IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 316 OF 2016

1. **GOBRE KWASLEMA**
2. **MAREKWA BOKI**
3. **KARATO FAUSTINE @ FARO** ..... **APPELLANTS**
4. **JOHN BOKI**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment of the High Court of Tanzania at Arusha)
(Mwaimu, J.)

dated the 10th day of November, 2015
in
Criminal Sessions Case No. 88 of 2014

.....

JUDGMENT OF THE COURT

26th June & 9th July 2018

NDIKA, J.A.:

The appellants, Gobre Kwaslema, Marekwa Boki, Karato Faustine @ Faro and John Boki, were condemned to death by the High Court of Tanzania sitting at Arusha after being found guilty of murdering Petro Emmanuel @ Emmanuel Petro @ Gwandu Baghayo at Getamok Village in Karatu District on 31st March, 2011. Aggrieved, they now appeal against both conviction and sentence.

Before dealing with the issues of contention in this appeal, we find it necessary to provide abridged facts of the case.

In the morning of 29th March 2011, one Petro Emmanuel, wearing a green/white *mgorole* outfit, left his father's home in Getamok Village to attend a call for community work in the village. According to his father, PW2 Emmanuel Massay, Petro was not seen again as he never returned home.

On 5th April 2011 at 11.00 hours, PW1 Elikana Surumbu, the Ward Executive Officer for Endamarariek Ward, was notified that a human skull had been found at some place in Getamok being devoured by dogs. Having confirmed the presence of the skull, PW1 reported the matter to the police who, on the following day, went to the village. About 1,200 metres from where the skull was found, lay a building that was burnt by fire a few days earlier, that is, in the night of 31st March 2011. The Police scoured the ruins of the burnt building and retrieved what were believed to be remains of a human body along with a burnt piece of green/white *mgorole*. PW2 identified the remained part of the *mgorole* apparel as one resembling the outfit that the deceased wore on the day he left his home.

Police investigations, led by PW5 F.606 D/Sgt Vendelinus, culminated in the arrest of the first appellant, who, was subsequently taken to PW4 Hudi Majid Hudi, a Justice of the Peace. PW4 adduced that the first

appellant made an extra-judicial statement (Exhibit P.2) in which he gave a detailed account of how he and his co-appellants murdered Petro. According to that statement, the appellants jointly accosted the deceased in the night of 31st March, 2011 before the third appellant drew his bush knife (*sime*) and decapitated Petro as other appellants held him to the ground. Having relieved the deceased of his money (that is, TZS. 210,000.00) they packed his body into a polythene bag that they carried to a building into which they dumped it. Thereafter, the second appellant set the building on fire.

It is noteworthy that at the trial the appellants objected to the admissibility of the extra-judicial statement into evidence. In particular, the first appellant denied to have made it. The learned trial Judge conducted a trial within a trial and ruled in favour of admission of the statement.

There was further evidence of PW3 Dr. Paulin John Senge who retrieved and examined the human skull as well as the remains that were collected from the ruins of the burnt building. According to PW3, the remains were mainly bones and ribs and that they were certainly of a human being. As to the cause of death, he certified, based on the circumstances at the crime scene, that the deceased died due to 100%

third degree burns. These findings are contained in the post-mortem examination report that was admitted as Exhibit P.1. In cross-examination PW3 admitted that neither the skull nor the bone remains were taken to the Chief Government Chemist for verification on whether they belonged to a human being.

In their defence, the appellants completely denied any involvement in the killing of Petro. All of them averred, in effect, that they were not at the crime scene on the fateful night when the deceased was allegedly murdered. In addition, the first appellant repudiated the extra-judicial statement claiming that he did not record before PW4.

After a summing up by the learned trial Judge, the three lady assessors who sat at the trial opined unanimously that the appellants were not guilty. They reasoned that there was no direct evidence linking the appellants to the murder and that the extra-judicial statement incriminating all the appellants was involuntary. The learned trial Judge took a different view. Relying upon the evidence of PW1, PW2, PW3 and PW5, he found it proven that the human skull and bone remains related to Petro and that he had indeed been murdered. In addition, acting on the repudiated but detailed confessional statement (that is, the extra-judicial statement) that

was held to be true, the learned trial Judge convicted all the appellants of the murder. As already indicated, the trial court, upon conviction, imposed on each appellant the mandatory death sentence.

Before us the appellants challenge both their respective convictions and sentence upon two Memoranda of Appeal. The first Memorandum jointly lodged by the first and second appellants contains two grounds of complaint thus:

> *"1. That, the trial court erred in law and fact in relying on extra-judicial statement that was unprocedurally procured.*
>
> *2. That, the trial court erred both in law and fact for failure to properly assess and analyse the evidence adduced, hence arriving at an erroneous decision."*

The third and fourth appellants lodged a joint Memorandum of Appeal containing four grounds of grievance thus:

> *"1. That, the Learned Trial Judge erred in law and in fact in relying on an extra-judicial statement (Exhibit P.2) which was admitted at the trial in clear contravention of the law.*

2. *That, the Learned Trial Judge erred in law and in fact to hold and conclude that the extra-judicial statement by the 1st appellant was voluntary (sic) made.*

3. *That, the Learned Trial Judge erred in law and in fact to conclude that the case was proved beyond reasonable doubt.*

4. *That, the Learned Trial Judge erred in law and in fact when he based his decision on extraneous matters, speculations and imaginations."*

At the hearing before us, Mr. Modest Akida, learned counsel, appeared for the first and second appellants while Mr. Kelvin Kwagilwa, learned counsel, represented the third and fourth appellants. The respondent Republic had the services of Ms. Agnes Hyera, learned Senior State Attorney.

Before the hearing of the appeal commenced in earnest, the Court invited the parties to address it on the propriety and legality of the conduct of a trial within a trial to determine the admissibility of the extra-judicial statement (Exhibit P.2) as shown at pages 82 to 87 of the record of appeal.

Submitting for the appellants, Mr. Kwagilwa argued that the trial within a trial was vitiated by the fact that the three assessors who sat with

the learned trial Judge were not shown to have retired before the mini-trial commenced. The record, he added, was silent on whether the assessors resumed their role right after the trial within a trial was concluded if at all they had indeed retired earlier on. He also faulted the trial court for admitting the extra-judicial statement at the end of the mini-trial without reading out its contents. It was the conclusion of the learned counsel that these procedural irregularities vitiated the whole trial.

On the course to be taken in view of the aforesaid procedural irregularities, Mr. Kwagilwa urged us to nullify the trial proceedings and the judgment, quash the conviction and set aside the sentence. However, he urged that no order for retrial be made upon his view that the evidence on the record against the appellants was weak and discrepant. Elaborating, he sought to impress upon us that while the post-mortem examination report (Exhibit P.1) certifies the cause of death as being 100% degree burns, the extra-judicial statement (Exhibit P.2) suggests that the deceased was callously decapitated. That apparent contradiction apart, the extra-judicial statement, being a co-accused's confession, could not be used to found a conviction against other appellants without corroboration. The learned counsel added further that the skull alleged to be the deceased's was not verified if was indeed a human skull and whether it was part of the

deceased's body. He also discounted the evidence that the remains recovered from the ruins of the gutted building were linked to the deceased on the basis of the *mgorole* piece that was found at the crime scene matching the one that the deceased wore on the day he left his home. The *mgorole* tale, he said, was not credible because it was made by the deceased's father (PW2) only in response to a question in cross-examination.

Mr. Akida, for his part, fully supported the submissions of his learned colleague, without more.

Ms. Hyera, too, fully adopted Mr. Kwagilwa's submissions on the irregular manner in which the mini-trial was conducted and its effect on the entire trial. She also went along with the submission that a retrial would be a wastage of time and resources as there was no direct evidence linking the appellants to the killing of Petro. She explained that there was no common thread connecting the skull, the human remains and the *mgorole* piece with the deceased; that the said partly burnt *mgorole* was not tendered in evidence at the trial; and that *mgorole* outfits are so common in that society and that there were no special marks mentioned that enabled PW2 to claim that the burnt *mgorole* was supposedly the outfit

Petro wore when he met his death. As regards the confession in the extra-judicial statement, she submitted that although it can be acted upon as the sole basis of conviction against the first appellant, it cannot be the only basis of conviction of the other appellants without corroboration.

We have gone through the record of appeal and considered the learned arguments of the counsel. From the record it is manifest that in the course of his testimony, PW4 tendered in evidence the extra-judicial statement alluded to earlier whereupon learned advocates for the appellants took turns and each objected to the admissibility of the statement in evidence on various grounds including the contention that it was involuntary. In response, the learned trial Judge ordered, rightly so, that:

> ***"Court:***
>
> *There is a dispute on whether the statement recorded by PW4 should be admitted. In the circumstances a trial within trial should take place. It is ordered accordingly."*

As shown at pages 83 through 87 of the record, after the above order was made, the mini-trial commenced without any mention that the assessors retired temporarily from the main trial. Going by the record

before us, it is inescapable to hold that the assessors participated in the ensuing proceedings. In this regard, we find it instructive to reproduce a passage in **Kiambati Mureithi and Another v. R** (1954) 21 EACA 272 quoted in this Court's decision in **Samwel s/o Oliech v. Republic**, Criminal Appeal No. 137 of 1992 (unreported) thus:

> *"It is always desirable that assessors should be required to leave the Court during a 'trial within a trial' and* ***that the record should show that this has been done.***" [Emphasis added]

Following the conclusion of the mini-trial, the Court overruled the objection and admitted the statement in evidence (page 87 of the record). As rightly submitted by Mr. Kwagilwa, the record is silent whether the assessors resumed their role after the mini-trial and that they were present when the statement was admitted, if at all they had retired earlier on. Moreover, the record bears it out that, having admitted the statement earlier in the day on 2nd July 2015, the learned trial Judge, then, adjourned the hearing to 13.45 hours. It is also evident from page 88 of the record that when the Court reconvened at the appointed time the assessors were recorded as being present. Contrary to Mr. Kwagilwa's contention,

however, the said extra-judicial statement was subsequently read aloud by PW4 in the presence of the assessors.

At this point, we recall that in **Ngwala Kija v. Republic**, Criminal Appeal No. 233 of 2015 (unreported), where an akin situation was confronted, this Court found it imperative to extract *in extenso* the proper procedure for conducting a trial within a trial as laid down in the case of **Kinyori Karuditi v. Regina** (1956) 23 EACA 480. We think it is vital that we reproduce the same passage as hereunder:

> *"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 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 than 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." [Emphasis added]

Then, having extracted the procedure as above, this Court emphasized in **Ngwala Kija** (supra) that:

> *"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 trial-within-trial in order to avoid being possibly prejudiced by hearing the evidence which might afterwards be held inadmissible."*

We subscribe to the above stance.

In view of the procedural infractions alluded to earlier, we are constrained to agree with the parties the trial was seriously vitiated by the flawed conduct of the trial within a trial as well as what followed after it. We think that the said infractions were prejudicial and derogated from fairness of trial. Given these circumstances, the extra-judicial statement cannot be said to have been admitted properly. As a result, its stands discounted.

We now come to consider the consequential order that we ought to make in view of the circumstances of this matter. In this regard, we have scrutinized the evidence on the record while conscious of the thoughtful

concerns that the learned counsel from both sides raised as to the quality and probative value of the evidence on the record against the appellants. It is evident from the judgment of the trial court that the discounted extra-judicial statement combined with the testimonies of PW2, PW3 and PW5 formed the main plank of the prosecution case against the appellants (see page 133 of the record of appeal). The learned trial Judge held the statement to be a voluntary and true confession. He also found various details and aspects of the confession sufficiently corroborated by the evidence of PW2, PW3 and PW5 to incriminate all the appellants. We find it apt to let the learned trial Judge speak for himself from page 16 of the typed judgment (page 133 of the record):

> *"In the instant case I am satisfied that the confession of the first accused to be true. The story narrated by the first accused was consistent with the evidence of PW2, PW3 and PW5 who testified about the building which was gutted with (sic) fire and it is the same place where the first accused said the deceased's body was taken to and before they put the building ablaze. On the other hand, human being remains were found in the burnt building. Also the first accused recorded in his statement that Karato Faro beheaded the deceased.*

The skull of the deceased was recovered at a different place."

We think the above passage presents a meticulous assessment of the evidence by the trial court. It suggests, contrary to the stance shared by the learned counsel on both sides, that there is a *prima facie* case against the appellants to justify a retrial.

Admittedly, without the extra-judicial statement the prosecution case can hardly connect any of the appellants to the murder of Petro. Certainly, it is the trial court, not the parties, that is to blame for the irregular conduct of the mini-trial, resulting in the discounting of the main piece of prosecution evidence, which happened to be the extra-judicial statement. Thus, there is an obvious need for the parties to even out.

Having considered the circumstances of this matter in the light of principles on whether or not to order a retrial as stated in **Fatehali Manji v. Republic** [1966] EA 343 as well as the gravity of the charge that the appellants faced at the trial, we are of the firm view that it is in the interests of justice that a retrial be ordered.

For the reasons we have given we find no need to deal with the grounds of appeal, and, instead, we invoke our revisional jurisdiction under

section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 and nullify the entire proceedings and judgment of the High Court. We thus quash the conviction and set aside the sentence against each appellant. As a consequence, we remit the record to the High Court for retrial before another Judge and a new set of assessors. It is further directed that in view of the peculiar circumstances of this case, the retrial should be fast-tracked and disposed of expeditiously. Meanwhile, the appellants shall remain in custody pending retrial.

DATED at **ARUSHA** this 6th day of July, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL