IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: LILA, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 413 OF 2018

EMMANUEL STEPHANO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

[Appeal from the decision of the High Court of Tanzania at Morogoro]

(Kente, J.)

dated the 15th day of November, 2018

in

Criminal Sessions Case No. 67 of 2015

JUDGMENT OF THE COURT

17th March & 9th April, 2021

KITUSI, J.A.:

The deceased and a woman known as Christina Abineli were in a relationship and had marriage in contemplation. At the same time a person known as Amon Mazengo had his eye on the same woman Christina Abiniel, and allegedly wanted to get rid of the deceased, his competitor. There is no dispute that the deceased was shot dead on 2nd December, 2012 while in bed at Christina Abineli's house, within Mamvisi Village in Gairo District, and the appellant became the prime suspect.

Therefore, the appellant was charged with the murder of the deceased, it being alleged that he was the one who shot him dead at

the instance of Amon Mazengo who is his uncle. The prosecution's case against the appellant was that a homemade muzzle loading gun belonging to the appellant was found at the scene of the murder by the villagers who turned up in response to an alarm. There was also found at the scene of crime one slipper commonly known as "Yeboyebo" which matched another slipper that was allegedly found at the appellant's home on the same night. Further that the appellant confessed to a police officer (PW3) that he is the one who shot the appellant dead by using the muzzle loading gun on instructions of Amon Mazengo, his said uncle.

In defence the appellant disowned the muzzle loading gun as well as the "Yeboyebo" and denied any involvement in the killing. He stated that in the early hours of 2/12/2012 he set out on foot to the Railway Station with the view of catching a train for Kigoma, unaware that the deceased had been killed around the same time. However, on 3/12/2012 he was arrested by a police officer who was escorting the train assisted by a person known as Zamoyoni Mogella.

The appellant further said he was taken to Gairo police station where he was kept and tortured from 5/12/2012 to 16/12/2012 when he

decided to confess to save his skin. He therefore retracted the confession, and denied being related to Amon Mazengo.

The trial Court found the appellant guilty and convicted him, placing considerable weight on the cautioned statement, Exhibit P4. This appeal challenges that conviction and the death sentence that was imposed on the appellant.

Mr. Nehemiah Nkoko, learned advocate filed a seven-ground memorandum of appeal on behalf of the appellant, abandoning the memorandum and supplementary memorandum of appeal which the appellant had personally filed earlier. After abandoning the 5th ground of appeal that had complained that the Judge did not explain to the assessors about their duty, the learned advocate's scheme of argument, started with ground 6 which challenges the summing up to the assessors for being improper.

On the summing up the learned counsel faulted it on account of the learned Judge omitting to direct the assessors on some vital points. He cited instances of the vital points to which the assessors were not directed as being the ingredients of murder and the evidential value of the cautioned statement. He suggested that since the assessors did not take part in the trial within trial which resulted into the admission of the

cautioned statement, the Judge had a duty to direct them on how such evidence could be applied.

Two cases were cited to us to support the counsel's view that in similar circumstances the Court would invoke section 4 (2) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2002] hereafter the AJA, to nullify the proceedings, quash the conviction and set aside the sentence. The cases cited are **Lazaro Katende v. Republic**, Criminal Appeal No. 146 of 2018 and **Malambi Lukwaja v. Republic**, Criminal Appeal No. 390 of 2017 (both unreported). Mr. Nkoko pointed out that upon nullifying the proceedings, quashing the conviction and setting aside the sentence, we may order a retrial but that would depend on our decision on the remaining grounds of appeal which he was going to argue subsequently.

Ms. Esther Martin, who appeared together with Ms. Neema Mbwana, both learned State Attorneys, made a rather short submission in response to the submission on ground 6. She submitted that although the Judge did not expressly direct the minds of the assessors to the ingredients of the offence of murder, he must have done so when explaining to them their duty. She took a different view from that of Mr. Nkoko on the cautioned statement because, she submitted, its

admission was upon holding a trial within a trial which did not involve the assessors. In any event, the learned State Attorney submitted, there were directions to the assessors on the cautioned statement.

In our deliberation on the complaint under the 6th ground of appeal, we shall take note of the settled law that involvement of assessors in trials before the High Court gives such trials legal legitimacy, because it is a requirement under section 265 of the Criminal Procedure Act, Cap 20 R.E. 2002, (the CPA). We agree with Mr. Nkoko that in a case where summing up is found to be wanting, as it happened in the cases he cited to us, the Court has tended to nullify proceedings, quash the conviction and set aside the resultant sentence. Other cases include **Tulubuzya Bituro v. Republic** [1982] TLR 265, **Said Mshangama @ Singa v. Republic,** Criminal Appeal No. 8 of 2014 and **DPP v. Revelian Naftali & Marick Emmanuel,** Criminal Appeal No. 570 of 2017 (the latter two being unreported). In **Said Mshangama** (supra) we clearly stated:

> *"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial Judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or*

misdirection on such 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."

We also agree with the learned counsel that the decision as to whether as a consequence a retrial should be ordered or not would depend on whether in the circumstances of each case, there would be evidence to support the prosecution case.

However, after our careful consideration of the matter at hand, we hesitate to go along with Mr. Nkoko. This is because the decision of the trial court was mainly based on the evidence of confession which the appellant is said to have made in the cautioned statement, therefore the summing up is mainly relevant only as far as it affects that evidence. To be fair to the learned trial Judge, we are satisfied that he directed the assessors on the length and breadth of the evidence of confession as submitted by Ms. Martin. The following excerpt from the summing up notes speaks loud:-

"Lady assessors, the above stated is the gist of the evidence from the two sides in the case. The most important question to determine is whether or not the confession contained in the accused's cautioned statement (exh. P3) which he made to PW3 is reliable or not. As for the amount of

weight to be accorded to the accused's cautioned statement you should not forget that the same was related by the accused and therefore it is a requirement of the law that it may not be safer to ground a conviction on it without corroborative evidence. But the law allows you if you are satisfied that the accused clearly admitted to have killed the deceased in his cautioned statement and that his confession was truthful, to return the verdict of guilty against him...But if on the other hand you will be not satisfied with the truthfulness of the accused's cautioned statement, in the absence of any other evidence connecting the accused's murder you will be entitled to return the not guilty verdict".

In our view, that excerpt offered sufficient directions to the assessors, and we do not think the learned Judge could have made it anyhow clearer. If anything, it could just be a matter of style, but we do not see any non-direction that affected the substance of the decision. We will therefore dismiss this ground of appeal and proceed to consider the arguments in relation to the substance of the case.

We start with ground 1 of appeal which raises a complaint that the evidence of the medical doctor (PW1) was wrongly admitted because he did not feature in the committal proceedings. Mr. Nkoko submitted that

the taking of PW1's testimony was in violation of section 289 (1) of the CPA, so he called upon us to expunge that evidence from the proceedings. The learned State Attorney conceded to this ground of appeal without ado.

With respect, we agree with both the learned advocate for the appellant and the learned State Attorney who prosecuted the respondent's case. The tone of section 289 (1) of the CPA is clear that the prosecution may not call as a witness a person whose statement was not read out during committal proceedings. There are quite a number of our decisions that have given effect to that mandatory statutory requirement, such as in the cases of **Hamisi Meure v. Republic** [1993] T.L.R 213 and **Sijali Shabani v. Republic**, Criminal Appeal No. 538 of 2017 (unreported). We are certain that section 289 (1) of the CPA was enacted for a sound reason, that is, to get the accused informed of what lies ahead in a case, which is an aspect of fair trial. The law however, envisages a situation where the prosecution may have inadvertently omitted to have a statement of an important witness read out. In such a situation the prosecution may, in terms of section 289 (1), (2) and (3) of the CPA introduce that witness after giving reasonable notice and obtaining leave of the court. Nonetheless, in the instant case nothing of that sort was done despite the prosecution

indicating at page 37 of the record during preliminary hearing, that a Doctor would be featuring as one of the witnesses. Consequently, it is our conclusion that there is merit in the first ground of appeal, so we expunge the testimony of PW1, as well as Exhibit P2, the report on postmortem which he tendered to prove the cause of death.

We turn to the second ground of appeal, which raises issue with the appellant's alleged confession contained in the cautioned statement (exhibit P4). We have earlier indicated that the impugned decision was mainly grounded on this piece of evidence, so we shall reproduce the full text of this ground of appeal. It goes thus: -

> *"THAT, the learned Trial Judge erred in law and in fact by convicting and sentencing the appellant relying on Exhibit P4 (Confessional Statement of the Appellant which was retracted and repudiated) while the same was taken out of time contrary to mandatory provisions of section 50 (1) and 51 (1) (a) and (b) of the CPA [Cap 20 R.E 2019] and the Trial Judge shifted the burden of proving voluntariness of the confessional statement to the appellant contrary to section 27 (2) of the Tanzania Evidence Act [Cap 6 R.E 2019]"*

Submitting on this ground of appeal, Mr. Nkoko pointed out that Exhibit P4 was objected to for having been recorded outside the statutory time, but the learned trial Judge's determination on the objection was on the issue whether that statement was made by the appellant voluntarily or not. The learned counsel submitted therefore, that the court did not resolve the issue of time which had been raised in the objection.

On the other hand, Ms. Martin took a different view, submitting that the trial court resolved the issue of time because it made a finding that during the preliminary hearing the appellant admitted that he was arrested on 16/12/2012. It also made a finding, according to Ms. Martin, that the appellant's statement recorded from 12.30 hours on that date was recorded within time. The learned State Attorney cited to us our decision in the case of **Jacob Asegelile Kakune v. Republic**, Criminal Appeal No.178 of 2017 (unreported) in which we reiterated the position that an accused person who confesses to a crime is the best witness. We may as well say it right here, that we have no problem with that principle because in a deserving situation, no witness can better tell the perpetrator of a crime than the perpetrator himself who decides to confess. However, the issue under discussion here is different. It is whether the safeguards as regards the time of recording the statement

and the suspect's willingness to make it as provided under sections 50 (1) and (2) up to 58 of the CPA were met.

The main complaint raised in the second ground of appeal relates only to the time of recording the appellant's statement because we do not see even a subtle suggestion that involuntariness was also alleged. Therefore, we will confine our discussion to the issue of the time of recording the confession. While the appellant's counsel submits that the court did not resolve that issue, the learned State Attorney maintains that it did.

Upon considering the arguments placed before us, we think the learned State Attorney is correct in her submission that the trial court considered the question of the time of recording the statement. At page 83 of the record of appeal in his ruling against the appellant's objection, the learned trial Judge stated that the statement had been recorded within time because the appellant had earlier admitted that he was arrested on 16/12/2012. We think what we are going to have to determine now is whether that finding correctly resolved the issue that had been raised in the objection.

Section 50 (1) of the CPA sets the basic time available for interviewing a suspect being four hours running from the time he is

taken under restraint. This begs the question, when was the appellant in this case taken under restraint? There are three versions as to when the appellant was arrested. The first is that of PW3 who said that on 16/12/2012 he was summoned back to the police station to perform a duty. On getting there he was instructed to record the statement of the appellant who had already been kept in custody. In the course of interviewing the appellant, PW3 was told by him that he was arrested while in a train bound to Kigoma. The second version is the cautioned statement (Exhibit P 4) in which the appellant stated that he was arrested by two members of the people's militia while in a train to Kigoma. The statement is silent as to the date of the arrest leave alone the time. The third version is that of the appellant himself saying he was arrested on 3/12/2012 and that he remained in the hands of the police from 5/12/2012 to 16/12/2012.

Let us subject the three pieces of evidence to scrutiny. To begin with, PW3's testimony is of no assistance in determining the date and time of the appellant's arrest because the date he referred to in his testimony is [that] when the appellant was turned over to the police after which he was instructed to interrogate him. PW3 had no idea of when the appellant was arrested except only as he was told by the appellant himself. Then Exhibit P4 is equally of no relevance in resolving

that question because it does not state anywhere the date and time of the appellant's arrest. In view of the above even if the appellant was recorded as admitting to the fact about the date of his arrest, we do not think it was thereby correct for the trial court to conclude that the date of the arrest was undisputed when the prosecution case itself was not consistent about it. As the cardinal principle of proof in criminal cases requires, we shall resolve that doubt in favour of the appellant and conclude that the prosecution did not prove the date of the appellant's arrest. There is therefore nothing to contradict the appellant's contention that he was arrested on 3/12/2012.

We have also decided to subject to scrutiny the appellant's alleged admission of the date of his arrest made during the preliminary hearing. In our considered view the procedure was not adequately complied with, for two reasons. One, it is the appellant's advocate who is recorded to have stated that he was admitting to five of the matters of fact which were read out to the appellant, including the date of his arrest. The record shows the appellant simply stating: -

"I agree with my advocates on those five items".

Two, there is no indication on the record that the memorandum of matters not in dispute was read over to the appellant as required by

section 192 (3) of the CPA. Over the years, case law has insisted that it is the accused, not his advocate, who should state whether he admits certain facts as true or not and that a memorandum of matters not in dispute prepared by the court shall be read over and explained to the accused. The case of **MT. 7479 Sgt. Benjamin Holela v. Republic** [1992] T.L.R 121 is authority for the position that it is the accused who should state the matters he does not dispute. The Court stated: -

> *"It is apparent that a statement by counsel or advocate for the accused to the effect that the matters raised are admitted is not sufficient under the law. It is the accused himself who must indicate what matters he or she admits".*

With that settled law in mind, would there be justification in concluding that the appellant's response referred to above, in which he agreed with his advocates on 'those five items', amounted to him saying he was arrested on 16/12/2012? With respect, we think the learned Judge should not have determined this crucial point on the basis of what transpired at the preliminary hearing conducted not in full compliance with the law. Instead this was a fit case for the learned Judge to exercise his discretion under the proviso to section 192 (4) of the CPA, which provides: -

> *"Any fact or document admitted or agreed (whether such fact or document is mentioned in the summary of evidence or not) in a memorandum filed under this section shall be deemed to have been duly proved;* ***save that if, during the course of the trial, the court is of the opinion that the interests of justice so demand, the court may direct that any fact or document admitted or agreed in a memorandum filed under this section be formally proved". (Emphasis provided).***

For all those reasons, we find merit in the second ground of appeal and conclude that the trial court wrongly admitted and relied on the retracted cautioned statement which had been objected to on the basis of time, an issue that remained unresolved. We accordingly expunge Exhibit P4 from the record. We emphasize that the provisions setting conditions in recording statements of suspects are not ornamental, but serve a purpose of safeguarding the rights of those suspects. Those provisions therefore, call for strict compliance as the Court stated in **Emmanuel Malahya v. Republic**, Criminal Appeal No. 212 of 2004 (unreported): -

> *"Violation of s. 50 is fatal and we are of the opinion that ss. 53 and 58 are on the same plane. These provisions safeguard the human rights of*

suspects and they should therefore not be taken lightly or as mere technicalities. We therefore expunge Exh. P1"

Having expunged Exhibit P4 in our case, what is there to support the prosecution case? We are not losing sight of the fact that the conviction of the appellant mainly rested on that confession.

That takes us to the third ground of appeal which we shall combine with the fourth ground of appeal. Under the third ground of appeal, the trial court is criticized for concluding that the muzzle loading gun (Exhibit P3) was the murder weapon. This criticism is mounted on two arguments. The first is that after expunging the testimony of the Doctor (PW1) and the postmortem report (Exhibit P2), there remains no evidence to prove the cause of death. The second argument is that since there is no ballistic expert opinion linking the gun to the killing nor evidence tending to prove that the appellant is the owner of that gun, the trial court wrongly applied that evidence in convicting him.

In response Ms. Martin submitted that death may be proved otherwise than by medical evidence. She added that there is no dispute in this case that the deceased died an unnatural death. She however conceded at some point that when the evidence of PW1 and Exhibit P2 are expunged, there is no other evidence to prove the cause of death.

The fourth ground of appeal complains that there were no independent witnesses to corroborate the appellant's confession as the testimonies of PW2, PW4 and PW5 were mere hearsay. On this ground Mr. Nkoko referred us to page 103 of the record where the learned trial Judge in summing up to the assessors stated that the evidence of PW4 and PW5 did not connect the appellant with the murder, yet in the judgment he considered their testimonies as corroborating the cautioned statement. He submitted that the evidence of PW4 and PW5 could not corroborate any evidence because theirs was hearsay evidence. Ms. Martin submitted that the evidence of PW4 and PW5 was on the ownership of the gun and the shoe that was found at the scene, and during the summing up, the Judge directed the assessors to resolve that issue.

We think the issue for our consideration in relation to the third and fourth grounds of appeal is whether, having expunged the cautioned statement, there remains on record some evidence on which the conviction could be found. We have no doubt there is no evidence left to base the appellant's conviction. First, we agree with the learned State Attorney that death may be proved without medical evidence showing the cause. That is what we decided in the case of **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004; **Mwita Kigumbe Mwita**

and Another v. Republic, Criminal Appeal No. 63 of 2015 (both unreported) and quite a few others. This is, however, relevant only if the death is ultimately linked to the appellant, and in our view, there are several reasons for concluding that in this case there is no such link.

One, assuming without deciding, that the deceased died as a result of a bullet discharged from the gun (Exhibit P3), there is no evidence to prove that the said gun belonged to the appellant. The same is the case with the shoe which is also part of exhibit P3. As the appellant disowned these items, and as PW2, PW4 and PW5 who are not members of the appellant's family did not clarify how they knew those items as belonging to the appellant, there could be no justification for considering these witnesses infallible. **Two**, it is plain from the record that the conviction was based on the appellant's confession, and the trial court gave the evidence of PW2, PW4 and PW5 the status of being mere corroborative. Having expunged the cautioned statement, there remains nothing which PW2, PW4 and PW5 could corroborate. For the reasons shown above, we find merit in the third and fourth grounds of appeal.

Because of our finding in the preceding grounds of appeal, we shall not deliberate on the seventh ground of appeal which raises a complaint that the trial court did not consider the defence case.

Undoubtedly, the conviction of the appellant was found on the confession he allegedly made in the cautioned statement which we have expunged. There is therefore no evidence left to support his conviction, and the question whether or not the defence case was considered becomes moot.

In the end, we allow this appeal, quash the conviction and set aside the sentence. We order the appellant's immediate release if his continued incarceration is not justified by any other lawful cause.

DATED at **DAR ES SALAAM** this 6th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 9th day of April, 2021 in the presence of the appellant in person linked via-Video conference from Ukonga Prison and Mr. Adolf Kisima, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESEMBURO
DEPUTY REGISTRAR
COURT OF APPEAL