IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMIAL APPEAL NO. 41 OF 2017

ELIGI VALENCE @ MARANDU @ MSORO----------1st APPELLANT

JULIUS GODLOVE @ KAAYA ---------- 2nd APPELLANT

VERSUS

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

(Appeal from the judgment of the High Court of the United Republic of Tanzania at Arusha)

(Dr. Opiyo J.)

dated the 25th day of May 2015
in
Criminal Sessions Case No. 69 of 2014

JUDGMENT OF THE COURT

16th & 25th March, 2020

MWANGESI J. A.:

According to the information which was lodged in court by the prosecution on the 10th day of February, 2015, the appellants herein were indicted for trial with the offence of murder contrary to the provisions of section 196 of the Penal Cap. 16 R.E. 2002 (**the Code**). It was the case for the prosecution that on the 26thday of June, 2013 at Kiwawa village, within Arumeru District in the Region of Arusha, the duo, jointly and together did

murder one Faustine s/o Idd Msuri @ Chasaka. When the information was read out to the appellants, they both protested their innocence.

In its endeavour to establish the commission of the offence by both appellants, the prosecution paraded four witnesses, whose testimonies was supplemented by three exhibits. The witnesses included, Patrick Michael Ngeza (PW1), Jackline Joackim (PW2), Onesmo Isack Urio (PW3) and E. 188 Detective Corporal Ammidulae Omary (PW4) whereas, the exhibits were a post mortem examination report (exhibit P1), a sketch map of the scene of the incident (exhibit P3) and a cautioned statement of Eligi Valence @ Marandu @ Msoro (exhibit P2). On their part in defence, each appellant relied on his sole sworn testimony.

At the end of the day after the learned trial Judge, who was being aided by gentle assessors had evaluated the evidence placed before them, they held that both appellants were culpable to the charged offence and as a result, each of them was ordered to serve the mandatory sentence of death by hanging. Aggrieved by the finding and the sentence meted out to them by the trial court, the appellants have preferred the current appeal to

the Court, premising their grievance on seven grounds of appeal, which were later added with other five grounds.

The original joint memorandum of appeal which was lodged by the appellants on the 30th November, 2016 had seven grounds of appeal which read *verbatim* that:

1. *That, the learned trial Judge, erred in law and fact when she failed to see the inconsistencies and contradictions in the testimonies of the prosecution witnesses which should have been resolved in favour of the appellants.*
2. *That, the learned trial Judge, erred in law and fact when she failed to scrutinize the cautioned statement according to the law.*
3. *That, the learned trial Judge, erred in law and fact by relying upon the cautioned statement of DW1 as sufficient evidence to incriminate the second appellant.*
4. *That, the learned trial Judge, erred in law and fact when she failed to realize that the evidence on record was too short and contradicting hence, casting doubt to the allegations.*

5. *That, the learned trial Judge, erred in law and fact for failing to evaluate the evidence on record and instead allowed her own speculation to influence her judgment.*
6. *That, failure by the prosecution to call the Medical Doctor who performed the post mortem examination, the court ought to have drawn an adverse inference on the part of the prosecution.*
7. *That, the learned trial Judge, erred in law and fact when she failed to scrutinize the evidence of PW1 and exhibit PE1 as a result she arrived at a wrong decision.*

In the additional grounds of appeal by the appellants which were lodged on the 9th day of March, 2020 they listed the following grounds of grievance namely:

1. *That, exhibit PE1 the post mortem examination report and exhibit PE2 the cautioned statement of the first appellant, should be expunged from the record for failure to comply with section 192 (3) of the CPA as there is no indication that the memorandum of undisputed facts at the PH was ever read over to the appellants.*

2. *That, in addition the post mortem examination (exhibit PE1) improperly found its way in the evidence for failure to comply with section 291 (3) of the CPA as the appellants were never informed of their right for cross-examination. This is fatal to the case against the appellants in the absence of exhibit PE1 there is no other evidence proving the death of the said Faustine.*
3. *That, the learned trial Judge, erred by failing to examine the credibility and reliability of PW1 in this case before basing on his evidence to convict the appellants whereas, his evidence should be disregarded. This adversely led to an unsafe decision.*
4. *That, the evidence tending to implicate the appellants in the death of the deceased is insufficient and unsatisfactory to sustain a conviction of murder.*
5. *In the alternative, the learned trial Judge, erred in convicting the appellants of the offence of murder without addressing the question of malice aforethought or direct the assessors on the same. In addition, the trial Judge, grossly erred to allow assessors to cross-examine the witnesses contrary to section 177 of the Tanzania Evidence Act, Cap. 6 R.E. 2002. This is fatal.*

When Mr. Kelvin Kwagilwa, learned counsel was assigned by the court, the dock brief to represent the first appellant in this appeal, he lodged a supplementary memorandum of appeal comprising of three grounds which read:

1. *That, the learned honourable trial Judge, erred in law in not taking into account that the cautioned statement (PE2) admitted during preliminary hearing, the contents of the cautioned statement were not read over to the appellants after the memorandum of matters that were not in dispute was drawn up in clear contravention of section 192 (3) of the Criminal Procedure Act, 1985.*
2. *That, the contents of cautioned statement (PE2) were not incorporated in the memorandum of undisputed matters and had to be proved during the proceedings of trial.*
3. *That, the learned trial Judge, erred in law and fact to rely on the evidence of PW1 and PW2 which were contradictory and inconsistent.*
4. *That, on the whole of the evidence on record, the case for the prosecution was not proved beyond reasonable doubt.*

Before we embark on considering the merits or demerits of the grounds of appeal, we think it is apposite, albeit in brief, to give the facts leading to the challenged decision as could be discerned from the record of the case. The appellants and the deceased were all residents of Arumeru District. On the 26th day of June, 2013, the deceased was arrested by a youth group of Wameru people known as '*Kiloviyo,*' which was being led by the second appellant on allegation that, he had sold stolen shoes to the first appellant.

After his arrest, the deceased was taken to the farm of one Fezos known as "Feros estate", where he was stripped off his clothes and heavily punished by being canned about sixty strokes. The ordeal of the deceased did not end by being canned only, he was severally injured on the whole of his body and ultimately, chopped off his right wrist and abandoned. The incident was reported at the Police Station, and when policemen arrived at the scene of crime, they found the deceased was already dead. According to the post mortem report, the cause of death to the deceased was due to multiple fore head injuries which led to intracranial bleeding and amputation of the right wrist.

From the investigation which was conducted by the policemen, the appellants herein were arrested in connection to the death of the deceased and charged with the offence of murder. On their part, both appellants distanced themselves from the alleged offence, the second appellant raising a defence of *alibi* that he was not at the scene of crime. However, as earlier pointed out, the defences by appellants were not bought by the learned trial Judge, who convicted both of them and hence, this appeal.

On the date when the appeal was called on for hearing, Mr. Kelvin Kwagilwa, learned counsel entered appearance to represent the first appellant whereas, Mr. Modest Akida, also learned counsel represented the second appellant. The respondent/Republic on the other hand, had the joint services of Mr. Charles Kagirwa and Ms. Riziki Mahanyu and Ms. Cecilia Foka, all learned State Attorneys.

At the very outset, the Court required the learned counsel of either side, to address it first on the fifth ground of appeal contained in the additional grounds of appeal by the appellants. Addressing us on this ground, Mr. Kwagilwa, argued that during trial of the appellants in this appeal, assessors were permitted by the trial Judge, to cross-examine the

witnesses. He referred us to pages 31, 32, 34, 40 and 43 as mere examples of what transpired in court during trial. In his view, the act by the trial Judge to permit the assessors to intensively cross-examine the witnesses of either side, was a fatal irregularity, which vitiated the entire proceedings.

The learned counsel for the first appellant, went on to submit that as a result of the irregularities occasioned by the learned trial Judge, under normal circumstances he would have asked the Court to invoke its powers under the provisions of section 4 (2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 **(the AJA)**, to nullify the proceedings of the trial court and order for a retrial. He however, was hesitant to move the Court to do so for the reason that, the need did not arise on account of insufficient evidence on the record, which did not justify an order of retrial in this appeal.

To demonstrate that the evidence relied upon by the prosecution in this appeal was shallow, Mr. Kwagilwa argued generally the grounds of appeal by the appellants, which were challenging the evidence led by the prosecution witnesses against the appellants. He first looked at the evidence contained in the exhibits that were admitted un-objected during

the preliminary hearing as reflected on page 26 of the record of appeal. These were a cautioned statement, a post mortem examination report and a sketch map of the scene of the incident. The learned counsel, submitted that these exhibits upon being admitted in evidence, their contents were not read out to the appellants. Placing reliance on the decision in **Efraim Lutambi Vs Republic** [2000] T.L.R. 266, he argued that the omission was a fatal irregularity, as it denied the appellants their right of knowing what was contained therein. He implored us to follow suit on what was done in **Efraim's case** (supra), by expunging all of them from the record.

Discussing on the testimony of PW1, which was highly relied upon by the learned trial Judge, in founding conviction to the appellants for the reason that he was an eye- witness, Mr. Kwagilwa, strongly disputed the said stance. According to him, PW1 was not a credible witness because he gave inconsistent versions during his testimony. While at page 31 of the record of appeal, the witness stated in examination in chief that, the deceased was punished by the mob, on cross-examination, he stated that the deceased was beaten by the appellants. Again while at page 33 of the record of appeal, he testified to the effect that "*kiloviyo*' was a youth group recognized under Meru customs, there was a change of mind by the

witness at page 34 of the record of appeal, where on being cross-examined by the defence counsel, he told the court that such group was illegal.

In the view of Mr. Kwagilwa, PW1 who was related to the deceased, had a purpose to serve in his testimony. This could be inferred from the testimony of PW2, whose evidence in court was that she heard the dying declaration of the deceased, wherein the name of the witness was mentioned as among the people who killed him. Under the circumstance, the learned trial Judge, ought to have warned herself before acting on the evidence of this witness. The learned counsel therefore, urged us to note such an anomaly, and do the needful by disregarding the testimony of this PW1.

With regard to the evidence of PW2 Mr. Kwagilwa, submitted that the same was as well not of much assistance regard being had to the fact that, she was not at the scene of crime when the deceased was being assaulted. Her testimony was basically pegged on the dying declaration of the deceased, which she claimed to have heard. The same however, was not consistent in that, while in the examination in chief, she told the court that she heard the deceased stating that "*kweli msoro umeamua kuniua*"

literally meaning that - is it true that Msoro you have decided to kill me. During cross-examination, she came out with another version that "*mjomba Patrick ameamua kuisimamia na kunimaliza*" literally meaning that – uncle Patrick has decided to ensure that I get finished.

Mr. Kwagilwa did yet point out another glaring anomaly which was not given plausible explanation by the prosecution. He submitted that the first appellant was well known in the area where the incident of killing the deceased occurred. Throughout from when the incident occurred on the 26th June, 2013 up to the 2nd August, 2013 when he went to surrender himself at the Police Station, he was there at the village. One wonders as to why he was not arrested in connection with the incident for the whole of that period of about one and half months, if indeed he participated to kill the deceased, an act which happened in public and on a broad day light. He implored the Court to find that the association of the first appellant with the death of the deceased, came as an afterthought to the prosecution without any founded bases.

Basing on what has been adumbrated above Mr. Kwagilwa, argued that there was evidence from the prosecution to establish the commission

of the offence by the first appellant and therefore, the order for a retrial would just occasion injustice to him as he would continue to remain under restraint for no apparent reasons. In the circumstances, he urged us to allow the appeal and set the appellant at liberty, concluded the learned counsel.

Submitting on behalf of the second appellant, Mr. Akida fully subscribed to what was submitted by his learned friend for the first appellant. Additionally, the learned counsel referred us to page 59 of the record of appeal, where the appellant strongly resisted his involvement to the incident leading to the death of the deceased for the reason that he was not at the scene of crime. Such averment was never challenged by the prosecution. Nevertheless, in her judgment as reflected on pages 115 – 116 of the record of appeal, apart from the learned trial Judge, discussing such issue of defence of *alibi* to the appellant, she disregarded it arguing that it was an afterthought. Relying on the provisions of section 194 (4) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (**the CPA)** and the decision in **Rashid Seba Vs Republic,** Criminal Appeal No. 95 of 2005 (unreported), Mr. Akida, argued that it was a misdirection on the part of the trial Judge, who shifted the burden of proof to the appellant. He

therefore, reiterated the prayer by his learned friend that, the need to order for a retrial did not arise and urged us to allow the appeal and set the appellants at liberty.

In response to what was submitted by his learned friends Mr. Kagirwa, was in agreement with them that the provisions of section 177 of the Evidence Act, Cap. 6 R.E. 2002 (**the TEA),** was indeed infringed in the proceedings against the appellants, for the reason that assessors were permitted to cross-examine witnesses. He also supported the contention that the remedy for such an anomaly, is for the Court to nullify the proceedings and quash the conviction as well as setting aside the sentences. He however parted ways with his learned friends on the way forward.

According to Mr. Kagirwa, there was ample evidence to establish the commission of the offence by both appellants. This evidence came from PW1 and PW2, both of which eye-witnessed the incident, as corroborated by the testimony of PW3. As a result, he implored the Court that upon nullifying the proceedings of the trial court, it be pleased to order for a retrial of the appellants before another Judge, with different set of

assessors. In so arguing, he sought refuge from the decision in **Mathayo Wilfred and Two Others Vs Republic,** Criminal Appeal No. 294 of 2016 (unreported).

What stands for our deliberation and determination in the light of the submissions from either side above, is whether the proceeding of the trial court was vitiated. Upon carefully reviewing the sequence of the proceeding in the record of the High court, we are fully in agreement with the stance taken by the counsel from either side, that it was highly irregular. It is the position of law under section 265 of **the CPA** that, criminal trials before the High Court, have to be with the aid of assessors. In its own words, the provision stipulates that:

> *"S. 265. All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit."*

The participation of assessors in the conduct of criminal trials before the High Court, is provided for under the provisions of section 177 of **the TEA** with the following words:

> *"S. 177. In cases tried with assessors, the assessors* ***may put any questions*** *to the witness, through*

or by leave of the court, which the court itself might put and which it considers proper."

[Emphasis supplied.]

Time and again the Court has held that, the questions which are to be put to witnesses by assessors, should not be in the form of cross-examination, which may change the role of assessors, from that of being umpires with the trial Judge, to that of being prosecutors or defenders of the accused. In **Mathayo Mwalimu and Another Vs Republic,** Criminal Appeal No. 147 of 2008 (unreported), the Court insisted that, under **the TEA**, assessors have no room for cross-examination but to ask questions only, which should be done after re-examination.

Back to the proceedings before us, as it was pointed out by the learned counsel for the first appellant, the assessors intensively cross-examined the witnesses. An example can be gathered from page 34 of the record of appeal, where it is reflected that:

"Cross-examination by the court assessors.

Ramadhan Said: -

The punishment of strokes started before being chopped off his hands.

I escaped after seeing him being cut off his hands.

He died because of bleeding from the cut.

Also at page 38 of the record of appeal, the same Ramadhani Said is quoted to have cross-examined the witness whose answers were in these words: -

He mentioned the first accused as the one involved (she identified the first accused from the dock).

When we left he was still alive but when the police took him, he was already dead.

It is apparent in view of the examples given above that, the assessors who sat with the trial Judge in the instant appeal, exceeded the mandate of their role as envisaged under section 177 of **the TEA** and hence, vitiated the proceeding as the appellants were not accorded a fair trial. See: **Kabula Luhende Vs Republic,** Criminal Appeal No. 281 of 2014 and **Kulwa Makomelo and Two Others Vs Republic**, Criminal Appeal No. 15 of 2014 (both unreported).

Ordinarily, where the proceedings of the trial court were vitiated, they are nullified and an order for retrial follows. Such an order however, is not automatic. This Court has consistently subscribed to the holding in the case of **Fatehali Manji Vs Republic** [1966] EA 343 that:

> *"In general, a retrial may be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill the gaps in its evidence at the first trial --- each case must depend on its own facts and an order for retrial should only be made where the interest of justice require it."*

We have had ample time to go through the evidence that was relied upon by the trial Judge, to convict the appellants. While discussing the involvement of the appellants in committing the charged offence, the learned trial Judge, based on the testimony of PW1 and exhibit PE2. She stated at page 113 of the record of appeal that: -

> *"The question of accused persons' involvement in inflicting injuries that caused Chasaka's death can be depicted directly from the evidence of PW1 and PW2 and similarly from evidence of PW2, PW3 and*

DW1. PW1 testified that deceased was taken for usual group's punishment which turned out sour when the second accused as a group leader started by randomly beating the accused (sic) all over his body and then directing and systematically supervising his assault by choosing any one from the crowd including the first accused to carry on the assault. ***This kind of evidence, coming from a person who was also at some point an accomplice named in the dying declaration as well as uncle of the deceased, is so tempting to be ignored as biased as correctly pointed out by the counsel for accused person.*** *But a change of mind is justified in the presence of a well and elaborate corroborating evidence of the first accused both in his oral testimony and his cautioned statement admitted unopposed as PE2 during preliminary hearing."*

[Emphasis supplied]

What we gather from the bolded part of the quotation above, is the fact that in the first place, the trial Judge doubted the testimony of PW1. She however changed mind and acted on it after finding that it had been corroborated by the contents of exhibit PE2. It will however be recalled

that, there was consensus from the counsel from both sides that, the contents of exhibit PE2 were not read out to the appellants and hence, they advised it to get expunged. And once the evidence of exhibit PE2 is discounted, the doubted evidence of PW1 by the trial Judge, remains uncorroborated by any other evidence and therefore becoming indeed unreliable.

On our part after examining the said evidence of PW1, we sail in the same boat with the learned trial Judge that, his testimony was doubtful. As pointed out by Mr. Kwagilwa, there was no consistency in his testimony. Regard being had to the fact that, initially he was jointly charged with the appellants undoubtedly from the fact that it was said that he was named in the dying declaration of the deceased, his testimony could not be safely acted upon. And once the evidence of PW1 and exhibit PE2 are discounted, there remains no evidence to implicate both appellants to the offence of murder. To that end, as submitted by the learned counsel for the appellants, the need to order for a retrial of the appellants, does not arise.

Consequently, we find merit in the appeal by both appellants, which we hereby allow by nullifying the proceedings of the trial court, quashing

the conviction against both of them, and setting aside the death sentences which was meted out against them. We order for their immediate release from prison unless they are lawfully held for some other cause.

Order accordingly.

DATED at **ARUSHA** this 23rd day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of March, 2020 in the presence of Mr. Kelvin Kwagilwa learned counsel for the Appellants and Mr. Charles Kagirwa, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T)