IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 46 OF 2016

CHARLES BODE ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the decision of the High Court of

Tanzania at Dar es Salaam)

(Kibela, J.)

dated the 3rd day of September, 2015
in
High Court Criminal Sessions Case No. 82 of 2010

JUDGMENT OF THE COURT

15th Feb & 6th March, 2019

MWANGESI, J.A.:

In the high Court of Tanzania at Dar es Salaam, the appellant herein stood arraigned for the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap 16 of the Laws Revised Edition of 2002. It was the case for the Republic that, on the 31st day of March, 2008, at about 02:00 Hours at Msoga village within Bagamoyo District in Coast Region, the appellant murdered one Amina Omari. The appellant protested his innocence.

The brief facts of the case leading to the arraignment of the appellant for the charge of murder was that, the appellant and the deceased used to live together in Dar es Salaam as husband and wife. After having been together for about ten years and being blessed with two children, in the year 2007, the deceased shifted from Dar es Salaam with her two daughters and went to live at Msoga village in Bagamoyo District, leaving the appellant still living in Dar es Salaam. They however continued to maintain their relationship.

On the 30th March, 2008, the appellant visited the deceased at Msoga. He arrived there during evening hours and spent the night there. While asleep during the night, there arose a scuffle between them which resulted to the death of the deceased. While the Republic claimed that it was the appellant who killed the deceased by stabbing her with a knife, the appellant denied the allegation and asserted that death of the deceased was occasioned by someone else when he had gone outside the house to attend the call of nature.

To establish the guilt of the appellant, the Republic paraded six witnesses whose testimony was supplemented by five exhibits. On his part in defence, the appellant relied on his own sworn testimony and called no

other witness. At the end of the day after the learned trial Judge had evaluated the evidence placed before him, was convinced beyond doubt that the appellant had committed the charged offence of murder and condemned him to suffer the statutory sentence of death by hanging. The appellant felt aggrieved and has come to this Court armed with a number of grounds to challenge the finding of the trial Judge.

The memorandum of appeal that was lodged by the appellant on the 11th April, 2018, is comprised of six grounds of appeal namely:

> ***One,*** *that the learned trial Judge erred in law and facts in taking and relying on uncorroborated evidence of Upendo Charles (PW1), who testified in Court without being sworn/affirmed.*
>
> ***Two,*** *that the learned trial Judge erred in law and in facts in convicting the appellant basing on extra- judicial statement (exhibit P3) without taking into account that, the witnesses who testified in the trial within trial were not sworn/affirmed.*
>
> ***Three,*** *that the learned trial Judge erred in law and in facts in taking and relying on caution statement (exhibit P3 (sic)), which was tendered and admitted in evidence without the appellant being given*

an opportunity to object to it or being informed as to its consequences.

Four, *that the learned trial Judge erred in law and in facts for failing to draw an adverse inference against the prosecution side who (sic) deliberately and without any good reasons declined to call material witnesses and/or produce material exhibits.*

Five, *that the learned trial Judge erred in law and in facts by relying on post mortem report (exhibit P1), while the appellant was not informed of his right to have a doctor who performed the post mortem examination to the deceased to be summoned for cross examination.*

Six, *that the learned trial Judge erred in law and in facts for allowing the assessors to cross examine the witnesses, the act which violated the mandatory requirement of the law of evidence governing the role of assessors.*

On the date when the appeal was called on for hearing before us, the appellant who was present in person, was represented by Mr. Paschal Kamala, learned counsel, whereas the respondent/Republic had the

services of Ms Jenipher Massue, learned State Attorney. On taking the floor to address us on the grounds of appeal, Mr. Kamala sought leave of the Court under Rule 81 (1) of the Tanzania Court of Appeal Rules, 2009 **(the Rules)**, to add one additional ground of appeal which he was given by the appellant on the very morning of hearing the appeal. The prayer having not been objected by his learned friend was granted. The added supplementary ground of appeal reads:

> *That, the proceedings of the successor Judge were a nullity, since the proceedings were conducted without jurisdiction contrary to the provisions of the Criminal Procedure Act, Cap 20 R.E 2002, governing conviction where proceedings heard by one Judge and partly by another.*

Before he could embark on arguing the grounds of appeal, Mr. Kamala, after consultation with the appellant abandoned the first, second, third and fourth grounds of appeal and thereby, proceeding to argue on the supplementary ground of appeal which henceforth will be referred to as the first ground of appeal, and the fifth and sixth grounds of appeal,

which will be referred to as the second and third grounds of appeal respectively.

Starting with the first ground, Mr. Kamala submitted that it is a legal requirement under the provisions of section 299 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 **(the CPA**) that, where a case has already been partly heard by one Judge, the successor Judge has to explain to the accused his rights stipulated under the provisions, a thing which was not complied with in the instant matter. In the view of the learned counsel, such omission was fatal and vitiated the entire proceedings of the successor Judge and the resultant judgment.

In view of the foregoing, Mr. Kamala implored us to nullify the proceedings of the successor Judge and the judgment which he composed, and set aside the sentence which was meted to the appellant. And in lieu thereof, he urged us to be pleased to direct the case file to be remitted to the trial Court, for continuation of the proceeding by another Judge from where the earlier Judge had ended in compliance with the dictates of law.

With regard to the second ground of appeal of which the complaint is that, the appellant was not given the opportunity of cross examining the

doctor who performed the post mortem to the body of the deceased, there was a change of mind by Mr. Kamala, probably after revisiting the proceedings of the trial Court that, the complaint of the appellant was not on the failure by the Court to accord him the chance to cross examine the doctor but rather, that the doctor who examined the body of the deceased and thereafter compiling the post mortem report, was unqualified. He argued that according to the record in the proceedings, the one who performed the autopsy to the deceased's body was a mere clinical officer who in his view, was not qualified to perform such duty as per the requirement of the law. He therefore faulted the learned trial Judge in relying on such report to hold the appellant culpable to the charged offence of murder.

The learned counsel for the appellant further submitted that, the complaint by the appellant in the third ground of appeal is to the effect that, the assessors who sat with the learned trial Judge in determining the appellant's case, were allowed to cross examine the witnesses which was in breach of the provisions of section 177 of the Tanzania Evidence Act, Cap 6 R.E 2002 (**the TEA**). In backing up his stance, the learned counsel referred us to the holding of the Court in the case of **Chrisantus Msingi**

Vs the Republic, Criminal Appeal No. 97 of 2015 (unreported), where upon finding an error of this nature, the Court invoked its revisional powers by ordering for a trial *de novo*. He urged us to follow suit in the instant appeal because the circumstances were similar

In response to the first ground of appeal, the learned State Attorney was at one with her learned friend that, indeed the appellant was not informed his rights stipulated under the provisions of section 299 (1) of **the CPA** by the successor Judge, which was legally improper. She however, hastened to submit that, the anomaly was not fatal because first, during trial of the case the appellant was legally represented by an advocate. Secondly, the learned State Counsel argued that, the testimony of the appellant in his defence during trials within trial in determining the admissibility of the cautioned statement as well as the extra – judicial statement, which was given before the earlier trial Judge, was the same as the one which he gave in his main defence before the successor Judge, meaning that nothing had changed. Under the circumstances, Ms Massue was of the firm view that, the anomaly was curable in terms of the provisions of section 388 of **the CPA**.

As regards the second ground of appeal, the learned State Attorney submitted that, the doctor who performed the post mortem to the body of the deceased, was the one who testified in Court as can be reflected at page 93 of the record of appeal. That being the case, the second ground of appeal by the appellant has no basis to stand on.

Responding to the argument raised by his learned friend from the bar that, what the appellant intended to complain about in the second ground was about the competency of the witness who conducted the post mortem examination, Ms. Massue submitted that, Mr. Rodges Aristides who performed the post mortem on the deceased's body, told the Court in his testimony that he was a clinical officer. In her opinion, a Clinical officer was qualified to do the work which he performed. After all, the learned State Attorney went on to argue, the fact that there was no dispute to the death of the deceased, even if the evidence of the post mortem report was to be expunged from the proceedings, still it would have no effect to the fact that the appellant committed the charged offence of murder. She therefore asked the Court to dismiss this ground of appeal.

The answer of the learned State Attorney to the third ground of appeal that, the assessors were permitted by the Court to cross examine

witnesses, she was again in agreement with her learned friend that, in terms of section 177 of **the TEA,** the duty of assessors in Court is just to seek clarification from witnesses on what they have testified, and not to cross examine them. However, from what could be noted from the answers which were given by PW1 to the questions which were put to her by assessors at page 43 of the record of appeal, she was of the view that they were meant to clarify on what the witness had testified in her examination in chief. Under the circumstances, it could not be said that, those questions were cross - examination so to speak. She thus asked the Court to find the anomaly alleged to have been occasioned to be innocuous and thereby, crippling down the third ground of appeal. In conclusion, she urged us to find the entire appeal by the appellant wanting in merit and as such, it be dismissed in its entirety.

The issue which stands for our deliberation and determination in the light of what was submitted by the learned counsel for either side above, is whether the appeal by the appellant is founded. We propose to deal with the grounds of appeal in the way they have been argued by the learned counsel. The first ground of appeal was pegged on the provisions of section 299 (1) of **the CPA,** which reads thus:

"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 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 proceedings."*** [Emphasis supplied]

As agreed upon by the learned counsel for both sides, there was non - compliance with the above quoted provisions of law in the appeal at hand in that, the successor Judge did not explain to the appellant his rights as stipulated under the provisions, when he was commencing the proceedings as a second Judge. The question which we had to ask ourselves is whether the omission was fatal. On the one hand, we are in agreement with the

learned counsel for the appellant that in the past, the Court treated such omission to be fatal and that, it vitiated the proceedings. See: **Chacha Mwita and Three Others Vs Republic,** Criminal Revision No. 1 of 2007 and **Masuke Malugu @ Matinyi and Daud Misungu @ Kishimba Vs Republic**, Criminal Appeals No 308 of 2015 and 518 of 2016 (both unreported).

Nonetheless, with the introduction of section 3A in the Appellate Jurisdiction Act, Cap 141 R.E 2002 **(the AJA**), which was brought about by the Written Laws (Miscellaneous Amendments) Act No 8 of 2018 whereby, the Court is required to basically focus on substantive justice, the question which we had to ask ourselves here, is whether the failure by the successor Judge to explain to the appellant about his rights, occasioned him any injustice. Regard being had to the fact that, the appellant was throughout the trial of his case represented by a learned counsel, we entertain no doubt as it was for the learned State Attorney that, no injustice at all was occasioned. We therefore find the first ground of appeal by the appellant to be without basis and we dismiss it.

The second ground of appeal is based on the act of assessors to cross examine the witnesses. The task of assessors during trial in a criminal case is explained under the provisions of section 177 of **the TEA** that:

> *"S. 177 Power of assessors to put questions.*
>
> *In cases tried with the assessors, the assessors may put any questions to the witnesses, through or by leave of the Court, which the Court itself might put and of which it considers proper."*

However, it is the law that the questions which are to be put to the witnesses by assessors under section 177 of **the TEA**, should not be cross examination. And the questions falling under the category of cross examination have been classified under the provisions of section 155 of **the TEA** to be those which are aimed at:

(a) Testing the veracity of the witness;

(b) Discovering who he is and what is his position in life; or

(c) To shake his credit by injuring his character.

The necessary implication therefore from what has been provided by the two provisions of law above that is section 155 and 177 of **the TEA** is that, assessors are not permitted to put questions to the witnesses of the nature falling under section 155 of **the TEA.**

Back to the appeal before us, what we could discern in the proceedings of the trial High Court is that, it is indeed reflected at page 43 of the record of appeal that assessors cross – examined PW1 when she was testifying in Court. Going by what it used to be in the past, the error was fatal and the proceedings would have to be nullified. See: **Chrisantus Msingi Vs Republic** (supra), **Mapuji Mtogwashinge Vs Republic**, Criminal Appeal No. 162 of 2015 and **Kulwa Makomelo and Two Others Vs Republic**, Criminal Appeal No. 15 of 2014 (both unreported). Nevertheless, with the advent of section 3A of **the AJA,** what we had to consider was the issue as to whether or not the questions which were put to the witness by the assessors prejudiced the appellant.

In considering the foregoing, we had to look at the answers which were given by the witness. As correctly submitted by the learned State Attorney, our finding was that the answers which were given by PW1 disclosed that, the questions which were asked to the witness by the

assessors, aimed at mere clarification of what she had already testified in her examination in - chief and nothing else. With such finding, we hold that the cross examination which was made by the assessors to PW1 was not prejudicial to the appellant, the resultant of which is to dismiss this ground of appeal.

We thereafter turn to the third ground of appeal, which is in respect of the post mortem report. This ground is two limbed in that, on the one hand which arose from the content of the ground lodged by the appellant, is whether or not the appellant was denied the right to call the doctor who performed the post mortem examination to appear in Court and get cross examined. The second limb which was raised by the learned counsel from the bar, is whether the person who performed the post mortem to the body of the deceased was unqualified.

After having gone through the records of the trial court, we found the complaint in the first limb of the ground of appeal to be unfounded because, the record is so clear at pages 98 to 99 of the record of appeal that, Rodges Aristides, the medical personnel who conducted the post mortem to the body of the deceased, gave his evidence as PW 6 and was

thereafter, adequately cross-examined by Mr. Mkoba learned counsel, who was representing the appellant during trial.

As regards the second limb, Mr. Rodges Aristides who conducted the post mortem to the body of the deceased, introduced himself during his testimony in Court that he was a Clinical officer. The subsequent question which we had to ask ourselves is, who is a clinical officer? Unfortunately, both learned counsel when prompted by the Court were of little assistance in answering this question. When we googled in Wikipedia, we found a Clinical officer (CO) being defined to mean:

> *"A gazetted officer who is qualified and authorized to practice medicine. A Clinical officer observes, interviews and examines sick and healthy individuals in all specialties to document their health status and applies pathological, radiological, pyschiatric and community health techniques ---"*

Our another attempt of getting the meaning of the term Clinical officer was made in the link of https://ipfs/ where it has been defined to mean:

"A licensed practitioner of medicine in East Africa and parts of Southern Africa, who is trained and authorized to perform general or specialized medical duties such as diagnosis and treatment of disease and injury, ordering and interpreting medical tests, performing routine medical practice ---"

Our understanding of the term "Clinical officer" from the meaning which has been given above, has left us with no doubt that, PW6 was qualified medical personnel, to perform post mortem examination to the body of the deceased and as such, his report was properly accepted by the trial court. To that end, we find the third ground of appeal to be also without merit and we accordingly dismiss it.

The other issue which we had to consider in respect of the appeal before us, is whether on the basis of the evidence that was placed before the learned trial Judge, there was justification by the learned trial Judge to hold the appellant culpable to the charged offence of murder. First and foremost, we noted that, neither the appellant nor his learned counsel ever raised any complaint regarding the evaluation of the evidence which was made by the trial Judge. Such fact notwithstanding, this being the first

appellate Court, we found ourselves legally obligated to step into the shoes of the trial Court and make our own evaluation of the evidence which was relied upon by the trial Court in finding the appellant guilty.

Upon going through the evidence which was given by the six witnesses who were summoned by the Republic and supplemented by five exhibits, as well as the evidence from the appellant who did not call any witness other than himself, we were able to find that, there was a problem with the testimony of one Fatuma Ally Kanga, who testified as PW2. Her testimony was given without being sworn or affirmed. Ordinarily, such type of evidence is given little evidence if any. In the circumstance, we discounted the testimony of this witness and proceeded to consider the testimony of the other remaining witnesses.

And, after earnestly considering the testimonies of the remaining five witnesses and in particular the testimony of PW1 (Upendo Charles), who told the Court that she eye-witnessed the incident, we are fully convinced to join hands with the evaluation which was made by the learned trial Judge that, indeed the appellant killed the deceased. The only subsequent question which we had to consider, was whether the killing was done with malice aforethought.

The decision of the Court in the case of **Enock Kipela Vs Republic,** Criminal Appeal no. 150 of 1994 (unreported), is very instructive when it comes to the question of ascertaining as to whether the killing committed by the appellant was done with malice aforethought or not. It was held thus:

> "--- *usually an attacker will not declare his intention to cause death or grievous bodily harm. Whether or not he had the intention must be ascertained from various factors, including the following:*
>
> *(i) The type and size of the weapon which was used in the attack leading to the death of the deceased;*
>
> *(ii) The amount of force which was used by the attacker in assaulting the deceased;*
>
> *(iii) The part or parts of the body of the deceased where the blow/s of the attacker were directed at or inflicted;*
>
> *(iv) The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
>
> *(v) The kind of injuries inflicted on the deceased's body;*
>
> *(vi) The utterances made by the attacker if any, during, before or after the attack;*
>
> *(vii) The conduct of the attacker before or after the incident of attack."*

When the above named factors are put into test to the circumstances of the appeal at hand, we find that first, the available evidence on record sufficiently established that the killing of the deceased was made with the use of a knife which is a lethal weapon. The same means that the first factor in case of **Enock Kipela** (supra), was met.

Secondly, according to the post mortem examination report, the body of the deceased was found with a huge cut wound around the neck, and there were also other serious cuts on the upper parts of the left arm and the right arm of the deceased. Furthermore, there was a serious cut on the stomach which led the intestine to protrude outside the body. The implication which we got from the foregoing cuts is that **one**, several cuts were made by the appellant on the body of the deceased; **two**, great force was used by the appellant in effecting the blows on the deceased's body and, **three**, that the blows were directed at delicate parts of the body of the deceased the stomach inclusive. In that regard, from the first factor to the fifth factor named in the case of **Enock Kipela Vs Republic** (supra), which are used in establishing malice aforethought were present in this appeal.

In the light of the foregoing, it is our holding that, the learned trial Judge correctly found the appellant guilty to the charged offence of murder, a finding which we accordingly sustain. The appeal by the appellant is therefore without merit and we dismiss it in its entirety.

Order accordingly.

DATED at **DAR ES SALAAM** this 4th day of March, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

THE COURT OF APPEAL OF TANZANIA

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL