IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 220 OF 2016

MATHIAS TANGAWIZI @ LUSHINGE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mlacha, J.)

dated the 14th day of March, 2016
in
Criminal Sessions Case No. 65 of 2010

JUDGMENT OF THE COURT

25th March & 5th April, 2018

KWARIKO, J.A.:

Before the High Court of Tanzania sitting at Geita, the appellant stood charged with Murder contrary to section 196 of the Penal Code [CAP. 16 R.E. 2002] (the Penal Code). It was alleged by the prosecution that, on or about the 24th day of May, 2008 at Kaduda Village within the District of Geita, the appellant murdered his mother–in-law one SOPHIA KAMULI (the deceased). He denied the charge and upon his full trial he was found guilty, convicted and sentenced to the mandatory death sentence by hanging.

Upon being aggrieved by the trial court's decision, the appellant came before this Court on appeal.

We find it pertinent to recapitulate the facts of the case at the trial court as follows. On 24/5/2008 at about 3:00 am the appellant visited at the home of his brother- in- law LUCAS MWENDESHA (PW3) complaining to be sick. PW3 promised to take him to hospital later. Meanwhile, upon request the appellant was given a paper and pen to write something. Moments later, he wanted to use the toilet as he said he had stomach problem. He went there and return. When he went for the second time to the toilet he did not show up. PW3 tried to trace him without success.

In the meantime, at 7:30 am of the same day in the same village, the appellant's farther-in-law SAMWEL NDELEMA (PW1), was on his way to the farm. When he was about 70 paces away from his homestead, he heard his wife, the deceased, crying for help "njooni mnisaidie". When he responded he saw the appellant stabbing the deceased in the back and ribs with a spear. The appellant was seen dressed in black jacket, white shirt and black trousers.

PW1 picked a stick and advanced towards the scene to rescue his wife but the appellant pulled the spear from the deceased's body and threatened to assault him as well. He said "na wewe njoo kama unataka" and he fled. SHIDA JUMA (PW2), a granddaughter of the couple who was living with them heard the deceased's cries and rushed out to find out what the matter was. She witnessed the appellant, his step-father assaulting the deceased before he ran away when PW1 appeared. PW1 and

PW2 raised alarms where people responded to the scene but the deceased had already died.

Earlier, during the preliminary hearing of the case a Post-mortem examination report, sketch plan map of the scene of crime and the appellant's extra judicial statement were admitted as exhibits P1, P2 and P3 respectively. According to exhibit P1 the death of the deceased was due to hemorrhagic shock. The report also showed that the deceased's body had multiple stab wounds in the left side of the waist, anterior abdominal wall, right side of the chest wall and right arm.

In his defence, the appellant, like it was in his extra judicial statement (exhibit P3) and when he was called upon to plead to the charge, admitted killing his mother-in-law but that he had no intention to do so.

The appellant gave an account that he suspected his mother- in- law to be a witch who had caused the death of his child. This is so because the child had come from visit of its grandparents bearing incisions (chale) all over its body which his wife said had been inflicted by traditional doctors as protective rituals (mazindiko). However, in the following days the child suffered from mysterious disease which included unusual sleep patterns characterized by sleep during the day and purging yellow substances. His sister advised him to take the child to hospital which he complied. Unfortunately, the child died on 17/7/2007 while receiving treatment at the hospital. He notified his in-laws of the burial on 18/7/2007 but they did not attend.

It was not until 4/9/2007 when his in-laws, including the deceased came to their home to offer their condolence. The following day when he returned from an errand, his wife served him food and later he saw the in-laws off. Thereafter, he started feeling stomach ache and his suspicion was attributed to the food he had eaten, which his wife said it had been prepared by the deceased.

The appellant accounted further that, his condition worsened and consulted a traditional healer who administered some medicine. He purged rotten meat and yellow substances similar to his child's. It was at that stage that he decided to divorce his wife. From that point, he moved from one traditional healer to the other to be cured in vain. On the material date while he was at the traditional healer, he experienced nose bleed and decided to go to PW3's home to ask them to look after his family as he had lost hope to live. He asked PW3 for a paper to write his Will. Thereafter, he went to the toilet and slept in the potato ridges. When he woke up, he decided to go to the deceased to seek pardon so that he could get cured of his illness.

At the scene he found the deceased preparing firewood but upon seeing him she started running away and she fell down. This act confirmed to the appellant that, the deceased was indeed a witch hence he picked an iron instrument used for digging soil and stabbed her. When he saw PW1 coming, he took to his heels after he realized what he did was wrong. He directly went to consult another traditional healer at Misungwi area where he got better.

When he was cross-examined the appellant said, no any traditional healer had told him that the deceased had bewitched him and that many times before he used to eat food prepared by her. He believed that he could die if he did not kill the deceased, hence he killed to protect his life. He regretted after the act. Although the appellant intended to call one witness on his behalf, he later abandoned the idea.

At the end of the trial, the court found that the prosecution evidence had sufficiently proved that, the appellant killed the deceased with malice aforethought. He was found guilty, convicted and sentenced as shown earlier.

Before this Court, the appellant first on 12/7/2018 filed an eight-grounds memorandum of appeal. Also, on 20/3/2019 the appellant's advocate, Mr. Constantine Mutalemwa, learned counsel filed a memorandum of appeal containing two grounds as follows:-

1. *That the trial judge erred in law for conducting the trial on account that the court was not properly constituted as ages of assessors were not ascertained as mandatorily required under section 266 (1) of the Criminal Procedure Act [CAP. 20 R.E. 2002].*
2. *That the trial judge erred in law for not conducting the trial by recording evidence of each witness in contravention of section 210 (3) of the Criminal Procedure Act [CAP. 20 R.E. 2002].*

Further, on 21/3/2019 Mr. Mutalemwa filed a memorandum of appeal raising a single ground of appeal thus;

> *That the trial judge erred in law for not hearing the advocates for the prosecution and for the defence submitting whether there was no case to answer as required under section 293 (1) of the Criminal Procedure Act [CAP 20 R.E. 2002].*

When the appeal was called on for hearing, Mr. Mutalemwa was granted leave to file one additional ground of appeal. He also abandoned the memorandum of appeal filed by the appellant on 12/7/2018. The additional ground of appeal reads:-

> *That the trial judge erred in law for not convicting the appellant for manslaughter as the malice aforethought/intention to kill was influenced by a belief in witchcraft.*

Now, for ease of reference, the additional ground of appeal will hereinafter be referred to as the first ground of appeal while those filed on 20/3/2019 and 21/3/2019 will be the second, third and fourth grounds of appeal respectively.

At the hearing of the appeal, the appellant appeared along with his counsel Mr. Constantine Mutalemwa, learned advocate, while Ms. Bibiana Kileo, learned Senior State Attorney assisted by Ms. Magreth Mwaseba, learned State Attorney appeared for the respondent Republic.

Mr. Mutalemwa argued the first additional ground of appeal in the main and the other three as alternative grounds of appeal. In the first ground of appeal, he

contended that the appellant's explained sickness and that of his deceased child made him to believe that it was a result of the deceased's acts of witchcraft which affected him so much so that he lost control as a result he killed her. He was thus of the view that such belief reduced the killing to manslaughter and the trial court ought to have convicted the appellant of that offence instead of murder. To fortify his argument, Mr. Mutalemwa referred the Court to its decision in **SHIJA NDIGILA @ SAMWEL & 2 OTHERS v R,** Criminal Appeal No. 400 of 2015 (unreported).

Alternatively, Mr. Mutalemwa submitted in relation to the second ground of appeal which relates to non-compliance by the trial court with the provision of section 266 (1) of the Criminal Procedure Act [CAP. 20 R.E. 2002] (the CPA). He argued that the omission to ascertain the age of the assessors by the trial court goes to the jurisdiction of the court because all criminal trials before the High Court are supposed to be held with the aid of assessors.

In the third ground of appeal, the learned counsel contended that the trial court did not comply with section 210 (3) of the CPA. That, although this provision is applicable to Magistrates, for the interest of justice, this Court can take inspiration therefrom. Two cases of this Court were cited in that respect. These are; **YOHANA MUSSA MAKUBI & ANOTHER v R,** Criminal Appeal No. 556 of 2015 and **TITO MANG'OMBE v R,** Criminal Appeal No. 208 of 2014 (both unreported), in which the Court took inspiration on section 210 (1) of the CPA applicable to Magistrates. He thus urged us to follow suit.

In the fourth ground of appeal, Mr. Mutalemwa submitted that at the close of the prosecution case, the trial judge did not hear the counsel from both sides on whether the appellant had a case to answer as required under section 293 (1) of the CPA. In reference thereof the decision of this Court in the case of **STEPHEN MHORO @ NGAZA SALEHE v R,** Criminal Appeal No. 39 of 2007 (unreported) was cited. He argued further that this omission amounts to denial of the right to be heard which is protected by the Constitution of the United Republic of Tanzania, 1977 vide Article 13 (6) (a) thereof. He charged that the non-compliance occasioned injustice to the appellant. He was of the contention that the omission is not curable under section 388 of the CPA because the appellant was not sufficiently accorded with the opportunity to be heard.

Finally, Mr. Mutalemwa prayed for the Court to quash the proceedings conducted from 10/3/2016 and order a retrial from that date or enter a conviction of manslaughter and sentence the appellant accordingly.

When she took the stage, Ms. Kileo, Senior State Attorney, started by opposing this appeal. She argued in the first main ground of appeal that, only under certain situations can belief of witchcraft reduce the killing from murder to manslaughter. That there ought to be established a defence of provocation which is defined under section 201 of the Penal Code. In our case the appellant said his child died on 17/7/2007 and the deceased and other in -laws came to visit his home in September, 2007 where the deceased was said to have prepared food, he suspected to contain poisonous material. She was thus of the contention that the incident on the material

date on 24/5/2008 could not have been a result of the alleged past incidents. Not even on the material date was there provocation against the appellant. If at all there was anything of that nature, the appellant had time to cool down. She argued further that, not even the alleged traditional healers told the appellant that the deceased was a witch. She referred the Court to the case of **JOHN NDUNGURU v R** [1991] T.L.R 102 which gave circumstances under which belief in witchcraft can be used as a defence. She argued that, if this excuse is allowed it would open a Pandora's Box where anyone could kill another on mere suspicion of witchcraft. That, there should be proof that witchcraft provoked the appellant into the killing. The case of this Court of **BAKARI BAKARI ISMAIL v R,** Criminal Appeal No. 107 of 2013 (unreported) was cited in that respect.

Lastly, Ms. Kileo prayed this Court to find that, the trial court properly convicted the appellant of murder and rightly sentenced him. She was however of the view that, should the Court disagree with them and find that the offence of manslaughter was proved, the same was in the borderline.

On her part, Ms. Mwaseba learned State Attorney argued against the alternative second, third and fourth grounds of appeal. In the second ground of appeal, she contended that section 266 (1) of the CPA does not impose any duty to the court to indicate the age of assessors in its proceedings. Whereas section 273 (4) of the CPA only requires a list of names of assessors in attendance and in compliance thereof the trial judge listed the names of the assessors at page 137 of the record of appeal. When they were given opportunity neither the defence nor the prosecution raised any

objection to any of the assessors. To cement her position, she cited the case of **TONGENI NAATA v R** [1991] T.L.R 54 where in it was observed that prejudice to the accused ought to be proved in case of an omission.

That, the Court cannot be led by inspiration in trial of cases, Ms. Mwaseba argued in the third ground of appeal regarding section 210 (3) of CPA. She charged that section 210 (3) of the CPA was meant to apply to Magistrates. The legislature enacted procedures for each court to follow during trial. If the legislature intended that the procedure under section 210 (3) of the CPA was meant to the High Court as well, it would have provided so specifically. That, had the appellant found the trial court erred, his counsel would have raised that concern thereat. She submitted that the cited case of **YOHANA MUSSA MAKUBI** (supra) is distinguishable in the sense that, it dealt with the authenticity of the proceedings of witnesses' evidence not being signed by the trial judge. And the case of **TITO MANG'OMBE** (supra) related to the issue of assessors cross-examining witnesses contrary to law.

Fourthly, the learned State Attorney argued that, the non-compliance with section 293 (1) of the CPA was not a fatal irregularity. She distinguished the case of **STEPHEN MHORO** (supra) because in that case the accused was not given opportunity to give his defence and was not addressed in terms of section 293 (2) of the CPA regarding his right of defence. She contended that, in the instant case should the defence found they had anything they wanted to raise they had that opportunity to do so during the final closing submissions of the case, which opportunity they were given. The learned State Attorney was of the view that no any injustice was occasioned

to the appellant. She wound-up by urging the Court to find that the appeal has no merit and fit to be dismissed.

In his rejoinder submission, Mr. Mutalemwa argued in relation to the first ground of appeal that the cumulative acts of witchcraft provoked the appellant into killing the deceased. He was of the view that the circumstances in this case are peculiar. That, in **BAKARI BAKARI ISMAIL'S** case (supra) the contention was non-direction to assessors on the issue of witchcraft. The court is at liberty to take that matter on board. He urged the Court to look into the primary motive leading to the attack as was the case in **SHIJA NDIGILA @ SAMWEL** (supra).

In relation to the age of assessors which is the complaint in the second ground of appeal, Mr. Mutalemwa contended that sections 273 and 266 (1) of the CPA ought to be read together. And that there is implied duty under the law for the Court to indicate the age of assessors.

The learned counsel submitted that truly section 210 (3) of the CPA is applicable in the subordinate courts, but he was of the view that there should not be discriminatory application of laws, argued Mr. Mutalemwa in respect of the third ground of appeal. That, it is good practice for the judge to read over the witnesses' evidence to the accused.

Lastly, Mr. Mutalemwa argued that failure to comply with section 293 (1) of the CPA could not be cured by closing submissions by the parties, because these are two different stages of the trial. That, a no case to answer cannot be raised in the closing

submissions and the non-compliance with section 293 (1) of the CPA nullifies the proceedings.

On our part, to start with the first main ground of appeal we find it apposite to be abreast with when killing on provocation is a defence. Section 201 of the Penal Code provides as follows:-

> *"When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in section 202, and before there is time for his passion to cool, he is guilty of manslaughter only."*

And the term provocation is defined under section 202 of the Penal Code thus:-

> *"The term "provocation" means, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered".*

In the same vein, we find it proper to have the meaning of a term **witchcraft.** According to the Longman Dictionary of Contemporary English, New Edition for Advanced Learners, the term **witchcraft** is defined at page 2014 thus:-

"The use of magic powers, especially evil ones, to make things happen."

In our laws, **witchcraft** has been interpreted under section 2 of the Witchcraft Act [CAP. 18 R.E. 2002], as follows:

> ***"witchcraft"*** *includes sorcery, enchantment, bewitching, the use of instrument of witchcraft, the purported exercise of any occult power and the purported possession of any occult knowledge."*

In the case at hand, because the appellant is the one who alleged witchcraft on the part of the deceased, he was the one to prove that the deceased was practicing witchcraft to cause illness to him and killed his child as such. It is our considered view that, apart from mere suspicion the appellant did not show during the trial that the deceased exhibited any witchcraft. No witness came to evidence that the deceased was a witch or suspected in her community to be a witch. As rightly submitted by Ms. Kileo and as held by the Court in **BAKARI BAKARI ISMAIL v R** (supra) thus:-

> *"It is settled that to constitute a defence in a charge of murder the belief in witchcraft must be founded on some physical and not metaphysical act."*

Further, in the case of **FABIANO KINENE s/o MUKYE & 2 OTHERS** [1941] EACA 96, where the appellants caught the deceased crawling about naked in their compound claimed that they killed him as they believed that the deceased was a wizard who had caused the death of their relatives by witchcraft and they caught him in the act. The court held thus:-

"That on the evidence the appellants were entitled to be held to have acted under grave and sudden provocation."

On that holding the court reduced the appellants' convictions of murder to manslaughter. Also, in the cited case of **JOHN NDUNGURU RUDOWIKI v R** (supra), this Court held that:-

"Although mere belief in witchcraft is no defence to a charge of murder, a threat to kill by witchcraft may in certain circumstances constitute legal defence to the charge"

In the instant case the appellant did not say he ever found the deceased in any unusual acts or she ever uttered any witchcraft threats to him to suspect her to be a wizard which would have made him loose control and kill her.

Even if the deceased was a proven witch and caused the death of the appellant's child, could it be said that the appellant was provoked by that act? Our answer to that question is in the negative. This is because the death occurred on 17/7/2007 while the appellant killed the deceased on 24/5/2008. If anything, he had sufficient time to cool down. Further, during the material day there was no any acts by the deceased which might have provoked the appellant. The appellant found the deceased doing her normal chores outside her home when he attacked her. The act of the deceased running after seeing the appellant, if at all she did that, is explainable. She might have found the appellant's visit in the early hours of the morning armed with a spear was unusual, hence was entitled to seek refuge. There was no provocation on the part of the appellant.

The appellant also said in evidence that not even any of his traditional healers told him that the deceased was a witch to have poisoned his mind so much that he killed her. As regards the suspected poisoned food, the appellant said in evidence that it was not the first time that the deceased had prepared food for him when she visited his home in September, 2007.

The foregoing analysis shows that the appellant's belief of witchcraft on the part of the deceased was unfounded. The evidence proved that the appellant had formed intention to kill the deceased and he executed that intention on 24/5/2008. The trial court rightly convicted the appellant with murder and legally sentenced him. This ground of appeal has no merit.

In the second ground of appeal, we find it appropriate to reproduce section 266 (1) of the CPA as follows:-

> *"Subject to the exemptions under the provisions of section 267 and subsection (3) of this section, all persons between the ages of twenty-one and sixty years shall be liable to serve as assessors."*

Therefore, according to the wording of this provision, there is no duty to the court to indicate the age of assessors in the proceedings. For the sake of understanding, it is not the duty of the court to appoint the assessors. This duty has been imposed to the local government authorities as provided under section 69 of the Magistrates' Courts Act [CAP. 11 R.E. 2002], it provides thus:-

"Every local authority shall, before the first day of March in each year, prepare and deliver to the district court a list of suitable persons ordinarily resident within the area of its jurisdiction, who shall be liable to serve as assessors when so required by a court."

Hence, when assessors are selected to serve in the High Court or courts subordinate thereto, the understanding is that all legal requirements pertaining thereof have been taken care of during appointment by the local government authorities. Section 8 of the Magistrates' Courts Act (supra) provides requirements for one to serve as an assessor. The practice in the High Court has been for the Registrar to inquire from relevant authority and the selected assessors whether the ones selected to sit in a particular case still possess the required criteria before they are presented to Court for the trial. However, the law obliges the court to indicate the list of selected assessors to sit in a particular trial. This is under section 273 of the CPA. It is provided thus:-

"At each session the High Court shall cause to be made a list of the names of those who have attended as assessors at the sessions."

In the instant case, as rightly submitted by the learned State Attorney the assessors who sat in the trial were listed as:-

1. Sospeter Makanza,
2. Rashid Mrisho,
3. Mussa Tonny.

These assessors served throughout the trial to its completion. Hence, there was no any omission in the case of the involvement of the assessors. The ground of appeal also fails.

As regards the third ground of appeal, we are in agreement with Ms. Mwaseba learned State Attorney that section 210 (3) of the CPA was enacted to apply to the subordinate courts. It says:-

> *"The magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence."*

Thus, if the legislature imposed the duty to a Magistrate to comply with this provision of law, we don't find any reason why the High Court should draw inspiration therefrom. The legislature purposely enacted that provision. We are of the considered view that the provision was meant to be applicable by Magistrates only. If the parliament intended it to be applicable by the High Court as well, it would not have failed to do so. We find solace on this stance in the Latin Maxim *expressio unius exclusio alterius.* And as rightly submitted by Ms. Mwaseba, the parliament enacted procedures to be followed by each court in the conduct of trials before them. The cited cases are distinguishable in that, the case of **YOHANA MUSSA MAKUBI & ANOTHER** (supra) related to non-compliance by the High Court to authenticate the proceedings by signing the witnesses' evidence. While the case of **TITO**

MANG'OMBE (supra) related to assessors cross-examining the witnesses contrary to law. This ground of appeal lacks merit.

The appellant's complaint in respect of the fourth ground of appeal is non-compliance with section 293 (1) of the CPA by the trial court which provides thus;

> *"When the evidence of the witnesses for the prosecution has been concluded, and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers after hearing the advocates for the prosecution and for the defence, that there is no evidence that the accused or any one of several accused committed the offence or any other offence of which, under the provisions of section 300 to 309 of this Act he is liable to be convicted, shall record a finding of not guilty."*

It is not disputed that after the close of the prosecution case, the trial court did not comply with the cited provision of law to hear the counsel from both sides before it ruled out that the appellant had a case to answer. We are in agreement with the learned State Attorney that this omission is not fatal because it is curable under section 388 of the CPA. This is so because no injustice was occasioned to the appellant as he was represented, and if his counsel found it necessary to be heard at that stage, he would have asked the court to be allowed to do so. Further, the counsel for both parties were given opportunity to give closing submissions where they revisited the evidence on record and the law applicable to the issues in the case. No alarm was raised then. Hence, it cannot be said that the appellant was denied

sufficient opportunity to be heard. The case of **STEPHEN MHORO @ NGAZA SALEHE** (supra) is distinguishable as it concerned violation of section 293 (2) of the CPA which obliges the High Court to address the accused his right of defence after the prosecution case established a prima facie case against him. This ground of appeal too has no merit.

In fine, we find no reason to fault the trial court's decision and hold that the appeal has no merit and we hereby dismiss it in its entirety.

DATED at **MWANZA** this 4th day of April, 2019.

M. S. MBAROUK
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL