IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MMILLA, J.A, MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 431 OF 2018

1. DANIEL SEVERINE
2. MEDIUS GREGORY
3. JUSTON GASPARI @ MWIJUKI } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkasimongwa, J.)

dated the 26th day of October, 2018
in
Criminal Sessions Case No. 63 of 2014

.....

JUDGMENT OF THE COURT

6th & 12th December, 2019

KWARIKO, J.A.:

Daniel Severine, Medius Gregory and Juston Gaspari @ Mwijuki, the first, second and third appellants, 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]. The prosecution alleged that on the 22nd day of February, 2014 during night hours at Nyabule village within Muleba District in Kagera Region, the appellants murdered one Majid s/o Ahmada (the deceased).

When the charge was laid before the appellants' door, they all pleaded not guilty. Thereafter, the case went on full trial. At the conclusion of the trial, the appellants were found guilty, convicted and were sentenced to suffer death by hanging. The appellants were discontented with that decision hence they have come before this Court on appeal.

The facts of the case which led to the arraignment of the appellants can be summarized as follows. On 22/2/2014 at night hours, the deceased and his wife Zaituni Majid (PW1) were asleep at their home. While asleep about ten bandits broke at their house. The bandits assaulted the deceased and PW1 and took them outside at the backyard where the deceased was tied up with ropes. Their grass thatched kitchen was set on fire and its light helped PW1 to identify the appellants and others who went at large as the bandits. Therefore, PW1 was taken inside the house and the second and third appellants kept her guard but she heard the deceased pleading with the bandits not to kill him. She did not hear him again. Later on, PW1 heard the first appellant calling those who were keeping her guard to leave. The bandits also cut banana trees, trees and coffee trees.

When the thugs left, PW1 went outside but did not see her husband. She slept until 6:00 am the following day. When she went out, she found her husband killed by decapitation where the head almost separated from the trunk.

PW1 went to inform her neighbours, including Flora Juma (PW2). The two informed the village Chairman who happened to be the first appellant. The first appellant reported the matter to the police who went to the scene together with the medical doctor. One of the police officers was Inspector Jaribu Sebastian (PW4). The scene of crime was inspected and a sketch map of the scene of crime was drawn. During the preliminary hearing on 7/9/2015, the sketch map of the scene of crime and the deceased's photographs were admitted as exhibits P1 and P2, respectively.

Meanwhile, an autopsy on the deceased's body was conducted by Dr. Mwamini Said Mbaruku (PW3). In her report, PW3 said that the deceased was decapitated, shoulders bone cut and a huge cut wound on left mandible exposing the teeth and there was severe bleeding. She concluded that the cause of death was severe hemorrhage. The postmortem report was admitted as exhibit P4. PW1 mentioned to the police the appellants

and others who went at large as the ones who invaded them. They were arrested and charged.

In their defence, the appellants distanced themselves from the murder. The first appellant said, he reported the matter to the police and assisted the arrest of others, hence his claim that he was unjustly implicated because, if he was the suspect he could have been mentioned and arrested right away. The second appellant said he lived at Buyondo hamlet which is about 2½ hours walk to the deceased's hamlet. That he did not hear the incident until he was arrested. The third appellant raised a defence of alibi. In fact, he had raised that defence during the preliminary hearing to the effect that at the material date he was at Murumo Island to fetch sardines (dagaa).

As shown earlier, the trial court found that the prosecution case was proved beyond doubt. The appellants were convicted and sentenced as such.

On 1/2/2019, the appellants filed a joint five-ground memorandum of appeal and on 2/12/2019, their counsel Ms. Jacquiline Evaristus Mrema, filed a six-ground supplementary memorandum of appeal.

At the hearing of the appeal, Ms. Mrema appeared for the appellants and she abandoned the appellants' memorandum of appeal, she thus prayed to argue the grounds of appeal contained in the supplementary memorandum. These are:-

1. *That, the Honourable Trial Judge erred for not considering the Defence case at all.*
2. *That, there was no fair trial as the Appellants were convicted before giving their defence.*
3. *That, the Honorable Trial Judge erred by convicting the Appellants basing on the evidence of PW1 which left much to be desired and the same contradicted by other witnesses.*
4. *That, the Honourable Trial Judge erred by taking the unproved previous conducts of the Appellants as the basis of their conviction.*
5. *That, the Honourable Trial Judge erred by convicting the Appellants on doubtful visual identification.*
6. *That, the prosecution case wasn't proved beyond Reasonable Doubt.*

Ms. Chema Maswi, learned State Attorney who represented the respondent Republic did not resist the appeal on the account of the first ground of appeal.

On our part, as the first ground of appeal is sufficient to dispose of the appeal, we will as nearly as possible only reproduce the counsel's submissions in that respect.

The counsel commonly argued that, the trial court did not at all consider the defence case in that it convicted the appellants on the basis of the prosecution evidence alone. The counsel contended that this was a fatal omission which vitiated the conviction. To support her position, Ms. Mrema referred us to the case of **Hussein Idd & Another v. R** [1986] T.L.R 166. On her part, Ms Maswi argued that the omission to consider the defence case violated the appellants' right to be heard as provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, as amended (the Constitution). She also relied on the case of **Stephen Solomon Molel v. R**, Criminal Appeal No. 248 of 2016 (unreported).

On the way forward, Ms Mrema urged us to quash the trial court's proceedings and order the release of the appellants. Ms Maswi on the other hand, urged the Court either, to step into the shoes of the trial court and consider the appellants' defence and make its own conclusions or quash the proceedings of the trial court and order a retrial of the

appellants because the prosecution evidence is overwhelming. As for the order of retrial, Ms Maswi placed her reliance on the case of **Chacha Matiko @ Magige v. R,** Criminal Appeal No. 562 of 2015 (unreported).

We have considered the first ground of appeal and the counsel's submissions. It is true that, the trial court did not at all consider the defence evidence. When it had summarized the evidence from both sides, the trial court considered the prosecution evidence alone from page 98 of the record appeal and it concluded the analysis and convicted the appellants at page 105 of the record. Nothing was said regarding the defence case, not even the defence of *alibi* by the third appellant given at the outset and during the trial and that of second appellant.

It is trite law that, no-consideration of the defence evidence is a fatal irregularity to the trial and the whole proceedings and it vitiates the conviction. There is a plethora of pronouncements by the Court in that respect, some of which are **Hussein Idd and Another v. Republic**, (supra), **Jonas Bulai v. Republic**, Criminal Appeal No. 49 of 2006, **Yustin Adam Mkamla v. Republic**, Criminal Appeal No. 206 of 2011, **Moses Mayanja @ Msoke v. Republic**, Criminal Appeal No. 56 of 2009, **Simon Aron v. Republic**, Criminal Appeal No. 583 of 2015, **Semeni**

Mgonela Chiwanza v. Republic, Criminal Appeal No. 49 of 2019 (all unreported) and **Stephen Silomon Mollel v. Republic**, (supra). For instance, in the case of **Hussein Idd & Another v. Republic**, (supra), the Court held thus: -

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

As rightly argued by Ms Maswi, non-consideration of the defence case before arriving at the decision amounts to a breach of one of the rules of nature justice, the right to be heard. This right is also safeguarded in the Constitution. Article 13 (6) (a) provides in the official version thus: -

> *(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba–*
>
> *(a) wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya*

kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika.

And literally translated, the sub-article in English reads:-

(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned.

In view of the serious irregularity committed by the High Court, we quash the proceedings, judgment and conviction and set aside the sentence against the appellants.

As to what is the way forward, we have considered the State Attorney's two options. In the first option, the learned counsel relied on the case of **Chacha Matiko Magige v. R** (supra), to implore us to order a retrial of the appellants. We have gone through that decision and found

that it is distinguishable from the instant case. In that case, the irregularity related to omission by the trial court to afford the appellant an opportunity to express whether or not he objected to any of the assessors. While in the instant case the omission is non-consideration of the defence case.

In the second option, Ms. Maswi urged us to enter into the shoes of the trial court to consider the defence evidence along with the prosecution evidence and make our own findings. On this, we are alive of the law that being a first appellate Court we are entitled to re-evaluate the evidence and come out with our own conclusions, because a first appeal is equal to a re-hearing of the case. See also our previous decisions in **Christina Damiani v. R**, Criminal Appeal No. 178 of 2012, **Leonard Mwanashoka v. R**, Criminal Appeal No. 229 of 2014 and **Deemay Daati and Two Others v. R**, Criminal Appeal No. 80 of 1994 (all unreported).

However, upon consideration of this case, we think we will not take such a move. This is because, we find the prosecution evidence wanting, especially PW1 who was the key and the only eye witness. We shall demonstrate few shortcomings in her evidence as follows. PW1 did not readily mention the names of the bandits to the people who responded to the scene of crime especially to PW2, her neighbor and hamlet chairman

(PW5). She did not even do that immediately after the arrival of the police, because the first appellant even assisted in the arrest of other suspects. It is trite law that, failure for a witness to name the suspect(s) immediately weakens her/his reliability. In the Court's previous decision in **Marwa Wangiti and Another v. R**, Criminal Appeal No. 6 of 1995 (unreported), it was said thus: -

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry."*

PW1 waited until she gave her statement at the police that is when she mentioned the appellants as among the bandits. This is inconsistent with reality and the spirit in **Marwa Wangiti's** case (supra).

Not only that, but PW1's conduct after the bandits had allegedly left the scene, leave a lot to be desired. She testified that, after she made sure that the bandits had left, she went out and searched for her husband in vain. She returned inside and slept until 6:00 am. It beats our imagination that any other reasonable person could have conducted

herself/himself that way in the circumstances. PW1 could have at least raised an alarm after the bandits had left, if she was afraid of them.

Further, although only the appellants were implicated with the murder, the evidence show that more than 10 people participated in the incident. We therefore find that; nothing has challenged the appellants' defences.

It is for the foregoing reasons we find that; the order of retrial will only enable the prosecution fill in gaps. We are fortified in this view by the case of **Fatehali Manji v. R** [1966] E.A 343 where it was held thus: -

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

[See also **Kanisilo Lutenganija v. R,** Criminal Appeal No. 25 of 2010 and **Mussa Abdallah Mwiba and Two Others v. R,** Criminal Appeal No. 200 of 2016 (both unreported)].

Consequently, we find the appeal with merit, allow it and order the release of all the three appellants from custody unless their continued incarceration is in relation to any other lawful cause.

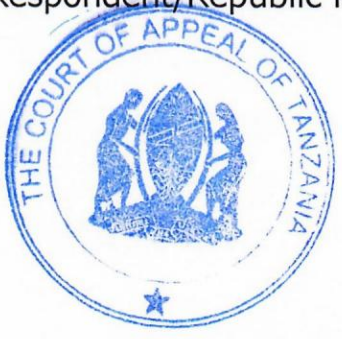
DATED at **BUKOBA** this 11th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of December, 2019 in the presence of Ms. Jacquiline Evaristus Mrema, learned counsel for the Appellants and Mr. Joseph Mwakasege, learned State Attorney appeared for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL