IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MUGASHA, J.A. MWANGESI, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 40 OF 2017

SAMWEL JAPHET KAHAYA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

[Appeal from the conviction and sentence of the High Court of Tanzania at Arusha]

(Massengi, J.)

Dated the 12th day of May, 2015
in
Criminal Session Case No. 55 of 2014

JUDGMENT OF THE COURT

18th March & 2nd April, 2020

WAMBALI, J.A.:

The High Court of Tanzania at Arusha (Masengi, J.) convicted Samwel Japhet Kahaya, the appellant of the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002]. Consequently, the appellant was sentenced to suffer death by hanging.

At the trial the prosecution paraded nine witnesses and tendered four exhibits namely, the record of search by police officer, certificate regarding exhibits, sketch map and post mortem report which were admitted as PE1, PE2, PE3 and PE4 respectively. The appellant was the only witness in his defence but he strenuously defended his innocence.

Nonetheless, at the height of the trial, the learned trial Judge was fully convinced that the prosecution proved the case beyond reasonable doubt that the appellant killed his wife one Marietha Shinael Minja on 14th September, 2013 at Mapea Village within Babati District in Manyara Region. He was therefore convicted and sentenced as alluded to above.

After the delivery of the decision, the appellant thought that the learned trial Judge was not justified to reach the conclusion that he was fully to blame for the murder, hence this appeal.

In this appeal the appellant has preferred ten grounds of appeal. However, having thoroughly scrutinized the respective grounds, we are of the considered opinion that the same can be compressed into two grounds. One, that the prosecution did not prove the case against the appellant beyond reasonable doubts. Two, that the circumstantial evidence which was relied upon by the trial court to convict the appellant was not conclusive as its chain was disjointed to the extent of not leading to the conclusion that none other than the appellant caused the death of the deceased.

Nevertheless, for the reasons which will be apparent shortly, we do not intend to reproduce the respective grounds of appeal comprised in the memorandum of appeal herein below.

At the hearing of the appeal, Mr. Julius Sabuni who was duly assigned to represent the appellant appeared to prosecute the appeal. On the adversary, the respondent Republic was duly represented by Ms. Tarsila Gervas Assenga and Mr. Ahmed Matitu both learned Senior State Attorneys.

It is not out of place to point out that as expected, Mr. Sabuni was the first to submit on the two compressed grounds of appeal in support of the appellant's appeal and urged us to allow the appeal.

However, as it turned out, when Ms. Assenga rose to respond to the submission of Mr. Sabuni, she out rightly supported the appeal, but for different reasons. In her submission, she pointed out two procedural irregularities which surrounded the appellant's trial at the High Court. In her view, the procedural irregularities fundamentally vitiated the trial.

Submitting on the procedural irregularities that clouded the appellant's trial, the learned Senior State Attorney, firstly, contended that the trial court Judge allowed assessors to cross examine witnesses contrary

to the requirement of the law. To this end, she argued that in terms of section 177 of the Evidence Act [Cap, 6 R.E. 2002] (the Evidence Act), assessors are only required to put questions to the witnesses and not to cross-examine as it happened in the case at hand. In the circumstances, Ms Assenga submitted that allowing assessors to cross examine witnesses was a fatal irregularity which vitiated the trial.

Secondly, Ms. Assenga submitted that the exhibits, namely, the sketch map (PE3) and the post mortem report (PE4) which were admitted at the trial were not read over so that the contents thereof could be made known to the appellant as required by law. She thus submitted that the said failure disabled the appellant to understand the contents and as a result, his counsel could not put proper questions to the witnesses who tendered the requisite exhibits. In the event, the learned Senior State Attorney prayed that both exhibits be expunged from the record of appeal.

In the premises, Ms. Assenga contended that since cross examination of the witnesses by assessors vitiated the trial and rendered it a nullity, ordinarily the respondent Republic could have prayed for the Court to order a retrial. However, she argued that in the circumstances of the present case if the exhibits PE3 and PE4 are expunged, a retrial is not worthy as

there is no evidence in the record of appeal to support the prosecution case.

The learned Senior State Attorney explained further that her argument against a retrial is due to the reasons, among others that the evidence which remains in the record of appeal cannot even prove that the skull and the skeleton that was found at the crime scene was that of the deceased, since no impeccable scientific evidence was tendered at the trial to reach that conclusion.

Furthermore, Ms. Assenga submitted that some of the crucial witnesses including a person (Dorkas Eliya) who was mentioned to have handed over the clothes of the deceased to Julius Lyimo (PW1) on explanation that they were sent to her by the appellant were not called to testify at the trial. In her argument, failure of the prosecution to summon such an important witness was sufficient to have moved the trial court to draw an adverse inference to the prosecution case. To support her submission she referred us to the decision of the Court in **Aziz Abdallah v. The Republic** (1991) TLR 71 which was referred and acknowledged to be a sound observation by the Court in **Rahel Mhando v. The Republic**, Criminal Appeal No. 54 of 2017 (unreported).

In the end, in view of the pointed out fundamental irregularities, the learned Senior State Attorney did not wish to discuss the two compressed grounds of appeal as most of them touched on the substance of the entire evidence in the record of appeal. She thus concluded her submission by urging us to allow the appeal and set the appellant at liberty.

In his brief response, Mr. Sabuni entirely agreed with the submission of Ms. Assenga. He however, added that the circumstantial evidence in the record of appeal which was relied upon by the trial court to convict the appellant was not conclusive as required by law. The learned counsel argued that even the evidence of Neema Samwel Japhet (PW2) and Japhet Samwel (PW3), the children of the appellant and deceased which was heavily relied upon by the trial judge to convict the appellant was not credible to the extent of being relied upon to ground the appellant's conviction. He submitted that the evidence of PW2 and PW3 apart from being contradictory was not corroborated by any other witness who testified for the prosecution.

Generally, Mr. Sabuni was of the firm view that the prosecution evidence taken together left doubt as to whether it is the appellant who killed the deceased or someone else. The learned counsel maintained that the prosecution did not sufficiently prove that the appellant was the last

person to be seen with the deceased before she met her death on the fateful day. Indeed, he joined hands with the learned Senior State Attorney who expressed her doubts as to whether the skeleton and the skull which were found at two adjacent areas at Mapea village were really that of the deceased. Mr. Sabuni argued further that as correctly stated by Ms. Assenga no scientific evidence was tendered at the trial to enable the trial Judge to arrive to the said conclusion.

In the end, Mr. Sabuni prayed that the appeal be allowed and the appellant be set at liberty since a retrial would not be in the interest of justice in view of the weak prosecution evidence in the record of appeal. Besides, he submitted, a retrial will enable the prosecution to fill the gaps to cover up and strengthen the weak evidence.

Having heard counsel for the parties, we think, we better start to deal with the issue of procedural irregularities before considering the way forward.

We have closely examined the record of the trial court proceedings in the record of appeal concerning cross examination of witnesses by assessors. Admittedly, we note that this is one of the case in which assessors were allowed to cross examine the witnesses for the prosecution

and the defence throughout the trial. What is more apparent in the proceedings is that assessors cross-examined witnesses before a party who called them made re-examination. Ordinarily, as it has been a practice even where assessors put questions to witnesses as required in terms of section 177 of the Evidence Act, they must do so after re-examination. In our respectful opinion, this was highly irregular and in essence, the irregularity fundamentally prejudiced both parties to the case.

At this juncture, we deem it appropriate, even at a risk of repeating ourselves to reemphasize the observation we made in **Mathayo Mwalimu and Another v. The Republic**, Criminal Appeal No. 147 of 2008 (unreported) thus:-

> *"... There is no room for assessors to cross-examine witnesses. Under the Evidence Act assessors can only ask questions.... The reason for the above exposition of the law is not farfetched. The exposition is based on sound reason. The purpose of cross-examination is essentially to contradict. That is why it is a useful principle of law for a party not to cross-examine a witness if he/she cannot contradict. By the nature of their function, assessors in a criminal trial are not there to contradict. They are there to aid the Court in a fair*

dispensation of justice. Assessors should not, therefore, assume the function of contradicting a witness in a case."

In the present case, having examined the entire proceedings in which assessors participated when the prosecution and defence witnesses testified at the trial, we are settled that the cross examination of witnesses which was done by assessors is a fatal irregularity which is incurable. To support our observation, we better reaffirm what we stated in **Kulwa Makomelo and 2 Others v. The Republic**, Criminal Appeal No. 15 of 2014 (unreported) as hereunder:-

"... The assessors are part of the Court; and the Court is supposed to be impartial. Since under section 146 (2) of the Evidence Act Cross examination is an exclusive domain of an adverse party, by allowing the assessors to cross-examine witnesses, the Court allowed itself to be identified with the interests of the adverse party, and therefore ceased to be impartial. By being partial the Court breached the principles of fair trial now entrenched in the Constitution. With respect, this breach is incurable under section 388 of the Criminal Procedure Act."

Indeed, in **Thomas Pius v. The Republic**, Criminal Appeal No. 245 of 2012 (unreported) the Court went to the extent of stating that the irregularity affected the rule against bias when it stated as follows:-

> *"... Where it is obvious that the assessors cross-examined witnesses, it is apparent that the accused person was not accorded a fair triai because the irregularity goes against one of the principles of natural justice namely the rule against bias, and it vitiates the entire proceedings –See the case of* ***Nathan Baguma @ Rushejeli v. Republic****, Criminal Appeal No. 166 of 2015, CAT (unreported) in which upon a finding that such an irregularity was established, the proceedings were declared a nullity and a retrial was ordered."*

Equally, in the present case, we are satisfied that the proceedings of the trial court were a nullity. The question which follows however is whether we should order a retrial.

It is noteworthy that counsel for the parties were of the firm opinion that considering the prosecution evidence which was laid against the appellant and the appellant's defence at the trial, an order of retrial will be prejudicial to the appellant.

We entirely agree with learned counsel for the parties for the following reasons. Firstly, the circumstantial evidence which was relied upon in grounding conviction against the appellants did not meet the guiding principles of law as expounded by the Court in its several decisions (see among others, **Justine Julius and Others v. Republic**, Criminal Appeal No. 155 of 2005; **John Mangula Ndogo v. Republic**, Criminal Appeal No. 18 of 2004; **Shaban @ Elisha Mpunza**, Criminal Appeal No. 12 of 2002; **Aneth Kapwiya v. Republic**, Criminal Appeal No. 69 of 2012 (all unreported) and **Ally Bakari v. Republic** (1992) TLR 10).

Overall, we do not hesitate to state that the circumstantial evidence in the present case did not irresistibly point to the guilty of the appellant in exclusion of any other person. This is supported by the fact that the witnesses who testified at the trial did not sufficiently confirm that the appellant and the deceased left together at the bus station where the deceased had gone to join the appellant to go to the farm which is located close to the areas where the deceased's skull and the skeleton were found at Mapea village. There is also no evidence that on the fateful day the appellant was seen at the scene of crime.

Secondly, the evidence of PW2 and PW3 which was greatly relied upon by the trial judge to convict the appellant was contradictory. In our

respectful opinion, the contradiction was material and prejudicial to the prosecution case. Besides, as correctly stated by Mr. Sabuni, the evidence of PW2 and PW3 despite being contradictory was not corroborated by any other prosecution witnesses.

Thirdly, the medical evidence which was placed at the trial court by Dr. Omeli Uyaha (PW9) being based on an expert evidence, did not persuasively conclude that the skull and the skeleton which were found at the scene of the crime were that of the deceased. In essence, during cross-examination PW9 admitted that: *"Apart from hair and clothes it was difficult to understand it was of a human being."*

At this juncture, we need to emphasize that expert witness evidence need to inspire confidence not only to the parties in the case, but also to the public at large. Indeed, the expert must go beyond making mere assertion, if he is to be taken seriously as convincing and effective. It is in this regard that in **Romeshi Chanrda Aggrawal v. Regency Hospital Ltd** (2009) 9 SCC 709, the Supreme Court of India stated as follows:-

> *"Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert. Where the experts give no real data in support of their opinion, the evidence even though*

admissible, may be excluded from consideration as affording no assistance arriving at the correct value."

The observation of the Supreme Court of India was referred and acknowledged as a sound observation by the Court in **DPP v. Shida Manyama @ Seleman Mabuba**, Criminal Appeal No. 285 of 2012 (unreported).

To this end, we have no hesitation to conclude that PW9 as an expert, failed to explain sufficiently the basis of his finding that the skull and the skeleton were that of the deceased. This is in view of the fact that what was before him was the skull and the skeleton which had been separated and there were no sufficient reasons offered as to how he came to the conclusion that both belonged to the body of the deceased. Besides, PW9 did not convincingly persuade the trial court on how he came to the conclusion that the deceased died because of 'HARMOURAGE'. This finding on the cause of death was simply arrived at because there was a cut in the broken skeleton which caused blood loss and that, the deceased piece of clothes which were found attached to the skeleton were full of blood.

Fourthly, if we disregard exhibits PE3 and PE4 because their contents were not read over at the trial court after they were admitted into evidence

as submitted by the learned Senior State Attorney, the prosecution evidence value diminishes.

Fifthly, we entirely agree with counsel for the parties that in the present case, some of the crucial witnesses were not summoned to testify at the trial. Specifically, we are with respect, surprised why the prosecution did not summon a very crucial witness, Dorkas Eliya who also signed to have witnessed a search report (exhibit PE2) when the appellant's house at Gallapo was searched on 23rd September, 2013. Admittedly, her evidence was so crucial to link the chain of circumstances as it was alleged that she is the one who handed over the deceased clothes to PW1 on information that the same were sent to her place as a neighbour by the appellant.

Be that as it may, the failure of the prosecution to summon some of the important witnesses would have prompted the trial court to draw adverse inference since if a party to the case opts not to summon a very important witness he does so at his detriment and the prosecution cannot take refuge under section 143 of the Evidence Act.

For purposes of emphasis, in **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008 (unreported) the Court stated:-

> *"... So, before invoking section 143 of the TEA regard must be heard to the facts of a particular case. If a party's case leaves reasonable gaps it can only do so at its own risk in relying on the section. It is thus now settled that, where a witness who is in a better position to explaln some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one".*

Apparently, earlier on the Court had similarly made corresponding remarks in **Aziz Abdallah v. Republic** (1991) TLR 71 which was referred to us by the learned Senior State Attorney to support her submission. To us, the observations of the Court in **Boniface Kundakira Tarimo v. Republic** and **Aziz Abdallah v. Republic** (supra) equally and squarely apply in the circumstances of the present case.

In the final analysis, from our deliberation above, we are satisfied that in view of the evidence which was placed at the trial court by the prosecution against the appellant's defence, which in our opinion sufficiently raised reasonable doubt, a retrial will not be for the interest of justice in the present case.

Consequently, we allow the appeal. In the result, we invoke section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 and nullify the proceedings of the trial court, quash conviction and set aside the sentence of death that was imposed on the appellant. In the result, we order that the appellant be released from custody forthwith unless held otherwise lawfully.

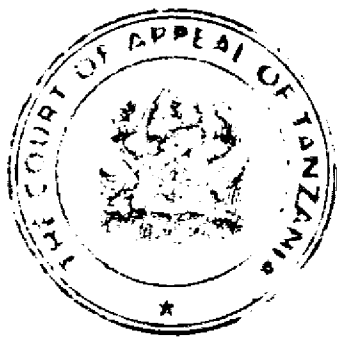
DATED at **ARUSHA** this 1st day of April, 2020.

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.S. MWANGESI
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

This Judgment delivered on 2nd day of April, 2020 in the presence of the Appellant in person and Mr. Hangi Chang'a, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B.A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL