IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 299 OF 2017

MATOKEO MBOYA...APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Dar es Salaam)

(Korosso, J.)

dated the 08th day of May, 2015

in

Criminal Sessions Case No. 102 of 2007

JUDGMENT OF THE COURT

21st September & 8th October, 2020

MWANGESI, J.A.:

In the Criminal sessions held by the High Court of the United Republic of Tanzania, Dar es Salaam District Registry at Morogoro, MATOKEO MBOYA, the appellant herein, alongside ANSELEM MBOYA and ISSAH HAMIDU MATUMLA @ TITIGA, stood jointly and together charged with the offence of murder contrary to the provisions of section 196 of the Penal Code Cap 16 of the Laws Revised Edition of 2002 (now 2019) **(the Code)**. The particulars of the offence were that on or about the 20th day of

April, 2006 at Mbasa village within Kilombero District in the Region of Morogoro, the appellant and his colleagues, murdered one PETER KUPATA.

The brief facts of the case leading to the arraignment of the appellant and his colleagues as gathered from the testimonies of the witnesses revealed that, on the fateful date that is, the 20th day of April, 2006, while the deceased and his wife one Prisca Matwani (PW1) were asleep at their home, they were awakened by a heavy blow which broke the door of their house. In no time, a group of about three people or so one of them being armed with a gun, stormed into their house. Upon finding the deceased and his wife therein, the one armed with a shotgun, shot the deceased on the stomach and then all of them disappeared in thin air without collecting anything from the house.

PW1 the widow and her son who had been with the deceased inside the house, raised an alarm which was responded to by neighbours, whose efforts to save the life of the deceased by rushing him to the Hospital, were unsuccessful as the deceased succumbed to death on the way before reaching the Hospital.

Thereafter, the hunt for those who were behind the incident was mounted leading to the arrest of the appellant and his colleagues, who were ultimately charged with the offence in which the appellant was convicted of. It was the testimony of PW1 during trial of the appellant and his colleagues that, she managed to identify the assailants on the material night, because they were familiar to her as they were all friends of the deceased. According to the records, the appellant was arrested on the 8th day of May, 2006 at Machipi village in Ifakara.

To establish the commission of the offence by the appellant, the prosecution relied on the testimonies of eight witnesses and four exhibits. The witnesses were, Prisca Matwani (PW1), Leah Chalongite (PW2), Thobias Helmes Rupia (PW3), Halidi Abdallah Salahande (PW4), George Sanga (PW5), Paulina Simon (PW6), Hassan Nassoro (PW7) and Doctor Marko Mbata (PW8), while the exhibits included, an extra-judicial statement of the appellant (Exhibit P1), a shot gun make Webley serial No. 17503 with 12 calibre (Exhibit P2), a cautioned statement of the appellant (Exhibit P3) and a Post Mortem Examination Report (Exhibit P4).

On his part, in defence, the appellant claimed to be a resident of Viwanja Sitini village in Ifakara area and that during his arrest, he was engaging himself in agriculture and hunting. He also claimed to be a blacksmith who was using scrappers of motor vehicles to make homemade guns. He told the court further, that even the gun which he was using for hunting was made by himself. He however, strongly resisted the contention by the prosecution witnesses, that he was concerned in any way with the murder of the deceased as on the alleged date he was not at the alleged area. In terms of the provisions of section 194 of the Criminal Procedure Act, Cap 20 R.E. 2002 **(the CPA)**, he raised a defence of alibi.

Upon the learned trial Judge summarizing the evidence placed before her to the three assessors who sat with her in the trial of the case, all of them returned a unanimous verdict of acquittal to the appellant and his colleagues. On her part, besides concurring with the assessors in acquitting the appellant's colleagues from the charged offence, she differed with them in regard to the appellant, whom she was convinced beyond reasonable doubt that the case against him had been established to the hilt. The appellant was therefore, convicted of the charged offence of

murder and condemned to suffer death by hanging, a decision which is the subject of this appeal.

To challenge the decision of the trial court, the appellant on the 01st day of June, 2017 lodged nine (9) grounds. Nevertheless, on the 28th day of January, 2020 he added other three grounds in a supplementary memorandum of appeal and thereby making a total of twelve (12) grounds of appeal. For reasons which will be apparent soon, we are not going to reproduce the grounds of appeal, save the ninth ground in the memorandum of appeal which reads thus: -

> *"(9) That, your Lordships, the learned trial Judge erred in law and fact by convicting the appellant while un-procedurally, the court assessors were asking leading questions and cross-examining the prosecution witnesses contrary to the procedure of law at page 24 lines 2-3, page 31 lines 19–20, page 71 lines 11-19, page 81 lines 2-18, page 41 lines 8-17 and pages 102 and 103."*

And, after Mr. Nehemiah Geofrey Nkoko learned counsel, had been assigned by the Court the dock brief to represent the appellant in this

appeal, he also lodged a supplementary memorandum of appeal comprised of six grounds of appeal, which read: -

1. *"That, the learned trial Judge, erred in law and fact by receiving the testimony and documentary evidence of a witness (PW2, Leah Chalongite), who was not listed during committal proceedings, and her statement and documentary evidence (exhibit P1, the Extra-Judicial statement of the appellant), was not read out as contemplated by section 246 (2) of the Criminal Procedure Act, Cap 20 R.E. 2002. Also, the said witness was allowed to testify contrary to the mandatory provisions of section 289 (1) of the CPA.*

2. *That, the learned trial Judge, erred in law and fact, by convicting and sentencing the appellant relying on exhibit P3 (cautioned statement of the appellant), which was retracted and repudiated and while the same was taken out of time contrary to the mandatory provisions of sections 50 (1) and 51 (1) (a) and (b) of the CPA.*

3. *That, the learned trial Judge, erred in law and fact, by convicting and sentencing the appellant, while there was no independent evidence to prove that*

the appellant had killed the deceased and that, exhibit P2 (shot gun), was the weapon which was used to kill the deceased including failure for the prosecution to call as a witness, a Ballistic Expert who examined exhibit P2, neither the exhibit P4 (Post Mortem Examination Report), did not prove that the deceased was killed by a bullet as the spent cartridge was tendered in Court. Also the said exhibit P4 was tendered by the prosecutor and not the witness who was in the dock.

4. *That, the decision was based on the High Court proceedings that were not authentic, since the trial Judge who took over proceedings and subsequently concluded the case, failed to append her signature after taking down the evidence of every witness. Thus there is no material proceedings upon which the appeal could be determined.*

5. *That, the learned trial Judge, erred in law and fact by convicting the appellant without appreciating the finding of the assessors who opined that the appellant was not guilty and the case against him was not proved beyond reasonable doubt. The learned trial Judge, did not assign reasons as to why she differed with the opinion of the assessors.*

6. *That, the learned trial Judge, erred in law and fact, when she failed to ask the appellant before the trial if he had any objection to the selected assessors or he agrees to the said assessors as directed by law although the proceedings do not show if the said assessors were selected at all."*

During the hearing of the appeal before us, Mr. Nehemiah Nkoko learned counsel, entered appearance to represent the appellant, who was linked to the Court from Ukonga Central Prison where he is serving his jail sentence via video conference, whereas the respondent Republic, had the joint services of Ms. Mwasiti Athumani Ally learned Senior State Attorney and Mr. Adolf Kissima learned State Attorney.

At the very outset, Mr. Nkoko rose to inform the Court that there were three sets of memoranda of appeal which had been lodged in Court to challenge the decision of the trial High Court. He sought leave of the Court to abandon the two memoranda which had been lodged earlier by the appellant that is, the memorandum of appeal which was lodged on the 1st day of June, 2017 save the ninth ground of appeal, and the Supplementary memorandum of appeal, which was lodged on the 28th day

of January, 2020. Additionally, the counsel prayed to abandon the fourth and fifth grounds of appeal contained in the Supplementary memorandum of appeal which he lodged on the 29th day of May, 2020 and thereby, remaining with a total of five (5) grounds of appeal to argue.

Upon the sought leave being granted by the Court, Mr. Nkoko proceeded to argue the remaining first, second, third and sixth grounds of appeal contained in the Supplementary grounds of appeal which he lodged on the 29th day of May and the ninth ground in the memorandum of appeal which was lodged by the appellant on the 01st June, 2017.

The learned counsel kick-started his submission by arguing conjointly the ninth ground in the memorandum of appeal and the sixth ground in the supplementary ground of appeal, both of which complain about improper involvement of assessors in the trial of the appellant. It was his submission that the assessors in the instant appeal, were not properly involved on mainly three factors that is; **One,** at the commencement of the trial, the appellant and his colleagues, were not asked by the court if they had any objection to either of them as reflected on page 19 of the record of appeal. **Two**, after the learned trial Judge, had differed with the options of the

assessors in the judgment, she did not give reasons as to why she differed with them. And **three**, that assessors were allowed to cross-examine the witnesses as noted on pages 24, 31,41, 71, 81, 102 and 103 of the record of appeal.

In view of the above pointed out irregularities, Mr. Nkoko submitted that the trial of the appellant, was vitiated and that the only available remedy is for this Court, to nullify the proceedings, quash the judgment and set aside the sentence which was meted against the appellant.

As to what should follow after the proceedings and judgment of the trial court have been nullified, the learned counsel urged us to set the appellant at liberty, for the reason that there was no evidence from the prosecution, to justify the Court to issue an order of retrial. In so submitting, the learned counsel sought sanctuary from the decisions in **Frednand s/o Kamande and Five Others Vs the Republic,** Criminal Appeal No. 390 of 2017 and **Anthony Matheo @ Minazi and Two Others Vs the Republic,** Criminal Appeal No. 13 of 2017 (both unreported).

In further support to his stance that the appellant has to be set at liberty, Mr. Nkoko proceeded to expound the other remaining grounds of appeal in the supplementary memorandum of appeal all of which go to show that the need for the Court to order for retrial, does not arise. Starting with the first ground in which the challenge is on the evidence which was received from PW2 and Exhibit P1 which she tendered in evidence, the learned counsel argued that the said evidence was illegally slotted in the record and therefore, illegally acted upon by the trial Judge. This was from the fact that, PW2 was not among the witnesses who were listed in terms of section 246 (2) of **the CPA,** that she would be among the witnesses to testify in the case.

As if the foregoing was not enough, exhibit P1 which was the Extra - Judicial statement which PW2 recorded from the appellant and tendered as exhibit in court, did not form part of the documents whose contents were read over to the appellant during committal proceedings in terms of section 246 (2) of the CPA. Furthermore, no leave was sought in terms of section 289 (1) of **the CPA,** to add PW2 as an additional witness or to add Exhibit P1 as an additional document to be tendered in evidence. In view of the

infraction pointed out above, Mr. Nkoko, urged us to expunge from the record, the testimony of PW2 and the contents of Exhibit P1.

Amplifying the second ground of appeal which is in respect of the cautioned statement of the appellant, which was admitted in evidence as Exhibit P3, the learned counsel, submitted that its recording contravened the provisions of section 50 (1) and 51 (1) (a) and (b) of **the CPA,** in that it was recorded beyond the period provided by the law without seeking extension of time as required by the law. Placing reliance on the holdings in **Janta Joseph Komba and Others Vs the Republic,** Criminal Appeal No. 95 of 2006 and **Alberto Mendes Vs the Republic,** Criminal Appeal No. 473 of 2017 (both unreported), Mr. Nkoko implored us to expunge exhibit P3 from the record.

The third ground of appeal, concerns exhibit P2 which was a shotgun alleged to have been applied in murdering the deceased. It was Mr. Nkoko's submission that, this exhibit had no any bearing in establishing the commission of the offence as well as answering the question as to who committed the offence. This was so on account that, there was no any evidence to link it with the offence of murder. After all, no Ballistic Expert

was summoned to appear in Court and testify as to whether there was any linkage between the gun and the death of the deceased. In the circumstances, Mr. Nkoko asked us to disregard exhibit P2 which was of no any assistance in the determination of the case.

Basing on the submission which he made above, Mr. Nkoko concluded by arguing that, since there was no cogent evidence to implicate the appellant to the offence of murder which he stood charged with, an order of retrial will not serve any useful purpose other than continuing to illegally incarcerate him for no apparent reason. He thus strongly urged us to set the appellant at liberty.

In response to what was submitted by his learned friend, Mr. Kissima on behalf of the respondent/Republic, was in full agreement. He therefore, reiterated the prayer which was made by Mr. Nkoko, that the proceedings of the trial court be nullified, the judgment be quashed and the sentence which was imposed to the appellant be set aside and the appellant unconditionally set at liberty.

The issue which stands for the Court to determine in the light of what has been submitted above, is whether the appeal by the appellant is sound. In resolving the issue, we are going to answer the grounds which have been raised by the appellant, by adopting the approach which was applied by Mr. Nkoko. We propose to start with the ninth ground of appeal which was conjointly argued with the sixth ground in the supplementary memorandum of appeal, which are about involvement of assessors in the trial of the appellant.

The involvement of assessors in a criminal trial, starts with their selection as provided under section 285 (1) of **the CPA** that: -

> *"(1) When a trial is to be held with the aid of assessors, the assessors shall be selected by the court."*

The provision was amply expounded by the Court in the case of **Hilda Innocent Vs the Republic,** Criminal Appeal No. 191 of 2017 (unreported), where it stated that: -

> *"It is instructive to note that involvement of the assessors as per section 285 (1) of the CPA, begins with their selection. The trial Judge therefore must*

indicate in the record that the assessors were selected followed by asking the accused person if he objects to the participation of any of the assessors before commencement of a trial. This must usually be followed by the usual practice that the trial Judge must inform and explain to the assessors the role and responsibility during the trial up to the end where they are required to give their opinions after summing up by the trial Judge."

See also: **Tongeni Naata Vs the Republic** [1991] TLR 54

After looking on what transpired in the proceedings of the appeal under discussion, it is evident that there was no compliance with what was clearly stipulated in the decision quoted above. To appreciate the situation, we let the proceedings of the trial court dated the 4th March, 2013 as reflected on page 19 of the record of appeal, when the case was ready for hearing, speak for itself: -

"04/03/2013

***Coram**: G. Mwakipesile, J.*

***For the Republic:** Ms. Cecilia Mkonongo assisted by Ms. Sharifa Karanda SA and Ms. Silvia Mtango;*

For defence:

1st Accused – Mr. Sikalumba

2nd Accused – Ms. E. Wamunza

3rd Accused – Ms. I. Punge

***Accused persons**: All present in person*

***CC**: Josephine*

***Assessors**: 1. Athumani Seif*

2. Mwanahawa Msuya

3. Emily Chikeki

***Ms.** Mkonongo: The case is for hearing and we have four witnesses.*

Defence Counsel:

Mr. Sikalumba, we are ready

Ms. E. Wamuza, I am ready for hearing

Mr. I. Punge, I am ready for hearing.

Information read over and explained to accused persons who are required to plead thereto: -

1st Accused "siyo kweli"

2nd Accused "siyo kweli"

3rd Accused, "siyo kweli"

***Court:** Entered as a plea of not guilty.*

Signed by the Judge."

What followed after the above proceedings, the case was marked opened and the first prosecution witness started to give her evidence. Apparently, the appellant and his colleagues, were denied their basic right of being asked as to whether they had any objection to any of the assessors who were selected by the court to preside over their case.

The foregoing infraction apart, after the learned trial Judge, had summed up the case to the assessors as reflected on pages 139 to 157 of the record of appeal, they returned a unanimous verdict that all accused persons, the appellant inclusive, were not guilty of the charged offence because the prosecution had failed to prove its case beyond reasonable doubt. However, while the learned trial Judge concurred with them in respect of the other two accused persons, she differed with them in respect of the appellant as reflected on page 198 of the record of appeal, whom she was convinced that it had been established that he was guilty. Even though in terms of the provisions of section 298 (2) of **the CPA,** she was not bound by the opinions of assessors, as correctly submitted by the counsel for the appellant, she ought to have given reasons as to why she differed with them.

Moreover, as it was conceded by both learned counsel, on pages 24, 31, 41, 71 (b), 102 and 103 of the record of appeal, during trial of the appellant, assessors were permitted by the court to cross-examine the witnesses. In so doing, they infringed the provisions of section 177 of the Law of Evidence Act, Cap 6 R.E. 2002 (now 2019) (**TEA)** which stipulates the duty of assessors to be: -

> *"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."*

What is vivid in the light of the wording of the provisions of section 177 of **TEA** above, is the fact that since assessors are part of the court, they are supposed not to ask the witnesses of either side, questions which would tend to identify them as having interest in either side of the case. Cross-examination as we held in **Mathayo Mwalimu and Another Vs the Republic,** Criminal Appeal No. 174 of 2008, is the exclusive domain of an adverse party to a proceeding. We stated further in the said case that: -

> *"... the purpose of cross-examination is essentially to contradict. By the nature of their functions, assessors in a criminal trial are not there to*

contradict. Assessors should therefore not assume the function of contradicting a witness in the case. They are there to aid the court in fair dispensation of justice."

In view of what we have endeavoured to highlight above, we are positive that the ninth ground of appeal in the memorandum of appeal and the sixth ground in the supplementary memorandum of appeal, are meritorious and we sustain them.

The complaint on the second ground in the supplementary grounds of appeal is about exhibit P3, which was the cautioned statement alleged to have been made by the appellant. The same was recorded by one George Maganga (PW5), on the 09th day of May, 2006 from about 08:00 hours. According to Mr. Maganga who also participated to arrest the appellant, he told the trial court that he was arrested on the 06th day of May, 2006. The question which crops here is whether the recording of the cautioned statement was made within the legally prescribed period. The provision which governs the recording of statements of persons suspected to have committed offences, is section 50 (1) of **the CPA**, which reads that: -

"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is–

(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;

(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended."

And, where there has been failure to comply with the period stipulated in the provisions quoted above for any founded reasons, a leeway has been given under section 51 of the same Act that: -

"(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may–

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period."

From the 06th May, 2006 when the appellant was put under police restraint to the 09th May, 2006 when his cautioned statement was recorded by PW5, it was a period of above twenty-four (24) hours which by very far, was beyond the four (4) hours provided by section 50 (1) of **the CPA.** Ordinarily, it would have been expected to find the provisions of section 51 (1) (a) and (b) of **the CPA** being brought into play by applying for extension of time. Nevertheless, much as the record reveals, nothing of the sort was done which moves us to sail in the same boat with Mr. Nkoko, that the cautioned statement was illegally recorded and as such, it cannot be left to stand. See: **Alberto Mendes Vs the Republic,** Criminal Appeal No. 473 of 2017 (unreported). Without any further ado, we sustain the second ground of appeal and expunge Exhibit P3 from the record.

With regard to the third ground, that exhibit P2 was of no any assistance to the determination of the case against the appellant, both counsel from either side were at one that indeed, the exhibit had no evidential relevance to the case against the appellant. According to the testimony of PW5, who tendered Exhibit P2 in evidence, the same was shown to them at where it got retrieved, by one Anselm Matokeo, who stood as the second accused, during trial of the appellant. However, there was no any scintilla of evidence to connect the said exhibit with the offence of murder, which the appellant stood charged with and convicted of. In using the exhibit to convict the appellant, the learned trial Judge, invoked the contents of Exhibits P1 and P3 that is, the extra-judicial and cautioned statements. As such, after having expunged the documents as held above, Exhibit P2 remains useless. The same is thus expunged from the record.

Once what has been highlighted above is done, apparently there remains no any evidence to implicate the appellant to the offence of murder which he stands charged with. In that regard, as proposed by Mr. Nkoko, the need to order for retrial after nullifying the proceedings of the trial court, does not arise. We allow the appeal by nullifying the proceedings of the trial court, quash the judgment and set aside the

sentence. Consequently, the appellant is set at liberty forthwith unless he is legally held for some other founded reasons.

Order accordingly.

DATED at **DAR ES SALAAM** this 5th day of October, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

This Judgment delivered on 8th day of October, 2020 in the presence of the appellant in person-linked via video conference and Ms. Imelda Mushi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL