IN THE COURT OF APPEAL OF TANZANIA

AT KIGOMA

(CORAM: MKUYE, J.A., SEHEL, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 236 OF 2020

SEMBURI MUSA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Kigoma at Kigoma)

(A. J. Kirekiano-SRM Ext. Jursd.)

dated the 20th day of May, 2020
in
Criminal Sessions Case No. 6 of 2019

JUDGMENT OF THE COURT

13th July & 5th August, 2021

MKUYE, J.A.:

The appellant, Semburi Musa was charged and convicted of murder contrary to section 196 of the Penal Code, Cap 16, R.E.2002 [now 2019] and was sentenced to death by hanging (Hon. Kirekiano, SRM Ext Jur.). It was alleged that the appellant, on 16/9/2018 in Kaparamsenga village within Uvinza District in Kigoma Region, did unlawfully kill one, Luiza s/o Gervas.

The brief background of the case leading to this appeal goes thus:

On the material date 16/9/2018, Luiza s/o Gervas (deceased) was walking home from shamba while holding a bush knife. On his way he

met the appellant who was holding a stick. According to Maria Edward Nduimana (PW1) who witnessed the incident, the appellant in getting close to the deceased snatched from him the bush knife and used it to cut him (deceased) several times on the head and neck. The deceased fell on the ground. Meanwhile, the appellant was heard telling him "*get up and go*". However, the deceased could not rise up. On seeing that, PW1 hurriedly went to report the matter to the military barracks nearby.

Picking from PW1, Jimmy Jackson (PW2), a local militia man overheard some women shouting that Samburi had killed someone. PW2 responded and on arrival at the scene of crime he met and saw the appellant holding a bloody bush knife and the deceased lying on the ground while seriously injured. PW2 managed to inquire from the appellant why he had done what he did to the decease and he replied that the deceased had also cut his figure which was hanging out.

PW2 put the appellant under restraint. He took him to the military barracks. The deceased was then rushed to a nearby dispensary for medical attention. Unfortunately, due to the nature of the wounds which he sustained, the dispensary was not capable to attend him. The deceased passed away.

Rajesh Abubakari, (PW4) conducted a post-mortem examination on the deceased's body and revealed that the deceased's death was due to severe head injury and haemorrhagic shock.

The appellant was arrested and then arraigned before the court for the charge of murder.

In his defence, the appellant distanced himself from the crime alleging that he did not know the incident and that he was just arrested when he was mourning the death of his mother.

Aggrieved, the appellant has now appealed to this Court fronting both a substantive memorandum of appeal (the former MA) and the supplementary memorandum of appeal (the latter MA). The former MA consists of four (4) grounds of appeals as follows:

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt.*
2. *That, malice aforethought, in the circumstances of this case, was not cogently established by the prosecution because of the followings: -*

    (i) The deceased died in exercise of the appellant's right to self defence.

    (ii) The conduct of the appellant after the assault on the deceased namely remaining at the scene of crime instead of running and

cooperating with PW2 is consistent with lack of malice aforethought (manslaughter).

(iii) Lack of prior planning of the attack on the deceased premised on the fact that the appellant had not carried any weapon prior to meeting the deceased on the road.

3. *That, PW1 lied under oath when: -*
   (a) She testified that she was alone in company of her small child when the offence occurred while in fact she was together with other women.
   (b) She testified that she didn't raise alarm while she did together with other women.
   (c) She attempted to suppress, during examination in chief, the fact that the deceased cut the appellant with the bush knife until such fact was elicited during cross examination.
4. *That, the alleged report on the status of mental health of the appellant from* ***ISANGA MENTAL INSTITUTE*** *was not part of evidence, the omission of which leaves open the defence of insanity.*

The latter MA is composed of three (3) grounds of appeal as follows:

1. *That, the Hon. Trial Senior Resident Magistrate with Extended Jurisdiction erred in law and facts for his non and misdirection in summing up on evidence not adduced by any witness and by not summing up on the possible*

defence of self defence and drawing his own conclusion to assessors when he summed up to the assessors.

2. *That, the Hon. Trial Senior Resident Magistrate with Extended Jurisdiction erred in law and facts by admitting exhibits P1 and P2 contrary to the law on procedures to admit exhibits where it was Public Prosecutor who tendered exhibit P1 by assuming the role of a witness and in total disregard of the requirement of reading admitted documentary evidence.*

3. *That, the trial Senior Resident Magistrate with extended Jurisdiction erred in law and facts in holding that the appellant assaulted the deceased intending to kill the deceased crux of the killing being the alleged quarrels in inheriting estate properties left behind by Appellant's parents whom were shared with PW3 without any cogent evidence to prove the allegations and total disregard to the evidence that the appellant and the deceased were fighting.*

When the appeal was called on for hearing, the appellant was represented by Mr. Sadiki Aliki, learned counsel and the respondent Republic was represented by Messrs Robert Magige and Raymond Kimbe, both learned State Attorneys.

Mr. Aliki prefaced by stating that he would argue the appeal in the following arrangement, that to say, grounds nos. 1, 2, and 3 of the

former MA together with ground no. 3 of the latter MA, followed by ground no. 1 and lastly ground no. 2 of the latter MA. He abandoned the 4th ground of appeal in the former MA. However, on our part, for convenience we shall deal with the grounds of appeal starting with ground 2 of the latter MA followed by grounds nos. 1, 2, 3 of the former MA and 3 of the latter MA together and lastly, ground 1 of the latter MA.

Addressing the Court on the ground no. 2 of the latter MA that exhibit P2 (the Post-mortem Examination Report) was not properly admitted in court for being tendered by the public prosecutor and having not been read over in court, Mr. Aliki contended that such exhibit ought to have been tendered by the doctor (PW4) who authored it as he was called to testify in court. He added that, even if it is found to have been properly tendered, there is another anomaly as it was not read out in court. For that reason, while relying on the case of **Said Salum v. Republic**, Criminal Appel No. 499 of 2016 (unreported), he urged the Court to expunged it from the record. The learned counsel went on dismissing the evidence of PW1 in that it cannot stand alone to prove the offence of murder.

On his part, Mr. Magige explained that Exh. P1 was tendered during Preliminary Hearing (PH) without any objection from the defence

counsel. He pointed out that tendering of such exhibit during PH is a matter of practice which is quite proper. At any rate, he went on submitting that, in terms of section 291 (3) of the Criminal Procedure Act, Cap 20 R.E. 2019 (the CPA), PW4 was called to testify in court. However, he conceded that since the same was not read over in court it be expunged from the record of appeal.

Unlike his counter-part, Mr. Magige submitted that even if Exh P1 is expunged from the record, there is ample evidence that the deceased died due to excessive bleeding as was explained by PW4. He referred us to the case of **Elinasani Matiko Ng'enge v. Republic**, Criminal Appeal No. 241 of 2012 (unreported) where the Court after having expunged the post-mortem examination report (Exh P2) considered the remaining evidence to find out whether or not it sufficed to prove the offence charged against the appellant and at the end it found that the charge of murder was proved by the prosecution beyond reasonable doubt.

There is no gainsaying that the Post-mortem Examination Report (PMER) was tendered by the prosecutor during PH conducted in terms of section 192 of the CPA. Since there was no objection from the learned advocate who represented the appellant, it was admitted as Exh P1

(page 28 of the record of appeal). It is noteworthy that, admission of exhibits during preliminary hearing is not barred in view of the purpose of introducing such procedure which is intended to accelerate trials or to promote expeditious trials and cost-effective disposal of criminal cases – See **Jackson Daudi v. Republic**, Criminal Appel No. 111 of 2002 (unreported) where it was emphasized that the main purpose of such procedure under section 192 of the CPA is to speed up the trial by ascertaining at the earliest stage in the proceedings matters which are not in dispute. In the same case it was also stated that:-

> *"Once those are ascertained then only the evidence on the disputed matters will be called at the trial. There will be no need to call witnesses or other evidence to prove that is which agreed to be undisputed".*

At any rate, as Mr. Aliki rightly submitted, the doctor (PW4) who examined the deceased's body was summoned in court in compliance with section 291 (3) of the CPA. However, he was not led to read out the PMER after it had been admitted in court.

On the other hand, we agree with both learned counsel that Exh. P1 was not read over in court after being admitted in court. We thus agree with the learned counsel's invitation that for the failure to read over Exh. P1 in court, it must be expunged from the record of appeal.

On this, we are guided by our numerous decisions on this issue. Just to mention a few, they include **Robinson Mwanjisi and 3 Others v. Republic**, [2003] T.L.R. 218; **Said Salum** (supra); **Joseph Maganga and Another v. Republic**, Criminal Appeal No. 536 of 2015; **Anania Clavery Betela v. Republic,** Criminal Appeal No. 355 of 2017; **Miraji Iddi Waziri @ Simwana and Another v. Republic**, Criminal Appel No. 14 of 2018; and **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 (all unreported). For instance, in the case of **Said Salum** (supra), the Court expunged the PF3 (Exh P1) for having not been read over after being cleared. The Court stated:

> *"On the second limb regarding failure to read over the PF3 in court, the record bears out that after the PF3 was admitted it was not read out in court. It is now settled law that once a document has been cleared for admission and admitted in evidence it must be read out in court. Failure to do so occasioned a serious error amounting to miscarriage of justice and that document ought to be expunged from the record."*

Applying the above authority in this case, since the Exh. P1 was not read over in court after being admitted in evidence we are settled in our mind that it was prejudicial to the appellant and we accordingly, expunge it from the record of the court.

In grounds nos. 1, 2 and 3 of former MA and ground no. 3 of latter MA, the appellant's complaint is that the case was not proved beyond reasonable doubt as the malice aforethought was not established. Submitting in support of the said ground Mr. Akili reasoned that, **one,** each appellant and deceased was on his own journey while deceased was carrying his bush knife and the appellant was holding a stick and as such the appellant did not make any preparation to kill the deceased. **Two**, though PW1 said the appellant attacked the deceased, she did not explain what really transpired between the two. **Three**, since PW2 said that after questioning the appellant why he attacked the deceased and the appellant said the deceased also attacked him and cut his finger which was bleeding and hanging out, it implies that there was a fight between them. He added that, in such a fight the appellant could attack the deceased on any part of the body. **Four**, the appellant's conduct of showing cooperation to PW2 at his arrest and when he was taken to the army barracks indicates that he did not intend to kill. **Five**, the appellant killed the deceased out of anger as he was denied to inherit his deceased's parents' properties.

In response to the said grounds nos. 1, 2 and 3 of the former MA and 3 of the later MA, Mr. Magige argued that the case was proved

beyond doubt by PW1, PW2, PW3 and PW4. He elaborated that PW1 who was the eye witness saw when the appellant grabbed the bush knife from the deceased and cut him with it on his head and neck. Mr. Magige went on to argue that the offence was committed at about 9:00 a.m. meaning during a day light; that the appellant was familiar to her as they lived in the same village; and that she observed him at a distance of about 3-5 paces. Apart from that, he contended, that PW1 reported the matter at the army barracks immediately after the incident which indicates her credibility and reliability.

Mr. Magige submitted further that PW1's evidence was corroborated by PW2's evidence who came at the scene of crime after hearing the alarm raised. He found the appellant holding a machete while the deceased lying on the ground with wounds on his head and neck. He added that, PW2 apprehended the appellant and took him at the barracks.

The learned State Attorney argued further that PW1 and PW2's evidence was corroborated by PW3 who examined the deceased and observed that his death was due to head injury and haemorrhagic shock. In this regard, he was of the view that the prosecution proved that it was the appellant who killed the deceased.

As regards the issue of malice aforethought, Mr. Magige argued that the same was proved beyond reasonable doubt. While relying on the case of **Charles Bode v. Republic**, Criminal Appeal No. 46 of 2016 (unreported) in which the case of **Enock Kapela v. Republic**, Criminal Appeal No. 90 of 1994 (unreported) was cited with approval, he argued that the appellant used a machete to cut the deceased on the head and neck which are sensitive parts of the body.

In rejoinder, Mr. Aliki stressed that malice aforethought was not proved as some factors in **Enock Kapela's** case (supra) were not met, and more so, if Exh P1 is expunged, the remaining evidence would be weak. He added that, the totality of evidence shows that the appellant had no motive to kill the deceased.

In the end, he prayed to the Court to find that the appeal has merit and allow it.

Having considered the grounds of appeal and the submissions from both sides, we think, the main issue for our determination is whether the prosecution proved the case beyond reasonable doubt that the appellant murdered the deceased.

On the issue relating to the proof of the case, at the outset, we agree with the learned State Attorney that PW1 was the key witness

who testified to have seen the incident. PW1 testified that she saw when the appellant grabbed a bush knife from the deceased and used it to cut him on his head and neck. When all this was happening, it was at about 09:00 hours meaning that it was during the day and thus was able to see him while she was at a distance of about 3-5 paces from where she was observing the attack. Moreover, the appellant was familiar to her as they lived in the same village. In our view, all these factors enabled unmistaken identity of the appellant.

Apart from that, PW1 immediately after the incident rushed to the military barracks to report about the matter. It is a cardinal rule that the ability of the witness to mention the suspect at the earliest possible time ensures credibility and reliability of the witness – See **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39 and **Anael Sambo v. Republic,** Criminal Appeal No. 274 of 2007 (unreported).

On top of that, as was rightly submitted by Mr. Magige, PW1's evidence was corroborated by PW2 who rushed to the scene of crime after hearing the alarm raised by some women suggesting that Samburi had killed someone. At the scene of crime, he found the appellant who was familiar to him holding a bush knife covered with blood while the deceased was lying on the ground with wounds on the head and neck. It

was him who disarmed the appellant and took him to the army barracks after apprehension. The two witnesses gave direct evidence on what they each witnessed. Besides that, PW1 and PW2's evidence was further corroborated by PW4 who examined the deceased's body. He also confirmed to have observed the dead body with wounds on the head and neck, the parts of the body which were seen by PW1 and PW2 to have been wounded. This was also affirmed by PW5 who investigated the case. In defence, the appellant distanced himself from involvement in committing the offence alleging not knowing even the incident of murder and that he was arrested while mourning the death of his mother.

On our part, we find such evidence did not cast any doubt to the strong prosecution evidence by PW1 and PW2 who saw him at the scene of crime. Their evidence was corroborated by the circumstantial evidence of PW3, PW4 and PW5 who saw the wounds on the deceased's head and neck as was testified by PW1 and PW2.

Like the trial court, we are satisfied that PW1, PW2, PW3, PW4 and PW5 adduced credible evidence that it was the appellant who unlawfully killed the deceased.

We now turn to the issue whether the appellant killed the deceased with malice aforethought. It was Mr. Aliki's argument that malice aforethought was not proved because the evidence suggests that there might have been a fight between the appellant and the deceased culminating into the appellant to act in self-defence. We are also mindful of PW2's evidence that he asked him why he did that to the deceased and the appellant answered that he had injured his finger. We have considered this argument and, we think that much as it may look attractive; it is unfortunate. We say it is unfortunate because, in his defence the appellant did not lead evidence suggesting that there was any fight or that the deceased cut his finger which could lead him to act under a self-defence. To the contrary, the appellant gave a total denial to the incident to the extent that, he said, he did not even know that there was such an incident. Even when he was cross-examined by the prosecution about his injured finger, he said he was harmed by the police. It is no wonder that the appellant's learned counsel at the hearing of this appeal lamented that the appellant was not comfortable with that line of argument in appeal.

On the other hand, we agree with the learned State Attorney that malice aforethought was established. In the case of **Charles Bode**

(supra) the Court expounded some factors to be taken into account when considering the issue of malice aforethought. They include:

> *(i) The type of weapon used in the attack leading to the death of the deceased;*
> *(ii) The amount of force which was used by the attacker in assaulting the deceased;*
> *(iii) The part or parts of the body of the deceased where the blows of the attacker were directed at or inflicted;*
> *(iv) The number of blows which were made by the attacker, although one blow may be enough depending on the nature and circumstances of each particular case;*
> *(v) The kind of injuries inflicted on the deceased's body;*
> *(vi) The utterances made by the attacker if any, during, before or after the attack; or*
> *(vii) The conduct of the attacker before or after the incident of attack."*

Applying the principles stated in the above authority, we agree with the learned State Attorney that most of them were met. It is on record that the appellant used the bush knife which he had grabbed from the deceased to inflict injuries in the deceased body. A bush knife is a lethal weapon which is dangerous if applied on the human body. He cut the

deceased thrice in the head and neck which are vulnerable and sensitive parts of the body. This was confirmed by PW4 who testified to have observed big cut wounds on the deceased's neck and at the back side of the head and that his skull was actually fractured. This implies that more than one blows were inflicted upon the deceased. That is not the only implication but also excessive force was used to the extent that the deceased's skull was fractured and that it was irreparable. But again, according to the evidence of PW1, the appellant after having wounded the deceased and fell down he told the deceased "Get up and go". This utterance which was made by the appellant after the attack implies that he was ridiculing him.

Indeed, among the factors mentioned in **Charles Bode's** case (supra) it is only the last one relating to the conduct of the appellant which was not met but all the factors were met.

Picking from the above issue, Mr. Aliki urged the Court to find that the appellant's conduct of cooperation during his arrest and when taken to the military barracks implied lack of malice aforethought. However, in our considered view, the totality of evidence including his utterance after the attack suggests nothing other than malice aforethought.

In this regard, we are equally satisfied that the prosecution proved beyond reasonable that the appellant killed the deceased with malice aforethought.

The 2nd ground in the later MA relates to the summing up to the assessors. It was Mr. Aliki's submission that the summing up to assessors was not properly conducted. He assailed the learned SRM (Ext. Jur.) for **one,** summing up to assessors on matters not testified; **two,** directing the assessors in that the appellant killed the deceased due to the misunderstandings based on inheritance as he was denied to inherit his parent's estate, while PW1 said she did not know the reason for killing the deceased; and **three,** directing the assessors that the appellant was sane while there was neither a report from Isanga Institution produced in court nor was there any witness who testified in court on the mental status of the appellant.

In this regard, it was Mr. Aliki's argument that as there was a misdirection or non-direction in summing up to assessors it, might have influenced them. He argued that this anomaly amounted to the trial being conducted without the aid of the assessors thereby offending section 265 of the CPA. While relying on the case of **Elly Milinga v. Republic,** Criminal Appeal No. 362 of 2018 (unreported), he urged the

Court to find that the SRM (Ext. Jur.) failed to properly direct the assessors and invoke our revisional powers to nullify the proceedings and judgment, quash the conviction and set aside the sentence.

For the respondent, it was Mr. Kimbe who responded to this ground of appeal. He contended that the learned trial SRM (Ext. Jur.) properly summed up the case to the assessors. As regards the failure to sum up on the defence of self-defence he argued that the appellant did not raise such evidence to warrant him sum up the same to the assessors. He added that the trial magistrate could not have summed upon the probable defence of self-defence where the appellant said nothing suggesting such self-defence. At any rate, Mr. Kimbe contended, the appellant denied to have been at the scene of crime or even to know the incident he was facing. He added that, even during cross examination when he was asked about his injured finger, he said that he was injured by the police.

On the issue that the SMR (Ext. Jur.) added some facts concerning the mental status of the appellant, the learned State Attorney submitted, and rightly so, in our considered view, that he explained what he saw in the report from Isanga.... Institution. Our glance on pages 33-34 of the record of appeal has revealed that the appellant was once at the

instance of his advocate ordered to be detained in Isanga Mental Institution for medical examination regarding his mental status. And therefore, what the learned SRM (Ext Jur.) explained is what he saw in the report thereof as regards the appellant's mental status at the time the offence was committed.

Responding on the appellant's contention that the learned SRM (Ext Jur.) summed up PW3's testimony on the misunderstanding based on inheritance, he said that the learned SRM (Ext Jur.) just summarised what PW3 said at page 44 of the record of appeal. He added that the case of **Elly Millinga** (supra) was distinguishable to this case as in that case the trial judge did not direct the assessors on circumstantial evidence.

In dealing with this ground of appeal, our starting point would be to restate that the issue of summing up to assessors is a requirement of law as per section 298 of the CPA which requires the trial judge to sum up to assessors the evidence for the prosecution and the defence before each of the assessor is required to give his / her opinion orally in relation to the case either generally or to a specific question of fact which may be addressed to them by the judge – See also **Mgongochori**

(Bonchori) Mwita Gesine v. Republic, Criminal Appeal No. 410 of 2017 (unreported).

We have examined the summing up to assessors which is covered from pages 58 to 62 of the record of appeal. Our observation is that from pages 58-59 the trial SRM (Ext Jur.) explained the content of the charge, the burden and standard of proof and the issues which were required to be proved. From page 60 – 62, he summarised the evidence from all prosecution witnesses and that of the appellant and in particular the PW2's testimony to the effect that he asked the appellant why he cut the deceased and he replied that the decease had also assaulted him by cutting his finger. He also explained that PW3 who was the appellant's sister and the decease's wife testified that the motive behind the killing was that the appellant was complaining that his siblings had taken his share of their parents. This was also testified by PW5 G3138 D/C Rajabu who investigated the case that the motive of murder was a conflict based on inheritance of land (see page 61).

Our critical perusal of the said summing up has revealed that, indeed, the trial SRM (Ext. Jur.) did not sum up to assessors the issue of self-defence, and rightly so in our considered view, because none of the prosecution or defence witnesses adduced evidence giving rise to the

circumstances where the defence of self-defence could arise. Even PW2 who asked the appellant the reason for cutting the deceased did not give evidence suggesting that there was a fight as the appellant merely said that the deceased had injured his finger without any more explanation. And, worse still, in his defence, the appellant said that he was injured by the police. In such a situation, we think, the trial SRM (Ext. Jur) could not have directed the assessors on the issue of self-defence. He was justified not to do so.

With regard to the issue of inheritance which was touched on in the evidence of PW3 and PW5, it is true that the trial SRM (Ext. Jur.) was just summarizing the evidence of the respective witnesses. At any rate, we think, the trial SRM (Ext. Jur.) could not have ventured to direct the assessors on it since the motive has never been used as a ground to convict the accused. This is because, in terms of section 10 (3) of the Penal Code motive is irrelevant in criminal responsibility. The said provision states:

> *"Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility."*

Hence, even if the SRM (Ext. Jur.) could have done so, such evidence could not have any effect in the conviction of the appellant. In this regard we find that the trial SRM (Ext. Jur.) properly summed up the case to the assessors and we see no reason to fault him.

Given the totality of what we have endeavoured to discuss, we are satisfied that the prosecution proved beyond reasonable doubt that the appellant murdered the deceased. We, therefore, find the appeal to have no merit. We hereby dismiss it.

DATED at **DAR ES SALAAM** this 30th day of July, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgement delivered this 5th day of August, 2021 in the presence of the appellant in person through Video facility from Bangwe Prison Kigoma and Mr. Robert Magige, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL