IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 262 OF 2018

THE REPUBLIC.....APPELLANT

VERSUS

1. **DONATUS DOMINIC @ ISHENGOMA**
2. **WAMALA JOSEPH @ JOHN BOSCO**
3. **DIONIZI BYAMANYIRWOHI @ BAMWIKAZE**
4. **GAUDIN JOSEPH @ BUGUZI**
5. **SOKOINE SAMSON @ SELESTINE**
6. **JAMES CHRISTIAN @ SONGAMBELE**
7. **ALKAD CHRISTIAN @ SONGAMBELE**

.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Kairo, J.)

dated the 19th day of April, 2018
in
Criminal Sessions Case No. 107/2016

JUDGMENT OF THE COURT

3rd & 10th May, 2019

MWARIJA, J.A.:

This appeal arises from the ruling of the High Court of Tanzania at Bukoba (Kairo, J.) dated 19/4/2018 in Criminal Sessions Case No. 107 of 2016. The facts giving rise to the appeal are not complicated. In the said case, Donatus Dominic @ Ishengoma, Wamala Joseph @

John Bosco, Dionizi Byamanyirwohi @ Bamwikaze, Gaudin Joseph @ Buguzi, Sokoine Samson @ Selestine, James Christian @ Songambele and Alkad Christian @ Songambele (the 1st – 7th respondents respectively) were charged in the High Court of Tanzania at Bukoba with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 13/3/2013, at Omukagondo village within Kyerwa district in Kagera region, the respondents murdered two persons, Danis Kalekayo and Johnson Damian (the deceased persons).

After the prosecution had closed its case, the trial Court proceeded to hear the defence evidence. When the 2nd respondent (the 2nd accused person at the trial) was giving his evidence, he contended *inter alia,* that on 15/3/2013, he went to express his condolences to the families of the deceased persons. In his testimony, he mentioned some of the persons he met when he went to the home of Damian Kalekayo, the father of the deceased, Danis Kalekayo.

During cross-examination, he mentioned among other persons, one Dashery Damian as one of the persons he met at the home of

Damian Kalekayo. When asked whether he would be prepared to call that person as a witness to support his assertion, the 2nd respondent, who testified as DW2 promised to do so and prayed to the court to summon that person. Then, at the close of DW2's testimony, the said Dashery Damian Kalekayo, who was in court when DW2 was giving evidence, was called to testify. Before he went into the witness box to give his evidence, he was interviewed by the respondents' counsel, Ms. Mrema on the nature of his evidence. Having been sworn, the said person who testified as DW3, commenced his evidence by stating the events which took place after Danis Damian Kalekayo, who is DW3's younger brother, had been killed. On whether or not he saw DW2 at his family's home after the incident, DW3 categorically denied DW2's assertion that he went there to express his condolences to the deceased's relatives.

Before the witness had finished his testimony, Ms. Mrema decided to make an intervention. She moved the trial court to exercise its discretion under s.163 of the Evidence Act [Cap. 6 R.E. 2002] (the Evidence Act) and declare DW3 a hostile witness. According to the

learned counsel, the witness recanted what he had told her before he gave his evidence in court. She addressed the court in the following words:

> *"I pray the court to declare DW3 a hostile witness since what he told me while preparing him together with other witnesses is different. He has recanted. Since I am the one who can tell what he has told me when preparing him, it is me again and now saying DW3 has recanted or denounced what he said. I thus pray to be given a right to cross-examine him. I so pray under section 163 of the TEA Cap. 6 R.E. 2002."*

The prayer was objected to by the learned State Attorney on account that the ground upon which the learned counsel's prayer was based did not meet the necessary conditions for declaring a witness hostile. Citing the case of **Jumanne Mketo v. R** [1982] TLR 232, the learned State Attorney submitted that the counsel for the respondents should have produced a statement which is alleged to have been recanted by the witness which, upon its scrutiny, the trial court would permit the

learned counsel to cross-examine her witness before the decision to declare him hostile or otherwise is reached.

In her rejoinder, Ms. Mrema submitted that the case of **Jumanne Mketo** (supra) is distinguishable. She argued that, in that case the witness, who was called by the prosecution, had made a statement at the police while the position was different in the case at hand because the witness (DW3) did not record any statement and therefore, what was to be relied upon was what DW3 told the learned counsel when she interviewed him before he gave his evidence in court.

Having considered the rival arguments of the counsel for both sides, the learned trial judge agreed with Ms. Mrema that, since there was no previously recorded statement of DW3, it was proper to act on what Ms. Mrema recounted before the court to be the evidence which was intended to be adduced by DW3; that he saw DW2 at the latter's home. For that reason, the court declared DW3 a hostile witness and the learned counsel was permitted to cross-examine him.

In the course of cross-examination of DW3 by the respondents' counsel, the learned judge formed the opinion that, from his answers, the witness was making scandalous statements against the counsel. As a result, she adjourned the hearing with a view of making an appropriate order as regards the way on which the proceedings should be continued. The order was eventually handed down on 20/4/2018. In the order, the learned judge expunged the evidence of DW3. In so doing, she reasoned that, apart from being scandalous, even if that evidence would support DW2's contention, the same would not be a conclusive evidence on the fact in question.

As stated above, the appellant has preferred this appeal against the said ruling. The appeal is predicated on three grounds as follows:

> "1. *THAT, the Hon. Judge erred in law and facts by declaring the third defence witness hostile to the detriment of the appellant without having been a previous statement made by the said witness to contradict his oral evidence in court.*

2. *THAT, the Hon. Judge erred in law and facts by proceeding to expunge the evidence of the third defence witness from the court record, the evidence of which was in favour of the appellant .*

3. *THAT, the Hon. Judge erred in law and facts by allowing speculative views to effect (sic) her decision."*

At the hearing of the appeal, the appellant was represented by Ms. Chema Maswi, learned State Attorney while Ms. Jackline Mrema, learned counsel appeared for the respondents.

Submitting in support of the 1st ground of appeal, Ms. Maswi reiterated the arguments which the prosecution made at the trial; that since no previous statement was produced to contradict the evidence of DW3, there was no basis for declaring the witness hostile. The learned State Attorney argued therefore, that the impugned ruling is erroneous. She cited the case of **Inspector Baraka Hongoli & Two Others v. Republic**, Criminal Appeal No. 238 of 2014 (unreported) to bolster her argument. She stressed that, the procedure for seeking invocation of s.163 of the Evidence Act where the witness' evidence

contradicts his previous statement, is that the party who desires that such witness be declared hostile, must produce a previous statement of that witness. The court would then compare that statement with the evidence tendered by the witness in court and if it finds that the evidence is contradictory, may then permit the applicant to cross-examine the witness before it makes a decision to declare him or her a hostile witness. She added however that the witness must be given the opportunity of being heard before the court makes its decision. Since that procedure was not complied with, Ms. Maswi went on to argue, the ruling of the High Court should not be allowed to stand.

With regard to the 2nd ground, the learned State Attorney argued that, despite declaring DW3 a hostile witness, his evidence should not have been expunged. She stressed that in law, the evidence of a hostile witness remains to be the evidence on record, even though it may at most, be ignored. She said further that there was yet another procedural irregularity, that the evidence was expunged without hearing the parties.

As for the 3rd ground, although she initially contended that in arriving at the decision to declare DW3 a hostile witness, the High Court acted on speculative evidence, on reflection, Ms. Maswi submitted that the decision was improperly based on the submission of the learned counsel for the respondents as submitted on the 1st ground of appeal.

In response, initially Ms. Mrema reiterated the arguments which she made in the High Court that, although s.163 of the Evidence Act may be invoked by both the prosecution and the defence, the position of the defence is different because, unlike the prosecution witnesses who usually write their statements at the police, the defence witnesses do not write such statements. She agreed however that a previous statement may be in writing or oral. She agreed also that in her capacity as an advocate representing the respondents, she was not competent to submit on matters of evidence regarding the oral statement made to her by DW3. In the circumstances, she conceded to the 1st ground of appeal.

On the 2nd ground, the learned counsel argued that the same was improperly raised because the appeal is against the ruling dated 19/4/2018. According to her submission, the order dated 20/4/2018 which expunged the evidence of DW3 is not the subject of the present appeal. She argued however that, in the event the Court allows the 1st ground of appeal, it should consider to exercise it powers under s.4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] (the AJA) to revise the order which was made without hearing the parties and which has its basis on the impugned ruling.

In rejoinder, Ms. Maswi did not have much to state after the respondent's counsel had conceded to the 1st ground of appeal. She agreed with Ms. Mrema's proposition that in the event the 1st ground of appeal is allowed, the Court should invoke its revisional powers to nullify the order.

We have duly considered the submissions made by the learned counsel for the parties. As pointed out above, in seeking an order declaring DW3 a hostile witness, the respondents' counsel relied on s.163 of the Evidence Act. According to that provision, she ought to

have applied first for permission to cross-examine the witness. The section provides as follows:

> *"63-*
>
> *The court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put by the adverse party."*

A party who seeks the permission of the court to put to his witness questions, which are ordinarily put by the adverse party, does so with a view of obtaining an order declaring such witness hostile so that his evidence may be discredited. In the case of **Shiguye and Another v. Republic** [1975] IEA 191 (CAD), for example, the *erstwhile* Court of Appeal for East Africa stated as follows:

> *"The purpose of having a witness declared hostile by the party who calls him is to discredit him completely."*

The ways on which the evidence of a witness is to be impeached are provided for under s.164 of the Evidence Act. The section states as follows:

(1). The credit of a witness may be impeached in the following ways by the adverse party or, ***with the consent of the court, by the party who calls him*** *–*

(a) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(b) by proof that the witness has received or received the offer of a corrupt inducement to give his evidence;

(c) ***by proof of former statement inconsistent with any part of his evidence which is liable to be contradicted.***

(d) *when a man is prosecuted for rape or an attempt to commit rape, it may be shown that the complainant was generally immoral character."*

[Emphasis added]

Considering the application of s.163(1) of the Kenyan Evidence Act which is in *pari materia* with s.163(1) of our Evidence Act, the Court of Appeal of Kenya stated as follows in the case of **Edusei Asili Malema v. Republic** [2007] eKLR:

> *"Section 163(1) categorizes the evidence which may be called by an adverse party or, with the consent of the court, by the party who calls him for impeachment of his credit. Such evidence which may be called to impeach the credibility of the witness includes proof of former statement whether* ***written or oral*** *inconsistent with any part of the evidence which is liable to be contradicted."*

We subscribe to the above stated position as regards the nature of the former statement which may be used to impeach the credibility of a witness i.e. a written or oral statement.

Having stated the position of the law as regards the power of the court, the procedure and the way on which the evidence of a witness may be impeached and the purpose of doing so, it is instructive to observe at this juncture that, from the wording of the provision of s.163 of the Evidence Act, a person who calls a witness may cross-examine him or her at the discretion of the court. It means that, when granting a person such a permission, the court does so in the exercise of its discretionary powers and ordinarily, a decision arrived at in the exercise of such powers cannot be questioned. It is trite law however, that the court's exercise of discretion may be challenged under certain circumstances.

The principles upon which that can be done were aptly stated in the case of **Credo Siwale v. The Republic**, Criminal Appeal No. 417 of 2013 (unreported). In that case, the Court had this to say:

"There are principles upon which an appellate Court can interfere with the exercise of discretion of an inferior court or tribunal. These general principles were set out in the decision of the East African Court of Appeal in ***MBOGO AND ANOTHER v. SHAH*** *[1968] E.A. 93. And these are:*

(i). if the inferior court misdirected itself; or

(ii). it has acted on matters on which it should not have acted; or

(iii) it has failed to take into consideration matters which it should have taken into consideration,

and in so doing, arrived at a wrong conclusion."

In this appeal, the appellant contends in essence, that the High Court wrongly exercised its discretion on account of the grounds of appeal reproduced above. In the first ground of appeal, the learned counsel for the respondents has challenged the ruling of the High Court on the ground of a failure to find that there was no previous statement which could be said to have been recanted by DW3. It is a

correct position that in arriving at its decision, the court acted on the submission of the respondents' counsel and permitted her to impeach his evidence on the basis of the contentions made by the respondents' counsel that the witness had previously made an oral statement which he later recanted during his testimony in court. The learned counsel was essentially asserting from the bar, existence of a previous oral statement alleged to have been made by DW3. The approach taken by the learned counsel was indeed improper in law and the court should not have acted on her submission to hold that there was a previous oral statement that was recanted by DW3 during his testimony in court. The position as stated by the Court of Appeal of Uganda in the case of **Transafrica Assurance Co. Ltd v. Cimbria (EA) Ltd** [2002] 2EA, to which we subscribe, is that, a matter of fact cannot be proved by an advocate in the course of making submission in Court. In that case, the Court stated as follows:

> *"As is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on."*

The position was also stated by this Court in the case of **Convergence Wireless Networks (Mauritius) Limited and Three others v. WIA Group Limited and Two others**, Civil Application No. 263 "B" of 2015 (unreported) in which the single Justice of the Court underscored the trite principle that an advocate cannot serve both as a counsel and a witness.

On the basis of the foregoing reasons, we agree with the learned counsel for the parties that the 1st ground of appeal has merit. Firstly as found above, DW3 was declared a hostile witness before having first being cross-examined. The ruling was solely based on the submissions of the learned counsel for the parties. Secondly, existence of the witness previous oral evidence was not proved. In the event, the 1st ground of appeal is allowed and consequently, the ruling of the High Court dated 19/4/2018 is hereby set aside.

On the 2nd ground of appeal, we also agree with the learned counsel for the parties that the order dated 20/4/2018 should be revised. There are two main reasons for doing so. Firstly, the parties, particularly DW3 who was found to have made scandalous statements

thus causing his evidence to be expunged by the trial court, were not afforded the right to be heard before the order was made. Secondly, and more importantly, since the ruling has now been set aside, the order which derived its basis therefrom lacks a leg to stand on. In the circumstances therefore, in the exercise of the powers vested in the Court by s.4(2) of the AJA, we hereby set aside that order as well.

In the event, the appeal is hereby allowed.

DATED at **BUKOBA** this 9th day of May, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL