IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

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

CRIMINAL APPEAL NO. 95 OF 2017

1. MICHAEL YOHANA @ BABU
2. JUMA RAJABU @ DONGO ..... **APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

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

(Mzuna, J.)

dated 27th day of September, 2016
in
Criminal Session No. 51 of 2014

JUDGMENT OF THE COURT

4th May, & 25th June, 2021

KITUSI, J.A.:

Two people appeared before the High Court on a charge of murder under section 196 of the Penal Code, the prosecution alleging that they jointly murdered one Sima Juma, hereafter the deceased. It was alleged that the deceased was a *bodaboda* rider and, unknown to him, the killers were his ill-intentioned passengers. After they killed him they made away with his motorcycle.

The trial Court convicted the two people and sentenced them to the mandatory death sentence. They preferred this appeal against the

conviction and sentence but Michael Yohana @ Babu who was the first appellant died while in prison awaiting hearing. Juma Rajabu @ Dongo, who was the second appellant, is the only surviving appellant.

At the trial, there was evidence that the deceased's death was reported to the Police by his uncle (PW3) immediately upon a search party finding his body on 12/1/2012, with a stab wound on the back.

There was also evidence that on 13/1/2012 while at Msamvu bus stand with his colleagues, a police No. 3339 Corporal Pambano (PW1) received a tip from a whistle blower that there was a motorcycle up for sale by people believed to have robbed it from a person they stabbed with a knife. The informer directed the police to the house in which it was suspected the motorcycle had been hidden. The person who was at that house, one Frank, told the police that it is true that the motorcycle had been there, but Michael Yohana and Juma Rajabu, the appellant, had left with it.

The police took Frank with them, and while driving around with him, they spotted Michael Yohana. On seeing the police with Frank, Michael Yohana took to his heels, but PW1 successfully gave chase and apprehended him. Again, as the police were driving towards the police station with Frank and Michael Yohana, the latter pointed to a man who

was playing pool table, as one of the culprits. The police arrested that man too. That man happens to be the present appellant.

In the course of interrogations conducted by the police it was learnt that the motorcycle was at Michael Yohana's residence at an area known as Msamvu Ndege Wengi, within Morogoro. A search conducted by PW1 and PW2 in the presence of PW6 a Ten Cell leader, confirmed that fact because the motorcycle was found in the room of Michael Yohana. That motorcycle was identified by PW3 and PW4 as the one the deceased had been using before he was found dead.

According to PW1, the suspects were then conveyed to Dumila Police Station within Kilosa District on 14/1/2012 at 7.30 a.m. Dumila being the area of jurisdiction within which the alleged killing took place. PW5 who said the suspects arrived at Dumila Police Station on 14/1/2012 at 9.00 a.m. recorded the cautioned statement of the appellant from 11.20 a.m. of that date. After a trial within a trial, the trial Judge admitted the statement as Exhibit P7, holding that it was made voluntarily.

In defence, Michael Yohana admitted to have been found in possession of the motorcycle but made an account of how he came by it. He stated that Frank and one Ramadhani offered that motorcycle to him for sale and he had agreed to buy it subject to being given its

registration card. So, according to Michael Yohana, Frank left the motorcycle at his residence as he went to get the registration card. However, he stated, before the card was brought to him, Frank and the appellant were arrested and upon interrogation as to where the motorcycle was, they disclosed that it was at his (Michael's) residence. That is when, according to Michael Yohana, he became aware that the motorcycle was a stolen property.

The appellant's defence was that he was a victim of a random arrest by the police. He said that on 12/1/2012 he moved from Mahenge where he was residing and doing mining, to Ifakara where he spent the night. On 13/1/2012 he travelled from Ifakara to Morogoro. At Morogoro while walking to a friend with whom he had communicated by mobile phone, he ran into the police who arrested him as a suspect of committing theft. However, he later found himself being joined with Frank and Michael Yohana who were, hitherto, unknown to him.

On the basis of the doctrine of recent possession, the trial court found Michael Yohana guilty and convicted him, rejecting his account of how the motorcycle got at his residence. The appellant's conviction was based on the cautioned statement. Aware of the danger of relying on a repudiated or retracted confession, the learned Judge warned himself

and proceeded to act on it because he was satisfied the same had been adequately corroborated.

The appellants appealed against that decision initially through a joint memorandum of appeal which was later supplemented by a supplementary memorandum of appeal filed only by the appellant. Mr. Merkiory Sanga, learned advocate, who represented the appellant at the hearing, filed yet another supplementary memorandum of appeal. This appeal as we have already indicated, is only in respect of that one appellant represented by Mr. Sanga. The respondent Republic entered appearance through Mr. Medalakin Emmanuel and Ms. Joyce Nyumayo, both learned State Attorneys.

However, before the appeal could be argued in substance, we called upon Mr. Sanga and the learned State Attorneys to address the Court on the Judge's summing up to the assessors and whether they considered it to be adequate. Although Mr. Sanga had not raised this aspect in the supplementary memorandum of appeal, he was quick to pick the scent, and Mr. Emmanuel followed suit. They agreed that the summing up was not in full compliance with the law.

The learned counsel submitted that the learned Judge did not explain to the assessors the ingredients of murder and the meaning of common intention. Further that while the trial Judge heavily relied on

circumstantial evidence, he was not equally exhaustive about it in the summing up to assessors. Also missing in the summing up, is explanation on the defence of alibi, which the appellant had raised, and the danger involved in using a repudiated or retracted confession.

As for the consequences of the inadequate summing up, Mr. Sanga and Mr. Emmanuel were also agreed that we should invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA) and nullify the proceedings of the trial court, because the same was conducted without the aid of assessors as required by law.

In dealing with the foregoing arguments relating to summing up, we think we need not emphasize that section 265 of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA), requires trials before the High Court to be with the aid of assessors. In order that the said assessors are not reduced to mere spectators, section 298 (1) of the CPA requires that they give their opinions after the Judge directs their minds on the important points in the case, by summing up the said case to them. We are satisfied that the learned trial Judge did not fully comply with the law because in the summing up to the assessors, he left out some points that were very vital to the case, thereby in effect, rendering the assessors no better than spectators in the trial. The proceedings, having been conducted in violation of the law were a

nullity and we accordingly, under section 4 (2) of the AJA invoke our revisional powers and nullify them.

What then is the way forward after nullifying the proceedings? Ordinarily, there would be an order of retrial as we have done in some cases such as, **Mohamed Seleman Kidari @ Nowata v. Republic**, Criminal Appeal No. 247 of 2017 (unreported). However, in this case we have been asked not to order retrial on the ground that there is no sufficient evidence to prove the case against the appellant. Both Messrs. Sanga and Emmanuel submitted on the areas which the prosecution case is wanting.

First, it has been submitted that there is no evidence that the appellant was at the house where the motorcycle was found, because he did not sign the certificate of seizure tendered in evidence. Secondly, it was submitted that the cautioned statement was recorded outside the prescribed time. Citing the case of **Joseph Shaban v. Republic**, Criminal Appeal No. 399 of 2015 (unreported), the learned counsel prayed that we should expunge it. Another important point that was raised referring to the impugned judgment is that it is trial Judge who seems to have implicated the appellant without there being evidence.

We have earlier indicated that the appellant's conviction was found on the cautioned statement although it was repudiated, so our main

focus will be on that piece of evidence. We shall conduct a rehearing this being a first appeal, and in the course of doing so, a portion of the appellant's testimony in defence, has caught our eye because it has a bearing in the ultimate decision. The appellant made a barbed account of the treatment he received while in the hands of the police, as follows:

> *"They beat me again with a club labelled "Pepsi". It was made of aluminium. It was a short one. I was tied head downside. They beat me while naked. They used naiis to fix them at my leg. I can show the scars.*
>
> *Court: The scars are shown with big dots."*

The proceedings show that after these assaults by the police, the appellant and the others were conveyed to Dumila where they arrived at around 7.00 – 8.00 Pm. In the morning that followed he was made to sign a statement he knew nothing about. He was taken to a Justice of the Peace where he denied committing the offence. However, the learned trial Judge took the view that the cautioned statement must have been made by the appellant because it carried details that could not have been narrated by anyone but him.

We are genuinely disturbed by two aspects. **One**, the learned Judge appears to have shifted the burden to the suspects, to prove that

they had been tortured, which is surprising considering that he had earlier seen the scars as shown above. At page 214 of the record the Judge observed:-

> *"The accused tried to impress the court that they were beaten and hit with nails however the alleged scars were quite different and there was no proof by PF3 that they suffered the injuries during the pendency of this case".*

Then, the learned Judge proceeded to accept the evidence that the cautioned statement was made by the appellant because, he said, it carried details which would not have come from anybody other than him. With respect to the learned Judge, it seems to him, the end justifies the means, in that if a suspect is made to spit out details which are considered to be implicating, then the issue of voluntariness in the process deserves no determination by the court. We think however, courts must play a nobler duty of seeing that suspects are treated according to human rights standards, and that is what sections 50 to 58 of the CPA stand for. See our recent decision in **Emmanuel Stephano v. Republic,** Criminal Appeal No. 413 of 2018, citing the Court's earlier decision in **Emmanuel Malahya v. Republic**, Criminal Appeal No. 212 of 2004 (both unreported). Those provisions were enacted to safeguard human rights in the investigation process. In this case we do not go

along with the learned trial Judge's view that the appellant had the duty to prove that he got the injuries while in the hands of the police. Rather the police had the duty to prove that he did not.

Two, there are three different versions as to when the suspects were conveyed to Dumila. PW1 said it was at 7.30 a.m. PW5 said it was at 9.00 am. Then, the appellant said it was at 7.00 to 8.00 p.m. the issue of the time of arrival at Dumila is critical because it bears on whether the cautioned statement was recorded within the basic hours or not. However, there was no finding by the trial judge on this, so in view of the complaint raised in this appeal that the cautioned statement was recorded beyond the prescribed time, there is no basis for us holding that the statement was recorded within time. From our discussion on the cautioned statement, we are increasingly of the view that the trial Judge should not have admitted it into evidence, which means that if a retrial is ordered it will provide the prosecution an opportunity to fill in such gaps.

When the cautioned statement of the appellant is expunged, there remains no other evidence that would support the prosecution case. Aware of the restrictive principles for ordering retrial, we guard against the possibility of the prosecution taking advantage of the would-be retrial to fill in gaps in their case. See the case of **Fatehali Manji v.**

Republic [1966] 1. E.A 343 which has been followed in many of our decisions.

There is one last feature of the case which was raised by Mr. Sanga and which we have to consider. He submitted that there was no evidence against the appellant rather it is the trial Judge who implicated him. He referred us to page 224 of the record, which is part of the judgment. We have taken a look at the relevant paragraph and found ourselves in agreement with the learned counsel. That paragraph goes thus: -

> *"As for the motorcycle, the parts had been dismembered definitely the culprits must have spent some time to do so and this was done to conceal its identity so that it may not be traced. The first accused admitted it was found in his house while in that state.* ***The second accused purports to distance himself but was a party to the murder".***

With respect, the learned Judge descended into the arena and ended up making conclusions that had no evidential proof of the appellant's alleged participation in the commission of the murder. Decisions of courts should always be based on the evidence on record and the applicable law.

In this case as we have demonstrated in the preceding pages, the only evidence against the appellant being the cautioned statement there remains nothing after expunging it. We cannot order a retrial in the circumstances. Instead, as this issue was raised by the Court, we invoke our revisional powers again under section 4 (2) of the AJA to quash the judgment and conviction and set aside the sentence that was imposed against the appellant. We order his immediate release from prison unless he is being held for some other lawful cause.

DATED at **DAR-ES-SALAAM** this 23rd day of May, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of June, 2021 in the presence of the appellant in person linked via video conference to Ukonga Prison and Mr. Medalakin Emmanuel, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

H.P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL