IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A And KITUSI, J.A.)

CRIMINAL APPEAL NO. 69 OF 2019

ESTHER AMAN .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)
(Kairo, J.)

dated the 22nd day of February, 2019

in

Criminal Session No. 14 of 2017

RULING OF THE COURT

8th & 17th December, 2020

MUGASHA, J.A.:

The appellant was charged with six counts on the offence of murder contrary to section 196 of the Penal Code Cap 16 RE: 2002. It was alleged by the prosecution that, on 20/10/2011 at Kalenge Village, Biharamulo District within Kagera Region, the appellant did kill six family members namely: Wilbard Melchior; Veronica Wilbard; Elivira Wilbard; Dorothea Wilbard; Gustaf Wilbard and Honoratus Wilbard, the deceased persons.

The appellant did not plead guilty. To prove its case, the prosecution lined up eleven prosecution witnesses and tendered four documentary exhibits namely: the statement of Sosthenes Charles (Exhibit P1); a sketch map of the scene of crime (Exhibit P2); 6 Reports on Post Mortem Examination (Exhibit P3 collectively) and a Forensic Toxicology Analysis Report (Exhibit P4).

What led to the arraignment and subsequent conviction of the appellant is briefly as follows: On 20/10/2018 around 8:00 am, Sosthenes Charles (PW1) while on the way to see his brother, found Gustaf Wilbard in pain unconscious lying under a tree and foam coming out of his mouth. He decided to call mzee Venance Kayuvi who was nearby farming and they took Gustavu home. On reaching there, they heard a snoring sound from inside the house and found another child Dorothea Wilbard with ailing conditions similar to Gustavu. They took them to the Kakonko Dispensary where they both succumbed to death. When their mother, Veronica Wilbard heard what had befallen her two children she collapsed and upon being rushed to the hospital she expired. Wilbard Merikiory the father of those children also collapsed and expired while on the way

to the hospital to see his ailing children and wife. Other children, Elivira and Honoratus who initially appeared to be fine, later they suffered a similar ailment and died. The appellant together with three other persons including Verediana Amani (PW3) were arrested in connection with the murder of those people. Doctor Tumpale Akim (PW8) examined the bodies suspected that the deceased died because of taking poison but he was not firm. Later, the liver samples extracted from the deceased were taken to the Chief Government Chemist (CGC). According to Domician Dominic (PW11) who conducted the analysis of the samples, he established existence of substance of a chemical known as Alkaloids in the liver samples of the deceased except that of Elivira Wilbard.

In the course of investigation, PW3 revealed that it is the appellant who directed her to pour what was alleged to be a poisonous powder concoction in the bucket of rain water taped outside the homestead of the deceased persons. Thus, only the appellant was prosecuted but PW3 and the other persons were discharged following the withdrawal of the charge against them by the Director of Prosecutions.

In her defence, the appellant denied each and every detail of the prosecution account. She told the trial court to have been apprehended by Wilbard Stanslaus together with Verediana Aman, Katunzi Mkeye, Aman Kayuvi and Amina Issa and taken to Biharamulo police station. She also told the trial court that on the fateful day, she was at her residence together with her husband and children and none of them including PW3 went out on the fateful night.

After a full trial, the judge summed up the case to the assessors who all returned a verdict of guilty. Ultimately, the appellant was convicted on all counts and sentenced to suffer death by hanging. Aggrieved, the appellant has appealed to the Court challenging the decision of the trial court. Seven grounds of appeal raised by the appellant herself were abandoned and instead, through the learned counsel, the appellant raised five grounds in the supplementary memorandum of appeal as follows:

1. **THAT,** the learned trial Judge erred both in law and in facts to convict the appellant basing on the evidence of PW3 Verediana Amani, an accomplice and whose statement or

substance of evidence was not read at committal proceedings;

2. **THAT,** the learned trial Judge erred both in law and in facts to hold that the case at hand support the principles (chain of custody) in the cited case, **Paul Maduka & 4 Others vs. Republic, Criminal Appeal No. 110 of 2007 CAT Dodoma (Unreported)**, instead infringed the same;

3. **THAT**, the learned trial Judge erred both in law and in facts to convict the appellant while the chain of custody of the poison allegedly found in the bucket containing water at the home of the six deceased persons and examined by the Government Chemist to have particles of alkaloids chemicals, was not established;

4. **THAT**, the learned trial Judge misdirected in law after she failed to raise an inference adverse against the prosecution who failed to call one **Amri Ramadhani** to testify as to the information led to discover that it was PW3 Verediana Amani who was associated with the killing of the six deceased persons, **PC Shirima** as to the chain of custody and **Amani Kayuvi** to verify the age of Veridiana Amani (PW3);

5. **THAT,** the learned trial Judge erred both in law and in facts to convict the appellant basing on a suspicious evidence;

To prosecute the appeal, the appellant had the services of Mr. Peter Joseph Matete learned counsel whereas Ms. Susan Masule and Mr. Grey Uhagile both learned State Attorneys represented the respondent Republic.

Initially, we wanted to satisfy ourselves on the propriety of the summing up to the assessors by the learned trial judge. On taking the floor, Mr. Matete submitted that, the trial Judge did influence the assessors with her own views on the guilt of the appellant which was irregular. In this regard, he initially prayed for a retrial but on a reflection, he changed his mind and urged the Court to set the appellant free due to weak prosecution account which did not prove the charge of murder against the appellant. Faulting the prosecution account, he first urged the Court to treat the evidence of PW3 with great caution or disregard it because initially being an accomplice, she had an interest to serve.

Secondly, Mr. Matete faulted the manner of collection, preservation and handling of the samples of water and pieces of liver from the bodies of the deceased person before onward transmission to the Chief Government Chemist. On this he argued

that, the container used to collect and preserve the water sample is unknown because while PW6 at page 42 to 44 of the record of appeal told the trial court that the sample of water was placed in Dasani bottle, PW10 at page 70 of the record testified to have been given water sample in a gallon. He argued this to have compromised the chain of custody because what was actually transmitted to the CGC is unknown. To support the proposition, he cited to us the case of **PAULO MADUKA AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 110 of 2007 (unreported). Furthermore, he faulted the manner in which the liver samples were collected in the absence of any of their relative considering that E. 8593 Sgt. Deogratius Vicent Mgwanga (PW9) who was present during the post-mortem examination was not related to the deceased therefore, not in a position to identify the bodies of the deceased. That apart, he added that, the liver samples were not tendered at the trial and neither was any inventory tendered to establish if the liver samples were discarded.

Mr. Matete challenged the autopsy report of Honoratus which was conducted on 22/10/2011 before he died according to the evidence of PW2. Similarly, he faulted the prosecution in not

parading a material witness one PC Shirima who was entrusted with the samples in question for transmission to the Chief Government Chemist on 8/7/2015. On this he argued that, since the chain of custody was broken, the absence of PC Shirima entitles the Court to draw adverse inference on the prosecution case. He as well, challenged the trial court in convicting the appellant in the wake of the prosecutions failure to establish the cause of death in respect of the deceased persons. He also faulted the oral and documentary account of PW11 from the CGC pointing out that, apart from concluding that the samples of water and liver had poison of Alkaloids chemical nothing is said on the content of the poison in question which can cause death. Finally, he argued that due to weak prosecution account which did not prove the charge against the appellant a retrial, is unworthy.

On the other hand, apart from Ms. Masule, learned State Attorney conceding to the infractions surrounding the summing up, she prayed for a retrial arguing that, on record there is sufficient prosecution account of PW3; PW6, PW9 and PW11 and Exhibit P4 to ground the conviction of the appellant. Secondly, she argued that,

the chain of custody was not broken because each sample was labelled before being taken to the CGC and as such, tampering and changing hands was not possible. To support the propositions, he referred us to the case of **JEREMIAH CHACHA MURIMI AND OTHERS VS REPUBLIC,** Criminal Appeal No. 551 of 2015 (unreported). In this regard, he argued that the case of **PAULO MADUKA** (supra) is not applicable here and as such, it was not necessary to parade PC Shirima as a prosecution witness.

On the cause of death, apart from conceding that the fatal dosage was not stated she was of the view that, the same was remedied by the evidence of PW11 who established that same substances of poisonous Alkaloids were found in the samples of water and pieces of liver. He argued this to corroborated the evidence of PW3 who was directed by the appellant to pour the powdered concoction in a bucket with water at the deceaseds' homestead. Finally, she reiterated her earlier prayer for a retrial.

In rejoinder, Mr. Matete reiterated his earlier submission and urged the Court to set the appellants free instead of ordering a retrial.

Having carefully considered the submissions of learned counsel and the record before us, we have to determine the propriety or otherwise of the learned trial Judge's remarks at the summing up to the assessors and the way forward.

Both learned counsel are at one that the summing up to assessors was irregular because the trial judge influenced the assessors and he did not direct them on vital points of law. Section 265 of the Criminal Procedure Act, Cap 20 RE. 2019 (CPA) mandatorily requires that all criminal trial before the High Court must be conducted with the aid of assessors. In that regard, in terms of section 298 (1) of the CPA, after the close of the case for prosecution and that of the defence, the trial Judge must sufficiently sum up the evidence of both sides in the case to the assessors, who are thereafter required to give their opinion. The essence of the opinion of assessors was emphasised in the case of **WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA 392 as follows:

> *"The opinion of assessors can be of great value and assistance to the trial judge but only if they fully understand the facts of the case before them in relation to the relevant*

law. If the law is not explained and attention not drawn to the salient facts of the case, the value of opinion of assessors is correspondingly reduced."

Therefore, the assessors must be properly informed so as to make rational and independent opinion as to the guilt or otherwise of the accused person. As such, in the course of summing up, a trial judge should as far as possible desist from disclosing his views or making remarks or comments which might influence the assessors one way or another in making up their minds about the issues being left to them for consideration. In the case of **ALLY JUMA MAWEPA VS REPUBLIC,** [1993] TLR 231 the trial Judge had influenced assessors with his own views which were not canvassed in the evidence. The Court among other things, emphasized the following:

"The assessors should be made to give their opinions independently, based on their own perception and understanding of the case after the summing up; ***the Judge makes his views known only after receiving the opinions of the assessors and in the***

course of considering his judgment in the case..."

[Emphasis supplied].

In the matter under scrutiny, we have noted that, in the course of summing up, at page 122 of the record, the learned trial Judge addressed the assessors as follows:

> *"Hon Assessors, you might have noted that the prosecution has rested its case on its key witness one Verediana Amani (PW3) who testified that she was sent by the accused, her mother to put some powder suspected to be poison. The said water was alleged to be the source of death of the sic deceaseds.* ***Thus, her evidence directly links the accused with the offence..."***

We have also gathered that, remarks by the learned trial Judge during the summing up might have influenced the assessors who returned a unanimous verdict of guilty basing mostly on the evidence of PW3 and partly that of PW11.

In our considered view, we think the directions by the learned trial Judge were clearly expressing her own findings of fact on the evidence and had nothing to do with wanting to get the assessors' opinion, but bent on influencing them to agree with her. With respect, it was wrong for the learned trial Judge to have made her impressions known to the assessors. (See **LUSABANYA SIYANTENI VS REPUBLIC** [1980] (TLR) 275. We therefore agree with the learned counsel that, the infraction during the summing up vitiated the trial which had an adverse impact on the appellant who was not fairly tried.

In view of the stated infraction, ordinarily this would have been remedied by ordering a retrial as submitted by the learned State Attorney. However, having carefully scrutinized the evidence on record, we are hesitant to follow that course and we shall give our reasons after considering the state of the prosecution account.

As to whether the prosecution proved the charge against the appellant, PW3 the key witness of the prosecution told the trial court that it is her mother who directed her to pour the poisonous concoction in the water which is alleged to have been consumed by

the deceased. However, since PW3 who testified against the appellant was initially a suspect, her evidence has to be treated with great caution. That apart, it really taxed our mind as to how Saidi Amri Ramadhani could discern that PW3 was associated with the killing because it is on record that he is the one who proposed that she be questioned on what had actually happened in relation to the powder concoction which was smeared in the bucket of water. However, the said Saidi Amri Ramadhani was not called as a witness irrespective of being listed as one of the witnesses at the committal stage in order to clear the doubts on what had precipitated the enquiry in question in relation to the killing incident. To say the least, Said Amri Ramadhani was a material witness and the prosecution was under a prima facie duty to call him as he would have testified on material facts relating to the fateful incident. Since nothing was said if he was not within reach or could not be found, the Court is entitled to draw an inference adverse to the prosecution. See – **AZIZ ABDALLA VS REPUBLIC** [1991] T.L.R 71.

Pertaining to the chain of custody in the handling of the samples of water and liver, we agree with the learned counsel that

the chain of custody was not intact considering the manner of collection and handling of exhibits for onward transmission to the CGC leaves a lot to be desired. We are fortified in that account in the light of what we said in the case of **PAULO MADUKA AND ANOTHER VS REPUBLIC** (supra) whereby the Court underscored the importance of establishing a proper chain of custody of exhibits having said as follows:

> *"A chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime..."*

In the case at hand, there is a conspicuous absence of a proper account of the chain of custody of the sample of water and the pieces of liver. We are fortified in our position because **one,** the record is completely silent if the seizure of water from the homestead of the deceased was conducted according to the provisions of section 38 of the CPA considering that, PW2 was one of the surviving relatives who happened to be at the homestead.

Two, while F 5156 D/Cpl Nassoro (PW6) who collected the sample of water testified to have placed it in Dasani drinking water bottle, the exhibit keeper E 1438 D/C Sgt. Iddi is on record to have recounted that he was given the water sample in a gallon on 22/10/2011 for onward transmission to the CGC.

In respect of the liver samples, it is PW9 a police officer who witnessed the autopsy and assisted the Doctor (PW8) to label the containers in which the six (6) liver samples were kept. However, none of the relatives of the deceased was present to verify and ensure that the samples taken were properly labelled with the correct names of the deceased. According to PW7 after being given the case file he discovered that there was no letter showing that the samples were taken to the CGC, he packed and entrusted them to Shirima to take them the CGC on 26/2/2015. This was more than four (4) years after taking the samples. During such period, the entire record is silent as to how the exhibits were preserved and who was the custodian. That apart, PC Shirima was not summoned to tell the trial court on the circumstances surrounding the compromised chain of custody. Another disturbing feature is that

the samples were not produced at the trial so as to enable the witness to identify them which leaves a lot to be desired.

In the circumstances, we are of the considered opinion that the improper account of the chain of custody, the samples were prone to being tampered with or mixed up and as such, it was unsafe for the trial court to act on such evidence to convict the appellant. In this regard the principle underlying the proper chain of custody as stated in the case of **PAULO MADUKA AND ANOTHER VS REPUBLIC** (supra) cannot be relaxed. Thus the cases of **CHACHA JEREMIAH MURIMI AND OTHERS VS REPUBLIC,** (supra) is distinguishable in the present matter.

Another burning issue is whether the cause of death was established. According to Dr. Tumpale Akim (PW8), in his oral account and the autopsy report, he merely suspected that the cause of death was poison having found the bodies had foam in the mouths. He did not make a conclusive finding of fact on what actually caused the death of the deceased. At this juncture, we have to revisit the evidence of Domician Dominic (PW11) an expert from the Chief Government Chemist. He made the analysis of the

samples in question, conducted laboratory tests and found that the sample of water had particles of alkaloids which were also found in the pieces of liver of five deceased. His report is at page 73 and for avoidance of doubt, it is reproduced hereunder.

" RIPOTI YA UCHUNGUZI WA SUMU
(FORENSIC TOXICOLOGY ANALYSIS REPORT)

YAH: ***UCHUNGUZI WA KIELELEZO: JALADA: BI/IR/1479/2011***

1.0 UTANGULIZI

Mnamo tarehe 8/7/2015 tulipokea kutoka Kamisheni ya Uchunguzi wa Kisayansi wa Makosa ya Jinai, Vielelezo kama ilivyoelezwa kwenye barua yenye Kumb. Na. Na. FB/CID/TOX/LAB/06/0061/2015 ya tarehe 06/07/2015 Ikiambatanishwa na PF.180 kutoka kwa Mkuu wa Upelelezi, Wilaya ya Biharamulo yenye Kumb. Namb. BI/IF/1479/2011 ya tarehe 01/07/2015 ili tuchunguze na kukupa maoni ya kitaalamu.

2.0 MATOKEO YA UCHUNGUZI

Uchunguzi umefanyika na matokeo yake ni kama ifuatavyo:

(a) KIELELEZO "A1": INI (WILBARD MELICHORI)

*Uchunguzi wa gramu 7.18 za ini uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aini ya '**Alkaloids**'.*

(b) KIELELEZO "2": INI (VERONICA WILBARD)

*Uchunguzi wa gramu 5.8 za Ini uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aina ya '**Alkaloids**'.*

(c) KIELELEZO "A3": INI (EUVIRA WILBARD)

Uchunguzi wa gramu 7.61 za Ini uliyotuletea umedhihirisha kutokuwemo kwa sumu yoyote inayotambulika.

(d) KIELELEZO "A4": INI (DORETHEA WILBARD)

*Uchunguzi wa gramu 10.32 za Ini uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aina ya **'Alkaloids'**.*

(e) KIELEZO "A5": INI (GUSTAVU WILBARD)

*Uchunguzi wa gramu 3 za Ini uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aina ya **'Alkaloids'**.*

(f) KIELELEZO "A6": INI (HONORATUS WILBARD)

Uchunguzi wa gramu 7.65 za Ini uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aina ya 'Alkaloids'.

(g) KIELELEZO "B": MAJI

*Uchunguzi wa mililimita 50 za maji uliyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali aina ya **'Alkaloids'**.*

3.0 MAONI YA KITAALAMU NA HITIMISHO

*Kutokana na matokeo hayo ya uchunguzi wa kimaabara katika vielelezo ulivyotuletea umedhihirisha kuwemo kwa chembechembe za kemikali ya **'Alkaloids'**.*

*'**Alkaloids**' ni chembechembe zinazopatikana kwenye mimea ya aina Fulani au hutengenezwa (synthesized) na huweza kuleta madhara na hata kusababisha kifo kwa binadamu kutegemeana kiasi na aina ya iliyomwingia mwilini.*

Imefanyiwa uchunguzi na :

Sgd

Dominician Dominic

MENEJA KITENGO SAYANSI JINAI TOKSIOLOJIA
MKEMIA MWANDAMIZI"

In his oral account at page 73 of the record of appeal, PW11 told the trial after analyzing the samples in question he concluded as follows:

> *"Alkaloids are particles found in certain plants or can be synthesized/ prepared/ made. The chemical has adverse effects to human being and can even cause death depending on the content/volume consumed and its type".*

The question to be answered is whether the report and the oral account of PW11 gave a clue on what caused death.

An abstract titled: **PLANT ALKALOIDS: Main Features, Toxicity, and Mechanisms of Action** an article authored by He'lio Nitaa Matsuura and Arthur Germano Fett- Neto, shows that:

> *"... toxic effects, in general, depend on specific dosage, exposure time, and individual, characteristics, such as sensitivity, site of action, and developmental stages.*

S.P Elliot in his book **PLANT TOXINS, 2017** in an article titled: **A case of Fatal Poisoning with Aconite Plant: Quantitative Analysis in Biological Fluid** has stated that:

> *"Aconitum napellus (aconite, Wofsbane, Monkshood) is one of the most poisonous plants in the UK. It contains various potent alkaloids such as aconitine, isoaconitine, lyacaconitine and napelline. Ingestion of Aconitium plant extracts can result in severe, potentially fatal toxic effects...the analytical findings in a recent death in the UK resulting from deliberate ingestion of Aconitum napellus extract, the concentrations of aconitine measured HPLC-DAD* ***in the post mortem femoral blood and urine were 10.8 micrograms.L and 264 micrograms/L respectively. The aconitine concetration in the antemortem urine was 334 micrograms/l and was estimated to be 6 micrograms/L in the ante serum.*** *Hence, accidental, suicidal or homicidal poisoning due to ingestion of plant material remains a possibility and should be borne in*

mind when investigating sudden or unexplained death."

The two authors give a clue on the fatal dose of poison from plants. This is not reflected in the oral account of PW11 and Exhibit P4. We are fortified in that account because Exhibit P4 which we have reproduced suffers the following several shortfalls: **One,** it is silent on the content of poisonous alkaloid chemical found in the sample of water which is alleged to have been contaminated by the poison in question. **Two,** apart from stating the grams of pieces of liver from each of the deceased persons, it does not indicate the content of the alkaloids poison found in each body and **three,** nothing is stated on the lethal dose of the alkaloids poison which could cause death.

The shortfalls were not addressed by the learned trial Judge who took for granted that as long as the poisonous substances of alkaloids were found in both samples, that is, water and pieces of liver, then the cause of death was established which was with respect, not the case. We are fortified in this view by what transpired in the case of **AGNES DORIS LIUNDI VS REPUBLIC** [1980]

TLR 46. In that case, the Court the appellant had administered poison to herself and her four children. They were all rushed to the hospital and three of her children died but she and her eldest son were saved by the Doctors. It was medically established that the three children had died of poisoning, as a result of the drink administered to them by the appellant. This is not the case here because neither did the Doctor (PW8) conclusively establish that the cause of death was poison nor did PW11 state the volume of alkaloids poison which may terminate life of a human being. In the circumstances, it cannot be safely vouched that the evidence of PW11 corroborated that of PW3 who is alleged to have been directed to pour powder substances in the bucket which was at the homestead of the deceased. We thus agree with the appellant's counsel that, it is highly probable that the deceased might have died due to other causes.

As earlier intimated, pertaining to the evidence of PW3, it is not in dispute that she was originally one of the accomplices but discharged after the prosecution entered *nolle prosequi.* This necessitated her evidence to be treated with great caution because

she had an interest to serve. However, in any case, Exhibit P4 and PW11 are silent of the fatal or lethal dosage of poisonous alkaloids the evidence on record including that of PW3 does not link the appellant with the killing incident. Thus, in a nutshell, the charge of murder was not proved beyond reasonable doubt against the appellant.

All said and done, we are satisfied that there is no evidence necessitating ordering a retrial or else that could be utilised by the prosecution to fill in the evidence gaps which will defeat the purpose of a retrial. On the way forward, we are guided by the principle stated in the case of **FATEHALI MANJI VS REPUBLIC** [1966] 1 EA 343 whereby the defunct Eastern African Court of Appeal had the occasion to say that a retrial will not be ordered for the purpose of enabling the prosecution to fill up the gaps in its evidence at the first trial.

All said and done, we thus, invoke our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act Cap 141 RE, 2002 (the AJA) to nullify the trial proceedings on account of irregular summing up to the assessors, quash and set aside the

conviction and the sentence meted on the appellant and order the immediate release of the appellant unless held for another lawful cause.

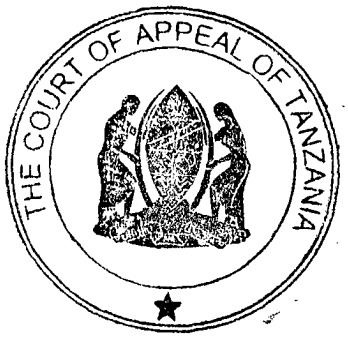
DATED at **BUKOBA** this 17th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered this 17th day of December, 2020 in the presence of Mr. Peter Joseph Matete, counsel for the Appellant and Mr. Juma Mahona, the learned State Attorney for the Respondent / Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL