IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KIMARO, J.A., MUGASHA, J.A., And MZIRAY, J.A.)

CRIMINAL APPEAL NO. 96 OF 2015

CHARLES KALUNGU

CHARLES KALINGA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Sumbawanga)

(Sambo,J.)

dated 25th February, 2015

in

Criminal Session Case No. 1 of 2013

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JUDGMENT OF THE COURT

6th & 12th April, 2016

KIMARO, J.A.:

On 26th April, 2011 one Apolinali Baruti was buried at Mpenje Village in Sumbawanga District in Rukwa region. According to the testimony of Joseph Mwanisenga, (PW1) who was an eye witness, after the funeral people gathered. The evidence is not clear on the venue of the gathering. Among the people present at the gathering was Gasper Mwanisenga (the deceased in the first count the appellants were charged with). The deceased and others were eating food commonly known as "*kande*". He was sharing the

food with others who were present at the funeral. While in the process of eating, the two appellants and three others who were not apprehended arrived at the place of gathering. They approached the deceased and forced him to eat the whole food alone. The evidence of PW1 shows that the appellants were armed with "*panga*", clubs and "*fyekeo.*" Thereafter they started beating him and carried him to the cemetery where the deceased Apolinali was buried. At the cemetery the appellants forced the deceased Gasper Mwanisenga to awaken the deceased so that he could join him in eating the "*kande*". Unfortunately, the deceased Gasper Mwanisenga had no ability to perform that function. His failure to perform what the appellants wanted him to do, made the appellants to continue brutally beating the deceased to his death hence denying him the right to life. In addition to the brutal beatings administered on the deceased, the appellants mercilessly took dry sisal and grass and burnt him.

Another eye witness to the killing of the deceased Gasper Mwanisenga was Liberatus Gasper Chilumba (PW2). He testified to have seen the appellants beating the deceased while taking him to the cemetery. He also corroborated the evidence of PW1 that the appellants and the others were armed with "*panga*", clubs and "*fyeked*". Both PW1 and PW2 said they had no problem with identifying the appellants because they hail from the same village and the incident occurred during broad light day time.

Amos Givini Mtula (PW3) was the Village Executive Officer of the Mpenje Village then. His testimony was that on 28th April, 2011 he heard shouts. He went to the house of the Chairman where they both proceeded to the office. On arrival at the office they saw a dead body of Noel Sangu. They went to the councilor of Mwazye ward who informed PW4 and his

Chairman of the village of Mpenje that he had taken action in respect of the deaths of Gasper Mwanisenga and Noel Sangu. While they were at the house of the councilor, the appellants went there. They were armed with "*fyekeo*", clubs and "*panga*". The appellants and the others who were with them asked PW3, the Village Chairman and the Councilor if they were happy with the deaths that were taking place in the village. All replied in the negative. The appellants ordered PW3 and the others he was with to disappear before they attacked them. According to PW3, to show the seriousness which the appellants had, they started pushing the motor cycle of the Ward Executive officer. PW3 rang to the Police Station at Mwimbi and Mpui and informed them about the incidence. He said the appellants were well known to him because he was their leader. PW3 said of the five persons who had killed Gasper Mwanisenga and Noel Sangu it was only the appellants who were arrested. The first appellant was arrested on 30th May 2011 while the second appellant was arrested on 15th May, 2011.

The last prosecution witness was WP No. 5234 D/C Lucina (PW4). The role she played in the case was to visit the scene of crime where she saw the dead bodies of Gasper Mwanisenga and Noel Sangu and drew a sketch plan of the scene of crime. The witness said all culprits were at large and were arrested on the dates mentioned by PW3.

With this evidence the appellants were charged with two counts of murder contrary to section 196 of the Penal Code [CAP 16 R.E.2002]. The first count is in respect of Gasper Mwanisenga. Both appellants are alleged to have intentionally caused the death of Gasper Mwanisenga on 28th day of April 2011 in Mpenje Village, Sumbawanga District, Rukwa Region. The second count is in respect of Noel Sangu. Both appellants are alleged to

have intentionally caused the death of Noel Sangu on the same date and in the same village.

Both appellants in their defence, raised the defence of alibi. They had during the preliminary hearing of the case indicated that they would raise that defence. Both appellants said they were at Ilembe, a suburb of Isanga in the valley of Rukwa doing agricultural work. Although they had indicated that they would summon witnesses to corroborate their defence, they did not summon defence witnesses.

The learned trial judge after evaluation of the prosecution and the defence evidence disregarded the defence of the appellants when weighed in relation to the evidence of PW1, PW2, and PW3. He said the evidence of the prosecution witnesses disproves the defence of the alibi. He took into consideration that both PW1 and PW2 were eye witnesses, they knew the appellants before because they resided in the same village and the offence was committed during daytime when there was no problem of seeing them and identifying them. He relied on the cases of **Waziri Amani V Republic** [1980] T.L.R. 250 and that of **Ally Salehe V Republic [1980] T.L.R.1** in assessing the weight of the prosecution and the defence case.

The appellants also complained that PW1 and PW2 were related and they wondered why the prosecution failed to call an independent witness to testify on their behalf. The learned trial judge held that:-

> "*It is in evidence that PW1 Joseph Mwanisenga, the late Gasper s/o Mwanisenga was his brother. Again, PW2 Liberatus Gasper Chilumba, the late Gasper Mwanisenga was his father. Now, should we believe*

their testimony or discard the same because relatives may choose to team up and untruthfully promote a certain version of events"

Relying on the cases of **R V Lukakombe s/o Mikwalo and Kibege** (1936) E.A.C.A. and that of **Syprian Justine Tarimo V Republic** Criminal Appeal No. 226 of 2007 (unreported) in which the court held it is not the relationship of the witnesses and the victim which matters, the learned Judge believed the evidence of PW1 and PW2. He said what matters is the competence and the credibility of the witnesses. So long as the relative witness testifies on relevant matters to the case and tells nothing but the truth there is no reason for the court to doubt the evidence of such a witness.

As the matter of death of the two deceased persons was not disputed, in resolving the issue whether the appellants killed the deceased with malice aforethought, the learned trial judge relied on the cases of **Enock Kapela V R Criminal** Appeal No. 150 of 1994 CAT Mbeya (unreported) and that of **Moses Michael @ Tall V R** [1994] T.L.R. 195 and after evaluating the evidence on how the offence was committed held that:

"The manner in which the deceased met their deaths as per the post mortem examination reports and the evidence of PW1 and PW2, on the persistent beatings, is proof of malice aforethought."

The post mortem examination report (exhibit P1) of the deceased Gasper Mwanisenga showed that he died because of severe deep burnt (96% of the body was burnt). That of Noel Sangu, the post mortem report (exhibit P2), showed that he died because of internal and external cerebral bleeding caused by head injury hence fracture of the skull occipital borne.

The trial court then entered conviction in respect of both counts for both appellants and sentenced each of them to suffer death by hanging. The sentences were ordered to run concurrently.

The appellants were aggrieved by the conviction and the sentence of death that was imposed on them. They filed four grounds of appeal challenging the legality of the conviction and the sentence. The grounds are:

1. *Since the two deceased Gasper Mwasinga and Noel Sanga (and who were relatives) were believably killed by the appellants on the belief that they killed Apolinali Baruti by witchcraft, were only two eye witnesses and who were coincidentally relatives PW1 and PW2 really credible and free from suspension of an implied family witchcraft feud without support of other eye independent witness from the big gathering that was abound on the material day.*
2. *Since the appellant, and who was in confinement had given names and addresses of his intended witnesses, was the judge correct to hold that he had failed to prove his defence of alibi for failing to call witnesses without showing what steps the court had taken to summon those witnesses.*
3. *The preliminary hearing conducted on 20/6/2013 did not conform to law for not inviting the accused to personally respond to the summary of facts.*
4. *The concurrent sentences of hanging were improper for the two offences charged.*

During the hearing of the appeal, Mr. Justinian Mshokorwa, learned advocate entered appearance for the appellants. The respondent was

represented by Ms. Catherine Gwaltu, learned senior State Attorney. Mr. Mushokorwa argued the grounds of appeal seriatim.

On the first ground of appeal, the learned advocate was doubtful on the fairness of the trial of the appellants because their conviction was based mostly on the evidence of PW1 and PW2 who were relatives of the deceased Gasper Mwanisenga. He said considering the circumstances under which the offence was committed, that is in a funeral where there were a lot of people, and the cause of the killing was said to be associated with witchcraft beliefs, and the killing occurred after the burial, there was need to have an independent witness from that gathering. He said that it was wrong for the trial judge to accept evidence of bad character of the first appellant. He prayed that their evidence be disregarded.

On her part the learned Senior State Attorney differed with the learned advocate. She supported the trial judge for relying on the evidence of PW1 and PW2 to convict the appellants for intentionally killing Gasper Manisenga. She said it is the trial judge who determines the demeanor of the witness. She said the trial judge assessed the credibility of the witnesses and was satisfied of their competence and credibility that they were reliable and truthful witnesses. Moreover, said the learned Senior State Attorney, the law does not bar relatives from testifying in cases involving relatives. She referred to the case of **Birahi Nyakongo and Kijiji Isiagi V Republic** Criminal Appeal No. 182 of 2010 (unreported) and that of **Goodluck Kyando V Republic** [2002] T.L.R.363. She prayed that the Court dismisses this ground of appeal.

In our considered opinion this ground of appeal has no merit. The Law of Evidence Act, [CAP 6 R.E.2002] section 127 (1) specifies who can testify in court. It provides:

> *"Every person shall be competent to testify unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease whether of body or mind) or any other similar cause."*

There provisions in the Cap. 6 confer privilege on certain witnesses from testifying but there is no provision which prevents a relative from testifying in cases involving relatives. In the case of **Bihari Nyankondo and another** (supra) the Court agreed with the principle of law that was enunciated in the case of **P. Taray V Republic,** Criminal Appeal No. 216 of 1994 (unreported) that:

> *"We wish to say at the outset that it is of course, not the law that whenever relatives testify to any event they should not be believed unless there is also evidence of non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of*

each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered gauged judiciously just like the evidence of non –relatives. It may be necessary, in given circumstance, for a trial judge or magistrate to indicate awareness of the possibility of relatives having a common interest to promote and serve, but that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by non-relatives."

The learned trial judge in relying on the evidence of PW1 and PW2 in entering a conviction of the appellants clearly explained why he trusted the witnesses meaning he was satisfied with their competency and credibility. The case of **Goodluck Kyando V R** (supra) has the same principle on testimonies of relatives. We find this ground of appeal having no merit.

Regarding the second ground of appeal the learned advocate lamented that the appellant did tell the trial court at the preliminary hearing that they would raise the defence of alibi and they also provided the names and addresses of the witnesses but the trial court did not assist them in having the witnesses summoned. For that reason the learned advocate is of the view that they denied a fair trial.

The learned Senior State Attorney said it is the appellants themselves who abandoned their right of having the witnesses they intended to summon come to court and give their evidence on their behalf.

On this ground we agree with the learned Senior State Attorney. The record of appeal at page 8 supports the learned advocate that the appellants indicated at the earliest stage of the proceedings that they would raise the defence of alibi and they had witnesses to summon. However, we do not agree with him that the court did not do its responsibility in assisting the appellants to summon their witnesses. The record of appeal at page 22 showed that on 21/10/2014 the proceedings were adjourned. On that day the trial court issued an order to the effect that on the next hearing date the defence witnesses should be summoned. Hearing of the defence resumed on 10/02/2015. The appellants gave their defence. After they had testified the advocate who was representing them, Mr. Chambi, learned advocate, informed the trial court that he was closing the case for the defence. Under such circumstances, the ground of appeal has no merit because it is the appellants who chose not to exercise their right of having their defence witnesses summoned.

In the third ground of appeal the learned advocate for the appellant challenged the preliminary hearing of the case that it was not conducted properly. Instead of the learned trial judge requiring the appellants to personally say which of the facts prepared by the prosecution they agreed and which facts they disputed, it was their advocate who answered. The learned advocate said that it was wrong. He cited to the Court the case of **MT 7479 Sgt B. Holela V Republic** [1992] T.L.R.121 and requested the Court to allow this appeal because of non-compliance with section 192 of the Criminal Procedure Act, [Cap 20 R.E.2002].

The learned Senior State Attorney in countering this ground of appeal said the appellants signed the memorandum of matters that were not

disputed as required by the law. He said this ground did not affect the conviction of the appellants.

Our observation is that the complaint about the preliminary hearing lacks merit. The record of appeal at page 6 shows matters which were not disputed. At page 7 of the record of appeal, the memorandum of matters not disputed was signed by Mr. Mwandoloma learned State Attorney for the prosecution/Republic, Mr. Kampakasa Counsel for the appellants and both appellants. In the case of **MT. 7479 Sgt Benjamin Holela** supra, the Court held that:

> *"Section 192(3) of the Criminal Procedure Act, 1985 imposes a mandatory duty that the contents of the memorandum must be read over and explained to the accused."*

The trial court complied with the mandatory requirements of section 192(3). The memorandum was read over to the appellants and they signed the same.

The last ground of appeal was on the sentences that were imposed on the appellants that the deaths should be carried out simultaneously. The learned Senior State Attorney said she was not supporting the conviction in respect of the death of Noel Sangu because the whole evidence that was tendered in the trial was concerned with the death of Gasper Mwanisenga. In the case of **Mwita Wambura V Republic** [1992] T.L.R. 114 the Court held that:

> *"Where more than one count of murder has been charged, and conviction entered on two or more*

counts, the practice has been to impose the death sentence in respect of the first of such conviction."

In this case we agree with the learned Senior State Attorney that there is no sufficient evidence to convict the appellants for the count in respect of the death of Noel Sangu. This being the case it serves no purpose to venture on discussing the sentence of death that was imposed on the appellants for the two counts of murder and was ordered to run concurrently. However, we share the views expressed by the Court in the case of **Mwita Wambura** (supra). That for conviction on charges of more than two murders a choice is on the trial court to enter a conviction on the count it prefers. We will also say that it defeats logic to enter conviction on more than one count because of the nature of the sentence. It can only be executed once.

The Court "*suo moto*" also raised the issue of the impartiality of the assessors who sat which the learned judge. The learned advocate agreed that the assessors were supposed to assist the Court in arriving at a fair decision without taking sides in respect of parties in the case. He was also asked to comment on whether the summing of the case by the learned trial judge to the assessors was adequately done. His response was that the learned judge was not thorough in summing up to the assessors. However, he insisted that the appellants should be set free because the evidence was not sufficient to convict them.

On her part the learned Senior State Attorney was of the opinion that there was a mix up on the questions which the assessors were required to ask witnesses. Her considered opinion was that the questions which the

assessors put to the witnesses did not affect the appellants' rights. She prayed that the appeal be dismissed.

Indeed section 177 of the Law of Evidence Act, Cap [6 R.E. 2002] allows assessors to put questions to witnesses that would have been asked by the judge. It does not allow them to stand for the prosecution or the accused. As such they have to remain impartial throughout the trial. This Court said in the case of **Abdallah Bazamiye V Republic** [1990] T.L.R. 42 that:-

> *"It is not the duty of the assessors to cross-examine or re-examine witnesses or the accused. The assessors' duty is to aid the judge in accordance with section 265, and to do this they may put their questions as provided under section 177 of the Evidence Act."*

The assessors who sat with the learned trial judge were Everanda d/o Kaemba, Salome d/o Kapele and Fidelis s/o Chimbala. Samples of answers to questions that assessors asked PW1 at page 11 of the record of appeal were:-

> XD by Mr. Chimbala
> *The deceased was my brother they were living peacefully. I wonder why they did so."*
> XD by Ms Kapele
> *"The incident took about one hour, when leader came they were threatened. I was at a distance of about 20 or 30 paces."*

"I hid myself in the maize plantation when the accused persons attacked the deceased. The other three culprits are still at large, then ran away with their weapon."

Looking at the answers to the question that was asked by assessor Chimbala he asked the witness about his relationship with the deceased. That was a question that was in a form of examination in chief or cross examination. That is the reserve of the prosecution and the defence. The answer to the PW1 by assessor Kapele was also one which was supposed to be asked by either the prosecution or the defence because it was related to the identification. The one that was asked by assessor Kaembe was also related to the identification of the appellants. That was not a question that was supposed to be asked by the assessors. Questions which assessors are allowed to ask are ones which seek clarification from the witnesses on matters not made clear.

As regards the summing up of the case to the assessors, the learned trial judge omitted informing the assessors about the ingredients of the offence of murder. He did also not give them detailed information about the defence of the alibi. But all in all despite the irregularities in the role of the assessors we are of a firm view that no miscarriage of justice was occasioned on the appellants. We say so because the offence was committed at day time. It was at time where there was sufficient light for the eye witnesses to the commission of the offence to see the appellants and what they did to the deceased Gasper Mwanisenga. They did not only beat him but they also set him on fire. The post mortem examination report showed that the

deceased Gasper had 96% of his body burnt. According to PW3 the appellants were heard boasting about the killings and they associated the same with witchcraft. The Constitution of this country guarantees every individual the right to life. No one is allowed to take away the life of another for whatever reason. The process of the law has to be followed. The learned advocate for the appellants said the whole event was based on witchcraft beliefs. The beliefs of the appellants notwithstanding, the appellants had no right to terminate the right of life of the deceased Gasper Mwanisenga. All the prosecution witnesses said they knew the appellants well before as they all resided in the same village.

In answering the question on whether the appellants killed Gasper Mwanisenga with *malice afore thought,* the learned trial judge relied on the case of **Enock Kapela v Republic**, Criminal Appeal No. 150 of 1994 (CAT Mbeya unreported). He said the deceased was beaten to death and he was burnt. That showed that they formed an intention to kill the deceased.

We agree that from the conduct of the appellants, the words they spoke, the act of taking the deceased to the cemetery where Apolinali Baruti was buried and required him to awaken him so that he could eat the "kande" with him and then continuously and mercilessly beating him to death and burn him sufficiently established *malice aforethought* for the killing.

After analyzing the evidence for both the prosecution and the defence, and the grounds of appeal we are satisfied that the learned trial judge correctly convicted the appellants. We dismiss the appeal in its entirety in respect of the first count. For the second count the appeal is allowed.

N.P. KIMARO
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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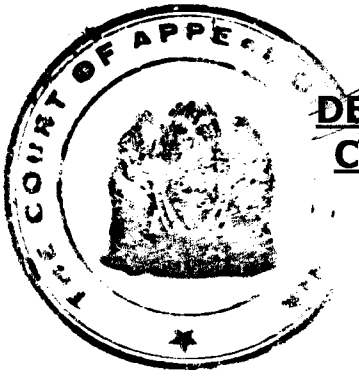

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL