IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

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

CRIMINAL APPEAL NO. 216 OF 2019

MICHAEL MSIGWA.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Njombe)

(Banzi, J.)

dated the 14th day of December, 2018
in
Criminal Sessions Case No. 83 of 2014

.....

JUDGMENT OF THE COURT

10th & 19th August, 2020.

MWANGESI J.A.:

MICHAEL s/o MSIGWA, the appellant herein was convicted by the High Court of Tanzania Iringa Sub Registry sitting at Njombe, of the offence of murder contrary to the provisions of section 196 of the Penal Code Cap 16 R.E. 2002 (**the Code**). It was alleged by the prosecution that on the 13th day of June, 2013 at Ikwete 'A' village within the District and Region of Njombe, he murdered one MESKO s/o LUFUMBE.

The brief facts of the case leading to the indictment and conviction of the appellant were that: The deceased and the appellant were residents of

neighbouring villages of Ikwete 'A' and 'B' respectively, situated within the District and Region of Njombe. On the 13th day of June, 2013 during evening, while the deceased was at his home in the kitchen in the company of his wife (PW1) and a grandson one Paulo Lufumbe (PW2), with whom they were skinning a goat, they were visited by the appellant. After greeting, the appellant informed them that their herd of cattle had strayed into the shamba where they were eating maize crops. The information by the appellant moved the deceased to instruct PW1, to go and check them and do the needful. In compliance, PW1 got out of the kitchen leaving the trio inside.

When PW1 returned back into the kitchen which was after a brief moment; she found the body of her husband (the deceased), lying on the floor lifeless with a big wound on the head, while the appellant and PW2 were nowhere to be seen. After finding her husband's lifeless body on the ground, she was astonished and raised an alarm which was responded to by neighbours among them being one Nowadi. The incident was reported to the village authorities and later to the Police Station. Investigation on the cause of death to the deceased was mounted whereby, the appellant was

arrested on the 9th July, 2013 and associated with the death of the deceased of which he was charged with.

On his part in defence, the appellant conceded to the fact that the deceased had been residing in a village which was adjacent to his. He however strongly distanced himself from any involvement with the death of the deceased arguing that, on the material date he was at Makambako, which was his place of work and residence by then. He contended further that, at the alleged period of time he was resting at his home along Kahawa Street Makambako, because on the said date he was not feeling well. He therefore urged the trial Judge, to acquit him from the offence which he stood charged with. Nonetheless, as alluded earlier above, the story by the appellant was not bought by the learned trial Judge, who convicted him as charged and condemned to suffer death by hanging.

Aggrieved by the decision of the trial Judge, the appellant now challenges it to this Court. Initially, on the 24th day of April, 2019 he lodged a memorandum of appeal comprising of seven grounds. Later, when Mr. Jally Willy Mongo learned counsel, was assigned by the Court the dock brief to represent the appellant in this appeal, on the 07th August, 2020 he filed a substituted memorandum of appeal containing three grounds which read: -

1. *That, the trial court erred in law in convicting the appellant of the offence of murder basing on exhibit P2 while the content of the said exhibit was not read out to the appellant after its admission contrary to section 192 (3) and (4) of the Criminal Procedure Act Cap 20 R.E 2019.*
2. *That, the trial court erred in law in convicting the appellant of the offence of murder basing on the evidence of PW2 while his evidence was taken contrary to sections 246 (2) and 289 (1) both of the Criminal Procedure Act Cap 20 R.E. 2019.*
3. *That, from the evidence on record the trial court erred in law and fact in convicting the appellant of the offence of murder.*

On the date when the appeal was called on for hearing before us, the appellant who was linked to the Court from Ruanda Central Prison via video conference, was represented by Mr. Jally Willy Mongo, learned counsel, whereas the respondent/Republic, had the joint services of Ms. Margret Mahundi and Ms. Edna Mwangulumba, learned State Attorneys.

Upon taking the floor to argue on the grounds of appeal, Mr. Mongo commenced by praying to abandon the grounds of appeal which were lodged by the appellant, a prayer which was granted by the Court un-resisted, and

proceeded to argue on the grounds which are contained in the substituted memorandum of appeal.

In expounding the first ground, Mr. Mongo faulted the learned trial Judge, for basing her conviction against the appellant on the post mortem examination report, which was admitted as exhibit P2 during preliminary hearing, because it was not read out to the appellant. He argued that the omission to read out the exhibit to the appellant, deprived him of the right to understand the nature and content of the said document and thereby, offending the stipulation under the provisions of section 192 (3) and (4) of the Criminal Procedure Act, Cap 20 R.E. 2002 **(the CPA)**. Basing on the holdings in **Eligi Valence @ Marandu @ Msoro and Another Vs Republic**, Criminal Appeal No. 41 of 2017 and **Jumanne Mohamed and Two Others Vs Republic,** Criminal Appeal No. 534 of 2015 (both unreported), the counsel urged us to expunge the exhibit from the record.

With regard to the second ground, it was the submission of Mr. Mongo, that the learned trial Judge erred in law to convict the appellant basing on the evidence adduced by PW2, on account that the said witness was neither among the witnesses who were listed by the prosecution during committal proceedings that he would testify in this case, nor was there made any

application by the prosecution in terms of section 289 (1) of **the CPA,** to call him as an additional witness. Under the circumstances, Mr. Mongo argued that the witness was improperly slotted in to give his evidence. Relying on the holding in **Jumanne Mohamed and Two others** (*supra*), he asked us to expunge the evidence which was given by this witness from the record.

The submission of the learned counsel for the third ground of appeal, hinged on what he had submitted in respect of the two grounds above. He argued that in view of what he had already submitted in the first two grounds above that exhibit P2 and the testimony of PW2 be expunged from the record; if the said prayer would be granted, the only evidence which remains to implicate the appellant to the charged offence is that which came from PW1. He was positive that PW1's testimony miserably failed to establish that the appellant was the perpetrator of deceased's death. This was so for the reason that her evidence was questionable on the following reasons.

First, while the witness claimed to have identified the appellant as the person who killed the deceased because he knew him as they lived in neighbouring villages, she failed to describe him in Court on how he appeared on fateful date. According to him, the failure was due to the fact that she did not see him at the scene of the crime on the fateful date.

Secondly, the witness failed to promptly name the appellant to the people who responded to the alarm which she raised, after finding her husband (deceased) had been attacked to death. The said failure by necessary implication meant that she did not recognize the person who committed the offence if she ever happened to see him, argued Mr. Mongo.

Mr. Mongo discredited and brushed aside the reason which was given by the witness in her testimony; that she failed to name the appellant promptly to the people who responded to the alarm which she raised, because she was confused. It was his submission that regard being had to the fact that, the person who had been killed was closely concerned with her that is, a husband, it is difficult to sink in anybody's mind that, the witness could have failed to name the murderer to the people who rushed to assist her. In his view, the idea that the appellant was the perpetrator of the incident under scrutiny, was just a frame up. We were implored to disbelieve this witness in line with the holding in **Hassan Mawazo Vs Republic,** Criminal Appeal No. 11 of 2014 (unreported).

Still with the credibility of PW1, Mr. Mongo went on to submit, she gave contradicting versions during her testimony. While at one point in time she told the trial court that the killing of the deceased occurred while there

was still sufficient day light which enabled her to easily identify the appellant; at another point, she stated that at the time when she was going out to check the strayed herd of cattle in the shamba after being asked by the deceased, she had to take a torch. The learned counsel wondered as to why a torch was being taken if there was still sufficient daylight. All in all, he urged us to disbelieve this witness because of her contradicting versions, which highly tainted her credibility.

The learned counsel for the appellant submitted further that, apart from the insufficient and doubtful testimony given by PW1, there was failure on the part of the prosecution to summon some material witnesses who could have filled up the gaps pointed out in the testimony of PW1. He named such witnesses to include; **one,** Nowadi, who was named by PW1 to be among the people who promptly responded to the alarm which she raised. **Two**, the Hamlet and Ten cell leaders, who were named by PW1 to be the ones who reported the incident to the police. And **three,** Hamisi, who was the police officer who apart from visiting the scene of crime and drawing the sketch plan of the scene of the incident, was the one who investigated the case. The failure by the prosecution to summon these key witnesses to

testify in court, ought to have alerted the trial court to draw an adverse inference against the prosecution, argued Mr. Mongo.

The learned counsel concluded his submission by inviting us to invoke our powers under the provisions of rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 **(the Rules)**, to re-evaluate the entire evidence on record because we are the first appellate Court, and come out with our own finding of fact which in his view, would be to find that the prosecution completely failed to discharge its duty and thereby, allowing the appeal and setting the appellant at liberty.

On the other hand, Ms. Mahundi on behalf of the respondent was in agreement with what was submitted by her learned friend in all fours. In addition to what he had submitted, she pointed out some further irregularities which were occasioned in the proceedings during trial. She argued that after the facts of the case had been read out to the appellant at the commencement of the trial, were admitted and marked ID1, as if they constituted part of the evidence in the case. In her view that was improper. Additionally, she went on submitting, apart from exhibit P2 not being read out to the appellant after being admitted in evidence, the appellant was not

told of his rights as required under the provisions of section 291 (3) of **the CPA.**

The learned State Attorney, further submitted to the effect that there was an unexplained delay in arresting the appellant. While the deceased was murdered on 13th day of June, 2013 the appellant was arrested at Makambako on the 9th day of July, 2013 which was after the lapse of about 26 days. One is left to wonder as to why it took such a long time to arrest the appellant, if indeed, he was identified by PW1 on the date of the incident as she stated. Had the investigator of the case been summoned to testify in court, she argued that he would have undoubtedly clarified the cause for the delay. On the basis of the pointed out gaps in the prosecution's case, she reiterated the prayer which was presented to us by her learned friend that, the appeal be allowed and the appellant be set at liberty.

In view of the submission from either side above, our task is to resolve the issue as to whether the grounds of appeal raised by the appellant to challenge the decision of the trial court are founded. We commence our analysis while mindful of the position of the statutory law as correctly submitted by Mr. Mongo, that under rule 36 (1) of **the Rules,** we are enjoined to re-evaluate the entire evidence on record save the one related

to the demeanour of witnesses, and come out with our own finding. This position has severally been clarified by the Court in its various decisions. In **Siza Patrice Vs Republic,** Criminal Appeal No. 19 of 2010 (unreported) for instance, the Court stated that: -

> *"We understand that it is settled law that a first appeal is in the form of rehearing. The first appellate court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary"*.

See also: **Yusuph Amani Vs Republic,** Criminal Appeal No. 255 of 2014, **Oscar Lwela Vs Republic,** Criminal Appeal No. 49 of 2013 and **Bahati Mdobofu Vs Republic**, Criminal Appeal No. 8 of 2013 (all unreported).

Mindful of the foregoing stance, we proceed to consider the grounds of appeal starting with the first ground in which the complaint is on the failure by the trial court to read out to the appellant, the content of the post mortem examination report after it had been cleared and admitted in evidence. It is well established practice that after a documentary exhibit has been cleared and admitted in evidence, it has to be read out to the accused to enable him understand what is contained in the said document See: **Jumanne Mohamed and Other's** case (*supra*) and **Robinson Mwanjisi**

and Others Vs Republic, [2003] TLR 218. Since in the instant appeal the content of the post mortem examination report was not read out to the appellant as reflected on page 28 of the record of appeal, it was a serious infraction which infringed the appellant's right to a fair hearing and therefore, vitiating the proceedings.

The foregoing apart, the appellant was not told by the trial court of his right as encompassed under the provisions of section 291 (3) of **the CPA,** that is, if he wished the doctor who prepared the report after conducting post mortem examination to the deceased, to be summoned in court and get examined. The said provision reads in *ipsissima verba* that: -

> *"Where the evidence is received by the court, the court may, if it thinks fit, and shall, if so required by the accused or his advocate, summon and examine or make available for cross-examination, the person who made the report; and the court* ***shall inform the accused of his right to require the person who made the report to be summoned*** *in accordance with the provisions of this sub-section."*
>
> [Emphasis supplied].

The Court had an occasion to emphasize on the necessity to comply with the provision, while discussing the provision of section 240 (3) which is

pari materia to the one under scrutiny but applied in the proceedings conducted in subordinate courts, when it stated in **Alfeo Valentino Vs Republic,** Criminal Appeal No. 92 of 2006 (unreported) that: -

> *"The Court has consistently held that once a medical report, as the PF3 is received in evidence, it becomes imperative on the trial court to inform the accused of his right of cross-examination. This Court has consistently held that, if a report is received in evidence without complying with the mandatory provisions of section 240 (3), such a report must not be acted upon."*

See also: **Joseph Mkumbwa Vs Republic,** Criminal Appeal No. 94 of 2007 and **Melkior Peter Vs Republic**, Criminal Appeal No. 49 of 2010 (both unreported).

In line with what was held in the authorities cited above, we are constrained to join hands with the learned counsel for either side that, the learned trial Judge, erred in acting on the post mortem examination report which had been admitted as exhibit P2, as reflected on pages 99, 107 109 and 115 of the record of appeal. We therefore expunge the post mortem examination report (exhibit P2) from the record. We however note that, notwithstanding the removal of the exhibit from the record, there is still the

evidence of PW1, which sufficiently established that the deceased was indeed dead and that his death was due to unnatural causes. That said, we allow the first ground of appeal.

The complaint in the second ground of appeal is in regard to the evidence which was received from PW2, who was not listed as among the witnesses who would testify in the case. Our perusal of the record of appeal and in particular on page 20 where the names of the prosecution witnesses were listed during Committal proceedings, we noted that the name of PAUL LUFUMBE, who testified as PW2 during trial of the case, does not feature. Nor did we find in the record any application by the prosecution, being made under section 289 (1) of **the CPA,** praying to summon PAULO LUFUMBE, as an additional witness. With that finding, we satisfied ourselves that PW2, did give his evidence without featuring in the committal proceedings.

When encountering an akin situation to the one under scrutiny in **Hamisi Meure Vs Republic** [1993] TLR 213, the Court rejected the evidence of the witness who did not feature in the Committal proceedings, with the following words; -

"It having been accepted by the prosecution and the Judge himself that PW2 did not feature in the record of committal proceedings, he

should not have been allowed to give evidence in contravention of the provisions of section 289 which are mandatory."

Also See: **Samwel Henry Juma Vs Republic,** Criminal Appeal No. 211 of 2011 (unreported).

In the same vein, we hold that the evidence of PW2 was improperly received by the trial court and therefore, illegally acted upon as reflected on pages 106, 110 and 111 of the record of appeal. We thus expunge it from the record and thereby, sustaining the second ground of appeal.

The complaint in the third ground of appeal which we move to consider now, is pegged on the evaluation of the entire evidence on record after exhibit P2 and the testimony of PW2 have been expunged from the record and thereby, leaving the testimony of PW1 alone. Both counsel were at one that the testimony of PW1, was unreliable and insufficient. The first doubt on her testimony arises from her failure to promptly name the appellant whom she claimed to have identified as the murderer of her husband (the deceased). It is on record that, PW1 did not name the appellant to the people who responded to the alarm which she raised after finding her husband had been attacked to death. The unexplained failure by PW1 in naming the

appellant, attributed to the delay in arresting him, which was made after the lapse of about twenty-six (26) days.

Where there has been a delay in mentioning the name of a suspect alleged to have been identified at the scene of the incident during the commission of an offence, the Court has been reluctant to act on that evidence. The rationale behind is that, the name of the suspect may have come as an afterthought after consideration of some extraneous factors. See: **Eligi Valence's** case (*supra*) and **Azizi Athumani Buyogera Vs Republic,** Criminal Appeal No. 222 of 1994 (unreported). In the latter case, the Court held that an unexplained delay in arresting the suspect casts doubt on the credibility of the witness. On the same basis, we are moved to doubt the credibility of PW1 in the instant appeal.

As if the foregoing doubt was not enough, there was also inconsistency on the testimony of PW1 as correctly pointed out by Mr. Mongo. A brief excerpt of her testimony as reflected on page 36 of the record of appeal, shows the said inconsistency when she testified that: -

> *"It was **still daylight** there was also light inside and there was firelight that is why I identified him. There was also light from oil lamp (koroboi). --- Then Michael Msigwa (appellant) told my husband that*

there were cattle eating maize outside. My husband then ***asked me to take a torch inside*** *so that I can go and see the cattle."*

[Emphasis supplied].

In the light of the foregoing testimony, it raises some doubt as to whether at the material time, it was still day light or it was already dark. And if it was still day light one would pose a question as the one asked by Mr. Mongo, as to why PW1 was advised to take a torch? Be that as it may, what is apparent is the fact that the testimony by PW1 was questionable. The inconsistency in the testimony of the witness coupled with her failure to name the appellant to the people who responded to the alarm she raised, makes it very unsafe to solely rely her testimony to found conviction against the appellant.

Besides the doubt expressed on the credibility of PW1 above who was the star witness, there were also other weaknesses occasioned by the prosecution as pointed out by the counsel for the appellant, which watered down the case for the prosecution in this appeal. Among them was its failure to summon some material witnesses to give their testimonies. These included **one**, the policeman who investigated the case as well as drawing the sketch plan of the scene of crime. **Two**, Nowadi who was among the

people named by PW1, to have responded to the alarm which she raised. **Three,** the Ten Cell leader and the Hamlet chairman, who were named by PW1 to be the ones who reported the incident to the Police Station.

On the basis of what we have endeavoured to highlight above, it is evident as it was concurrently submitted by the learned counsel from either side, that the learned trial Judge erroneously convicted the appellant of the charged offence. We therefore quash the finding of the trial Court, set aside the death sentence which was meted out to the appellant and order that, he be set at liberty forthwith unless lawfully held for some other cause.

Order accordingly.

DATED at **IRINGA** this 18th day of August, 2020.

S. E. A MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 19th day of August, 2020 in the presence of the Appellant in person via Video Conference and represented by Mr. Jally Willy Mongo, learned counsel and Ms. Edna Mwangulumba assisted by Jackline Nungu, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL