IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., MASSATI, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 356 OF 2015

EMMANUEL MALOBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Ebrahim, J.)

dated the 21st day of July, 2015
in
Criminal Sessions Case No. 151 of 2010

JUDGMENT OF THE COURT

19th & 24th October, 2016

MASSATI, J.A.:

EMMANUEL MALOBO (herein "the appellant") was convicted for the murder of his estranged girlfriend, REHEMA d/o MAGEE. The prosecution alleged that the offence was committed on the 12th January, 2009, at Kijiweni Area, Sengerema District, in Mwanza Region.

The brief facts which were established at the trial were that the appellant was the deceased's boyfriend. On the fateful night he visited her for a conjugal session to which advances the deceased refused. They slept, seemingly without incident. But in the midnight, the deceased was woken up by a fire in her room but noticed that the appellant was nowhere to be found and the door to her room was locked from outside. From the fire the deceased sustained severe burns which led to her death two days later. The immediate cause of her death was severe dehydration and neurogenic shock. Before her death however, the deceased gave a dying declaration naming the appellant as the suspect. On the basis of that information, the appellant was arrested and charged with the murder to which he pleaded not guilty. So the prosecution had to prove its accusation.

A total of 6 prosecution witnesses testified and two documentary exhibits were produced, including the appellant's Cautioned Statement (Exhibit P1) and the Post Mortem Examination Report (Exhibit P2).

The trial began before Mwangesi, J. on 2/12/2015. He took down the testimonies of PW1 and PW2. PW1 was the owner of the

house where the bar at which the deceased was working was located. He testified that the deceased was also accommodated in a room next to the bar. So, when people noticed the fire at his property, they informed him and he had to go there. He heard the deceased naming the appellant as the one she suspected to have caused the fire. PW2, was the police officer, who issued a PF3 to the deceased before WP Jovitha took her to hospital where she succumbed to death on 14/1/2009. After this, the hearing of the case was adjourned to another session.

When the trial resumed on 12/2/2015, it was before another judge (Ebrahim, J.). The record is not clear why the case was transferred and had to proceed before a new judge and why the predecessor judge could not complete the trial. Be that as it may, the successor judge continued with the trial to its conclusion. She took down the testimonies of PW3, PW4, PW5 and PW6 as well as the defence case. Of those, PW3 and PW5 were police officers who investigated the case and took the appellant's cautioned statement respectively. PW4 was the tenant of PW1 who operated the bar where the deceased was working. She was also privy to what the deceased

said as the cause of her death before she died. PW6 was a retired medical doctor who testified as to the cause of death and identified the post mortem examination report which he had prepared.

The appellant then gave his defence in which he denied any knowledge of the deceased or anything relating to her death.

After the close of the defence case and as the parties did not want to make use of their right to make final addresses, the learned trial judge summed up the case to the assessors. In response, the assessors gave the following joint opinion:

> *"**Assessor John Juma:***
>
> *On behalf of all the assessors, I would like to say that, us (sic) assessors have found that the charge has not been proved beyond reasonable doubt..."*

The learned judge was "mindful of the assessor's opinion" in her judgment which led to the conviction of the appellant from which he was sentenced to death by hanging.

Aggrieved, the appellant has now come to this Court. Initially, the appellant himself had filed his own memorandum of appeal with six grounds of grievances. But on 4th October, 2016, Mr. Alex Banturaki who was briefed to represent him in this appeal, filed another memorandum of appeal, comprising two grounds of appeal. At the hearing of the appeal, Mr. Banturaki sought and was granted leave to withdraw both memoranda of appeal previously lodged, and orally formulated a new ground altogether. The new formulated ground was that:

> *"The learned successor judge erred in law in proceeding with the trial of the appellant in contravention of section 299(1) of the Criminal Procedure Act (the CPA)."*

So at the hearing, Mr. Banturaki only engaged us on that ground. He briefly submitted that since the trial began before Mwangesi, J. who took down the testimonies of PW1 and PW2, before Ebrahim J. took over and proceeded with the hearing of the case to its conclusion, and no reasons were recorded to show the reason for the transfer of the case to the successor judge, and since the appellant was not informed

of his right to recall the witnesses as guaranteed in section 299(1) of the CPA, the trial was vitiated. He therefore prayed that the proceedings be nullified, the conviction quashed, the sentence set aside, and an order for a retrial be made. He cited no authority for that proposition.

Probed by the Court, the learned counsel quickly conceded that it was also irregular for the trial court to have acted on the joint opinion of the assessors, as such mode of taking the assessors' opinions violated the provisions of section 298(1) of the CPA. The effect was also to vitiate the trial.

Mr. Juma Sarige, learned Senior State Attorney, represented the respondent. Without much ado, he agreed with Mr. Banturaki that the trial proceeded before Ebrahim J, contrary to section 299(1) of the CPA, and that the assessors' opinion was taken contrary to section 298(1) of the CPA. He submitted that both irregularities had crippling effects to the trial, which was thereby vitiated. He therefore prayed that in exercise of its powers under section 4(2) of the Appellate Jurisdiction Act (the AJA) the Court should be pleased to revise the proceedings of the lower court and order a retrial.

There is no dispute that this case was heard partly by Mwangesi, J. and partly by Ebrahim, J. There is also no doubt that in such a situation the provisions of section 299(1) of the CPA apply. That section provides as follows: -

> *"299(1). Where any judge, after having heard and recorded the whole a part of the evidence in any trial is for any reason unable to complete the trial or he is unable to complete the trial within a reasonable time, another judge who has and who exercises jurisdiction may take over and continue the trial and the judge so taking over may act on the evidence or proceeding recorded, by his predecessor, may, in the case of a trial resummons the witnesses and recommence the trial; save that in any trial the accused may, when the second judge commences his proceedings, demand that the witnesses of or any of them be resummoned and reheard and shall be informed of*

such right (by) the second judge when be commences his proceedings."

It is our understanding that, this provision sets out two necessary conditions that must be met before a trial proceeds before a successor judge. The first condition is that there must be a reason that should be made known to the accused why the predecessor judge could not complete the trial. The second condition-precedent is that the accused must be informed of his right to resummon the witnesses or any witness, if he so wishes. But, the successor judge also has a discretion to resummon witnesses, but it is not condition precedent for the continuation of the trial.

In the present case not only no reason is recorded for the takeover, but also there is no record that the accused was informed of his right to recall witnesses. So both condition-precedents were breached. The issue is, what is the effect?

We think that the purpose of section 299(1) of the CPA is twofold. The requirement for giving reasons for the change of hands is intended to promote transparency and minimize chaos in the

administration of justice and thus enhance the integrity of judicial proceedings. (See **MS GEORGES CENTRE LIMITED v THE HON. ATTORNEY GENERAL AND TANZANIA NATIONAL ROAD AGENCY**, Civil Appeal No. 29 of 2016 (unreported). In that case the proceedings were vitiated for non compliance with Order XVIII r.10 of the Civil Procedure Code Cap. 33 R.E. 2002, which has a more or less similar wording as section 299(1) of the CPA.

On the other hand, the condition that an accused person be informed of his right to recall witnesses is based on the need for the successor judge to properly evaluate, particularly, the testimonial evidence of witnesses who had testified before the predecessor judge. This is the more so if the case is to be decided on the credibility of the witnesses. As we said in **MS GEORGES CENTRE LIMITED** case (supra):

> *"Credibility of witnesses which has to be assessed is very crucial in the determination of any case before a court of law."*

As far as assessment of credibility is concerned, a judge who sees and hears the witnesses is placed in a better position than his/her successor.

The wording of section 299(1) is similar to what used to be section 214(2)(a) of the CPA (which applies to subordinate courts) before it was amended by Act No. 9 of 2002. Considering the effect of the said wording this Court held in **LIAMBA SINANGA v. R** (1994) TLR 97 that:

> *"The language in s. 214(2)(a) of the Criminal Procedure Act is mandatory in that the learned second magistrate was obliged to inform the appellant of his right to demand that witnesses who testified before the first magistrate be resummoned to testify before the second magistrate if the appellant so wished."*

As to the effect of non compliance of this provision, the High Court of Tanzania in **RAPHAEL v R** (1969) 1 EA 544 had occasion to comment on section 196 of the erstwhile Criminal Procedure Code which had the following proviso:

"In any trial the accused may when the second magistrate commences his proceedings demand that the witnesses or any of them be resummoned and reheard and shall be informed of such right by the second magistrate when he commences his proceedings."

In that case, the second magistrate did not inform the accused of his right to recall witnesses. The High Court held:

"(i) it is a prerequisite to the second magistrate's exercise of jurisdiction that he should apprise the accused of his right to demand that the witnesses or any of them be resummoned and reheard.

(ii). if the second magistrate has not complied with this prerequisite it is fatal, he has no jurisdiction, and the trial is a nullity."

We fully agree with and approve the reasoning of the High Court, and we would apply that same reasoning in the present case. Since the successor judge in this case did not inform the accused of his right to resummon the witnesses that had testified before her predecessor, she had no jurisdiction to continue with the trial. The rationale is not far to find. By not informing the accused of his right, he is thereby prejudiced because as alluded to above, the successor judge would not be in as good a position to assess the credibility of witnesses who had testified before his/her predecessor who had the advantage of seeing and hearing them. We thus agree with the learned counsel that the proceedings before Ebrahim J. were a nullity and that a retrial would be appropriate. The only remaining issue is how far back, should the proceedings be vitiated. On our part, we do not see the reason to order a retrial denovo as the learned counsel seem to suggest. This is because the proceedings before Mwangesi, J are not tainted with any irregularity. So, the proper order to make is to nullify only those proceedings up to judgment and sentence superintended by Ebrahim J.

The next infraction that we have asked the learned counsel to address us on, is on the taking of assessors' opinions.

As correctly pointed out by Mr. Sarige, section 298(1) of the CPA requires the trial judge to demand a separate opinion from each of the assessors sitting with him. It was therefore a violation of that provision for the assessors in the present case to have given a joint opinion.

This Court has previously dealt with this situation. Thus in **YUSUPH SYLVESTER v R**, Criminal Appeal No. 126 of 2014 (unreported) the Court held that, where assessors give a joint opinion, the opinion is in vain and the trial is deemed to have been one without the aid of assessors, and so vitiates the entire proceedings. In that case the Court quashed the proceedings and ordered a retrial.

In the light of the above highlighted irregularities we find ourselves in agreement with the learned counsel that all the proceedings in the present case before Ebrahim J. are null and void. So in exercise of our revisional powers under section 4(2) of AJA we revise the proceedings of the lower Court from the stage where Ebrahim J took over (See **MWITA CHACHA & OTHERS v R**, MZ Criminal Revisional No. 1 of 2007 (unreported). We quash the

conviction and set aside the sentence. In the aftermath and in the circumstances of this case we order a retrial of the appellant from that stage with immediate dispatch before a different judge and as practicable as possible with the same set of assessors.

Order accordingly.

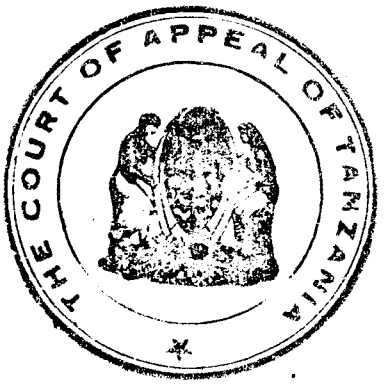
DATED at **MWANZA** this 20th day of October, 2016.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL