IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., MZIRAY, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 296 OF 2017

EMMANUEL KONDRAD YOSIPATI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mlacha, J.)

dated the 30th day of June, 2017

in

Criminal Sessions Case No. 31 of 2015

JUDGMENT OF THE COURT

11th & 21st February, 2019

MWARIJA, J.A.:

The appellant, Emmanuel Kondrad Yosipati was charged in the High Court of Tanzania at Mtwara with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 16/7/2014 at Nanganga village within Ruagwa district, Lindi region, the appellant murdered one Christian Kiliani.

The facts leading to the appellant's arraignment can be briefly stated as follows: On 16/7/2014 during the night time, while inside a hut at his farm, the appellant suspected that there was a thief harvesting sunflower (possibly sunflower heads) from his (the appellant's) farm. Armed with a machete, he proceeded to inspect the farm. He confirmed his suspicion when after a short moment he encountered a person on the farm. The appellant used the machete to cut that person on the head. The person was later identified to be the deceased, Christian Killian, the appellant's neighbour.

After that act, the appellant decided to take the deceased to the village authorities with a view of obtaining an introductory letter to the police for the purpose of taking him to hospital for treatment. The deceased was however, not taken to hospital. After few hours later, the deceased was found on the way in an ailing condition and before he could be taken to hospital for treatment, he passed away. As a result, the appellant was charged as shown above.

During the hearing of the case, the prosecution relied on the evidence of seven witnesses while the appellant depended on his own evidence. In his evidence, Mussa Abdallah Nangongola (PW3), who was at

the material time the Nanganga village chairman, said that on 16/7/2014 at 4.00 a.m. while at Getini area where he worked as a watchman, the appellant arrived there in the company of the deceased. According to PW3, the appellant narrated the circumstances under which he came to apprehend the deceased. The appellant requested for a letter introducing him to the police so that he could take the deceased to hospital for treatment. He testified further that he thought of involving the members of people's militia to escort the deceased to police. He went in the house to prepare himself ready to go to the office for necessary arrangements to that effect. However, when he came out, he neither found the appellant nor the deceased. It was PW3's evidence further that he was later on informed by one Rashid Bakari (PW4) that he found the deceased on the way in a bad health.

According to PW4, at about 6.00 a.m., he found the deceased on the way naked and bleeding from cut wounds on his back and head. The witness reported the incident to PW3 who in turn, informed the Ward Executive Officer one Mohamed Ahmed Mapua (PW6). Both of them went to the scene and while there, PW6 called and reported the matter to the

police. In response, the police arrived there in the company of a doctor, one Hamis Ng'itu (PW2) who conducted a postmortem examination on the deceased's body. He prepared a postmortem report (exhibit P.1) which he later signed on 15/10/2014. According to exhibit P.1, the cause of the deceased's death was brain damage and bleeding.

In his defence, the appellant (DW1) admitted that he wounded the deceased. He contended that, on the material date at about 4.00 a.m. while in his hut at the farm, he heard some movements suggesting that there was someone around. From the past history of incidences of theft at his farm, he suspected that there was a person who was stealing sunflower heads from the farm. He went out holding a machete and loudly asked if there was anyone there but did not get any reply. Instead, a person ran towards him but stumbled on a certain object and fell down.

According to the appellant, he reacted by cutting that person with a machete on the head. He later recognized that person to be the deceased. Thereafter, he decided to take him to the village office but as he could not find any of the leaders there, he went to PW3's work place for the purpose of obtaining a letter introducing to the police. His intention was to send the

deceased to hospital for treatment. He contended however, that after having listened to him, PW3 chased them away. DW1 went on to state that, as a result, he decided to go back home and as such, he could not know where the deceased went from there. With regard to exhibit P.2, the appellant retracted it contending that he did not make it. He said that, he was taken before PW1 who forced him to sign a document, the contents of which he did not understand. He contended further that the document was prepared at the police station and taken to PW1 who, after confirming the appellant's name required him to sign it.

Having considered the prosecution and the defence evidence as well as the final submissions of the learned Senior State Attorney and the learned advocate for the appellant, the trial High Court found that the case against the appellant had been proved beyond reasonable doubt. It found that, although the evidence against the appellant was basically circumstantial, that evidence was sufficient to warrant the appellant's conviction. The trial court found however that, even if the circumstantial evidence would have required corroboration, exhibit P.2 sufficiently provided for that requirement. As a result, the learned trial judge convicted

the appellant and consequently sentenced him to the mandatory death sentence.

The appellant was aggrieved by the decision of the High Court hence this appeal. On 15/1/2018, the appellant lodged a memorandum of appeal consisting of twelve (12) grounds. Later however, on 5/2/2019, his advocate lodged a supplementary memorandum containing eight (8) grounds of appeal as follows:-

1. *That the Honourable trial Court erred in law and in fact by failure to see that the Appellant was convicted and sentenced to death by hanging basing on a trial which was conducted without the aid of the assessors.*

2. *That the Honourable trial Court erred in law and in fact by failure to see that Exhibit P2, although cleared and exhibited, was not read over before the accused and assessors.*

3. *That the Honuorable trial Court erred in law and in fact by failure to see that Exhibit P2 although admitted and considered, was not corroborated by prosecution evidence.*

4. *That the Honourable trial Court erred in law and in fact by failure to see that Exhibit P2 was inadmissible for failure to adhere to Honourable Chief Justice's Guide for Justice of the Peace.*

5. *That the Honourable trial Court erred in law and in fact by failure to see that it was unsafe to act on retracted confession [Exhibit P2] without warning itself of the danger of doing so.*

6. *That the Honourable trial Court erred in law and in fact by failure to see that the chain of circumstantial evidence was seriously broken such that the circumstances do not irresistibly point to the Appellant as the one who killed the deceased.*

7. *That the Honourable trial Court erred in law and in fact by failure to see that conclusions, conviction and sentence were both based on the considerable suspicion only which is not sufficient to support the conviction.*

8. *That the Honourable trial Court erred in law and in fact by failure to see that the Appellant was wrongly committed to the High Court.*

At the hearing of the appeal, the appellant was represented by Mr. Hussein Mtembwa, learned counsel while the respondent Republic was

represented by Mr. Wilbroad Ndunguru, learned State Attorney. In arguing the appeal, Mr. Mtembwa abandoned the grounds raised by appellant on account of the same having been covered in the grounds that were concisely framed in the supplementary memorandum of appeal. Out of the eight grounds however, the learned counsel abandoned the 5th and 8th grounds.

Submitting in support of the 1st and 2nd grounds, Mr. Mtembwa argued that, since after admitting exhibit P2, the same was not read over to the appellant and the assessors, the exhibit was wrongly acted upon to found the appellant's conviction. He added that in effect, the omission contravened the requirement of holding a trial with the aid of assessors. The learned counsel argued further in these grounds that, in his summing up to the assessors, the learned trial judge did not address the assessors on the contents of the said exhibit and the requirement that such evidence, which was retracted by the appellant, required corroboration. Citing the Court's decisions in the cases of **Sikujua Hosea v. Republic**, Criminal Appeal No. 354 of 2014 and **Mashimba Dotto v. Lukubajika**, Criminal Appeal No. 117 of 2013 (both unreported), Mr. Mtembwa stressed that,

from such an irregularity, exhibit P2 was under the circumstances, lacking evidential value.

Relying further on the principle stated in the case of **Elimringi Joseph @ Malay v. Republic**, Criminal Appeal No. 243 of 2010 (unreported), the appellant's counsel argued that the document which was contested, could only be acted upon in evidence after the same had been cleared of its admissibility and later, exhibited and read over in court in the presence of the parties.

With regard to the 3rd ground, Mr. Mtembwa challenged this credibility of exhibit P2 arguing that the same was wrongly acted upon by the learned trial judge in the absence of corroborating evidence. This is more so, he said, because firstly, the statement speaks only of the past events, not the facts relating to matters which took place on the date of the incident and secondly, that the document contains contradictory statements as regards the particular person who arrested the appellant. To bolster his argument on the requirement for corroboration, the learned counsel relied on the case of **Umalo Mussa v. Republic**, Criminal Appeal No. 150 of 2005 (unreported). In that case, the Court cited with approval the famous case of **Tuwamoi v. Uganda** [1967] E.A. 84 in which the

erstwhile Court of Appeal for East Africa underscored the rule that, when any confession is retracted, the same should not, as matter of practice, be acted upon unless it is corroborated.

As to the 4th ground, Mr. Mtembwa challenged the validity of exhibit P2 contending that the same was recorded in contravention of the Chief Justice's Guidelines. He argued that, PW1 did not comply with three out of the six guidelines stated in the case of **Petro Teophan v. The Republic**, Criminal Appeal No. 58 of 2012 (unreported). The three guidelines are those which require a justice of the peace to consider the time and date of the suspect's arrest, the place of his arrest and the place where he slept before the date when he was taken before the justice of the peace.

In the 6th and 7th grounds of appeal, the appellant's counsel challenged sufficiency of circumstantial evidence. He relied on existence of a gap in the prosecution evidence between the time when the appellant left from PW3's place of work and the time when the deceased was later seen on the way in an ailing condition. It was the argument by the learned counsel that the learned High Court judge erred in his holding that the circumstantial evidence led irresistibly to the conclusion that it was the appellant who killed the deceased.

Citing the cases of **Republic v. Betram Mapunda** and **Another** [1999] TLR 1, and **Republic v. Kerstin Cameron** [2003] TLR 84, the learned counsel stressed that, in order to base conviction solely on circumstantial evidence, the chain of events must be consistent and unbroken. In this case, he argued, there is a possibility that between the period when the deceased left PW3's place of work at Getini area and the time when he was found on the way, he could have been harmed by any person other than the appellant.

In his reply submission, Mr. Ndunguru opposed the appeal. With regard to the submission made in support of the 1st and 2nd, he argued that, although exhibit P.2 was not read over after its admission in evidence, the omission did not prejudice the appellant. He contended that, according to the proceedings dated 30/5/2017, the contents of the document were read over to the appellant on the previous court sitting. It was on the basis of that fact, he said, that in his defence, the appellant adduced evidence challenging the contents of the exhibit.

With regard to the 3rd ground, the learned State Attorney submitted that the evidence tendered through exhibit P.2 was sufficiently corroborated by medical examination report which shows that the

deceased was wounded *inter alia* on the head and shoulder. He added that the document is further corroborated by the evidence of PW5 to the effect that, the appellant admitted to have wounded the deceased and volunteered to bear the costs of sending him to hospital for treatment.

Responding further to the submission made in support of the 4th ground of appeal, the learned State Attorney argued that, although it is true that in the course of recording exhibit P.2, PW1 did not comply with some of the conditions laid down in the Chief Justice's Guidelines, the non-compliance did not prejudice the appellant.

Finally, as for the 6th and 7th grounds of appeal, Mr. Nduguru supported the finding of the learned trial judge that the available circumstantial evidence led irresistibly to the appellant's guilt. He stressed that, since in his evidence the appellant had admitted that he wounded the deceased and later went with him to PW3, being the last person to be seen with the deceased within a short period before his death, in the absence of explanation as to how he parted with him, the appellant is, in law responsible for the deceased's death. In support of his argument, the learned State Attorney cited the case of **Richard Matangule and Another v. Republic** [1992] TLR 5.

In his rejoinder submission, Mr. Mtembwa reiterated his argument that the omission to read over exhibit P.2 to the appellant and the assessors was a fatal irregularity. On the issue relating to corroboration of the confession evidence, he argued, without citing any authority that the same could not be corroborated by the postmortem report because, that evidence required corroboration. He added that the prosecution witnesses testified on the past events, that is; on matters which took place after the deceased had been wounded and therefore, he argued, such evidence cannot as well, be used to corroborate the confession evidence. With regard to the learned judge's reasoning that the appellant was liable because of his failure to give explanation on how he parted with deceased, Mr. Mtembwa opposed the argument on contention that the failure to do so does not constitute sufficient circumstantial evidence for holding the appellant guilty of the offence charged. In the same vein, the learned counsel challenged the submission that based on the fact that the deceased's death occurred within a short period from the time when he was seen with the appellant at PW3's place of work. According to Mr. Mtembwa, that period was more than sufficient for any person other than the appellant to cause the deceased's death.

Having considered the respective submissions of the learned counsel for the appellant and the learned State Attorney for the respondent, we need not be detained much in determining the 1st, 2nd and 3rd grounds of appeal. The appellant's complaints in these grounds are **firstly**, that the evidence of exhibit P.2 was inadmissible because it was not corroborated and for having been recorded in contravention of the Chief Justices Guidelines to the Justices of the Peace and **Secondly**, that even if the same was properly admitted in evidence, the same was not read out to the appellant and the assessors thus rendering it invalid.

For the reason which will be apparent herein, we wish to begin with the second complaint. From the record, it is a correct position as submitted by Mr. Mtembwa that, after having conducted a trial within a trial and after the learned trial judge had ruled out, on 31/5/2017, that the confession was admissible, he admitted it in evidence. It is apparent from the record however that, although on that date, the trial proceeded in the presence of the appellant and the assessors, the document was not read over to them. The learned State Attorney conceded that the contents of exhibit P.2 were not read over to the assessors. He argued however, with regard to the appellant, that the document was read over to him a day before the date

when the same was admitted in evidence meaning that; it was read over to the appellant during the trial within a trial. With respect to the learned State Attorney, the record does not support his assertion. There is nowhere shown in the proceedings in the trial within a trial that the statement was read over to the appellant. What is reflected therein is that the same was read over to him at the preliminary hearing stage.

It is trite principle that where in a trial held with the aid of assessors, a contested statement of an accused person is admitted in evidence, the same must be read over in court so as to enable the accused person and the assessors to understand its contents. In the case of **Ntobangi Kelya and Another v. The Republic**, Criminal Appeal No. 234 of 2015 (unreported) for example, the Court observed as follows:-

> *"...it was wrong for the trial court to receive the cautioned statement as evidence without ordering the same be read over in court."*

The Court cited to that effect, its previous decisions in the cases of **Sumni Amma Aweda v. The Republic**, Criminal Appeal No. 393 of 2013 and **Tibashekerwa Gaspary and Another v. The Republic**, Criminal

Appeal No. 122 of 2012 (both unreported). In first case above, the Court stated *inter alia* as follows:-

> *"...to have not read those statement in court deprived the parties and the assessors in particular, the opportunity of appreciating the evidence tendered in court. Given such a situation, it is obvious that this omission too constituted a serious error amounting to miscarriage of justice and constituted a mis-trial."*

Similarly, in the case of Moshi **Mabeja v. The Republic**, Criminal Appeal No. 74 of 2014, faced with a similar situation where the appellant's conviction was solely based on the evidence of his extra judicial statement which was acted upon by the trial court while like in the present case, the statement was not read over in court after its admission, the Court held as follows:-

> *"Going by the fact that the conviction was solely founded on the extra-judicial statement, this case was, essentially, one where the assessors should have had the benefit of a careful and detailed briefing on the contents of the damning document, just as they were expected to be fully informed of its legal import. That was not done and, in such a*

situation, we are unable to say with certainly that the assessors would have returned the same opinion had they been properly directed. In the premises, we cannot hesitate to hold that such was a serious non-direction on a vital and material point which goes to the root of the entire trial."

On the basis of the position of the law on admissibility and the use of retracted cautioned or extra judicial statement in evidence, we agree with the appellant's counsel that the learned trial judge erred in acting on exhibit P.2. The same was not read over in court in the presence of the appellant and assessors and was thus invalid. With that finding, we do not see it necessary to consider the appellant's first complaint relating to whether or not exhibit P.2 was recorded in compliance with the Chief Justice's Guidelines and whether or not the same was corroborated.

However, unlike in the case of **Moshi Mabeja** (supra) where the appellant's conviction was solely founded on his extra judicial statement, in the present case, apart from the appellant's statement, the trial court relied also on circumstantial evidence. It was the learned State Attorney's strenuous argument that the available circumstantial evidence proved the case against the appellant to the hilt.

In his decision, the learned trial judge held that the circumstantial evidence "led to the conclusion that the accused is one who killed the deceased at the exclusion of all others...." According to Mr. Mtembwa, since there is a gap of time from the period when the deceased and the appellant arrived at PW3's place of work and the time when the deceased was found on the way in a critical condition, there is a possibility that the injuries which caused his death were inflicted by a person other than the appellant. With due respect to the learned counsel, we are unable to agree with his argument. It is not disputed that the appellant was the last person to be seen with the deceased. For that reason, as argued by Mr. Nduguru in the absence of a plausible explanation from the appellant regarding the death of the deceased, the appellant cannot exonerate himself from being the person who killed the deceased. In the case of **Mathayo Mwalimu and Another v. The Republic**, Criminal Appeal No. 147 of 2008, the appellants were the last person to be seen with the deceased a day before his death. Applying the doctrine of the last seen person, the Court stated as follows:-

> *"In our considered opinion, if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible*

explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer. In this case, in the absence of an explanation by the appellants to exculpate themselves from the death of HAMISI MNINO, like the court below, we too are satisfied that they are the one who killed him."

-See also the Court's decision in the case of **Robert Edward Moringe @ Kadogoo v. The Republic**, Criminal Application No. 9 of 2005 (unreported) and the decision of the Court of Appeal of Kenya in the case of **Ndunguri v. The Republic** [2000] I EA 179.

It is imperative to add that, since the appellant had admitted having wounded the deceased by cutting him on the head with a machete before he went with him to PW3's place of work, the circumstances are that he cannot be disassociated with the deceased's death. The postmortem report shows that the deceased had big cut wounds on the head and both shoulder. As stated above, the cause of death was brain damage and bleeding. Taking in to consideration all the above stated factors leading to the death of the deceased, drawing of an inference that it was the appellant who murdered the deceased is irresistible.

For the above stated reasons, we do not find merit in the appeal. The same is hereby dismissed.

DATED at **MTWARA** this 19th day of February, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

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

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL