

**IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA**

(CORAM: MWAMBEGELE, J.A, KEREFU, J.A. And, KENTE, J.A.)

CRIMINAL APPEAL NO. 275 OF 2019

**1. ALEX MINANI
2. EMMANUEL MINANI
3. ISSAYA SIMON** }**APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Biharamulo)**

(Ebrahim, J.)

dated the 14th day of June, 2019

in

Criminal Sessions Case No. 26 of 2016

JUDGMENT OF THE COURT

10th & 16th August, 2021

KEREFU, J.A.:

Alex Minani, Emmanuel Minani and Issaya Simon, the first, second and third appellants herein, were charged jointly with the offence of murder contrary to section 196 of the Penal Code, [Cap. 16 R.E 2019] (the Penal Code) in the High Court of Tanzania sitting at Biharamulo in Criminal Sessions Case No. 26 of 2016. It was alleged that, on 29th March, 2013 during night hours at Karamba hamlet, Mumilamila Village.

within Ngara District in Kagera Region the appellants did murder one Gaudencia Simon (the deceased).

Upon the information being read over and explained, the appellants pleaded not guilty hence, the case proceeded to a full trial. To establish its case, the prosecution marshalled a total of five witnesses and tendered two exhibits namely, the sketch map of the scene of crime (exhibit P1) and the post-mortem examination report (exhibit P2). The appellants relied on their own evidence as they did not call any witness.

In a nutshell, the prosecution case found on the record of appeal stated that, in the night of 29th March, 2013 at around 20:00 hours when the deceased was at home together with her daughter Nahimana Issaya (PW1), grand-daughter Furaha Issaya (PW4) and her son-in-law (the third appellant) was visited by her two sons (the first and second appellants). The first appellant accused the deceased that she was a witch and had bewitched his wife. It was the testimony of PW1 that the deceased denied the said accusation, hence the first appellant with the assistance of the second appellant, who later came in the house together with the third appellant started to beat the deceased by using cassava

sticks from 20:00 to 22:00 hours. PW1 testified further that she raised an alarm but the third appellant covered her mouth and warned her not to scream. She said that, a moment later, the wife of the second appellant arrived and took her husband back home. PW1 went on to state that the first appellant continued to beat the deceased and finally strangled her and caused her death. She said, thereafter, the appellants threw the deceased body into the river while the third appellant was holding her. PW1 added that the first appellant warned her not to disclose the incident to anyone and if she did, he would also throw her into the river. PW1 testified further that she told the third appellant to report the incident to the ten-cell leader one Remegio Dominic (PW2) who reported the matter to the chairperson of the hamlet.

It was the further testimony of PW1 that, on 30th March, 2013 they went to search for the deceased's body and found it in the bush swollen. On 31st March, 2013 the information was sent to the police who responded to the scene of crime with Dr. Ponsian Luhimingungi (PW3). PW3 conducted an autopsy on the deceased's body and concluded that the cause of death was lack of oxygen due to strangulation. His finding

was recorded in the post-mortem report, which was admitted in evidence as exhibit P2.

The testimony of Furaha Issaya (PW4) in respect of how the death of the deceased happened dovetailed, in many aspects, with that of PW1. She however added that, at the scene of crime, there were other young children and that when the first appellant was beating the deceased the third appellant was just seated. PW4 testified further that she was taught by PW1 to testify that at the fateful night there was clear moonlight and that the appellants killed the deceased because she was a witch.

E. 3966 Dt/Corp/Filbert (PW5) the investigation officer testified that he was involved in the investigation of the incident, drew the sketch map of the scene of crime and arrested the appellants. The said sketch map of the scene of crime was admitted in evidence as exhibit P1.

In their defence, all appellants denied any involvement in the alleged offence. The first appellant (DW1) testified that at the time when his mother was murdered, he was at his house sleeping with his wife and that he was arrested on the following date. He also indicated that he had

no bad blood with PW1 and PW4. The second appellant (DW2) also testified that on the incident night he was at his house with his wife hence could not have cooperated with DW1 and the third appellant (DW3) to kill the deceased. DW2 also admitted that he had no bad blood with PW1 and PW4. On his part, DW3 testified that, on the incident night he was invaded by unknown people who took the deceased away. He said that he went to inform PW2 about the incident. DW3 said that he was surprised that PW1 and PW4 testified that he was involved in the killing of the deceased. He added that prior to the incident he quarreled with PW1.

However, after a full trial, though the trial court discarded the evidence of PW4 for being taught by PW1 on what to testify before the court, it found PW1 to be credible and reliable witness and that the prosecution had proved the case against the appellants to the required standard. Hence, the appellants were found guilty, convicted and each was sentenced to suffer death by hanging.

Aggrieved by that decision, the appellants have lodged three separate Memoranda of Appeal raising a total of eleven (11) grounds.

However, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal before us, the appellants were represented by Mr. Josephat S. Rweyemamu, learned counsel. The first and third appellant were also present in Court while the second appellant appeared through a video link from Butimba Central Prison. On the other side, Messrs. Grey Uhagile and Nehemia Kilimuhana, learned State Attorneys, joined forces to represent the respondent Republic.

On taking the stage, Mr. Rweyemamu prayed to abandon several grounds in the memoranda of appeal and prayed to be heard only on the first ground in the supplementary memorandum of appeal lodged on 4th August, 2021 and the second, fourth and fifth grounds in the substantive memorandum lodged on 17th July, 2019. The said grounds raise the following areas of complaint against the trial court's decision; **First**, that the learned trial Judge misdirected herself by relying on the evidence of PW1 to convict the appellants without complying with the provision of section 130 (3) of the Evidence Act, [Cap. 6 R.E. 2019] (the Evidence Act) governing the evidence of spouses despite the glaring evidence on

record that PW1 was the wife of the third appellant; and **second**, that the learned trial Judge erred in fact and law by grounding the appellants' conviction on the evidence of PW1 who was not credible witness.

Submitting in support of the above grounds, Mr. Rweyemamu argued generally that, during the trial there was enough evidence on the record that PW1 was the wife of the third appellant and even the summing up notes to the assessors found at page 53 of the record of appeal, the learned trial Judge also indicated that fact. However, before receiving her evidence, the learned trial Judge did not comply with the provisions of section 130 (3) of the Evidence Act governing the evidence of spouses. Mr. Rweyemamu clarified that according to that section, being a wife of the third appellant, PW1 was a competent but not compellable witness and prior to adducing her evidence before the trial court, she was supposed to be addressed on the provisions of that section. It was his argument that since the requirement of that section was not complied with, the evidence of PW1 is inadmissible and should be expunged from the record. To buttress his proposition, Mr. Rweyemamu cited the case of **Matei Joseph v. Republic** [1993] T.L.R. 152. It was his further argument that after expunging the evidence of

PW1 who was the prosecution's eye witness, the remaining evidence of PW2, PW3 and PW5 cannot be sufficient to sustain the appellants' conviction.

Upon being probed by the Court as whether the evidence of PW1 is only inadmissible against the third appellant or for all the appellants, Mr. Rweyemamu responded that since PW1 testified for the entire case and her evidence was illegally procured, the same is inadmissible in respect of other appellants as well and not otherwise. Based on his submission, Mr. Rweyemamu urged us to allow the appeal, quash the judgment of the trial court, set aside the sentence and set the appellants at liberty.

In response, Mr. Uhagile, at the outset, declared their stance that they are opposing the appeal. He challenged the submission of Mr. Rweyemamu on the applicability of section 130 (3) of the Evidence Act in the case at hand. According to him, the said section is only applicable where a spouse is charged alone without co-accused. To clarify on this point, Mr. Uhagile referred us to section 130 (4) of the same Act and argued that if section 130 (3) was intended to apply in both situations where a spouse is charged '*solely*' or '*jointly*' with a co-accused, then

words '*solely or jointly*' charged with co-accused inserted under section 130 (4) would have been also inserted in that subsection. It was therefore the argument of Mr. Uhagile that, since in the case at hand the third appellant was charged along with co-accused, section 130 (3) is inapplicable. He thus distinguished the case of **Matei Joseph** (supra) relied upon by Mr. Rweyemamu by arguing that the facts in that case are not relevant to the circumstances of the current appeal because in that case there was only one accused person, which is not the case herein. He thus urged us to find that PW1 was competent and compellable witness and her testimony should not be expunged from the record.

As regards the credibility of PW1, Mr. Uhagile argued that PW1 was a credible and reliable witness as she clearly narrated how she witnessed the incident. He argued further that the evidence of PW1 was corroborated by PW2, PW3 and PW5 hence sufficient to prove the charge against the appellants to the required standard. Without further ado, Mr. Uhagile urged us to dismiss the appeal for lack of merit.

In a brief rejoinder, Mr. Rweyemamu emphasized that section 130 (3) of the Evidence Act apply to all circumstances where a spouse is

charged solely or jointly with co-accused and the testimony of a wife or husband of the spouse charged, is applicable to the entire case and not only to the respective spouse.

On the credibility of PW1, Mr. Rweyemamu insisted that PW1 was not credible witness as she coached PW4 on what to testify before the trial court hence the testimony of PW4 was discarded by the trial court on that account. He thus reiterated his prayer that the appeal be allowed and the appellants be set free.

Having carefully considered the grounds of complaint, the submissions advanced by the learned counsel for both parties and the record before us, the main issue for our determination is whether the Prosecution case was proved to the required standard.

Starting with the first ground on the legality of the evidence of PW1, it is a common ground that there was no dispute that the third appellant and PW1 were husband and wife respectively. The information regarding their status was availed at the initial stages of preliminary hearing where the facts of the case were submitted by the prosecution as well as when PW1 was testifying. Pursuant to section 130 (1) and (3)

of the Evidence Act, a person is a competent but not compellable witness in a case involving his/her spouse. For the sake of clarity, we find it apposite to reproduce the provisions of section 130 (1) and (3) of the Evidence Act herein below: -

"130 (1) Where a person charged with an offence is the husband or the wife of another person that other person shall be a competent but not a compellable witness on behalf of the prosecution, subject to the following provisions of this section;

(2) NA

(3) Where a person whom the court has reason to believe is husband or wife or, in a polygamous marriage, one of the wives of a person charged with an offence is called as a witness for the prosecution the court shall, except in the cases specified in subsection (2), ensure that that person is made aware, before giving evidence, of the provisions of sub-section (1) and the evidence of that person shall not be admissible unless the court has recorded in the proceedings that this subsection has been complied with."

It is therefore clear that the evidence of a spouse against his/her spouse can only be acted upon by the court after the conditions prescribed under those subsections have been complied with. Therefore, in the case at hand, upon being informed that the third appellant and PW1 were husband and wife, the trial court should have been on alert and taken the necessary precautions before taking her evidence. However, that was not done as it is on the record that PW1 testified against her husband without being addressed in terms of section 130 (3) of the evidence Act. The failure to comply with the requirement of that section was stated in the case of **Matei Joseph** (supra) cited to us by Mr. Rweyemamu. In that case the evidence of the spouse that was illegally admitted was not considered on appeal as the court stated that:

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"The evidence of a spouse who has been compelled to testify against another spouse in a criminal case contrary to the provisions of section 130 of the Evidence Act, 1967, is inadmissible and of no effect."

The same position was taken by the Court in the case of **Grayson Zakaria Mkumbi @ Mapendo and Another v. Republic**, Criminal

Appeal No. 418 of 2018 where the Court after being faced with an akin situation expunged the evidence of PW5, the wife of the second appellant in that case, on account of it being illegally admitted for non-compliance with the provisions of section 130 (3) of the evidence Act. (See also the case of **Zamir Rahimu v. Republic**, Criminal Appeal No. 418 of 2018 (unreported)).

Similarly, in the case at hand, since PW1 gave evidence against the third appellant who was her husband without being addressed in terms of section 130 (3) of the Evidence Act, her evidence was illegally obtained hence subject to be expunged from the record as argued by Mr. Rweyemamu.

We are mindful of the fact that in his submission, Mr. Uhagile argued that section 130 (3) of the Evidence Act is only applicable where a spouse is charged alone without co-accused. According to him, the evidence of PW1 was properly received by the trial court. The learned State Attorney promised to avail us with authorities to this effect but he could not walk the talk until we composed this judgment. With respect, we find his the submission to be misconceived as the status of being husband or wife does not change when one is charged alone or with co-

accused. We thus, respectfully, are of the view that the law in this jurisdiction is that where two or more persons are charged jointly, the wife or husband of any such accused person is a competent but not compellable witness against any co-accused person.

It is therefore our settled view that, since the evidence of PW1 was illegally admitted the same cannot be left to remain on the record as we did in **Grayson Zakaria Mkumbi @ Mapendo and Another v. Republic** (supra) where there were co-accused and the evidence of the wife of the second appellant in that case was expunged from the record for being illegally admitted. We are thus in agreement with Mr. Rweyamu that in the case at hand, since the evidence of PW1 was illegally admitted deserve to be expunged from the record, as we hereby do.

Now, after expunging the evidence of PW1 from the record of appeal, then, the immediate crucial issue which has exercised our mind, is whether the remaining evidence on record is sufficient to sustain the appellants' conviction. The prosecution key witnesses in this case were PW1 and PW4 who were alleged to be at the scene of crime and witnessed the incident. It is on record that after discarding the evidence

of PW4 on account of being taught by PW1 on what to testify before the court, the learned trial Judge relied on the evidence of PW1, as the only remaining prosecution eyewitness, to convict the appellants because PW2, PW3 and PW5 only corroborated what was testified by PW1.

In the circumstances, we are satisfied that after expunging the evidence of PW1 there is no sufficient evidence on record which could safely be concluded that the appellants committed the offence. It is our further view that had the learned trial Judge expunged the evidence of PW1 from the record and considered the above aspects, we think, she would have come to the inevitable finding that it was not safe to sustain the appellants' conviction.

As such, we find the first ground of the appeal to have merit. Since the determination of this ground suffices to dispose of the appeal, we see no reason to examine other grounds in this appeal. We are in agreement with Mr. Rweyemamu that the entire appeal has merit and it is hereby allowed.

In view of what we have demonstrated above, we find merit in the appeal and allow it. Accordingly, we quash the appellants' conviction and

substitute it with an acquittal resulting in setting aside the sentence. We order that the appellants be released from custody forthwith unless they are otherwise lawfully held.

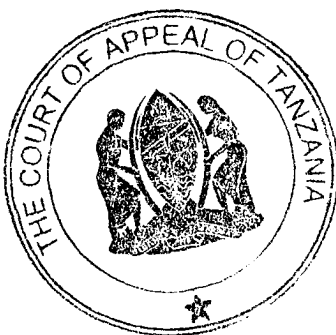
DATED at BUKOBA this 13th day of August, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 16th day of August, 2021, in the Presence Mr. Josephat S. Rweyemamu, learned Counsel for the Appellants, present in person and Mr. Amani Kilua, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL