IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 507 OF 2016

(CORAM: LILA, J.A., MWAMBEGELE, J.A., And., SEHEL, J.A.)

1. SYLVESTER s/o FULGENCE.....1st APPELLANT

2. VEDASTUS s/o SYLVESTER.....2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment of the High Court of Tanzania at Tabora)

(Kente, J.)

dated the 29th day of October, 2014
in
Criminal Sessions No. 3 of 2013

JUDGMENT OF THE COURT

3rd Dec., & 11th December, 2019

SEHEL, J.A.:

In Criminal Sessions Case No. 3 of 2013 in the High Court of Tanzania at Tabora, the appellants, Sylvester s/o Fulgence and Vedastus s/o Fulgence, who are father and son, respectively were convicted of murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition of 2002 (the PC) for allegedly murdering one Efrazia Tibasana on the 25th day of March, 2011 at Kabinga village within Kibondo District in

Kigoma Region. Upon conviction, the 1st appellant was sentenced to death by hanging whereas the 2nd appellant who was below 18 years of age at the time of the commission of the crime, was ordered to be detained during the President's pleasure in terms of section 26 (2) of the PC. Aggrieved with both the conviction and sentence they appealed to this Court.

The evidence which led to the appellants' conviction was that: on 25th day of March, 2011 after dinner time, Erasto Fulgence (PW2) received information from his brother Herladius about the disappearance of their mother, Efrazia Tibasama who went to fetch firewood from the forest but never came back. Upon receipt of that information, he went to notify his brothers Gerald Fulgence (PW1) and the 1st appellant. The trio decided to go at the deceased's house where they found the door locked. They then went to report the incident to the village chairman who advised them to return to their respective homes as it was night time and that the search will be conducted the next day in the morning.

On the following day at 08:00 hrs a search was mounted involving the villagers and members of the family. According to PW1, the body of the deceased was found in a nearby forest. The police was notified.

They arrived together with Bigilimana Mapigano (PW3), a medical officer at Kakonko Medical Centre. PW3 examined the body of the deceased and opined that the deceased's death was due to severe head injury. At the trial court, PW3 tendered a Post-Morten Examination Report and it was admitted as Exhibit P1.

It was the evidence of PW1 and PW2 that the 1st appellant was not in good terms with his mother (the deceased) because he was accusing the deceased to have bewitched his wife and threatened to kill her on several occasions. They told the trial court that the deceased had at one time reported the 1st appellant to the local leader one Mpanuka who failed to reconcile their difference and that it was the Village Executive Officer who managed to effect settlement. It was further the evidence of PW1 that the 1st appellant admitted during the settlement that he was the one harassing and threatening the deceased but promised to stop the harassments if the deceased could stop bewitching his wife by ensuring that the wife recovered from her illness.

It is not evident from the record of appeal as to when the appellants were arrested. Nevertheless, there is evidence of E. 4320 Detective Corporal Mwaimu (PW5) that he recorded the cautioned

statements of the 1st and 2nd appellants which were admitted, respectively, as Exhibits P3 and P4. It is apt to state here that they were not read after they were admitted in evidence.

The facts further reveals that on the 31st day of March, 2011 the 2nd appellant was taken to the Ward Executive Officer one Morton Barutwa (PW4) to record his Extra Judicial Statement. That statement was also tendered and admitted as Exhibit P2 but it was not read out in court after its admission.

Both appellants, when they took the witness box, denied to have committed the offence. The 1st appellant in his sworn evidence one way or another supported the prosecution case. He conceded that there was a dispute between him and the deceased which resulted from the deceased punishing the 1st appellant's children. He also concurred with the prosecution evidence that he was summoned by the local leaders where the deceased agreed to pardon him and the matter ended there. In his cross-examination he repudiated his cautioned statement.

The 2nd appellant in his sworn testimony retracted both his cautioned and extra judicial statements and alleged that he was tortured and threatened by PW5 to sign the two documents.

At the conclusion of the trial, two out of three assessors who sat with the presiding Judge unanimously returned a verdict of not guilty against the appellants. The learned presiding Judge (Kente, J.) concurred with the other assessor returned a verdict of guilty and, as the result, the appellants were found guilty and convicted. In grounding the convictions against the appellants the presiding Judge relied on the confessions of the appellants and extra judicial statement of the 2nd appellant which he observed that they were corroborated by the evidence of PW3 and Exhibit P1. He also found and held that PW4 and PW5 to be truthful witnesses.

At the end, as already alluded to above, the presiding Judge sentenced the 1st appellant to death by hanging and the 2nd appellant was ordered to be detained during the President's pleasure pursuant to section 26 (2) of the PC. The appellants were each not satisfied with both the convictions and sentences. They separately lodged their

respective notices of appeal followed by the filing of the two separate memoranda of appeal.

Before us, Mr. Method Kabuguzi and Masendeka Ndayanse, learned counsel appeared and represented the 1st and 2nd appellants, respectively.

Mr. Kabuguzi started to roll the ball. He first sought leave to withdraw the Memorandum of Appeal filed on the 8th day of January, 2018 by the 1st appellant and to proceed with the Memorandum of Appeal filed on the 21st day of November, 2019 that advanced four grounds.

Mr. Kabuguzi opted to argue the four grounds of appeal generally and directed himself mainly on the fourth ground that given the circumstance of the case, the 1st appellant's conviction was illegal and unjustified. In elaborating the ground, he contended that the trial of the 1st appellant was seriously flawed with procedural irregularities. He expounded the aspect of irregularities as follows; first, he impressed upon us to find and hold that the trial court ought to have conducted a trial within trial to ascertain the voluntariness of the cautioned

statement and extra judicial statement as there was objection on their admission. When probed by the Court as to whether the objection was in relation to determination of voluntariness of making the statements, he readily conceded that they were not but insisted that since there was objection on the competency of PW4 in tendering Exhibit P2 and the cautioned statements were retracted and repudiated by the appellants in their defence then this Court should find and hold that there was miscarriage of justice and make an order for retrial.

Secondly, he submitted that the procedure of tendering Exhibits P3 and P4 was not followed because PW5 explained in court what was contained in the Exhibits before they were admitted in court as an exhibit. He further argued that even though no objection was raised by the appellant's counsel, the appellants were prejudiced. He charged that the Exhibits ought to have been initially cleared for admission, admitted and then read out. With that flaw, he prayed for Exhibits P3 and P4 to be expunged from the record.

The third procedural irregularity, he argued, was the failure to read out the documents after they were cleared for their admission. He

submitted that Exhibits P2, P3 and P4 after they were admitted in court they were not read out to the appellants. It was his view that such omission occasioned a miscarriage of justice to the appellants as they failed to know the contents of the documents admitted. To support his submission, he referred us to the case of **Issa Hassan Uki v The Republic**, Criminal Appeal No. 129 of 2017 (CAT unreported).

Thirdly, he argued, if for the sake of argument that the exhibits were correctly admitted, looking closely at the documents one will notice that they have no probative value to warrant the conviction of the appellants. He pointed out that it was alleged by the prosecution that the 2nd appellant voluntarily made Exhibits P2 and P4 which are contradictory to each other. He charged that reading through the contents of Exhibit P2, it incriminates the 1st appellant while Exhibit P4 completely exonerates him. He further added that Exhibit P2 was recorded in attendance of another person going by the name Eva d/o Mwaitege, who was an office attendant. Another anomaly which he believed could water down the reliability of Exhibits P3 and P4 was the fact that they do not indicate the time the recording of the statements ended. They only show at the front of each statement two different

times. For instance, he pointed out, it is shown at Exhibit P3 that it was recorded on the 26th day of March, 2011 at 17:30 hrs and 18:15 hrs. With those two different times, he charged one cannot say with certainty the time of commencement of the interrogation.

He concluded his submission by urging us to expunge the three exhibits tendered as they were tendered in contravention of laid down procedures and for the appellants to be set free.

Mr. Ndayanse, like his learned friend Mr. Kabuguzi, sought leave to withdraw the Memorandum of Appeal filed on the 8th day of January, 2018 by the 2nd appellant and to proceed with the Memorandum of Appeal filed on the 22nd day of November, 2019. He then fully adopted the submissions made by Mr. Kabuguzi with an addition that PW4 being Ward Executive Officer had no powers and authority to record the Extra Judicial Statement of the 2nd appellant. He, however, failed to substantiate his submission because he could not recall the exact year or number of the Government Notice that exonerated the Ward Executive Officer from being Justice of Peace recording extra judicial statements. The only authority that he was able to refer us to was the

case of **Juma Ali v The Republic** [2006] T.L.R 320 where the cautioned statement recorded by a police officer who had no authority was held to be inadmissible. He thus beseeched us to hold that since PW4 had no authority then Exhibit P2 could not have been received as evidence.

He concluded his submission by praying for the Exhibits to be expunged and appellants be set free as there is no other evidence to convict the appellants with the offence of murder.

On the other hand, the respondent Republic was represented by Mr. Deusdedit Rwegira, learned Senior State Attorney, who supported the appeal on the sole ground that Exhibits P2, P3, and P4 were not read out after they were admitted. He argued that although that omission was highly prejudicial to the appellants but does not warrant for them to be set free. He thus pressed for an order of retrial because he argued that the appellants are not disputing the truthfulness of the contents of the Exhibits and this Court should find and hold that the appellants gave detailed account on how they plotted on the commission of the crime. After the Court adverted him to his prayer for the exhibits to be expunged, he withdrew the prayer for retrial.

On the authority of PW4 to record the extra judicial statements, Mr. Rwegira eloquently addressed us from where PW4 derived his mandate for recording the said extra judicial statement of the 2nd appellant. He tendered a Government Notice No. 369 published on the 29th day of September, 2004 (the G.N.) made under section 51 (2) of the Magistrates' Courts Act, Cap 11 Revised Edition 2002 (the MCA) which indicated that Ward Executive Officers are appointed by the Minister responsible of justice to be justices of peace. He argued that the G.N has to be read in conjunction with sections 51 and 57 of the MCA where justices of peace have been mandated to hear, take and record the confessions of persons in the custody of a police officer. With that authority, he contended that PW4 had mandate to record the extra judicial statement of the 2nd appellant.

We have carefully heard the conceding arguments and from their submissions our main task is to determine whether the procedure in admitting exhibits P2, P3 and P4 was flawed and if so, whether such omission occasioned a miscarriage of justice to the appellants.

We shall start by asserting that under section 27 (1) of the Evidence Act, Cap 6 Revised Edition of 2002, a confession made to a

police officer is admissible and may be proved against an accused person, if it is proved that it is voluntary and lawfully recorded in accordance with the provisions of the provisions of the Criminal Procedure Act, Cap 20 Revised Editions 2002 (the CPA). Similarly, a statement made to the Justice of Peace in compliance with the Chief Justice's instructions is admissible and may be proved against the maker pursuant to section 59 of the MCA. The instruction issued by the Chief Justice was published in a booklet titled "*A Guide for Justice of the Peace*" which contain, inter alia, the manner of taking extra Judicial statements from 1st July, 1964 the date when the Magistrates Courts Act, Cap. 537 came into force. See:- The case of **Japhet Thadei Msigwa v The Repubic**, Criminal Appeal No. 367 of 2008 (unreported). The said instructions have now been revised and updated in a booklet titled "*A Handbook for Magistrates in the Primary Courts*" published by the Judiciary of Tanzania with the support of the World Bank dated January, 2019.

That apart, we have held in several occasions without number that whenever it is intended to introduce in evidence any documentary evidence, it should first be cleared for admission and be actually

admitted before it can be read out. See the cases of **Robison Mwanjisi and 3 Others v The Republic** [2003] T.L.R 218; **Walii Abdallah Kibutwa and 2 Others v The Republic**, Criminal Appeal No. 181 of 2006; **Omari Iddi Mbezi v The Republic**, Criminal Appeal No. 227 of 2009; **Said s/o Masolwa @ Bunga and Another v The Republic**, Criminal Appeals No. 322 and 323 of 2009; and **Dalali Mwalongo v The Republic**, Criminal Appeal No. 27 of 2017 (all unreported).

Further in the case of **Twaha Ali and 5 Others v The Republic**, Criminal Appeal No, 78 of 2004 (unreported) we emphasized the importance and necessity for the trial courts not only to inform accused persons of their right to say anything in connection with the intended documentary evidence but also the duty to record faithfully what an accused person says in response. We then said:

> *"Accuseds' procedural rights are there to be strictly observed not only for their benefit but also to ensure that justice is done in the case."*

If an accused person does not object to the tendering of the document and that document is admitted and its contents read over

then he cannot, at a later stage, be heard in objection raised thereafter in respect of its voluntariness. We held so in the case of **Emmanuel Lohay and Another v The Republic**, Criminal Appeal No. 278 of 2010 (unreported) where we said:

> *"With respect, it is too late in the day for them to do so because their admissibility or otherwise was never raised at the trial. As a matter of general principle an appellate court cannot allow matters that were not raised and decided by the court(s) below. In the instant case the objection, if any, ought to have been taken under Section 27 of the Evidence Act that the statements were not made voluntarily or that they were not made at all. Objection could have also been taken under Section 169 of the Criminal Procedure Act that they were taken in violation of the CPA, etc. If objection had been taken under section 27 above the trial court would have been duty bound to conduct a trial within trial to determine the admissibility or otherwise of the statements. It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must*

*do so before it is admitted and not during cross-examination or during defence – **Shihoze Semi and Another v The Republic** [1992] TLR 330. In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

Once a document has been cleared for admission and admitted in evidence, it must be read out in court in order to enable not only the accused person but also, in certain cases as the case at hand, the assessors, know and appreciate the contents and substance of that documentary evidence. Failure to do so occasioned a serious error amounting to miscarriage of justice. See:- **Sunni Amman Awenda v The Republic**, Criminal Appeal No 393 of 2013; **Jumanne Mohamed and 2 Others v The Republic**, Criminal Appeal No. 534 of 2015; **Manje Yohana and Another v The Republic**, Criminal Appeal No. 147 of 2016 (All unreported); and **Issa Hassan Uki v The Republic** (supra).

For instance in **Issa Hassan Uki v The Republic** (supra) where the valuation report, exhibit P3 was admitted in evidence but not read out in court after admission, having referred to the cases of **Thomas Pius v The Republic** and **Jumanne Mohamed & 2 Others v The Republic** (supra) we said:

> *"Admittedly, Ext. P3 was admitted in evidence and the proceedings do not show if the same was read out in court after admission. This omission is fatal as we held in a number of cases including* ***Thomas Pius*** *and* ***Jumanne Mohamed*** *(supra)....It is fairly settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court. In* ***Thomas Pius*** *the documents under discussion were: Post Mortem Report, cautioned statement, extra-judicial statement and sketch map. We relied on our previous unreported decision of* ***Sunni Amman Awenda v The Republic****, Criminal Appeal No. 393 of 2013 to hold that the omission to read them out was a fatal irregularity as it deprived the parties to hear what they were all about."*

In the present appeal, it is borne out by the record of appeal at pages 44 and 45, when PW5 was testifying, he informed the trial court that he had interviewed the appellants and thereupon he recounted to the trial court what was told to him for recoding. Thereafter, he prayed to tender the appellant's cautioned statements. The record further shows that the appellants were given a chance to comment. The comment was given by the appellants through their advocate, Mr. Ndayanse, who also represented both of them at the trial court. Mr Ndayanse told the trial court thus:

> *"My Lord, these statements have a shortfall in law but we will disclose it in our questions, during cross-examination"*

It is not clear what the learned counsel meant in his response but it seems that he did not have an issue on voluntariness of the cautioned statements. Given that response, the trial court rightly so received the documents and they were marked as Exhibits P3 and P4, respectively. Unfortunately, after they were admitted, they were not read out to the appellants. The omission committed by the trial court was in our firm view, a fundamental and incurable irregularity and it greatly prejudiced

them as it deprived the appellants to know and understand the nature and substance of the prosecution case for them to mount a proper defence. Without doubt, that omission leads to the admitted confessional statements being expunged from the record. We, accordingly, expunge from the record the cautioned statements, Exhibits P3 and P4.

The same irregularity was committed during the admission of the extra judicial statement of the 2nd appellant made to PW4. At page 37 of the record shows that when PW4 was testifying he furnished the contents of the extra judicial statement and thereafter he prayed to tender it. The statement was admitted but after an objection for its tendering was overruled by the trial court. The objection raised is the same objection which Mr. Ndayanse had raised in this appeal that PW4 had no authority to record the statement. We hasten to say that it was rightly overruled. As correctly submitted by the learned Senior State Attorney, and we fully agree with him, that pursuant to the GN read together with sections 51 (2) and 57 of the MCA, PW4 had mandate and powers to hear, take and record the confession of the 2nd appellant who

was in the custody of Kakonko police. We thus failed to see any merit on this complaint.

Having digressed a bit we come back to the issue at hand. From the record of appeal, after extra judicial statement was admitted, it was not read out in court. Since, it was not read out then it suffers the same consequence of being expunged from the record. We thus proceed to expunge Exhibit P2 from the record.

For the sake of completeness and future guidance, we find it instructive to point out that although we agree that it was highly improper on the way PW4 and PW5 introduced the documents which they intended to tender but taking into account the exhibits were not objected for their admission and they were actually admitted then no prejudice was occasioned to the appellants. We are fortified to hold that from what we said in the case of **Said s/o Masolwa @ Bunga and Another v The Republic**, Criminal Appeals No. 322 and 323 of 2009 (unreported) where the cautioned statement of the 2nd appellant was narrated in court by PW3 before it was tendered as evidence, thus:

> *"The assessors were not supposed to hear the evidence before it was adjudged admissible. This*

can only happen after a trial within a trial has been conducted. It was highly irregular for PW3 to narrate in the presence of the assessors the contents of Exhibit P2, the cautioned statement of the 2nd appellant before the admissibility of the said piece of evidence was determined. If the court had decided that Exhibit P2 is in-admissible then the assessors would have heard prejudicial, in-admissible evidence. A trial within a trial is conducted to establish whether or not the confession was voluntary .... In taking in consideration the circumstances of this case and the fact that the 2nd appellant was not prejudiced in any way, we are of the considered view that there was no miscarriage of justice."

In this appeal we still find and hold the same position that since the cautioned and extra judicial statements were admitted in court there was no prejudice occasioned to the appellants as such the complaint that its contents were narrated by the witnesses before admission lacks merit.

Having expunged Exhibits P2, P3, and P4 there is no other evidence to support the conviction and sentence of the appellants. The

case against the appellants stood or fell on those exhibits. In the event, we find merit in the appeal by the appellants and allow it. We quash the conviction and set aside the sentence. We order the immediate release of the appellants namely Sylvester s/o Fulgence and Vedastus s/o Sylvester from prison unless they are being held for any other lawful purpose. It is so ordered.

DATED at **TABORA** this 10th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2019 in the presence of Mr. Tito Mwakalinga, learned State Attorney holding brief for Mr. Method Kabuguzi for the 1st appellant, also holding brief for Mr. Masendeka Ndayanse, learned counsel for 2nd appellant and Mr. Tito Mwakalinga, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL