IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA
(CORAM: MUSSA, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 234 OF 2017

1. **HASSAN RAMADHANI MNDIKA**
2. **MUSSA AUGUSTINO KAJITI** ..... **APPELLANTS**
3. **JUMMANNE MSHANA**

VERSUS

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

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

(Makuru, J.)

Dated 25th day of November, 2011
In
Criminal Session No. 36 of 2009

JUDGMENT OF THE COURT

5th & 13th March, 2018

MWARIJA, J.A.:

In the High Court of Tanzania, Moshi District Registry, the appellants were charged with and convicted of the offence of murder under section 196 of the Penal Code [Cap. 16 R.E. 2002] (the Penal Code). They were found guilty of having murdered one Mwarabu s/o Melita on 14/9/2004 at Bendera Village in Same district within Kilimanjaro region. Consequent upon their conviction, the 1st and 3rd appellants were sentenced to the statutory death sentence while the 2nd appellant who was, at the material

time of the offence aged below 18 years, was sentenced under s. 26(2) of the Penal Code, to be detained during the President's pleasure.

The appellants were aggrieved by the decision of the High Court. They have as a results, preferred this appeal. The facts of the case are not complicated. It is not disputed that on 12/9/2004, the deceased left his home at Sunga Village and went to Majengo village to redeem his donkeys from an undisclosed person who had held them after the said animals had strayed into his farm and ate his crops. Having redeemed the donkeys, and while on the way back home, the deceased met his younger brother's son called Lemai and asked him to take the donkeys home.

The deceased did not return home on that day. His brother, Panda Melita (PW6) became worried because on that day the family had celebration as the wife of PW6 had given birth to a baby boy. On 13/9/2004, PW8 informed the Bendera Ward Executive Officer (WEO) one Robert Shangari Ludeghe (PW5) that the deceased had gone missing. PW5 reported the incident to the Police, Kihurio Post who advised him to inform the villagers and embark on searching for the missing person. The deceased could not be immediately traced. On 19/10/2004, a human body was found buried in a shallow pit at Mrango Village. The body was

discovered by Said George Mburi (PW3) who had on that date, gone to his farm to guard his crops against monkeys. He had his dogs and while they were chasing monkeys to the nearby forest, he saw the dogs digging the ground. When he went closer to the place, he found that they had unearthed a cloth and upon a closer observation, he saw a human body which he believed to be of a Masai person because the cloth of that colour is usually worn by Masai people. PW3 reported the incident to PW5 who informed the police. The police through No. E 9965 D/C Faustine (PW8) arranged for retrieval of the body and availability of the doctor who conducted a postmortem examination on it.

The process was witnessed by the villagers and the deceased's relatives who included PW6. He identified the body to be that of his brother. The body was also identified by PW5 who had known the deceased before. According to Dr. Waziri Juma Semarundu (PW1) who conducted postmortem examination on the deceased, the death occurred about 5 days prior to his examination and the cause was due to a severe blood loss.

According to the prosecution evidence, the deceased was killed by the appellants. It basically relied on the evidence of Hadija Joseph Mlemba (PW4) who testified that sometime in September, 2004 while in her farm at Majengo Village guarding her maize against monkeys, the 1st and 2nd appellants arrived there in the company of one person, who from his attire was a Masai by tribe. The 1st appellant told her that she could go home and they would assist her to guard her crops. When she later heard that a Masai person had gone missing, she informed PW5 about the arrival of the 1st and 2nd appellant at her farm with a Masai person. Upon that evidence, the 1st and 2nd appellants were later arrested and charged.

After his arrest, the 2nd appellant was interrogated by No. E. 587 Sgt Msafiri (PW2). According to his evidence, the 2nd appellant admitted the offence and implicated the 1st and 3rd appellants. The witness tendered a cautioned statement which was allegedly made by the 2nd appellant and the same was admitted as an exhibit (Exh P.2). The 1st and 3rd appellants are also implicated with the offence in the extra-judicial statement of the 2nd appellant (Exh.P.3) which was tendered by Pamela Meena (PW7). It was also on the basis of that evidence of the 2nd appellant that the 3rd appellant was charged.

All the appellants denied the charge. They all raised a defence of alibi. In his evidence, the 1st appellant (DW1) contended that on 18/10/2004 he travelled to Mazinde to help his aunt to plant maize. He said that he returned back home on 20/10/2004 the date on which he was arrested. He stated further that his house was searched but nothing suspicious was found. He was later charged in this case.

The 2nd appellant (Dw2) testified that on the material date of the offence, that is 14/9/2004, he stayed at home through out the day. He was arrested on 23/10/2004 at his grandmother's home in Hedaru village. He denied the allegation that he fled from his home at Lasa Village. He also denied that he wrote a cautioned and extra-judicial statements. As for the cautioned statement, it was his defence evidence that at the police station he was beaten and although he saw three police officers who included PW2 and PW8 writing something on pieces of paper, he knew nothing about the statement. As for the extra-judicial statement, he said that he told PW7, whom he did not know that she was the justice of the peace, that he was beaten by police. According to him, PW7 went on to write what he did not know because the document was not read over to

him. He also disputed the evidence of PW4, that she saw him at Mrango Village on 14/9/2004.

On his part, the 3rd appellant testified that between July, 2004 and April, 2006 he was residing in Dar es Salaam where he was working as a bus conductor. He said that he was arrested on 5/2/2008 in connection with another offence, the offence of arson. He denied the evidence implicating him to the effect that he participated in the killing of the deceased as alleged in the 2nd appellant's cautioned and extra-judicial statements.

In convicting the appellants, the High Court observed that, although the evidence tendered by the prosecution was mostly circumstantial as none of the witnesses witnessed the incident, that evidence had proved the case against the appellants beyond reasonable doubt. In her judgment, the learned judge relied on the 2nd appellant's cautioned and extra-judicial statements (Exhibits P2 and P3 respectively) and the identification evidence of PW4. She also relied on the evidence of the 1st and 2nd appellants to the effect that they led PW5 and PW8 to the place where the diseased was killed and buried as well as the conduct of the 1st and 3rd appellants, that they escaped from the village after the murder incident.

As stated above, the appellants were aggrieved by the decision of the High Court hence this appeal. In their memorandum of appeal filed on 4/8/2017, the 1st and 3rd appellants have raised five grounds of appeal. They also filed written submission in support of their grounds of appeal. On his part, the 2nd appellant has raised seven grounds in his memorandum of appeal filed on 31/7/2017.

At the hearing of the appeal, the 1st and 3rd appellants were represented by Mr. Faustine Materu, learned counsel while the 2nd appellant was represented by Mr. Erasto Kamani, learned counsel. On the other hand, the respondent Republic was represented by Mr. Khalili Nuda, learned Senior State Attorney who was being assisted by Mr. Fortunatus Mhalila, learned State Attorney.

Mr. Materu argued the grounds of appeal filed by the 1st and 3rd appellants. Mr. Kamani did also argue the grounds filed by the 2nd appellant. In the course of hearing the appeal, the Court required the counsel for the parties to address it on the point of law whether or not, in her summing up, the learned High Court judge properly directed the assessors on the vital points of law involved in the case.

Mr. Nuda submitted that the assessors were not properly directed; firstly, on the circumstantial evidence and secondly on the ingredients of the offence of murder such as malice aforethought. He argued that the omission amounted to a non-direction, the result of which is to render the trial a nullify because the same cannot be said to have been conducted with the aid of assessors. He did not however, press for a retrial on account that the prosecution evidence was insufficient.

The learned advocates for the appellants agreed with Mr. Nuda that the trial was vitiated because there was non-direction to the assessors on the vital points stated above. They prayed that the appeal be allowed.

We respectfully agree with the learned Senior State Attorney and learned Counsel for the appellants that the assessors were not properly directed on the vital points involved in the case. As found by the learned trial judge, the prosecution evidence was mostly circumstantial. In her summing up however, although she attempted to direct the assessors on the situations under which circumstantial evidence may found conviction, she did not explain to them the nature of that kind of evidence.

It is also plain from the record, that the assessors were not properly directed on the ingredients of the offence with which the appellants were charged. That was, with respect, a non-direction on the part of the learned trial judge, the effect of which is to vitiate the trial. This position was clearly stated in the case of **Kandi Marwa Maswe v. The Republic,** Criminal Appeal No. 467 of 2015 (unreported) in which the Court held as follows:-

> *"Where there is inadequate summing up, non-direction or misdirection on... a vital point of law to assessors it is deemed to be a trial without the aid of assessors and renders the trial a nullity. See,* ***Said Mshangama @ Senga v. R.,*** *Criminal Appeal No. 8 of 2014 and* ***Masolwa Samweli v. R.,*** *Criminal Appeal No. 206 of 2014 (both unreported)"*

Similarly in the case of **Omari Khalfani v. The Republic,** Criminal Appeal No. 107 of 2015, the Court had this to say.

> *"It is clear from above conclusion; such vital points of law as the ingredients of the offence of murder... were not touched except for the question put out to the assessors as to whether the appellant had*

malice afore thought. The application of circumstantial evidence and how this type of indirect evidence can irresistibly link the appellant to the ingredient of murder was another vital point of law which was not addressed to the assessors. There was a non-direction on the part of the trial Judge in not addressing the assessors on those vital point of law. It cannot be said that the trial was with the aid of assessors as envisaged under section 265 of the CPA. The irregularity marred the entire proceedings"

Having found that the assessors were not properly directed on the vital points involved in the case and after having found that the omission was serious, in the exercise of the powers of revision vested on the Court by S. 4(2) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002], we hereby nullify the proceedings of the High Court, quash the judgment and conviction of the appellants and set aside the sentence imposed on them.

Ordinarily after nullifying the trial court's proceedings, an order of retrial has to follow. Before making such order however, the principles stated in the case of **Fatehali Manji v R** [1966] E.A. 543 have to be considered. A retrial will not be ordered where, for example, the evidence

was insufficient. Both learned counsel for the appellants submitted that the evidence which was tendered by the prosecution was insufficient to found the appellants' conviction. They argued that whereas some of the documents which were relied upon by the High Court were inadmissible, the evidence of the prosecution witnesses was tainted with serious contradictions and inconsistencies. Mr. Nuda, learned Senior State Attorney supported the submissions made by the learned advocates for the appellants.

We agree with the counsel for both parties that the prosecution evidence was insufficient. Firstly, the cautioned statement of the 2nd appellant was inadmissible because the same was recorded out of the period prescribed under S. 50(1)(a) of the Criminal Procedure Act [Cap 20 R.E. 2002]. (the CPA) The prescribed period is four hours *"commencing at the time when the [interviewed person] was taken under restraint in respect of the offence".* It is not the duration of the interview as held by the learned trial judge. See for example, the cases of **Janta Joseph Komba and 3 others v R,** Criminal Appeal No. 95 of 2006, **Tumaini Mollel @ John Walker and Others v. R,** Criminal Appeal No. 40 of 1999; **Salim Petro B. Ngalawa v. R,** Criminal Appeal No. 85 of 2004;

Joseph Mkumbwa and Another v. R, Criminal Appeal No. 94 of 2007; **Abbas Selemani Mfinga v. R,** Criminal Appeal No. 250 of 2008 and **Christopher Chengula v. R,** Criminal Appeal No. 215 of 215 of 210 (all unreported).

The effect of recording a cautioned statement out of the prescribed time is to render it invalid and inadmissible. In this case, when that document is excluded, the only remaining vital evidence will be that of the extra-judicial statement of the 2nd appellant and the evidence of PW4 who contended that she saw the deceased with the 1st and 2nd appellants at her farm. Whereas in the extra-judicial statement, the 2nd appellant had exonerated himself from the offence, his evidence, against the 1st and 3rd appellants, being the evidence of a co-accused required corroboration. As to the evidence of PW4, the same is highly doubtful to be relied upon to establish that the Masai person she saw at her farm was the deceased. Her evidence was contradictory because she initially testified that she saw that person for the first time but later, she conversely stated that the Masai person she saw was Mwarabu, meaning that she had known him before. With regard to the evidence that the 1st and 2nd appellants led PW5 and PW8 to the scene of crime, that evidence is also unreliable

because PW5 and PW8 had been at the scene even before the appellant had been arrested.

From the nature of the evidence, coupled by the fact that there was a variance between the charge and evidence as regards the date of the offence, the defect which was not remedied by the trial court by way of amendment under S. 234 of the CPA, we are of the considered view that a retrial is not appropriate. In view of the above, we hereby order that the appellants be released from prison forthwith unless they are otherwise lawfully held.

DATED at **ARUSHA** this 12th day of March, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL