IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A, KOROSSO, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 498 OF 2017

EDGAR S/O KAYUMBA.....APPELLANT

VERSUS

D.P. P.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Sumbawanga)

(Mgetta, J.)

Dated the 11th day of October, 2017
in
Criminal Sessions No. 5 of 2014
.....

JUDGMENT OF THE COURT

27th March & 2nd April, 2020.

KITUSI, J.A.:

At Kavifuti village within Sumbawanga District in Rukwa Region, a man known as Peter Jekap died as a result of being hit on his head and shoulder by an axe. Edgar Kayumbi, the appellant, was charged for the murder of Peter Jekap, under section 196 of the Penal Code [Cap. 16 R.E. 2002], the prosecution alleging that he is the one who administered the fatal blow. The trial High Court convicted the appellant and sentenced him to death by hanging. He appeals hereto.

The genesis of the case is that, on 30/1/2013 in the morning the deceased left his home with his two sons Didas Jekap (PW1) and Feliciano Jekap (PW2) heading for their shamba, but they never reached their destination. As they moved towards the shamba they had to stop by the appellant's house which is along the path leading to the shamba, because the appellant asked the deceased to go into the house so as to help him lift his ailing mother on to a bicycle in order that she could be taken to hospital. The deceased agreed and went to the appellant's house. He held steady the bicycle which was at the doorstep waiting for the appellant who had gone into the house, presumably to bring the patient. However, instead of bringing out the ailing woman the appellant got out holding an axe in his hands with which he hacked the deceased on the shoulder, neck, head and leg. PW1 and PW2 who were right there about twenty steps from the house, raised alarms but the appellant escaped into a nearby forest, and was not to be found until much later, as it will be shown.

Among the people who responded to the alarm were Juma Parson (PW3) Bernard Paulo Saidi (PW4) and Charles Mbalazi (PW5). The latter was the ten-cell leader of the area and went to inform PW3,

the then Acting Village Executive Officer (VEO). They all found the deceased lying on a pool of blood with cut wounds on his shoulder head and leg and he told them that it was the appellant who attacked him. The deceased was taken to hospital where he died on 18/2/2013.

The Report on Post-mortem Examination shows that death resulted from "Injury to spinal vertebral column."

PW1 and PW2 testified that the deceased told them that the appellant had gone to consult a witch doctor who told him that the deceased was a witch, and that was the reason for the attack.

According to DC Masuke (PW6) the appellant was arrested on 3/6/2013 about 5 months later, in Tunduma, and this is not a matter in dispute because in his sworn testimony the appellant referred to the same date of his arrest. On 26/6/2013 the appellant recorded an extra judicial statement before Rosta Mofuga (PW7), a Primary Court Magistrate at Sumbawanga. The appellant repudiated the statement and disowned the signature appended to it. The trial court ordered the opinion of a handwriting expert from identification Bureau be obtained so as to establish if the signature on the statement was or was not of the appellant. Hearing of the case was then adjourned.

At a resumed hearing after one year, Mr. Kampakasa who was representing the appellant withdrew the objection as to signature. This came when the report from Identification Bureau had been received although, following the withdrawal of the objection, its contents were not disclosed. The extra judiciary statement was thus admitted as Exhibit P3 without objection.

In defence the appellant stated that on the date and time of the alleged attack on the deceased he was not around as he had gone to attend to his shamba, which means he could not have been the one who dealt the fatal blow on the deceased at his residence. He admitted that he was arrested at Tunduma on 3/6/2013 where he had gone on business ventures of buying sardine fish. During cross examinations the appellant said he had gone to Tunduma in June, 2013 and was arrested within the same month on 3/6/2013. We take note that if the appellant's version is to go by, then it tends to suggest that he was arrested within a day or two of his arrival in Tunduma because he claims he went there in June and was arrested on 3/6/2013.

The appellant totally denied killing the deceased and stated that the prosecution case had not been proved against him beyond reasonable doubt. He prayed to be acquitted.

In convicting the appellant the High Court believed the version of PW1 and PW2, the eye witnesses to the attack on the deceased, as seen at page 87 of the record where the learned Judge stated: -

> *"I think under the circumstances of this case, I don't have a reason as also opined by court assessors, to disbelieve or doubt such articulated evidence of PW1 Didas and PW2 Feliciano. They witnessed him cutting the deceased. They identified him during the material morning time and saw him disappearing in a nearest forest."*

The learned judge also considered the extra judicial statement and concluded that it contains a confession by the appellant that he caused the death. Nothing was said of the defence case, and that is the major and only ground of this appeal.

At the hearing, the appellant though present in person, was represented by Mr. James Berdon Kyando, learned advocate. The respondent Director of Public Prosecutions was represented by Mr. Fadhili Mwandoloma, Senior State Attorney and M/s Irene Mwabeza, learned State Attorney. Six grounds of appeal had initially been raised in the Memorandum of Appeal but Mr. Kyando dropped the first five grounds and retained the 6th ground which challenges the trial court for disregarding the defence case. He had two additional grounds to argue and we allowed him to.

However, before addressing the substantive grounds of appeal, Mr. Kyando sought and we granted him leave to address the issue of improper summing up to assessors, which sadly, is increasingly becoming a perennial problem in trials before the High Court.

The complaint on the summing up was that the learned judge directed the assessors on a fact that was alien to the proceedings because it had not been testified on by the witness. This point was not hard to see and Mr. Mwandoloma conceded that at page 59 the trial judge directed the assessors to a fact which had not been testified on by PW3. The learned judge told the assessors that the deceased

informed PW3 that the appellant had attacked him on suspicions of witchcraft, but that was not the case.

When this fact was conceded to by Mr. Mwandoloma, the learned counsel for the appellant moved the Court to nullify the proceedings and order a retrial, picking a leaf from our decision in **Shija Sosoma v. DPP,** Criminal Appeal No. 327 of 2017 (unreported). Mr. Mwandoloma was opposed to the prayer for a retrial, arguing that the case of **Shija Sosoma** (*supra*) is distinguishable from this case. He submitted that in **Shija Sosoma**, the words which the judge introduced in the proceedings were totally new, whereas in this case the issue of witchcraft was testified on by PW1 and PW2 therefore not new. The words were new only in respect of PW3, he submitted.

We now turn to the new issues. Mr. Kyando had two new issues but we allowed him to argue only one under this category, which is that two exhibits were not read after being admitted. Again, this was readily conceded to by the learned Senior State Attorney that the Postmortem Report and the sketch map were not read after admission. Mr. Kyando prayed that the two exhibits be expunged, and cited the case of **Nkolozi Sawa & Another v. Republic,** Criminal Appeal No. 574 of

2016 (unreported). The second new ground is that the trial High Court did not consider the defence of *alibi*. This, we thought, could be argued along with the substantive ground of appeal which, as earlier said, attacks the trial court for disregarding the defence case.

Mr. Kyando had earlier filed written submissions in respect of the 6th ground of appeal alleging failure by the trial High Court to consider the defence case. We shall now take a look at counsel's written arguments on that ground. The learned counsel argued that the appellant had denied making the extra judicial statement and raised an *alibi* even though it was not preceded by a notice. In the learned counsel's view the omission to address these points vitiated the trial because the appellant was denied the right to a fair trial. He referred us to the cases of **Elias Mwaitambila and 5 Others v. Republic,** Criminal Appeal No. 412 of 2013 (unreported) and **Amir Mohamed v. Republic,** [1994] TLR 138. Counsel invited us to exercise our powers of revision under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002], nullify the proceedings, quash the conviction and set aside the sentence.

Once again, Mr. Mwandoloma conceded that the trial judge turned a blind eye to the defence case, but the leaned Senior State Attorney did not consider this to be a ground for ordering a retrial. The reason for taking that view according to Mr. Mwandoloma is that this Court has powers to re-evaluate the evidence, and in doing so it shall consider the defence case. In a short rejoinder, Mr. Kyando submitted that irrespective of the Court's power to re-evaluate the evidence on first appeal, it is in the interest of justice in this case to order a retrial.

After hearing the learned arguments, we think we should remove the chuff first and deal with the grain later. First of all, the omission to read the documentary exhibits after admission is an irregularity which may not be cured. The case of **Robison Mwanjisi v. Republic** [2003] TLR 218 and a score of other decisions have long settled the position on this area. Thus, the documents in question, that is, the Report on Post Mortem Examination and the sketch map are hereby expunged from the record.

Next is the issue of summing up. Agreed, the learned trial judge smuggled into the summing up notes some facts which were not stated

by PW3 during his testimony. The relevant part in the summing up is found at page 59 and goes thus: -

> *"PW3 Juma went on asserting that upon asking him as to why the accused person assaulted him causing him suffer such serious injuries on the shoulder, back and leg; the accused replied that the accused person claimed that he bewitched his mother who was sick..."*

However, we drew the attention of Mr. Kyando to the testimonies of PW1 and PW2 in which they stated the cause for the attack on their father as being allegations of witchcraft. Mr. Kyando conceded that the issue was, in view of that, not extraneous. He however maintained that the assessors were influenced because PW3 was the Acting VEO. We took the learned counsel to page 72 of the record where it is clear that the assessors' opinions were greatly influenced by what was stated by PW1 and PW2. The learned counsel maintained his position.

We agree that in **Shija Sosoma** the Court nullified proceedings because of introduction of extraneous matters into the summing up. The same was done in the case of **Yustine Robert v. Republic**,

Criminal Appeal No. 329 of 2017 (unreported). As rightly submitted by Mr. Mwandoloma, in those cases the learned trial judges introduced new and totally irrelevant facts which were not in the testimonies of witnesses. This case is different because the word being referred to as new was, in fact, testified to by two witnesses.

Besides, it is clear to us that Mr. Kyando is making the proverbial mountain out of a molehill, because with or without witchcraft, the main issue in this case is whether the appellant is the one who caused the injuries that led to the deceased's death. Since witchcraft has not been raised as a defence it is not, in our view, a vital point that would have any influence in the minds of the assessors. With respect we decline the invitation to nullify the proceedings on the ground of summing up.

Lastly, we consider the substantive ground of appeal, which is double edged, in our view. The learned trial judge is criticized first, for generally not considering the defence and specifically for not considering the defence of *alibi*. The appellant's *alibi,* though not formally raised, was that at the time of the alleged attack on the deceased he was away to his farmland.

We shall first consider an auxiliary issue in relation to this, whether we should outright order a retrial or re-evaluate the evidence. Mr. Kyando clings to the view that we should order a retrial even though we have powers to re-evaluate the evidence. With respect, we cannot agree with the learned counsel because that will amount to abdication of our duty as it is settled law that the first appeal is always in a form of a re-hearing. See **Kasema Sindano v. Republic**, Criminal Appeal No. 214 of 2006, **Fatai Said Mtanda v. Republic,** Criminal Appeal No. 249 of 2014, **Vuyo Jack v. DPP,** Criminal Appeal No. 334 of 2016 (all unreported).

We are now left with one issue, whether the appellant is the one who caused on the deceased injuries that led to his death. In answering this issue, we are going to re-evaluate the evidence including the defence case in which the defence of *alibi* was raised. We remember that we expunged the Post Mortem Report, but we are aware that death may be proved otherwise than by medical evidence. See the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (unreported) and many others. On the evidence of PW1, PW2, PW3 and even the appellant himself we entertain no doubt that

Peter Jekap died and died an unnatural death after he was attacked by an axe on 30/1/2013.

Earlier we said that the trial judge's conclusion that it is the appellant who attacked the deceased was based on two threads of evidence. The first was the evidence of PW1 and PW2, and the second was the extra judicial statement that was recorded by PW7. We shall begin re-evaluating the latter.

Objection to the admissibility of the extra judicial statement was withdrawn. Considering that fact and the evidence of PW7, the justice of the peace, we have no doubt that the appellant made that statement. In the appellant's defence and during the hearing of this appeal it has been argued that the appellant did not make the extra judicial statement to PW7. But we think that is an afterthought and we cannot accept it because the objection was withdrawn. There is no basis for faulting the learned trial judge in his conclusion that the extra judicial statement was, in fact, made by the appellant.

The learned trial judge after reproducing some relevant parts of the extra judicial statement and evaluating it concluded that the statement amounted to a confession. With respect we think it does not.

If read carefully, the statement appears to show that when the appellant attacked the deceased, he believed he was attacking something which was not an ordinary human being. This is what we understand from the following excerpt: -

> *"Pia mama alinieleza kuwa mtu huyo alikuwa katika mazingira ya utata kwani alikuwa uchi kabisa na hata mimi nilipoangaza nilimuona mtu huyo yuko nyuma ya mlango na nilipomuuliza hakumjibu ndipo nilipochukua shoka na kumpiga..."*

We take the above statement to be exculpatory as it qualifies the attack on the person and negates an intent to cause death or grievous harm to a human being.

Let us now consider the evidence of PW1 and PW2, the second thread of evidence on which the conviction was based. They testified that they saw the appellant attack their father with the axe after he had lured him to go to his house to give him a hand. Thereafter the appellant escaped into a forest after threatening PW1 and PW2 when they tried to intervene. According to PW6, the appellant went at large

until when he was arrested at Tunduma, within Momba District, five months later.

On the other hand, the appellant said he was not at the scene of crime because he was at his shamba with his wife. The learned trial judge accepted the version of PW1 and PW2. In the submission of the learned counsel for the appellant it has not been suggested that these witnesses should not have been believed.

First of all, the fact that the deceased was found injured at the appellant's compound is undisputed. It has been testified to by PW3, PW4 and PW5. The appellant does not dispute that fact but he says that he was not at home.

It is the prosecution's word against the appellant's. We earlier reproduced the trial judge's finding as regards the evidence of PW1 and PW2 at page 87. PW1 and PW2 knew the appellant well and the alleged attack took place in broad daylight at the appellant's homestead. In the absence of a suggestion of grudge, we have no reason for differing with the conclusion that was reached by the learned trial judge on the point. Like the trial judge we are undoubtedly satisfied that PW1 and PW2 saw the appellant attack their father, the deceased. Within the

same breath we wish to state that the defence of *alibi* that was raised by the appellant does not introduce a reasonable doubt in the prosecution's case in view of the strong evidence of eye witnesses. In **Abdallah Hamisi Salim @ Simba v Republic**, Criminal Appeal No. 68 of 2008 (unreported), the Court said;

> *"It follows that the trial High Court having believed PW1 and PW2 on the evidence of identification of the appellant, the defence of alibi died a natural death".*

Similarly, in this case, having found no reason to doubt the version of PW1 and PW2 that they witnessed the appellant attack their father, the defence of *alibi* is rendered lame.

In the end, while we agree with the learned counsel for the appellant that the trial court did not consider the defence case, on our evaluation of the evidence for the prosecution we are satisfied that the guilt of the appellant was proved through the evidence of PW1 and PW2 beyond reasonable doubt. After considering the defence case, especially that of alibi, we see nothing that would displace the

prosecution case. Accordingly this appeal has no merit, it is dismissed in its entirety.

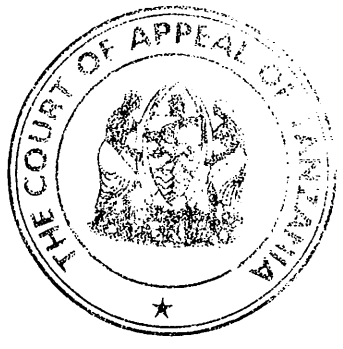
DATED at **MBEYA** this 1st day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of April, 2020 in the presence of the Mr. James Kyando, counsel for the Appellant and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL