IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 233 OF 2015

NGWALA KIJA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Rumanyika, J.)

dated the 28th day of March, 2014
in
Criminal Session Case No. 84 of 2011

.....

JUDGMENT OF THE COURT

11th & 18th April, 2016

MUSSA, J.A.:

In the High Court of Tanzania, the appellant was arraigned and convicted for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. Upon conviction (Rumanyika, J.), he was handed down the mandatory death sentence. The appellant is aggrieved and, presently, he seeks to impugn both the conviction and sentence. Ahead of our consideration of the issues of contention, we propose to briefly explore the factual background.

From a total of five witnesses and two documentary exhibits, the prosecution sought to establish that on the 4th day of March, 2010, at Ndolelezi Village, within Bariadi District, the appellant murdered a certain Holo Ntulugi, whom we shall simply refer to as "the deceased."

It is, perhaps, pertinent to apprise at this stage that, during the trial, the appellant was represented by Mr. Kaunda, learned Advocate, whereas the respondent Republic had the services of Mr. Lwenge, learned State Attorney. In a nutshell, the evidence in support of the prosecution case was to the effect that on the night of the fateful day, an unspecified number of bandits invaded the house of residence in which the deceased and her family were sleeping. The intruders pulled the deceased from her bed and hacked her severally by the use of machetes. The deceased died a few moments later and, upon a post-mortem examination, her death was attributed to haemorrhagic shock secondary to multiple cut wounds.

The appellant and a certain Magwa Kija were arrested little later on the wee hours of that same day, upon suspicion that they had a hand in the homicide. It was said that the deceased who happened to be the partenal aunt of the accused, was involved in a land dispute with her nephew (accused). The suspects were initially interrogated by traditional vigilantes

(*sungusungu),* but they were, subsequently, handed over to a police Detective staff Sergeant No. C4277, namely, Vincent (PW5). The latter interviewed the appellant and recorded a cautioned statement into which the appellant allegedly confessed involvement in the killing. The cautioned statement was adduced into evidence (exhibit P2) but, as we shall demonstrate at a later stage of our judgment, the procedure adopted by the trial court towards its tendering was unprecedented and irregular.

In reply to the foregoing unveiled prosecution version, the appellant was relatively brief. In his sworn statement, he completely disassociated himself form the prosecution accusation. On the fateful day, he claimed, he was throughout at his Mwabuki Village residence in the company of his brother, Magwa Kija. He was surprised to be arrested by the *sungusungu* commander, namely, Binza Patrick for an allegation of murder which he knew nothing about. Although he did not expressly pronounce, the appellant seemingly disowned the cautioned statement.

On the whole of the evidence, the two ladies and gentleman assessors who sat with the trial Judge were unanimous in finding the appellant not guilty. The learned Judge was minded of a different view but, with respect, he did not deem it courteous to reveal the grounds for his dissent. It is,

however, discernible from the Judgment that the learned Judge almost entirely relied upon the cautioned statement in convicting the appellant. As already intimated, upon conviction, the appellant was sentenced to death. In his present quest, the appellant seeks to impugn both the conviction and sentence upon two grounds, namely:-

> *"1. That the trial before the High Court was a nullity as the procedure adopted by the Hon.. trial Judge in conducting, trial within trial and admitting the appellant's cautioned statement as Exhibit P2 was irregular.*
>
> ***In the alternative***
>
> *2. The prosecution evidence is so shaky and failed to prove the charge of murder against the appellant."*

At the hearing before us, the appellant was represented by Mr. Kamaliza Kayaga, learned Advocate, whereas the respondent Republic had the services of Mr. Iddi Mgeni, learned State Attorney.

Arguing the first ground of appeal, Mr. Kayaga submitted that the trial-within-trial was incurably vitiated by the fact that the assessors were allowed to attend a portion of the proceedings of the mini-trial contrary to the established practice. To fortify his argument, the learned counsel for the appellant referred to us the unreported Criminal Appeal No. 215 of 2007 – **Francis Mashara Makewa vs The Republic**. It is noteworthy that the referred case reiterated the accepted procedure to be adopted in conducting a trial-within-trial, as was laid down by the defunct Court of Appeal for Eastern Africa in **Kinyori Karuditi vs Reginam** (1956) 23 EACA 480. Counsel concluded that to the extent that the procedure was flawed, the appellant was not afforded a fair hearing and, accordingly, the entire trial was vitiated. Mr. Kayaga prayed for a retrial before another Judge and a new set of assessors. As regards the second ground of appeal, Mr. Kayaga briefly sought to impress on us that apart from the cautioned statement which was improperly admitted, the remaining evidence does not sufficiently implicate the appellant.

For his part, Mr. Mgeni supported the appeal and fully adopted Mr. Kayaga's submissions. He added a detail to the effect that, upon being tendered into evidence, the cautioned statement was not read aloud in court

for the benefit of the assessors. The learned State Attorney also prayed for a retrial before another Judge and a new set of assessors. To appreciate the force behind the concurrent learned submissions, we think it is instructive to revisit the procedure adopted by the trial Judge in the course of the tendering of the cautioned statement.

From the record of proceedings, it is discernible that, in the course of his testimony, PW5 sought to adduce the cautioned statement but, as he made the attempt, Mr. Kaunda intervened thus:-

> *"We object to the prayer. Because he never made it voluntarily. Having been threatened that was (sic) going to be injured by PW5 had he not admitted the offence."*

In the wake of the objection, the trial Judge, rightly in our view, ordered that a trial-within-trial was inevitable and, accordingly, the two ladies and gentleman assessors were asked to retire. The mini-trial proceeded immediately with the prosecution featuring the Sergeant (PW5) as its first witness. At the apparent close of his mini-trial testimony, the Sergeant tendered the cautioned statement for identification purposes,

cause, the learned counsel for the accused (appellant here) had second thoughts and submitted thus:-

> *"**Mr. Kaunda**: (on second thoughts). The statement falls short of legal stds (sic) (allegedly recorded under section 10 of the CPA contrary to section 57 (3) of the same CPA cap. 20 R.E. 2002). In fact the ssgt did abrogate the procedure. As such the statement was incurably defective it renders it (sic) inadmissible in evidence. I undertake to bring with me a CAT authority tomorrow. As such I pray to withdraw the allegations of threat by PW5 to the accused."*

Mr. Lwenge for the respondent Republic welcomed his friend's withdrawal of the allegations of threat but looked forward to confront the refined point of objection as and when counsel for the accused availed the case law as promised.

As to what exactly was the import of the refined point of objection, is anybody's guess but, as it were, the trial court did not issue any consequential order apart from adjourning the hearing to a future date. More particularly, the trial court did not actually terminate the trial-within-trial in the wake of Mr. Kaunda's refined point of objection. Strangely though, when the matter came up for hearing on the scheduled date, the assessors had apparently been recalled and were present in court. As it turned out, counsel from either side proceeded to submit in support of, or in opposition to the raised point of objection in the presence and hearing of the assessors. At the close of the exercise, the point of objection was overruled and the cautioned statement was tendered into evidence, although, as correctly remarked by Mr. Mgeni, the same was not read aloud in court. No wonder, the assessors did not question PW5 on its contents.

Addressing the issue of contention, we should express at once that the procedure adopted by the trial court in the conduct of the trial-within-trial appeared to be in a confused state and leaves one in real doubt as to whether the presiding officer was aware of the proper procedure as laid down in the case of **Kinyori Karuditi** (*supra*). For purposes of future

down in that case:-

> *"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 arises and submit that the assessors be asked to retire. It is important 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 issues, 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 that 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."

Several principles underlie the foregoing procedure but, for the purpose of this appeal, one culls therefrom an imperative requirement that the assessors should retire throughout the conduct of the trial-within-trial in order to avoid being possibly prejudiced by hearing of the evidence which might after wards be held inadmissible.

In the matter presently under our consideration the requirement was infringed the moment when the assessors were recalled in the middle of the mini-trial and heard a portion of its deliberations. This was, no doubt, a serious infringement in the face of which we have found ourselves in full agreement with both counsel's submission that the trial within trial was fundamentally flawed. We additionally agree that the entire process was

also devastatingly riddled by the fact that the details of the cautioned statements were not disclosed after the same was tendered. As a result, it cannot be meaningfully asserted that the appellant had the benefit of the details with which to confront the confessional cautioned statement. Neither could it be said that the assessors had a detailed hindsight of the cautioned statement when they gave their respective opinions. We therefore uphold the first ground of appeal and discount the cautioned statement (exhibit P2) in its totality.

Given the situation, a question crops up as to what should be the fitting consequential order of the Court. It is noteworthy that, in the absence of the cautioned statement, the prosecution case is left with skeletal evidence which barely implicates the appellant. We are mindful of the fact that the mishandling of the trial-within-trial falls squarely on the shoulders of the trial court. That be so and, to encompass the interests of both sides in the trial, we are minded to invoke our revisional jurisdiction in terms of section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws. In fine, the entire proceedings of the High Court are, accordingly, nullified with an order for a retrial before another Judge and a

custody pending the resumption of his trial.

DATED at **TABORA** this 15th 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