IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., MUGASHA, J.A., And NDIKA, J.A.)

CRIMINAL APPEAL NO. 561 OF 2015

PETRO MANHYAKUWALWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J.)

dated the 20th day of November, 2015
in
Criminal Sessions Case No. 83 of 2010

.....

JUDGMENT OF THE COURT

25th & 28th September 2018

NDIKA, J.A.:

The appellant, Petro Manhyakuwalwa, was condemned to death by the High Court of Tanzania sitting at Mwanza following his conviction for murdering Shenda d/o Busagara at Kanyerere Village in Missungwi District, Mwanza Region on 21st August, 2008.

The abridged facts of the case were as follows: while on his errands in Kanyerere Village on 21st August, 2008 at about 16:00 hours, PW1 James Ndaki came across the corpse of a person he identified as Shenda d/o Busagara (Shenda), lying on a farm owned by one Paulo Nganashi. As

Shenda appeared to have met a violent death, the matter was immediately reported to the police who then, dispatched to the scene of the crime a team that included PW3 D/Cpl. Wilson, a police investigator, and PW5 Dr. Michael Mwita Magesa, an Assistant Medical Officer. After the scene was inspected and its sketch map (Exhibit P.2) drawn, Shenda's body was taken for an autopsy conducted by PW5. According to the post-mortem examination report that PW5 tendered in evidence (Exhibit P.4), Shenda's body had scratches and bruises around the neck and that the eyes had dilated pupils. All these pointed to asphyxia as the immediate cause of Shenda's death following strangulation. In addition, the report indicated that the examination on Shenda's private parts suggested that she might have been sexually assaulted before her death.

As it was widely believed that the appellant was the last person known to have been with Shenda, he was arrested and taken to the police station just a day after the discovery of Shenda's body. On the same day at the police station, the appellant allegedly recorded a cautioned statement to PW2 D.6580 D/Cpl. John in which he confessed to the murder, giving a detailed but perturbing account of how he killed Shenda on the fateful day following being contracted to do so by Shenda's sister known as Helena.

The said statement was admitted as Exhibit P.1 after the trial court had ruled, following a trial-within-trial, that it was a voluntary account given by the appellant.

There was further evidence of PW4 E.9348 D/Cpl. Edward who tendered a statement under section 34B (2) (c) of the Evidence Act, Cap. 6 RE 2002 made by a sibling of Shenda called Lucia Busagara at the police station (Exhibit P.4). The said Lucia could not appear at the trial as she passed away before she could do so. In that statement, Lucia asserted that she saw the appellant in possession of a red *kitenge* cloth which Shenda wore the last time she left their mutual home. Shenda was without her red *kitenge* when her body was found.

In his sworn defence evidence, the appellant refuted the charge against him. Despite acknowledging that Shenda was, indeed, dead, he averred that he was astounded at being arrested and beaten up by his fellow villagers for Shenda's death in which he had no involvement. He also strongly contested to have recorded any cautioned statement at the police. As regards the allegation that he was found in possession of Shenda's *kitenge*, he flatly denied any knowledge of it.

After summing up of the case by the learned trial judge, the three assessors who sat at the trial returned a unanimous verdict that the appellant was guilty as charged. Likewise, the learned trial judge was impressed by the prosecution case. He convicted the appellant of the charged offence upon the confession contained in the cautioned statement as well as what he supposed to be the appellant's incriminating recent possession of Shenda's *kitenge*.

Aggrieved, the appellant now appeals against both conviction and sentence. In the beginning, on 28th July, 2017, the appellant himself anchored his appeal upon a Memorandum of Appeal containing six grounds of complaint, which we need not reproduce herein. Nonetheless, on 11th September, 2018, through the services of Mr. Constantine Mutalemwa, learned counsel, the appellant lodged a supplementary Memorandum of Appeal containing three points of grievance as follows:

> *"1. That the trial Judge (Hon. Justice Mlacha) erred in law in proceeding with the trial of the case in contravention of section 299 (1) of the* ***Criminal Procedure Act*** *[****Cap. 20 R.E. 2002****]*
>
> *2. That the trial Judge (Hon. Justice Mlacha) erred in law in conducting the trial and receiving opinion*

of assessors who did not hear all the evidence from the commencement of the trial to the conclusion.

3. Alternatively, the trial Judge (Hon. Justice Mlacha) erred in law and fact for convicting and sentencing the appellant in the absence of the evidence duly taken and recorded in compliance with section 215 read together with section 210 of the ***Criminal Procedure Act****, [****Cap 20 R.E. 2002****]"*

At the hearing of the appeal, Mr. Mutalemwa, appearing for the appellant, abandoned the Memorandum of Appeal lodged by the appellant and only argued the first ground of appeal contained in the supplementary Memorandum of Appeal. He briefly contended that Mlacha, J. erred in law in taking over and proceeding with the trial of a partly heard case to its conclusion without recording any reason for the transfer of the case to him from Mwangesi, J. (as he then was) who was the predecessor trial judge. He illustrated that contention by referring to page 3 through page 29 of the record of appeal indicating that the trial was initially presided over by Mwangesi, J. (as then was). Further reference was made to page 29 of the record where Mlacha, J., is shown to have taken over the trial but the cause for the change of the presiding judge is nowhere indicated.

While acknowledging that the successor judge rightly addressed the appellant on his right under section 299 (1) of the Criminal Procedure Act, Cap. 20 RE 2002 (CPA) to recall the witnesses, Mr. Mutalemwa contended that the said provisions entailed a further requirement for stating the cause for the succession of one presiding judge by another judge. He submitted that this infraction vitiated the trial as the successor judge had no jurisdiction to take over and conclude the trial. To bolster his position, he cited the following decisions of the Court: **Emmanuel Malobo v. Republic**, Criminal Appeal No. 356 of 2015; **Shabani Mohamed @ Onditi v. Republic**, Criminal Appeal No. 565 of 2016; **Adam s/o Charles Mkude v. Republic**, Criminal Appeal No. 446 of 2016; and **Sabasaba Enosi v. Republic**, Criminal Appeal No. 135 of 2015 (all unreported). In conclusion, the learned counsel prayed that the proceedings of the trial court before Mlacha, J. be nullified and that the matter be remitted to the High Court for it to recommence the trial from where Mwangesi, J. (as he then was) ended, after compliance with the dictates of section 299 (1) of the CPA.

On the part of the respondent Republic, Ms. Subira Mwandambo, learned State Attorney, conceded, quite candidly and unreservedly, that

the trial proceeded before the successor judge in contravention of section 299 (1) of the CPA as the cause of the succession was not stated and recorded. She further acknowledged that this indiscretion vitiated the trial and supported her learned friend's prayer for nullification of the irregular proceedings and recommencement of the trial from where Mwangesi, J. (as he then was) ended. However, she urged us to order the successor judge to sit with the same set of assessors that sat at the trial with Mwangesi, J. (as he then was).

For a start, it is beyond peradventure that this case was initially partly heard by Mwangesi, J. (as he then was). He commenced the trial as the presiding judge on 4th March, 2014; he recorded the testimonies of PW1, PW2 and PW3. In that process, he also conducted a trial-within-trial on the admissibility of the cautioned statement (Exhibit P.1) after the defence questioned its voluntariness. Then, the trial was subsequently adjourned on 12th March, 2014 to the next sessions.

On resumption of the trial on 30th October, 2015, Mlacha, J. took over the case. Before he recorded the testimony of PW4 on 3rd November, 2015, he rightly addressed the appellant as to his right to have the witnesses recalled in terms of section 299 (1) of the CPA. Nonetheless, the

record is loud and clear that no cause was stated for the transfer of the case to a new judge. Apart from recording the evidence of PW4, the successor judge took down the testimony of PW5 as well as the appellant's defence evidence.

As correctly pointed out by the learned counsel, the succession of presiding judges in a criminal trial is governed by section 299 (1) of the CPA. The said provision stipulates as follows:

> *"Where any judge, after having heard and recorded the whole or any 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 proceedings recorded by his predecessor, and may, in the case of a trial re-summon 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 or any of them be re-summoned and re-heard and shall be informed of such right by the second judge when he commences his proceedings."* [Emphasis added]

In our decision in **Emmanuel Malobo** (supra), which Mr. Mutalemwa cited in his submission, we restated the stance that the above 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 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 a condition precedent for the continuation of the trial."* [Emphasis added]

In the above decision, the Court stated that the rationale for the requirement to record the cause for the change of presiding judge (or presiding magistrate, as the case may be) is to promote transparency and minimize chaos in the administration of justice and thus enhance the integrity of judicial proceedings. In **Priscus Kimaro v. Republic**, Criminal Appeal No. 301 of 2013 (unreported) the Court, when stating the rationale for stating the reason for the change of presiding magistrates in terms of

section 214 (1) of the CPA (which mirrors section 299 (1) of the CPA), held thus:

> *"... where it is necessary to reassign a partly heard matter to another magistrate, the reason for the failure of the first magistrate to complete the matter must be recorded.* ***If that is not done, it may lead to chaos in the administration of justice. Anyone, for personal reasons, could just pick up any file and deal with it to the detriment of justice.****"* [Emphasis added]

As regards the effect of the omission to state the cause of the transfer of a partly heard case to a second presiding judge or magistrate, we agree with both learned counsel that it renders the trial vitiated. On this point, we would do no more than pay homage to our recent decision in **Shabani Mohamed @ Onditi** (supra) to which Mr. Mutalemwa made reference. In that case, where we confronted a similar infraction, we quoted from our earlier decision in **Abdi Masoud @ Iboma and Three Others v. Republic**, Criminal No. 116 of 2015 (unreported) thus:

> *"In our view, under s. 214 (1) of the CPA it is necessary to record the reasons for reassignment or change of trial magistrate. It is a requirement of the*

> *law and has to be complied with.* ***It is a prerequisite for the second magistrate's assumption of jurisdiction. If this is not complied with, the successor magistrate would have not authority or jurisdiction to try the case.***" [Emphasis added]

Applying the above position of the law to the instant matter, we agree with the learned counsel that since the successor judge did not state why the predecessor judge could not complete the trial, he had no jurisdiction to continue with the trial. Consequently, the entire proceedings before him were a nullity and that the case has to be retried. We thus find merit in the first ground of appeal.

In the light of the foregoing analysis, we allow the appeal and nullify the proceedings before Mlacha, J. Consequently, we quash the appellant's conviction and set aside the death sentence imposed on him. We remit the record to the High Court and order expedited trial of the appellant, from where Mwangesi, J. (as he then was) ended, before another judge, sitting with the original set of assessors, according to the dictates of section 299 (1) of the CPA. In the event that the original set of assessors cannot be

constituted, the case should be tried *de novo*. Meanwhile, the appellant shall remain in remand custody pending recommencement of the trial.

DATED at **MWANZA** this 27th day of September, 2018

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL