

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 225 OF 2019

JACKSON WILLIAM }
JAMES OBEDI } **APPELLANTS**

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Ebrahim, J.)

dated the 18th day of June, 2019

in

Criminal Sessions Case No. 88 of 2017

.....

JUDGMENT OF THE COURT

9th & 16th August, 2021

MWAMBEGELE, J.A.:

The appellants, Jackson William and James Obedi, together with one Japhet Albert @ Abubakar Dioniz who is not a party to this appeal, were condemned to death by the High Court of Tanzania sitting at Biharamulo after being found guilty of murdering one Gabriel Martine on 24.01.2014 at Ngararambe Nyakahura Village in Biharamulo District

in Kagera Region. Aggrieved, they now appeal to the Court against both conviction and sentence.

Before going into the nitty gritty of the determination of the appeal before us, we find it compelling to provide a brief background to the case leading to the appellants' arraignment as they could be gleaned from the prosecution evidence in the record of appeal.

The deceased was a cowhand; taking care of a herd of cattle belonging to Sirali Samwel Kapyolo (PW3) at Ngararambe Nyakahura Village in Biharamulo District in Kagera Region. PW3 resided at Nyakahura Village in the same district. On the night of 24.01.2014, the deceased was invaded by unknown people who killed him and made away with thirty-six (36) head of cattle and two sheep. On the following day in the morning, Elias Musa (PW2); son of PW3 arrived at the scene of crime only to find the deceased lying in a pool of blood. He was already dead. He had a big cut wound on his head and his mouth was oozing of blood. The cattle and sheep were not there. He called his mother and waited at the scene.

It happened that on 25.01.2014 at about 03:00 hours in the morning, a traditional guard defence group commonly known as

sungusungu, under the command of Ndaraba Julius (PW1), which was on patrol, arrested three people at Midaho hamlet in the same district driving thirty-six (36) head of cattle. They suspected some foul play as the three people had no permit in that regard. After some interrogation, two of the culprits took to their heels but one of them, the first appellant, was arrested and taken to Lusahunga Police Station. The second appellant and the said Japhet Albert @ Abubakar Dioniz who was acquitted by the trial court, were arrested at a later stage.

The second appellant was made to write a cautioned statement (Exh. P3) before No. G. 1846 D/C Salum (PW4) and an extrajudicial statement (Exh. P4) before Edward Samara (PW5); a magistrate at Biharamulo Urban Primary Court and admitted to have committed the offence. Likewise, the first appellant wrote a cautioned statement (Exh. P5) before Insp. Kusaya Mayala (PW7) in which he also admitted to have committed the offence.

The appellants and the said Japhet Albert @ Abubakar Dioniz were arraigned and at the end of the day the appellants were convicted as charged and sentenced as alluded to above. Japhet

Albert @ Abubakar Dioniz was acquitted. The appellants' joint appeal to the Court is predicated on nine grounds comprised in two memoranda; eight grounds in the substantive memorandum of appeal and four in the supplementary memorandum of appeal.

At the hearing before us, the appellants were represented by Mr. Aaron Kabunga, learned advocate. Ms. Happiness Makungu and Ms. Suzan Masule, learned State Attorneys, joined forces to represent the respondent Republic.

It is noteworthy that Mr. Kabunga, at the outset of his submission, abandoned eight grounds in the substantive memorandum of appeal. He remained with the first one which he argued together with the four grounds contained in the supplementary memorandum of appeal. The learned counsel addressed the Court on all the remaining five grounds of appeal. Likewise, the learned State Attorneys responded to all the five grounds. However, given the nature of the verdict we are going to give, and being apprehensive of preempting the orders we are going to make subsequently, we will consider and determine only the first ground in the substantive memorandum of

appeal. And even both parties were at one that the rest of the grounds were argued in the alternative.

The complaint in the first ground of appeal is that the High Court erred in law for failure to assign an advocate for each appellant given that each one of them implicated another.

Arguing this ground, Mr. Kabunga submitted that the appellants had conflicts of interest in their evidence which necessitated that each appellant be assigned an advocate to sufficiently represent him. Instead, he argued, the appellants were represented jointly by one advocate and in such a process, the appellants were not fairly tried. The learned counsel referred us to Exh. P3 and Exh. P5 which are, respectively, a cautioned and extrajudicial statements of the second appellant in which he exculpates himself and implicates the first appellant. Likewise, the learned advocate invited us to look at Exh. P4 which is a cautioned statement of the first appellant in which, like the second appellant, implicates the second appellant and exculpates himself. In the circumstances, Mr. Kabunga argued, justice demanded that each appellant be assigned to be represented by a separate

advocate for efficient representation and to serve the interest of justice.

As for the way forward, Mr. Kabunga prayed that a retrial order be given so that the appellants are fairly tried by each of them being assigned a separate advocate to represent him.

Ms. Masule for the respondent was at one with Mr. Kabunga on the first ground of appeal on both the arguments and the way forward. She conceded that given the defences of the appellant in which each implicated another, justice would have triumphed if the appellants were represented by a different counsel each. This was supposed to be so because they had conflicting interest in the case. She also conceded that a retrial of the matter was the best way forward.

In a short rejoinder on the first ground, Mr. Kabunga submitted that a predicament of the learned advocate who represented them is quite vivid in the proceedings of the High Court where he objected to the admission of the second appellant's cautioned statement in evidence but did not object to the admission of the cautioned statement of the first appellant. It was the view of Mr. Kabunga that

in so doing, was inclined to rescue the second respondent and dump the first. That course of action, he argued, was detrimental to the first appellant. The learned counsel thus reiterated his prayer for the appellants to be retried afresh with each being represented by an advocate.

Having considered the learned arguments of the appellants' counsel on the one hand and those of the learned state attorney in concession, on the other, we think the issue for our determination is simply whether the appellants, for being jointly represented by one advocate, were unfairly tried.

That the appellants' evidence at the trial was exculpatory of each other is apparent on the record. The trial court made heavy reliance on the appellants' cautioned statements and the second appellant's extrajudicial statement to found a conviction against them. To demonstrate the apparent conflict of interest, we will reproduce here the relevant part of the appellants' supposedly confessional statements as appearing in the cautioned statements and the extrajudicial statement. The second appellant is recorded at p. 146 as stating in his cautioned statement:

"Mara baada ya kama nusu saa niliamka nikaelekea haja ndogo ndipo JACKSON akawa amemrukia yule mchungaji kisha alianza kuomba msaada twende tukamsaidie. Ndugu ABUBA s/o? alipoenda kumsaidia JACKSON akamwambia kuwa ampige kichwani, JACKSON akasema kuwa na mimi niende kuwasaidia nikiacha kwenda wakimaliza wananifuata na mimi. Mara baada ya hapo niliogopa kisha nilienda kuwasaidia nilimshika kifuani, Jackson naye alikuwa amemshika, ABUBA s/o? akawa anampiga fimbo za kichwani mara baada ya hapo nguvu zilimuishia ndipo nilipomwachia JACKSON akaendelea kumshikilia huku ABUBA s/o? akiwa anaendelea kumpiga. Nilienda mbali kidogo wenyewe wakaendelea kumpiga hadi alipoanguka chini wakamvuta wakampeleka pembeni; mara baada ya hapo ndipo walipoanza kuniita lakini sikuitika ndipo walipoanza kuswaga ng'ombe."

Our literal translation of the above would be:

"After about half an hour, I woke up and went for a short call. JACKSON jumped at the herdsman and started calling for help. ABUBA s/o? went to offer some help, JACKSON told

him to hit the herdsman on the head. JACKSON commanded me to go and give them a hand, or else as soon as they are done with the herdsman they would come to me as well. I was scared. I went to help them. I held the herdsman on the chest, Jackson held him while ABUBA s/o? was hitting him on the head with a stick. When I saw that the herdsman was helpless, I released him, but Jackson continued holding him while ABUBA s/o? was hitting him. I went a bit far from there. The two continued hitting him until when he fell down. They pulled him on the side and started calling me. I never responded. That is when they started driving the cattle away."

And in his extrajudicial statement before PW5 he is recorded at p. 156 as stating:

"Baada ya Jackson kumrukia huyo na kuomba msaada ili twende kumsaidia ndipo Abuba alienda wa kwanza na akaambiwa na Jackson kuwa "mpige kichwani" na ndipo Abuba alianza kumpiga kichwani huyo Gabriel na alikuwa akimpiga kichwani kwa kutumia fimbo, na mimi nikaenda kumsaidia Jackson kumbana huyo

mchungaji. Abuba alimpiga mpaka huyo jamaa akaishiwa nguvu na akadondoka chini na ndipo Jackson akammaliza kwa fimbo la mwisho na baada ya kugundua kuwa ameshakufa ndipo Jackson na Abuba walimbeka na kwenda kumuweka ndani ya kibanda cha nyumba iliyokuwa hapo.”

Literally translated the excerpt would read:

"After Jackson jumped onto him and started calling us for help, Abuba went first and was told by Jackson to hit him (the herdsman) on the head. That is when Abuba started hitting that Gabriel. He used a stick to hit him. I went to help Jackson to hold that herdsman. Abuba continued hitting that person until he could not hold it anymore and fell down. Jackson finished him by hitting him with a stick. Having realised that he was already dead, Jackson and Abuba took him inside a hut that was there.”

It is apparent from the above statements of the second appellant that it was the first appellant and a certain Abuba (perhaps this is Japhet Albert @ Abubakar Dioniz who was acquitted) who played an active role in the killing of the deceased.

For his part, the first respondent is recorded in his cautioned statement at p. 159 as stating:

"Muda Kitambo tulisikia kelele ya JAMES s/o OBEDI akisema tuje tumsaidie amemuuma tukamkuta mchungaji huyo nguvu zinaelekea kumwishia, mie nilipiga fimbo moja mabegani, ABUBAKARI naye alipiga miguuni. Mchungaji kwa jina alikuwa akiitwa GABRIEL s/o? alikuwa amevuja damu nyingi sana na damu zilikuwa zinavuja toka kichwani mimi na mwezangu ABUBARI kidogo tuondoke wakatuita tukarudi mara walisema kazi imeisha pia na maelewano tayari, tusife moyo."

We also undertook to literally translate the first appellants statement as meaning:

"After a while, we heard JAMES s/o OBEDI calling us to go and help him as he had already killed him. We went and found the herdsman almost losing consciousness. I hit him with a stick once on the shoulders, ABUBAKARI hit him on the legs. The herdsman's name was GABRIEL s/o? He had lost so much blood and was still bleeding heavily on the head. As

ABUBAKARI and I were about to leave, they called us. We went back and they told us that the job is finished and the consensus had been reached therefore we should not give up.”

As can be seen in the above excerpts, the conflict of interest between the appellants at the trial was apparent. They could not be effectively represented by one counsel. What the trial court ought to have done in the circumstances was to adjourn the trial and order that each appellant be assigned a separate advocate. That was done and to our mind, the appellants were deprived of effective legal representation and were thus not fairly tried. It is not the first time we are encountered with this scenario. In **Elias Mwaitambula & three others v. Republic**, Criminal Appeal No. 414 of 2013 (unreported), for instance, a confession by one appellant was admitted at the trial which clearly showed conflict of interest among the accused persons. We held that for effective representation of the accused persons, the trial Judge ought to have adjourned the trial so that each accused person could be assigned a separate counsel to realize the right to effective legal representation. We observed at p. 12 of the typed judgment:

"... having admitted the confession of the first appellant, he [the trial Judge] should have noted that there were conflicts of interest among the accused persons. So, it was not practicable for all the accused persons to be effectively represented by one counsel. In such a situation, the best the trial court could have done was to adjourn the trial, so that each accused could get a different counsel to realise their right to effective legal representation."

Having so observed, we proceeded to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Edition, 2002, to quash all the proceedings and conviction, set aside the sentence and ordered the retrial of appellants before another judge and a different set of assessors. In addition, for the purpose of effective legal representation, we ordered that each of them be assigned a separate counsel.

We are guided by the position we took in **Elias Mwaitambula** (supra). In view of the apparent conflict of interest between the appellants in the case at hand, we engage section 4 (2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Edition, 2019 which

bestows upon us revisional jurisdiction to quash the proceedings and conviction and set aside the sentence meted out to the appellants. Given the serious nature of the offence, we order that the appellants be retried with immediate dispatch before another judge and a new set of assessors. For effective legal representation of the appellants, we order that each of them be assigned a separate counsel. In the meantime, the appellants shall remain in custody to await their retrial.

This appeal is allowed to the extent stated above.

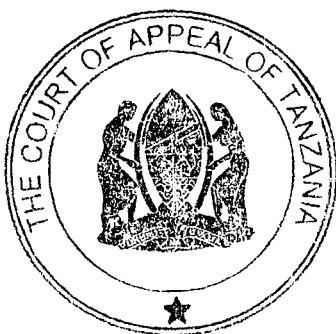
DATED at BUKOBA this 13th day of August, 2021.

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 of Mr. Aaron Kabunga, counsel for the Appellants 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