IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MMILLA, J.A., MUGASHA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 557 OF 2015

MPEMBA MASHENENE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlacha, J.)

dated the 3rd day of November, 2015
in
HC. Criminal Sessions Case No. 95 of 2012

JUDGMENT OF THE COURT

4th & 11th July, 2018

MMILLA, J.A.:

Mpemba Mashenene (the appellant), was charged in the High Court of Tanzania, Mwanza Registry, with the offence of murder contrary to sections 196 and 197 of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that on 4.7.2011, he unlawfully murdered one Shenda d/o Sengerema (the deceased). He had protested his innocence.

According to the facts of this case, the deceased was the sister in law of the appellant; the latter married the former's younger sister, one Shija d/o Sengerema.

On the morning hours of 5.7.2011, at Mwangiligili village in Sisu B area in the District of Misungwi, the deceased's relatives, who had slept in the same house with her, woke up and found the latter lying on her bed with a lot of blood around her. Naturally they became inquisitive. On examining her, they discovered that she was already dead. They immediately reported the incident to the police at Misungwi Police Station who hurriedly became involved.

The OC-CID of Misungwi District instructed PW1 to visit the scene. Accompanied by PW3, PW1 arrived at the scene and found the dead body of Shenda d/o Sengerema lying on the bed, as aforesaid with a lot of blood around her. They also found out that the body had three wounds on the head. PW1 and his team were informed by unnamed deceased's relatives that the late Shenda d/o Sengerema was, on the night previous drinking local brew with the appellant and another person known as Lubala s/o Samike at a

certain house. That information gave them the lead which culminated into the arrest of the appellant.

On 16.9.2011, the appellant was arrested at Membili village in the Region of Geita. He was sent to Misungwi Police Station on 17.9.2011. It is alleged that the appellant, on being questioned at the police station, he admitted involvement and offered a cautioned statement (exhibit P3). Later on, he was referred to a justice of peace where he likewise offered an extra judicial statement (exhibit P1). He was therefore charged with the offence of murder as aforesaid.

In his defence in court, the appellant was categorical that he did not commit the charged offence. He insisted that he neither confessed before the police that he killed the deceased, nor before the justice of peace.

Like before the trial High Court, the appellant was before us represented by Mr. Silvery Chikwizile Byabusha, learned advocate; whereas Ms Dorcas Akyoo, learned State Attorney, represented the respondent/Republic.

There were two sets of memoranda filed in the Registry; the first having been filed on 14.3.2018 by the appellant in person; and the second

was filed on 7.6.2018 by Mr. Byabusha on behalf of the appellant. At the commencement of hearing, the learned defence advocate dropped the memorandum which was filed by the appellant in person in favour of the second set. Those grounds of appeal were as follows:-

1. *That the cautioned statement exhibit P.3 was wrongly taken in the presence of police officers who were not the recording officer, so, the appellant was not a free agent.*
2. *That the learned trial judge erred in law and fact in admitting the cautioned statement exhibit P.3 which was recorded outside the statutory time*
3. *That the extra judicial statement exhibit P.1 was wrongly recorded in the presence of police officers.*
4. *That the extra judicial statement exhibit P.1 was recorded without the consent of the appellant and it was not read out to him thus depriving appellant a chance to verify it as correct or make corrections.*
5. *That torture of appellant led to an untrue admission of guilty.*
6. *That questions put to witnesses by honorable assessors amounted to cross-examination contrary to law.*

7. That the confession evidence of the appellant did not prove the case beyond reasonable doubt.

We advised Mr. Byabusha to begin his submission with the sixth ground of appeal in which it is alleged that the gentleman and lady assessors were wrongly allowed to cross examine the witnesses; so also the aspect of improper summing up to assessors, a matter which was raised by the Court *suo motto,* as well as the first and fourth grounds of appeal concerning improper reliance on the cautioned and extra judicial statements. We were induced by the fact that by their nature and circumstances, these grounds are sufficient to dispose of this appeal.

To begin with, the learned advocated submitted that some of the question which were put to some of the witnesses by the assessors amounted to cross examination and were prejudicial to the appellant.

He referred the Court to page 9 of the Record of Appeal, last paragraph, at which he claimed, the first assessor named Vedasto Bruno cross-examined PW1. He added that the same witness was cross examined by the second assessor, Belinda Mkama.

Mr. Byabusha referred us too to page 22 of the Record of Appeal at which he said, once again the first assessor Vedasto Bruno cross examined PW2. The learned advocate contended that when one reads the answers which resulted from the said cross examination, it becomes evident that they were very incriminating and so prejudicial to the appellant, thus constituting unfair trial. He contended that that is contrary to the spirit of section 177 of the Evidence Act Cap. 6 of the Revised Edition, 2002 (the EA). He urged the Court to find merit on that point, the consequence of which, he said, is to quash the proceedings and the judgment of the trial High Court.

On another point, Mr. Byabusha submitted that the summing up to assessors was unsatisfactory on the ground that the trial judge did not address the assessors on the important aspect of malice aforethought. He said that it was a fundamental omission whose effect which constituted unfair trial, calling for the remedy of quashing the proceedings and the judgment of the trial High Court.

He also placed much weigh on the fact that the appellant's cautioned statement was improperly accepted as evidence and wrongly relied upon for two reasons.

In the first place, Mr. Byabusha submitted that it ought not to have been accepted because it was recorded outside the time allowed by law. He stated that the appellant was arrested at Geita on 16/9/2011, and was sent to Misungwi on 17.9.2011 where they arrived around 4:00 p.m., and that the said statement was recorded the next day, that is on 18/9/2011 at 11:00 p.m. which was after 20 hours had elapsed. He argued that in the circumstances, it was recorded in contravention of section 50 of the CPA which allows such statement to be recorded within a period of four hours from the time of arrest, of course mindful that the time taken in travelling is counted out. He challenged the prosecution witnesses' assertion that they did not record the statement on 17.9.2011 because the appellant told them that he was tired as baseless. Even, he went on submitting, had they been serious with their duty, they could have resorted to section 51 (a) and (b) of the CPA under which they could have applied for extension of time in which to receive the appellant's such statement, but they did not do so. He pressed the Court to expunge it from the record. He referred us to the case of **Hamis Juma @ Nyamhanga vs Republic**, Criminal Appeal No. 126 of 2011, CAT (unreported).

The second concern about the cautioned statement was that, even where it was to be said that the said statement was recorded within time, which is disputed, that statement was not at all a confession because the appellant said in the disputed statement that Lubala s/o Samike was the person who killed the deceased, while he (the former) was outside the house. Mr. Byabusha submitted that because the charge sheet did not mention that there were other persons who participated in the killing, and because the appellant did not admit killing, the cautioned statement did not amount to a confession. Thus, it was not good evidence on which to base the appellant's conviction.

The other point canvassed by Mr. Byabusha concerned the improper reliance on the extra judicial statement. Mr. Byabusha submitted in this regard that apart from the fact that the extra judicial statement was not a confession because, like in the cautioned statement, the appellant threw blame on Lubala s/o Samike, he asserted that it was not good evidence on the basis that it was taken in the present of a police officer, therefore that it was not voluntary. Even, he went on to submit, the appellant did not sign to acknowledge that he was informed of his rights, and that he was willing to

give a statement. Further, he added, the statement was not read to him. He concluded that in view of these irregularities, the statement was a nullity. He referred us to the case of **Msafiri Jumanne and two others v. Republic**, Criminal Appeal No. 187 of 2006, CAT (unreported).

Basing on the fact that there were no eye witnesses in the incident of Shenda d/o Sengerema's death, and because the prosecution's case depended solely on the cautioned statement and the extra judicial statement of the appellant, Mr. Byabusha urged the Court desist from ordering a retrial but make a decision of releasing the appellant from jail.

On her part, Ms Akyoo submitted very briefly that after carefully going through the record, and having considered the submission of the learned advocate for the appellant, she was supporting the appeal because both, the cautioned statement and the extra judicial statements were wrongly relied upon, also that the summing up to assessors was unsatisfactory. She likewise supported the idea that the court releases the appellant.

After carefully considering the submissions of the counsel for the parties, we find it appropriate to begin, as learned advocate Byabusha did, with the point that in the course of putting questions to the assessors as

envisaged by section 177 of the EA, the assessors cross examined the witnesses. We agree with him. That section stipulates that:-

> *"In cases tried with assessors, the assessors may put any questions to the witness, through or by leave of the court, which the court itself might put and which it considers proper."*

We think it is requisite at this stage to also point out that the Parliament never intended the assessors to cross examine the witnesses. We need to point out that section 290 of the CPA directs who may be cross examined and by who. It commands that:-

> *"The witnesses called for the prosecution* ***shall be subject to cross-examination by the accused person or his advocate*** *and to re-examination by the advocate for the prosecution."* [Emphasis provided].

We traced the leads disclosed to us by Mr. Byabusha. We appreciated that at page 9 of the Record of Appeal, last paragraph, chance was given to the first gentleman assessor, Vedasto Bruno, to put questions to PW1 No. F.2464 D/Cpl. Theophilius. Though the questions were not recorded, the answers were as follows:-

"He confessed to kill using a spear on the head. He inflicted three times. He said that he was with Lubala s/o Samike. They broke the door and speared the deceased while asleep."

A similar feature appears in the answers provided by PW1 when he was asked questions by the second lady assessor, Belinda Mkama. The answers were as follows:-

"He was arrested in the village. I am a resident there and cannot recall the village. He said they killed her due to land disputes."

Mr. Byabusha referred us also to page 22 of the Record of Appeal at which he complained that once again, instead of asking questions the first gentleman assessor, Vedasto Bruno, cross examined PW2 Fratern Temba. The relevant part is as follows:-

"I recorded what he was ready to speak. I did not question him about other people. He participated in the way I have recorded."

The same trend appears at page 33 of the Record of Appeal at which the questions asked by the first gentleman assessor, Vedasto Bruno

amounted to cross examination. The said questions fetched the following answers:-

"The PF3 has problems. Even the writer is not known. Our PF3 has a pink colour. It appears this is a photocopy."

From the above quotations, it is certain that the assessors cross examined the witnesses instead of putting questions to them in terms of the provision just cited - See the case of **Mathayo Mwalimu & Another v. Republic,** Criminal Appeal No. 147 of 2008, CAT (unreported) where the Court said:-

". . . . there is no room for assessors to cross-examine witnesses. Under the Evidence Act assessors can only ask questions . . . The reason for the above exposition of the law is not farfetched. The exposition is based on sound reason. ***The purpose of cross examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. They are there to aid the court in a fair***

dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case. *They should only ask him/her questions."* [Emphasis added].

In essence, short as the extractions may seem to have been, they had grave effects to the appellant's fate in the case because they were very incriminating. We think, that irregularity compromised the concept of fair trial, a role which the courts are required to safeguard and up hold. We are constrained to agree with Mr. Byabusha that it made the proceedings a nullity, by which we mean every accused person should have his guilt or innocence determined by a fair and effective legal process.

There are a host of cases which are to the effect that allowing assessors to cross examine the witnesses encroach to the principles of impartiality, including those of **Kulwa Makomelo & 2 Others v. Republic,** Criminal Appeal No. 15 of 2014, CAT and **Thomas Pius v. Republic**, Criminal Appeal No 245 of 2012, CAT (both unreported). In the case of **Kulwa Makomelo & 2 Others v. Republic,** we had the occasion to state that:-

". . .the assessors are part of the court; and the court is supposed to be impartial. Since under section 146 (2) of the Evidence Act cross examination is an exclusive domain of an adverse party, by allowing the assessors to cross examine witnesses, the court allowed itself to be identified with the interests of the adverse party, and therefore ceased to be impartial. By being partial the court breached the principles of fair trial now entrenched in the Constitution. With respect, this breach is incurable under section 388 of the Criminal Procedure Act."

A similar expression was made in the case of **Thomas Pius v. Republic** (supra) in which we stated that:-

*". . . **where it is obvious that the assessors cross-examined witnesses, it is apparent that the accused person was not accorded a fair trial because the irregularity goes against one of the principles of natural justice namely the rule against bias, and it vitiates the entire proceedings** – See the case of the **Nathan Baguma @ Rushejela v. Republic**, Criminal Appeal No. 166 of 2015, CAT (unreported) in which upon a finding that such an*

irregularity was established, the proceedings were declared a nullity and a retrial was ordered." [Emphasis provided].

Over all, therefore, the complaint in ground No. 6 has merit and we allow it.

We now turn to the ground focusing on unsatisfactory summing up to assessors.

We keenly went through the summing up notes reflected on pages 44 to 48 of the Record of Appeal. We gleaned that the trial judge did not cover one of the important aspects for consideration in determining whether or not the person charged with murder premeditated to kill his/her victim, that is, malice aforethought. Omission to cover that point meant that the trial court did not give proper directions to the assessors, which is not a strict compliance with the provisions of section 265 of the CPA which commands that all trials in the High Court be held with the aid of the assessors, and that their participation can be of great value and assistance to the trial judge only if they are properly guided – See the case of **Washington Odindo v Rex** (1954) 24 E.A.C.A. 392 in which it was stated that:-

The opinion of the assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before

them in relation to the relevant law. If the law is not explained and attention (is) not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced.

We have addressed the issue whether or not the omission was fatal. We are satisfied that it was, because as already pointed out, that point is one of the crucial aspects for consideration in determining whether or not the person charged with murder premeditated to kill his/her victim, and in fact, it will not qualify as a trial with the aid of assessors – See the case of **Tulubuzya Bituro v Republic** [1982] T.L.R. 264 in which the Court stated that:-

Since we accept the principle in Bharat's case as being sensible and correct, it must follow that in a criminal trial in the High Court where assessors are ***misdirected on a vital point****, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a* ***non-direction to the assessors on a vital point****.* [Emphasis is ours].

In view of what we have attempted to show, we agree with Mr. Byabusha that the summing up to assessors was unsatisfactory, therefore that it occasioned injustice. Thus, there is merit on this point too.

We now come to discuss the second ground of appeal which challenge that the appellant's cautioned statement was taken outside the time allowed by law.

To begin with, it is not in controversy that the appellant was arrested at Geita on 16.9.2011 and was sent to Misungwi on 17.9.2011 where they arrived at around 4:00 p.m. It is also a fact the police recorded his statement on 18.9.2011 at 11:00 a.m., which was indeed, after 20 hours had passed, excluding the time spent in travelling. Obviously therefore, the statement was recorded outside the four hours contemplated under section 50 (1) (a) of the CPA. That section provides that:-

"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours

commencing at the time when he was taken under restraint in respect of the offence."

We noted that though there is a stipulation under section 51 (1) (a) of that Act for extension of time in which to still record the accused's statement after four hours will have elapsed, the recording officer did not take that advantage.

It is essential to point out that the defence side complained before the trial court that the appellant's statement was not recorded within the time allowed by law, and that it was a fatal irregularity. The Republic's response was that they did not record it on 17.9.2011 because the appellant told them that he was tired. In his judgment the trial judge said that because the appellant had travelled by bus from Geita to Misungwi, he was by all standards tired at the time they reached Misungwi, therefore that it could have occasioned injustice had the police recorded his statement on 17.9.2011. He also talked about other logistics which PW1 had to take into account before appellant's statement could be recorded, including reporting to his immediate superior.

With great respect to the learned trial judge, that reasoning does not appeal. We agree with Mr. Byabusha that the trial judge misdirected himself in finding that it is a plausible explanation because the police were duty bound to comply with the demands of the law. On realizing that the four hours had elapsed, they ought to have resorted to applying for extension of time in terms of section 51 (1) (a) of that Act provides that:-

> *"(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may–*
>
> *(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly."*

On the basis explained above, it is obvious that the cautioned statement under consideration was improperly admitted and used as evidence because it was taken in contravention of section 50 (1) (a) of the CPA. As we are aware, it is now settled law that non-compliance with the provisions of sections 50 of the CPA is a fundamental irregularity that goes to the root of

the matter, and renders the illegally obtained evidence inadmissible and one that cannot be acted upon by the Court – See the cases of **Emmanuel Malahya v Republic**, Criminal Appeal No. 212 of 2004 CAT, **Christopher Chengula v Republic**, Criminal Appeal No. 215 of 2010, **Said Bakari v Republic**, Criminal Appeal No. 422 of 2013 CAT, and **Mkwavi s/o Njeti v. Republic,** Criminal Appeal No. 301 of 2015, CAT (All unreported). In the case of **Emmanuel Malahya v Republic** (supra) the Court amplified that:-

> *"The violation of s. 50 is fatal and we are of the opinion that ss.53 and 58 are on the same plane. These provisions safeguard the human rights of suspects and they should, therefore, not be taken lightly or as mere technicalities . . . ."*

As we said in **Mkwavi s/o Njeti v. Republic** (supra), the effect of non-compliance with these provisions is to render the involved such document bad evidence liable to be expunged from the record. Thus, we find that the cautioned statement constituted in exhibit P3 is bad evidence, we accordingly expunge it from the record.

Having expunged the cautioned statement of the appellant from the record, we find no necessity in tackling the issue whether or not it was a confession. We leave it at that.

Next for discussion is the complaint that the extra judicial statement was faulty for the following reasons; one that, it was taken in the presence of the policeman two that, he did not sign after he was purportedly informed of his rights to make it or not in order to show that he consented or otherwise, and three that, after recording the same, it was allegedly not read to him.

We have closely examined exhibit P1 (the extra judicial statement) under discussion. In paragraph 3 of that exhibit, it is reflected that the appellant was placed under the guard of a police officer. That in our view, implied that he was not a free urgent as submitted by learned counsel Mr. Byabusha. Likewise, it is not indicated in that exhibit if the appellant consented to offering a statement before the justice of the peace. This is on the ground that he did not sign anywhere to reveal his consent. Also, at the end of exhibit P1 it was not indicated if it was read to him or not after the recording. In our view, these omissions were fundamental and rendered that statement inadmissible as evidence in the case because it was taken in breach of the Chief Justice Instructions to the Justices of the Peace published in 1964 in a booklet titled *"A guide for Justice of the Peace"* - See, **Hatibu**

Gandhi & others v. Republic, [1996] T.L.R. 12 and **Japheth Thadei Msigwa v. Republic** Criminal Appeal No. 367 of 2008 (unreported).

In the case of **Japhet Thadei Msigwa v. Republic** (supra), the Court said that:-

"So, when Justices of the Peace are recording confessions of persons in the custody of the police, they must follow the Chief Justice's Instructions to the letter. The section is couched in mandatory terms. Before the Justice of the Peace records the confession of such person, he must make sure that all eight steps enumerated therein are observed.

The Justice of the Peace ought to observe, inter alia, the following

(i) The time and date of his arrest

(ii) The place he was arrested

(iii) The place he slept before the date he was brought to him

(iv) Whether any person by threat or promise or violence he has persuaded him to give the statement.

(v) Whether he really wishes to make the statement on his own free will.

(vi) That if he make a statement, the same may be used as evidence against him."

See also the case of **Joseph Kafuka & Another v. Republic**, Criminal Appeal No. 87 of 2014 (unreported).

In view of what we have attempted to state above, this exhibit too was bad evidence liable to, and we hereby expunge it from the record.

Under normal circumstances, having upheld ground No. 6 that allowing the assessors to cross examine the witnesses constituted a fundamental irregularity, so also the aspect touching on the unsatisfactory summing up to assessors, we ought to have ordered a retrial. However, it has been necessary for us to consider other surrounding factors in the case.

In the present case the prosecution's case depended solely on the evidence in the form of exhibits P1 and P3. We have already found out that these exhibits constituted irregular evidence which resulted from the way they were recorded, and we have expunged them. The crucial issue we now pose is whether there is other cogent evidence in the circumstances of this

case which, if retrial is ordered, such evidence may be capable of attracting a conviction.

There were four witnesses in this case all of whom were not eye witnesses. PW1 was the officer who visited the scene of crime immediately after the police were informed of the incident and subsequently conducted investigation which led to the arrest of the appellant. He was informed that the deceased could have been killed by the appellant and one other person known as Lubala s/o Samike. The persons who gave him such information were not called as witnesses for no apparent reason, and the said Lubala was not traced and arrested. The other witnesses included PW2 who was a justice of the peace, and who his evidence has been expunged, D/Sgt John who had recorded the appellant's cautioned statement, similarly expunged for reasons explained above. So, we remain with only one witness PW3 Dr. Lugela Gasper Evarist who conducted the autopsy on the deceased's body. In our view, this was the only evidence and we think it is incapable of attracting conviction should we order a trial de-novo. In the circumstances, we accede to the prayer by Mr. Byabusha that it will be justice in this case if we desist ordering retrial, instead release the appellant from jail.

That said and done, we hereby quash the proceedings, judgment, conviction and set aside the sentence of death by hanging which was imposed on the appellant, in its stead, we order his immediate release from prison unless he is being continually held for some other lawful cause.

Order accordingly.

DATED at **MWANZA** this 9th day of July, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL