IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL. NO. 265 OF 2018

MAGE KALAMU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mbeya.)

(Levira, J.)

dated the 7th June, 2017
in
Criminal Sessions Case No. 14 of 2012

JUDGMENT OF THE COURT

20th & 27th November, 2020

MWARIJA, J.A.:

The appellant, Mage Kalamu and another person, Ezekia Nasoro @ Matata (to be referred by his first name of Ezekia) were jointly and together charged in the High Court of Tanzania at Mbeya with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). They were accused of having murdered one Edna Daud (the deceased) on 21/1/2011 at Bulyaga area within Rungwe District in Mbeya Region. They denied the charge and thus the case proceeded to hearing.

The prosecution relied on the evidence of four witnesses while on its part, apart from the evidence of the appellant and Ezekia, the defence called three witnesses. At the conclusion of the trial, the trial court found the appellant guilty. As for Ezekia, it found that the prosecution had failed to prove the case against him. As a consequence, whereas Ezekia was acquitted, the appellant was convicted and sentenced to the mandatory sentence of death. She was aggrieved by the decision of the High Court hence this appeal.

The facts giving rise to this appeal can be briefly stated as follows: The deceased who was aged about $3^1/_2$ years, was until the material time staying with her grandfather, one Andutule and his wife, Jenti Isote (PW2). The other members of the family, who were living at Igogwe Village in Rungwe District, are PW2's grandmother and one Asifiwe.

On 21/1/2010, when PW2 returned home from her business, she did not find the deceased at home. After concerted efforts of her husband and the villagers in search of the child, at about 00.00 hrs, she was informed that the child's body had been found at Bulyaga Lutheran Church area, near a river. PW2 went to identify it. The police took the body to Makandana Hospital and medical examination was conducted on it.

The deceased's body was examined by Geofrey A. Sanga (PW4), a Medical Assistant. According to his evidence, which was supported by his medical report (Exhibit P1), the deceased's death was due to the act of being raped and suffocation as a result of a pressing on her neck. It was his evidence further that, he found the deceased's heart intact. He added that he also took the deceased's blood sample and vaginal smear for the purpose of DNA testing. The samples and the deceased's clothes were handed over by him to the police. Thereafter, the body was taken to Ikama Village for burial.

When PW2 returned home after the burial of the deceased, the neighbours went to her home with the view of consoling her for losing the grand child. One of the neighbours who visited her during that sad period was the appellant. According to PW2's evidence, unlike the other mourners however, instead of consoling her, the appellant uttered insulting words. The words which resulted into the appellant being suspected of the murder of the deceased and thus the decision to charge her together with Ezekia were stated by PW2 in his testimony as follows:

> *"She told me to stop crying much, she said the child who passed away was HIV positive and therefore they have refused to buy her heart. I asked her whether they were selling the heart, she said she was given one week by Matata to find a*

child, she said Matata gave her 2,500,000/= for her to find a child. She said she does not know where to keep the money, she had given her husband 300,000/= Tshs. Her husband asked her why did she give him that money? She told him that she received contribution 'mchango"

In her evidence, PW2 testified that the words were uttered in the presence of one woman who had arrived there from the market area where PW2 was also operating the business of selling groundnuts. It was that woman who went to inform the village leaders about the appellant's act which caused PW2 to be shocked and become unconscious such that she was to be taken to hospital. The incident caused the village Chairman to convene a meeting of villagers to discuss the matter. According to PW2, the appellant admitted to have uttered those words and apologized. The villagers became angry and when the situation became tense, the police was informed. Consequently, some police officers were dispatched to the area and the appellant was taken to the police station.

After the filing of the charge, No. D.2383 D/Sgt Major Michael (PW3) was assigned to conduct investigation. In his evidence, he narrated how the police received information and how the body was recovered and sent to Makandana Hospital for medical examination. He testified further that following the words which were uttered by the appellant and the

information received from a police informer, Ezekia was also arrested and charged.

According to PW3, he was involved in causing the deceased's vaginal smear and blood sample to be taken by PW4. He also caused to be taken, the blood sample of Ezekia. The samples were for DNA testing to establishe whether or not it was Ezekia who raped the deceased. The witness testified also that he was involved in the process of sending the sample to the Zonal Government Chemist.

On her part, Gloria Thomas Machuve (PW1), the Chemist who received the samples from the Chief Government Chemist, testified that the DNA from the blood sample taken from Ezekia resembled that which was found in the samples taken from the deceased.

As stated above, in their defence, the appellant and Ezekia denied the charge but at the end of the trial, whereas the appellant was convicted Ezekia was acquitted. We do not therefore, intend to recite the substance of his evidence and that of the two witnesses who testified for him.

With regard to the appellant, her testimony was brief. Having narrated how on 21/1/2010, she came to notice the absence of the deceased from home and how her body came to be recovered, DW1 disputed the evidence that she participated in the killing of the deceased.

She also denied the allegation that she told PW2 that she should not cry much because the child was HIV positive and that her heart was for that reason valueless. She also denied to have told PW2 that Ezekia gave her TZS. 2,500,000.00 to find a child whose heart could be sold. It was her further evidence that she was present at the burial ceremony and participated in cooking and serving food to the mourners

In its judgment, the High Court (Levira, J. as she then was), found that there was no dispute that the deceased died a violent death. It found further that the evidence relied upon by the prosecution was solely circumstantial. Having analyzed the evidence of the prosecution witnesses and after having appraised herself of the principles governing application of circumstantial evidence as reiterated by this Court in a number of decisions, including the cases of **John Mabula Ndengo v. Republic**, Criminal Appeal No. 18 of 2004 (unreported), **Magendo Paul and Another v. Republic** [1993] T.L.R. 219 and **Hamudu M. Timotheo v. Republic** [1993] TLR. 125, the learned trial Judge was satisfied that, whereas the evidence had proved the charge against the appellant, it was not the case as regards Ezekia who was the 2nd accused person.

As pointed out above, the appellant was dissatisfied with the decision of the High Court and thus preferred this appeal. She initially,

on 21/8/2018, filed a memorandum of appeal consisting of seven grounds. Later on 12/11/2020 however, her counsel filed a supplementary memorandum containing three grounds of appeal.

At the hearing of the appeal which was conducted through video conferencing facility linked to Ruanda Central Prison, Mbeya, the appellant was represented by Ms. Joyce Kasebwa, learned counsel. On its part, the respondent Republic was represented by Mr. Hebel Kihaka assisted by Ms. Sara Rumanywa, learned State Attorneys.

Ms. Kasebwa informed the Court that after having consulted her client, she decided to abandon the grounds of appeal filed by her client and intimidated that she would argue the three grounds contained in the supplementary memorandum of appeal in terms of Rule 73 (2) of the Court of Appeal Rules, 2009 as amended. The grounds raised by the learned counsel are as follows:

> *"1. That the learned trial judge erred in the manner of summing up the case to assessors and failure to direct on vital points of law on circumstantial evidence and confession to convict the appellant.*
>
> *2. That the honorable trial judge erred in [failing] to analyze and evaluate the*

defence evidence hence reached to wrong decision.

3. *That the honorable trial judge erred in . . . introducing new facts/extraneous matters with assumptions contrary to law."*

Although as stated above, the learned counsel raised three grounds of appeal, in the course of hearing, she agreed that the 2nd and 3rd grounds were misconceived. On the 2nd ground, the appellant's counsel had contended that the trial court failed to evaluate the defence evidence and on the 3rd ground she submitted that arriving at her judgment, the learned trial Judge acted on extraneous matters and relied on presumptions. When probed by the court however, Ms. Kasebwa conceded that, since this is a first appeal, even if the Court would find that the defence case was not properly evaluated, the Court would be entitled to undertake that duty. She conceded further that the learned trial Judge did not act on extraneous matters or presumptions but made inferences from the tendered evidence with a view of determining the pertinent issues which arose in the case. For that reason therefore, the appeal hinged on the 1st ground of appeal.

Submitting on the first ground of appeal, Ms. Kasebwa argued that although after the closure of the hearing, the learned Judge summed up

the evidence to the assessors, the summing up was not properly done because they were not directed on vital points of law arising from the evidence. In particular, the learned counsel argued that the assessors were not directed on the nature and application of circumstantial evidence, confession evidence and the ingredients of the offence of aiding and abetting.

Relying on the provisions of ss.198 (1) and 265 of the Criminal Procedure Act [Cap. 20 R.E. 2019], the learned counsel urged us to find that the omission vitiated the proceedings. To bolster her argument, she cited the decision of the Court in the case **Yustine Robert v. Republic,** Criminal Appeal No. 329 of 2017 (unreported).

Responding to the submission made in support of the 1st ground of appeal, Mr. Kihaka conceded that the summing up was not properly done by the learned trial Judge as argued by his learned friend. He added that the assessors were also not directed on the defence of alibi raised by Ezekia. With regard to the effect of the omission, Mr. Kihaka agreed with the appellant's counsel that it vitiated the proceedings.

Having considered the submissions made by the learned counsel for the parties, we agree that although the learned trial Judge made a summing up to the assessors, she did not, with respect, direct them on

vital points of law for them to be properly informed before they gave their opinions, particularly on the nature and application of circumstantial evidence and oral confession, the evidence which was acted upon to found the appellant's conviction.

There is an unbroken chain of authorities which decided to the effect that, the omission renders the trial a nullity as it amounts to having held without the aid of assessors. – See for example, the cases of **Hamis Basil v. Republic,** Criminal Appeal No. 165 of 2017, **Omari Katesi v. Republic,** Criminal Appeal No. 508 of 2017 and **Kaudi Marwa Maswe v. Republic,** Criminal Appeal No. 487 of 2015 (all unreported). In the latter case, referring to the cases of **Said Mshangama @ Sanga v. Republic,** Criminal Appeal No. 8 of 2014 and **Masolwa Samwel v. Republic,** Criminal Appeal No. 206 of 2014 (both unreported) in which the Court was faced with similar situation, it was observed that:

> *"Where there is inadequate summing up, non-direction or misdirection on . . . a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

Having found that the assessors were not directed on the vital points of law involved in this case, there is no gainsaying that the trial was a

nullity. We therefore, hereby nullify the proceedings, quash the appellant's conviction and set aside the sentence.

With regard to the way forward, ordinarily, in such situation, the case should be remitted back to the trial court for a fresh trial. Ms. Kasebwa has however, urged us not to do so. She submitted that a retrial will not be in the interest of justice because the evidence led by the prosecution was not sufficient to found the appellant's conviction. According to the learned counsel, the crucial evidence relied upon by the prosecution is that of PW2, the nature of which was circumstantial. That evidence, she said left doubt as regards its credibility.

On his part, Mr. Kihaka was at one with the appellant's counsel on what should be the way forward. Basing his argument on the principle stated in the case of **Fatehali Manji v. R** [1966] I EA 343, he argued that from the nature of the evidence on record, a retrial order will not be appropriate. It was his argument that the evidence of PW2 is doubtful and since that was the crucial evidence relied upon at the trial, in the event a retrial is ordered, the same will not positively advance the prosecution case to any fruitful conclusion.

Expounding his argument, the learned State Attorney contended that the credibility of PW2 is doubtful because **one,** the alleged oral

confession of the appellant was not corroborated, **two,** the deceased's heart was found to be intact thus contradicting the statement about the cause of the allegation against the appellant and **three,** lack of proof of the allegation that the appellant was given TZS. 2,500,000.00 by Ezekia to find a child whose heart could be sold.

Having considered the arguments of the counsel for the appellant and the learned State Attorney, the task before us is to determine the propriety or otherwise of a retrial order. As pointed out by the learned State Attorney, the principle as regards decision on whether or not to order a retrial was laid down in the often cited case of **Fatehali Manji v. Republic** (supra). In that case, the Court of Appeal of East Africa stated as follows:

> *"In general a retrial will 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 the purpose of enabling the prosecution to fill gaps in its evidence at the first trial; even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."*

In the case at hand, as correctly found by the learned trial Judge, the prosecution case depended solely on circumstantial evidence, the nature of which and the situations under which the same may found conviction was elaborately stated by the learned trial Judge. It is the testimony of PW2 on which the prosecution anchored its case. The issue for our consideration is whether that evidence is cogent such that it will be appropriate to order a retrial.

Having re-evaluated the evidence, we agree with both the counsel for the appellant and the learned State Attorney that reliability of PW2's evidence is doubtful. Apart from the factors stated by Mr. Kihaka, viewing it from the angle of the appellant's alleged conduct, PW2's evidence should not have been believed. The import of the statement which the appellant allegedly made before PW2 had the effect of incriminating herself. It is an undeniable fact of life that in the normal run of criminals they do not behave in such a thoughtless and dangerous manner. – See the case of **Ally Bakari and Another v. Republic** [1992] T.L.R. 10. Gleaned from that perspective, the evidence of PW2 should have been accorded little weight.

On the basis of the foregoing reasons, we find that since the prosecution case was hinged on the evidence of PW2 which, for the

reasons stated above, is wanting in terms of credibility, an order of retrial will not be for the best interests of the case. In the circumstances, we order that the appellant be released from prison forthwith unless she is otherwise lawful held.

DATED at **MBEYA** this 27th day of November, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of November, 2020 in the presence of Joyce Kasebwa, counsel for the Appellant and Mr. Hebel Kihaka, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL