trial. Failure of justice or (sometimes, referred to 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 (see for instance WILLIBARD KIMANGO v. R, Criminal Appeal No. 235 of 2007 (unreported) 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 error in acquitting than punishing, it is also in the interests of the state that crimes do not go unpunished. So, in deciding whether a failure of justice has been occasioned, the interests of both sides of the scale have to be considered."

On the basis of that principle and our finding that the omission has occasioned a failure of justice, we find that the proceedings were vitiated

and thus liable to be declared a nullify. The same are accordingly hereby nullified. As a result, the appellant's conviction is quashed and the sentence is set aside.

Having found that there was a failure of justice on the part of the prosecution, in the interests of justice, a retrial is an appropriate remedy. In the event, we hereby order a retrial before another judge and a new set of assessors.

DATED at **TABORA** 29th this 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