IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: NDIKA, J.A., WAMBALI, J.A. And SEHEL, J.A.)

CRIMINAL APPEAL NO. 361 OF 2018

BAHATI NDUNGURU @ MOSES ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate of Ruvuma with Extended Jurisdiction)

(Dyansobera, PRM. Ext. Jur.)

Dated the 13th day of June, 2013
in
RM. Criminal Sessions Case No. 19 of 2012
HC. Criminal Sessions Case No. 4 of 2012

JUDGMENT OF THE COURT

3rd & 7th May, 2021

WAMBALI, J.A.:

The appellant, Bahati Ndunguru @ Moses appeared before the Court of Resident Magistrate of Ruvuma sitting under Extended Jurisdiction (Dyansobera PRM E. J. - as he then was) where he faced a charge of murder contrary to the provisions of section 196 of the Penal Code Cap 16

R. E. 2002 (now R. E. 2019) (the Penal Code). The particulars in the information alleged that on 6th September, 2011 at Ndondo village within Mbinga District in Ruvuma Region the appellant murdered one Cypirian Nyoni. The allegation was strongly contested by the appellant.

To substantiate the allegation, at the trial, the prosecution relied on the following witnesses; Dr. Agnes Mapunda (PW1), Kathalina Menas Nyoni (PW2), Menas Innocent Nyoni (PW3) and E.6628 D/CPL Michalino (PW4). Two exhibits; namely, the Post Mortem Report (PMR) and the sketch map (SM) were also tendered and admitted as exhibits P1 and P2 respectively.

Essentially, the substance of the prosecution evidence was that on the fateful date, the appellant stabbed the deceased with a knife and as a result he caused his death. Particularly, PW2, a sister of the deceased and an estranged wife of the appellant, testified that on 6th September, 2011 at 20:00 hours the appellant went to the club belonging to his father (PW3) where she was selling liquor and ordered two bottles of beer. However, at around 21:00 hours the appellant decided to leave the place without paying TZS. 4000.00 which was the price of the beers he consumed. When PW2 followed him and demanded the payment the appellant slapped her. The act was witnessed by the deceased who went to intervene to rescue

his sister. The appellant then started to fight with the deceased but the dispute was quelled by those who were present at the club.

According to PW2's further testimony, that was not the end of the fight as the appellant went to his house and returned with a knife which he immediately used to stab the deceased on the left arm and lower part of the chest. After the incident PW2 notified PW3 who responded quickly and gave the deceased the first aid by restoring the intestines which had protruded outside the stomach as a result of the stabbing. PW3 then sent the deceased to Litembo Hospital, but unfortunately, he passed away on 11th September, 2011. Basically, in their testimony, PW2 and PW3 maintained that as the appellant had evil intention to cause the death of the deceased, after the incident he disappeared on the same night until when he was arrested by the police in Dar es Salaam, about a month thereafter, on 10th October, 2011.

The body of the deceased was examined and according to (PW1) the examination which was conducted at Litembo Hospital indicated that the cause of death was severe haemorrhage and sepsis.

On the other hand, PW4's testimony basically centered on his investigation of the case, drawing sketch map and coordination of the arrest of the appellant in Dar es Salaam which was facilitated by the information from his relatives.

In his spirited defence, the appellant strongly emphasized that he did not commit the alleged offence of murder on the fateful date, that is, 6th September, 2011. He also firmly testified that on that date he did not go to the club to drink beer and refused to pay as alleged by PW2. He maintained that on that date and at the alleged time he was at home together with his uncle, Herman Nombo (DW2) and slept at 23:00 hours. DW2, the only witness who testified in support of the appellant's defence fully supported the appellant's story and added that the appellant did not go to Dar es Salaam for hiding but for his business activities.

After a full trial, the trial court critically evaluated the evidence for both sides, and in the end, the appellant was found guilty, convicted and handed down a mandatory death sentence. Essentially, the trial court found as a fact that the deceased died a violent death and that it was the appellant who caused his death and that the unlawful act was actuated with malice.

It is the said finding of the trial court which prompted the appellant to lodge the instant appeal before the Court. It is significant to point out that initially the appellant lodged a memorandum of appeal comprising seven grounds of appeal. However, at the hearing of the appeal, Mr. Jally Willy Mongo, learned advocate, who appeared to represent the appellant, abandoned the respective grounds and substituted therefor with two grounds of appeal. These are; first, that the trial PRM E. J. erred in law to allow assessors to cross-examine witnesses for the parties at the trial. Second, that the trial PRM E. J. wrongly convicted the appellant with the offence of murder instead of manslaughter.

As Mr. Shaban Mwegole learned Senior State Attorney who appeared to represent the respondent Republic did not object to the prayer of the appellant's counsel, we accordingly, in terms of Rule 81(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules), granted Mr. Mongo the requisite leave to argue the two substituted grounds of appeal.

Submitting in respect of the first ground of appeal, Mr. Mongo forcefully argued that the presiding Magistrate with extended jurisdiction wrongly allowed assessors to cross-examine witnesses for the prosecution and the defence contrary to the provisions of sections 146 and 177 of the

Evidence Act, Cap 6 R. E. 2019 (the EA) and sections 290 and 294 of the Criminal Procedure Act, Cap 20 R. E. 2019 (the CPA). He further submitted that according to the provisions referred above, assessors are only required to ask witnesses questions for clarification and not to cross-examine them for purpose of discrediting their testimonies. He emphasized that the participation of assessors envisaged under the provisions of section 265 of the CPA aims to assist the trial court to ensure there is fair administration of justice. On the contrary, he submitted, assessors are not expected to be partisan to either side of the case by cross-examining witnesses.

To demonstrate his complaint in respect of the alleged cross-examination of witnesses, Mr. Mongo made specific reference to pages 18, 19, 21, 22, 33, 36 and 37 of the record of appeal. To substantiate the position of the law with regard to the role of assessors at the trial and the consequences of the shortcoming, the learned counsel for the appellant referred the Court to its previous decision in **Joseph Balami @ Panga v. The Republic**, Criminal Appeal No.237 of 2016 (unreported). In the circumstances, Mr. Mongo submitted that as the omission of the trial court is fatal, the entire proceedings should be nullified, conviction quashed and sentence set aside and a retrial be ordered by the Court.

Responding to the complaint in the first ground of appeal, Mr. Mwegole fully supported the submission of Mr. Mongo and maintained that the apparent cross-examination which was done by assessors in the presence of the trial magistrate was contrary to the law. He added that it was also wrong for the assessors to ask questions to the appellant and his witness as reflected at pages 33 and 34 of the record of appeal immediately after cross-examination and before re-examination was done by the appellant's counsel. To support his contention, he made reference to the decision of the Court in **Idrisa Hamimu @ Mwela v. The Republic**, Criminal Appeal No.112 of 2016 (unreported).

In the end, Mr. Mwegole who joined hands with his learned friend's submission regarding the fatality of the shortcoming and the consequences which should follow, urged us to allow the first ground of appeal.

We wish to preface our deliberation on the first ground of appeal by restating the position of the law on the role of assessors in capital offences' trial before subordinate courts.

It cannot be overemphasized that assessors are part and parcel of the trial court's proceedings as stipulated by section 265(1) of the CPA. It

is in this recognition, that in terms of sections 285 and 298(1) respectively of the CPA, assessors must be present throughout the trial and in the end they are required to give their opinions concerning conviction or acquittal of the accused before the court. Thus, to facilitate the assessors' assistance to the trial court, during the trial they are allowed in terms of section 177 of the EA to put questions to witnesses with the leave of the court. For clarity, section 177 of the EA provides as follows:-

> *"In cases tried with assessors, the assessor may put any question to the witness, through or by leave of the court, which the court itself might put and which it considers proper".*

We are also mindful of the provisions of section 146 (2) of the EA which stipulates that cross-examination of a witness is done by the adverse party. It is therefore not the duty of assessors to cross-examine witnesses. The assessors' duty is to assist the trial judge or magistrate with extended jurisdiction in accordance with the provisions of sections 265 and 174 of the CPA respectively. For avoidance of doubt the said provisions provide as follows:-

Section 265:-

> *"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit".*

Section 174:-

> *"All offences tried under the provisions of section 173 shall be tried with the aid of two or more assessors and in the manner prescribed for the trial of offences by the High Court".*

The importance of adherence to the provisions of sections 265 and 174 of the CPA was vividly underscored by the Court in its decision in **Omary Rashid @Makoti v. The Republic,** Criminal Appeal No.167 'B' of 2015 (unreported).

At this juncture, we must emphasize that presiding judges and magistrates with extended jurisdiction who are assisted by the assessors at the trial should ensure that they guide them in asking questions as envisaged in section 177 of the EA. In this regard, the Court in **The Republic v. Crospery Ntagalinda @ Koro,** Criminal Appeal No.73 of 2014 (unreported) observed that:-

"We should add that the presiding judge should warily guide assessors' questions and see to it that they are within permissible mandate..."

Therefore, as assessors are not adverse parties, they should not be allowed to cross-examine witnesses for the parties as correctly stated by the Court in **Joseph Balami @ Panga v. The Republic** (supra) referred to us by Mr. Mongo.

Moreover, it is instructive to acknowledge what the Court stated in **Baraka Jail Mwandembo v. The Republic**, Criminal Appeal No.102 of 2014 consolidated with Criminal Appeal No.103 of 2014 (unreported) with regard to the position of the law on the role and limits imposed on assessors during the trial thus:-

1. *In cases tried with assessors, the assessors may put any question to the witness, through or by leave of the Court, which the court itself might put and which it considers proper as prescribed under section 177 of the Evidence Act Cap 6 R. E. 2002. On the other hand, section 146(2) of the Evidence Act states that the examination of a witness by adverse party is called cross-examination. Cross-examination is a feature of*

adversarial process and designed to let a party confront and undermine the other party's case by exposing deficiencies in a witness's testimony. By section 155 (a) and (c) of the Evidence Act, when a witness is cross-examined, he may also be asked questions which tend to test, respectively, his veracity to shake his or her credibility, by injuring his character.

2. *It is one thing for the assessors to put questions to witnesses during a trial in order to seek clarification in the testimony volunteered by the witness, which is perfectly acceptable under section 177 of the Evidence Act; it is another thing altogether, for them to cross-examine witnesses to test the veracity of their testimony or to shake their credibility, by injuring the character. That is beyond their limit. It is not without a reason that section 177 of the Evidence Act is explicit that the questions that may be put by assessors to witnesses are those which the court itself may put.*

3. *Assessors are not authorized to cross examine witnesses under either section 146 (2) of the Evidence Act or section 265 of the CPA as they*

cannot serve as an adverse party in a fair, impartial and just determination of the criminal case. With respect the High Court which undersection 177 of the Evidence Act is enjoined to oversee the questions that assessors may put to witness, allowed them to wonder into cross-examination and in a line of questioning disallowed by law. The lay assessors' cross-examination, completely innocent as it may have been, offended section 177 of the Evidence Act and surpassed the role ascribed to them in aiding the court under section 265 of the CPA".

Admittedly, the Court in that appeal nullified the High Court's proceedings, quashed conviction, set aside the sentence and ordered a retrial.

However, it is also correct to state that nullifying trial court's proceedings and ordering a retrial on account of the omission of allowing assessors to cross-examine witnesses depends on the circumstances of each case. In this regard, we do not hesitate to state that whenever there is a prayer for nullifying the trial court's proceedings and ordering a retrial on account of the contention that assessors wrongly cross examined witnesses, the Court must be satisfied that the omission occasioned

injustice to the appellant. Particularly, it must be patently demonstrated from the record of proceedings that the nature of the response to the issues raised by assessors in their questions which may be considered as cross-examination, entirely aimed to discredit the integrity of the particular witness. Thus, if upon proper consideration of the response of the witness it is apparent that the questions put by the assessors were basically intended to seek clarification of what the witness said earlier on in his testimony either during examination in chief or cross-examination; it must be concluded that the respective questions did not intend to contradict the witness's credibility. Therefore, it is not sufficient to simply contend, like in the instant appeal, that the fact that the trial judge or magistrate with extended jurisdiction used the prefix "XD" or "XXD" when the respective assessor was allowed to ask question implies that what was done was not aimed to seek clarification but to cross-examine the particular witness. Even where cross examination is established the key issue should be whether in accordance with record of proceedings the parties were prejudiced by such omission.

We are supported in our observation by the decision of the Court in **Elias Mtati alias Ibichi v. The Republic**, Criminal Appeal No.65 of 2014

(unreported). In that decision though the Court acknowledged that it was wrong for the trial judge to give room to the assessors to cross-examine PW1, it held that the appellant was not prejudiced. The same reasoning was reached by the Court in **Charles Kalungu and Charles Kalinga v. The Republic**, Criminal Appeal No.96 of 2015 (unreported). Noteworthy, in the former decision, the Court particularly stated as follows:-

> *"The crucial question is however, the effect tied to the shortcoming. It seems to us that when confronted with a corresponding misnomer, each case would be dictated by its own circumstances, the determining factor being whether or not the person accused was prejudiced.*
>
> *Looking at PW1's response to the assessor's questioning, it seems to us that the questions were focused on what she testified in court and, for that matter, we are of the settled view that the appellant was not prejudiced".*

In the instant appeal, we have carefully revisited the record of the trial court proceedings in the record of appeal on specific pages complained of and we are of the settled opinion that assessors did not cross-examine witnesses as maintained by counsel for the parties. Basically, though the

trial magistrate indicated in respect of each assessor the prefix "XD" which is usually intended for examination in chief, it does not follow that the respective assessor examined in chief or cross-examined a particular witness. On the contrary, our thorough scrutiny of the response of the witnesses for both parties demonstrates that assessors asked questions for clarification as required under the provisions of section 177 of the EA. Few examples shall suffice to support our observation.

Firstly, at page 17 of the record of appeal, PW2 had testified in chief that at the club there was electricity light. At page 18 of the record of appeal in response to the question from the first assessor; PW2 stated that; ***"at the club there was electricity inside and outside"***. Indeed, PW2's further response to the question from the second assessor on the same issue was that; ***"at the bar there was electricity from the generator"***. In our respectful opinion, we are settled that in view of the nature of the above reproduced response by PW2 the questions put by the two assessors aimed to have a clarification on the source and intensity of the light which was at that club that would have facilitated proper identification of the assailant.

Secondly, in her evidence in chief at the same page (17), PW2 testified that the deceased ran towards the house of one Kunan to save his life after the appellant followed him. Noteworthy, at page 18 of the record of appeal during cross-examination, PW2 responded as follows to the appellant's counsel question; ***"From that pombe club to Kunan is nearby about 20 metres away"***. After that response it seems to us that the second assessor followed up with another question on the same issue which was responded as follows by PW2; ***"By the time Kunan was asleep and did not wake up".***

Clearly, the nature of response which is mostly reflected in almost all pages referred by Mr. Mongo and supported by Mr. Mwegole cannot lead us to conclude that the respective assessors cross-examined witnesses. Equally important, though it is clear at pages 33, 34 and 35 of the record of appeal, that assessors asked questions to the appellant (DW1) and his witness (DW2) before re-examination as submitted by Mr. Mwegole, we are settled that in view of the evidence and the circumstances of this case, no prejudice was occasioned to the appellant.

In the circumstances, we respectively disagree with the concurrent submissions by counsel for the parties that the trial court wrongly allowed

assessors to cross-examine witnesses. Thus, the authorities which were referred in support of their respective position are distinguishable with the circumstances in this appeal and are not applicable.

Ultimately, from the foregoing deliberation we dismiss the first ground of appeal.

As regards the second ground of appeal, Mr. Mongo argued that in view of the evidence in the record of appeal, the trial court wrongly rejected the fact that the deceased met his death in the cause of fighting with the appellant. He elaborated that according to the evidence in the record of appeal there is no doubt that the crucial evidence concerning the fighting between the appellant and the deceased was given by PW2 who was the only person who witnessed the incident on the fateful date.

Mr. Mongo added that in the testimony of PW2 she clearly stated that there was a fight which was in two stages and that it was in the later stage that the appellant stabbed the deceased with a knife. In this regard, the learned counsel argued that the evidence in the record of appeal leaves no doubt that the deceased was stabbed in the cause of the fight and that his

death was caused by the presence of hemorrhage and sepsis which was a result of the stab wound inflicted by the appellant.

On the basis of his submission in support of this ground of appeal, Mr. Mongo urged us to reverse the finding of the trial court which is to the effect that the appellant caused the death of the deceased with malice aforethought, and thereby substitute the conviction with manslaughter. He also prayed that if the second ground of appeal is allowed, the sentence to be imposed on the appellant should consider the period he has been in custody, that is, since 2011 when he was arrested and later convicted of murder to date. Essentially, he prayed that the second ground of appeal be allowed.

On his part, Mr. Mwegole drastically disagreed with the contention of Mr. Mongo that the evidence in the record of appeal supports the conviction of the appellant on the offence of manslaughter instead of murder. In his submission, PW2 who was the eye witness patently proved that the appellant killed the deceased with malice aforethought. He explained that the appellant fought with the deceased during the first phase and later he retreated to his home and took a knife which was used to stab the deceased. He strongly argued that even the nature of wounds

which were inflicted on the body of the deceased as stated by PW2 and supported by exhibit P1 indicates that the parts of the body which the deceased was stabbed left no doubt that the appellant had intended to kill the deceased. To support his contention, he referred us to the unreported decision of the Court in **Enock Kipela v. The Republic**, Criminal Appeal No.13 of 1998 which was also followed in **Said Ally Matola @ Chumila v. The Republic**, Criminal Appeal No.129 of 2005 (unreported).

In the circumstances, Mr. Mwegole pressed us to dismiss the second ground of appeal on the contention that the prosecution proved the case of murder against the appellant to the hilt.

Admittedly, the trial court strongly relied on the evidence of PW2 who witnessed the incident of the deceased's stabbing by the appellant on the fateful date. Moreover, the evidence of PW1 and exhibit P1 was also considered to base the finding that the nature of the wounds which were inflicted on the deceased indicated that the attacker had intended to end the life of the deceased on earth.

On the other hand, the appellant on his defence categorically denied to have caused the death of the deceased with or without malice

aforethought. He therefore refuted the allegation that in the course of fighting the appellant he stabbed him with a knife.

We have carefully and thoroughly reviewed the evidence on the record of appeal. In this regard, we are satisfied that the deceased met his death in the cause of the fight with the appellant. It is noted that the appellant did not strongly dispute the testimony of PW2 with regard to what transpired during the fighting between him and the deceased. It is clear in the record of appeal that the appellant through his counsel did not strongly cross-examine PW2 to shake her testimony on the aspect of the fighting. Thus, as PW2 was the sole witness who witnessed the incident, and her evidence was not shaken by the appellant's defence, the fact that the appellant and the deceased fought cannot be impeached easily by any other witness who testified at the trial.

On the other hand, we are mindful of the fact that throughout the testimony of PW2 during examination in chief she was firm that the appellant stabbed the deceased after a lapse of time from the first phase of the fight to the second phase. However, as rightly stated by Mr. Mongo, PW2's response to the question for clarification from the second assessor as reflected at page 19 of the record of appeal renders credence to the

finding that the deceased's death occurred in the cause of the second phase of fighting with the appellant. For clarity, we better let the record of the trial court's proceedings at that particular page speak for itself thus:-

> *"There were two stages of fighting... The deceased was stabbed at the second interval of the fight from the first fight to the second half a second had passed..."*

A close analysis of the above reproduced response leaves us with no doubt that between the first and second phases of the fight, the time which elapsed was too minimal for the appellant to rush to his home to grab a knife and return to the scene to reignite the fight and stab the deceased. In the premises, we find that the response of PW2 negates her earlier examination in chief testimony that it took some considerable time after the first fight before the appellant stabbed the deceased. Besides, in view of the clear evidence of PW2 in the record of appeal, what is important is that she patently witnessed the incident of fighting and the stabbing of the deceased by the appellant. Therefore, the fact remains that the deceased was injured in the cause of a fight with the appellant which ultimately caused his death.

In in view of our finding above, we agree with Mr. Mongo that in the circumstances of the evidence in the record of appeal, it can certainly be concluded that the death of the deceased occurred in the course of a fight with the appellant. It cannot therefore, be inferred or concluded to the contrary that the said death was actuated by malice aforethought on the part of the appellant. On the contrary, the facts on the record categorically disclose the offence of manslaughter contrary to section 195 of the Penal Code.

Generally, it is settled law that death resulting from a fight is not murder but manslaughter. In this regard, in **Zuberi Abdallah v. The Republic**, Criminal Appeal No.144 of 1991 (unreported) the Court stated that:-

> *"It has been held a number of times by this Court, and its predecessor, the East African Court of Appeal that death resulting from a fight is at worst, a manslaughter".*

The said decision was followed in **Israel Misezero @ Miriani v. The Republic**, Criminal Appeal No.117 of 2006 and **James Kabole v. The Republic**, Criminal Appeal No.435 "B" of 2013 (both unreported).

Indeed, in an akin situation, in **Emmanuel Mrefu @ Bilinge v. The Republic**, Criminal Appeal No.271 of 2006 (unreported), the Court substituted the conviction of murder with manslaughter after it became apparent that in view of the evidence in the record, though the deceased's death was caused by the appellant in the cause of fighting, there was no indication that malice aforethought was established.

In the circumstances, we respectfully disagree with the learned Senior State Attorney for the respondent Republic that the prosecution proved beyond reasonable doubt the case of murder against the appellant as found by the trial court. On the contrary, based on our evaluation of the evidence in the record of appeal as demonstrated above, we find that the appellant is guilty of the offence of manslaughter contrary to the provisions of section 195 of the Penal Code.

Ultimately, we quash the conviction of murder and substitute for it with one of manslaughter. Accordingly, we set aside the sentence of death.

On the other hand, we are mindful of the appellant's prayer to us that in imposing the sentence, we should consider the period the appellant has been in custody, that is, from 2011 to date.

On our part, having carefully considered the period the appellant has been in custody and the circumstances that led to the death of the deceased, we impose a term of imprisonment for fifteen years from the date of the appellant's conviction, that is, 13th June, 2013.

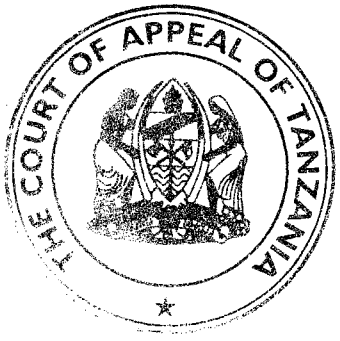
DATED at **IRINGA** this 6th day of May, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The judgment delivered this 7th day of May, 2021 in the presence of the appellant linked via video conference at Iringa Prison, and Ms. Radhia Njovu, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL