IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 160 OF 2015

1. **MABULA DAMALU**
2. **MAKENZI MIHAMBO @ KABORA ..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Koroso, J.)

dated the 31st day of October, 2014
in
Criminal Session Case No. 169 of 2012

.....

JUDGMENT OF THE COURT

4th & 8th April, 2016

MASSATI, J.A.:

The appellants were charged with and convicted of the offence of murder contrary to section 196 of the Penal Code and sentenced to death, in a trial which took place at Shinyanga.

Before the trial court, it was alleged that the two murdered one MAYUNGA s/o ELIAS on the 15th day of September, 2010, at Itumbili village, within Kahama District, Shinyanga Region.

The brief facts adduced at the trial court, are that the deceased had a retail shop in his village, called Ng'ananga. As is the desire with all businessmen, he wanted his business to flourish. On the 14/9/2010, the appellants visited the deceased and held themselves to him that they were medicineman of repute who could help him achieve his ambition. The deceased was convinced. So, on 15/9/2010, both the appellants and the deceased left the deceased's village with some money, an axe, and a knife, to Itumbili village each riding his own bicycle. That was the last time, the deceased was seen alive.

On 18/9/2010, a naked, headless body, with injuries on the neck and a buttock missing, was stumbled upon in a bush in Itumbili village. The villagers reported about the discovery of the unknown body to the police Kahama, who went with a doctor and conducted an autopsy. Since the body was not yet claimed, the police allowed it to be buried.

Meanwhile, the family of the deceased, who all along, kept on looking for him, got wind of the recovery of the body. They rushed to Itumbili village, where they discovered the deceased's bicycle, and identified the headless body as that of, the deceased. This information was again

conveyed to the police, who applied for an exhumation order from a court. It was identified by his family, and reburied.

After some investigations, the police arrested MABULA s/o DAMALU (the 1st Appellant) on 23/12/2010 in Isagebe village, Urambo District, and MAKENZI s/o MIHAMBO @ KABORA (the 2nd Appellant) on 31/12/2010 at Iloelo village, Nzega District. They were accordingly charged with murdering the deceased as said earlier.

After hearing seven (7) prosecution witnesses, and the appellants' own version to the story, Korosso, J., found the appellants guilty, contrary to the unanimous opinions of the three assessors who sat with her, who found them not guilty.

The appellants still believe that they are innocent. So they have lodged separate appeals in this Court.

The first appellant who had the services of Mr. Kamaliza Kayaga, learned counsel, lodged his own memorandum of appeal comprising of five grounds, all going to challenge the substance of the evidence paraded against them. On the other hand, Mr. Mussa Kassim, who represented the

second appellant, lodged his memorandum of appeal, in addition to the five grounds raised by the appellant himself. After some exchange with the bench, it was agreed that the ground raised by Mr. Kassim be argued and possibly determined first.

The only ground raised by Mr. Kassim is:-

> *"That the learned trial judge erred in law to conduct the Appellant (sic) trial by taking and recording the witnesses testimonies and evidence in a Reported speech and base his (sic) findings and conviction on the same."*

At the hearing of the appeal, Mr. Kassim submitted that, the learned trial judge, wrongly recorded the evidence of the prosecution and the defence witnesses in a reported speech manner, instead of a narrative form. He said that this was contrary to section 215 of the Criminal Procedure Act (the CPA) and GNs 28 of 1953 and 286 of 1956; where Rule 3 (a) prescribes that the record of evidence of witnesses in the High Court shall be in the form of a narrative.

The learned counsel then went on to cite a decision of this Court made in Mwanza in **KAIZA FRANCE vs REPUBLIC**, Criminal Appeal No. 34 of 2011 (unreported). That decision considered the effect of noncompliance with the manner of recording evidence in subordinate courts which is governed by section 210 of the CPA. The Court held that if such evidence was taken in the form of a reported speech it was as good as no evidence at all. So, it was expunged. By parity of reasoning, Mr. Kassim submitted that as the wording of section 210 (1) (b) of the CPA is identical to that of Rule 3 (a) of the Rules made under section 215 of the CPA, the Court should treat both situations in an identical manner. When the Court referred to him another case decided in Tabora by the Court in **MASHAKA JUMA NTALULA vs R,** Criminal Appeal No. 159 of 2015 (unreported) the learned counsel retorted that this Court should follow the earlier one because it was more reasoned. He went on to submit that if the Court accepts his, proposition, it should expunge all the said evidence, and since there was nothing on record to support the conviction, it should order that the appellants be set free.

Mr. Kayaga, learned counsel basically supported the view taken by Mr. Kassim. But he had a different view on the way forward. He was of the

view that since there are two conflicting decisions of the same Court on the same point, the best approach would be to invite the full bench to resolve the conflict. He went on to say that if we were to follow our earlier decision of **KAIZA FRANCE vs R**, he would advocate for a retrial.

On his part, Mr. Ildephonce Mukandara, learned State Attorney, who appeared for the respondent/Republic agreed with Mr. Kassim and Mr. Kayaga that the learned trial judge's manner of recording evidence was defective. He also agreed with the stance taken by this Court in **KAIZA FRANCE vs R.** (*supra*) that such evidence ought to be expunged. However, he did not think it was right to let go of the appellants in this case because of this defect. He prayed, instead, that should the Court agree to expunge the misrecorded evidence, then the best option, in the interests of justice, would be to order a retrial.

Given a chance to reply Mr. Kassim urged this Court to decide the case forthwith, and not to refer it to the full bench. In his view, if any party would be aggrieved by any such decision, he would then be able to refer the matter to the full bench.

There is no dispute in this case that, the learned trial judge recorded almost all the evidence of the witnesses in the form of a reported speech. The issue is what is the effect of such an irregularity?

Rule 3 (a) of the Criminal Procedure (Record of Evidence) (High Court) Rules Government Notice 28 of 1953 and 286 of 1956 (the Rules) provides:-

> *"In all trials of Criminal cases before the High Court the record of the evidence of each witness shall consist of a record or memorandum of the substance of the evidence taken down in writing by the judge which shall not be ordinarily in form of question and answer but in the form of a narrative."*

Similarly, section 210 (1) of the CPA, which applies to subordinate courts provides:-

> *"In trials, other than retrials under section 123, by or before a magistrate, the evidence of the witnesses shall be recorded in the following manners:-*
>
> *a) Not relevant*

b) The evidence shall not ordinarily be taken down in the form of questions and answers but subject to subsection (2) in the form of a narrative."

So, it is true that, the wording of section 210 (1) (b) of the CPA and Rule 3 (a) of the Rules, is identical. Both derive their authority under the CPA. When it comes to interpretation, it is a statutory rule of interpretation that if similarly worded, the subsidiary legislation cannot be read to contradict that of the principal statute. The provisions of a subsidiary legislation must be read so as to harmonise with those of a principal statute (See section 36 (1) of the Interpretation of Laws Act (Cap 1 R.E. 2002).

So from the submissions of counsel, apparently, there are two conflicting decisions of this Court on this point. The question is what can be done in the circumstances? Mr. Kassim urged us to follow our earlier decision in **KAIZA FRANCE vs R.** and disregard the latest decision in **MASHAKA JUMA NTALIWA vs R.** (*supra*). Apparently Mr. Mukandara seemed to have been in support of the position taken by the Court in **KAIZA FRANCE** case. While supporting the position taken by the Court in **KAIZA FRANCE** case, Mr. Kayaga, however suggested that the Court convene a full bench to resolve the conflicting decisions.

As a final Court of Appeal of Tanzania, this Court has no doubt, jurisdiction to depart from its earlier decisions in certain circumstances (See **JUMUIYA YA WAFANYAKAZI TANZANIA vs KIWANDA CHA UCHAPISHAJI CHA TAIFA** (1988) TLR. 148. In that case, the Court also adopted with approval the following passage from **DODHIA vs NATIONAL & GRINDLAYS BANK LTD AND ANOTHER,** (1970) EA. 195.

> *"...as a matter of judicial policy this Court as the final Court of Appeal .... while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. This power should be exercised only after a careful consideration of the consequences of doing so and the circumstances of a particular case ..."*

So, in the absence of strong reasons to the contrary obtaining in each case, this Court would normally follow its previous decisions on a particular subject matter.

As we held in **ARCOPAR (O.M) S.A. vs HARBERT MARWA & FAMILY AND OTHERS**, Civil Application No. 94 of 2013, (unreported) there are many instances, in which the Court may find itself not following its previous decisions. These may include where:-

(i) the prior decision was given *per incuriam* that is, inadvertently, without consideration of an applicable authority or statutory provision (See **JUMUIYA YA WAFANYAKAZI TANZANIA vs KIWANDA CHA UCHAPISHAJI CHA TAIFA** (*supra*) or;

(ii) the proposition in the previous decision was **obiter dicta** or;

(iii) the precedent case has been overruled by a new statute, or;

(iv) the previous case, and the case under consideration are factually distinguishable.

The list is not exhaustive. There could be many more situations, which may justify the Court not following a previous decision.

As alluded, section 210 (1) (b) of the CPA was considered by the Court in **KAIZA FRANCE vs R.** (*supra*). The Court held that noncompliance with the provision was fatal and may lead to the expulsion of the evidence of witnesses taken in contravention thereof. Indeed, there, the evidence of the witnesses was expunged and as there was no other evidence, the appellant

was set free. Rule 3 (a) of the Rules, was considered by the Court in **MASHAKA JUMA NTALUWA vs R.** (*supra*). The Court was of the opinion that noncompliance was a curable irregularity. But that was not the basis of the decision in that appeal. The appeal was decided by quashing the trial on account of allowing assessors to cross examine witnesses. So, the observation on the manner of recording of witnesses there, was just **obiter dicta.** Whereas in the **KAIZA FRANCE** case, the noncompliance with the statutory methods of recording evidence formed part of the ratio **decidendi** of that decision. As far as the doctrine of stare decisis is concerned, that part of the judgment in **KAIZA FRANCE** is binding.

Theoretically therefore, the **obiter dicta** in **NTALUKA's** case is not binding on a subsequent case, such as the one at hand. With respect therefore, we do not agree with the learned counsel that the two decisions of this Court are in conflict that have to be resolved by the full bench. In our opinion, there are no such conflicts. Indeed, **obiter dicta** cannot conflict with **ratio decidendi** because they occupy different stations in the hierarchy of precedents or *stare decisis*.

Given the above parameters, it is our considered opinion that the correct position of the law with regard to the recording of witnesses in both

the High Court and the subordinate courts is that laid down in **KAIZA FRANCE vs R**, (*supra*). And it is to the effect that all evidence of witnesses must be recorded in the narrative form. Any other form of recording of such evidence reduces it to no evidence at all. It is expungable. Unfortunately this decision was not cited in **NTALUKA's case**. If it were cited, perhaps the observation made by the Court on this point would not have been made.

In the present case, there is no dispute that all the evidence of the witnesses was recorded by way of a reported speech. This was wrong, and it was fatal. As such, all the evidence has to be expunged from the record.

However, we agree with Mr. Mukandara that in the present case, to let free the appellants on account of the judge's misfeasance would lead to a miscarriage of justice. In the peculiar circumstances of this case, including the little that could be gathered from the record, we exercise our revisional jurisdiction, quash all the proceedings, beginning from the recording of the testimony of PW1, the judgment and sentence and order a retrial of the appellants as soon as possible before a different judge and a different set of assessors. Meanwhile the appellants are to remain in remand prison to await the new trial.

It is so ordered.

DATED at **TABORA** this 5th 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