IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: JUMA, C.J., MWAMBEGELE. J.A, And KENTE, J.A.)

CRIMINAL APPEAL NO. 485 OF 2019

JACKRINE EXSAVERY.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Kilekamajenga, J.)

dated the 26TH day of September, 2019

in

Criminal Session Case No. 117 of 2016

JUDGMENT OF THE COURT

24th & 27th August, 2021

JUMA, C.J.:

On 20th October, 2016, the appellant, Jackrine Exsavery, was charged before the High Court of Tanzania at Bukoba with murder, contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 (now R.E. 2019). The particulars of the charge were that in the morning of 6th April 2015 at Kitwechenkura village in Kyerwa district of Kagera region, Jackrine Exsavery murdered Tansiana Exsavery, the second wife of Exsavery Johakimu. The appellant pleaded not guilty, and her trial commenced

on 18th September 2019 before Kilekamajenga, J., who sat with three assessors.

A total of five witnesses testified to support the prosecution's case against the appellant. Dr. Betson Kaijage (PW1) is the medical officer who conducted post mortem examination of the body of Tansiana Exsavery (the deceased), who was the senior wife of Exsavery Joakim (PW2). The appellant was PW2's second wife. Mzakiru Haruna (PW3) testified that he, PW2, and the deceased were neighbours at Kitwechenkura village. About 120 footsteps separated their neighbourly houses. PW3 recalled the chain of events that led up to the traumatic death of Tansiana Exsavery. Justian Tindamanyire (PW4) was the hamlet chairperson of Ibare when he testified as a prosecution witness. E.8773 detective corporal Godfrey (PW5) testified how PW4 phoned to inform him about the stabbing.

For PW3, it was an ordinary day, just like any other day in the life of Kitwechenkura village in Kyerwa District. By 08:30 hours PW3 had completed his rounds of selling coffee, and went home, where he met some visitors. He then walked to his neighbour, PW2's house. Apart from PW2 and Tansiana his senior wife, Yohana Joakim was also present. They all drank tea as they engaged in small talk. PW3 testified that a few minutes later, the appellant showed up covered in a

shawl *(khanga).* Appellant suddenly pulled out a knife from under her wrapper, stabbed Tansiana on her stomach before running away from the scene.

Meanwhile, the hamlet chairman (PW4) was at a neighbour's house when his son came over to inform him that a visitor was at home waiting to see him. PW4 stated the visitor turned out to be the appellant, who asked him to protect her. It was at this time when PW4 received a call from PW3 to inform him about the incident. PW4 summoned members of people's militia before he walked the appellant back to where the deceased lay injured. PW4 asked PW3 to escort the appellant to retrieve the knife, which they did. Once the militiamen arrived, PW4 began to look for transport to take the deceased to the village dispensary. The extent of the injury was beyond the capacity of that dispensary. PW4 phoned the police, who came and took away the appellant and PW2. The deceased died the following day, 7th April 2015. Dr. Betson Kaijage (PW1) of Nyakahanga Hospital examined the deceased's body and prepared post mortem report (exhibit Pl) indicating that the cause of death was perforated intestines.

The appellant testified under oath and did not call witnesses to testify on her behalf. Led by her learned Advocate Zeddy Ally, she denied the charge.

After weighing the evidence on record, the trial judge found that the

prosecution had proved the offence of murder beyond reasonable doubt. He convicted the appellant and sentenced her to suffer death by hanging.

Dissatisfied with the conviction and sentence of death by hanging, the appellant has appealed to this Court. She filed her memorandum of appeal on 17th January 2020, setting out six grounds of appeal.

At the hearing of this appeal, Mr. Emmanuel Kahigi and Mr. Amani Kilua, learned State Attorneys, represented the respondent. Learned advocate Josephat S. Rweyemamu who appeared for the appellant, relied on the supplementary memorandum of appeal filed on 16/08/2021. Mr. Rweyemamu submitted on first, second, and third grounds from the supplementary memorandum of appeal. From the memorandum of appeal that the appellant filed, Mr. Rweyemamu abandoned the first, second, third, fourth, and sixth ground but retained the fifth ground; which faults the trial court for rejecting the appellant's defence.

The first ground in the supplementary memorandum of appeal faults the trial judge for failing to comply with the provisions of section 293 (2)(a) (b) of the Criminal Procedure Act (the CPA), which, according to Mr. Rweyemamu, embarrassed the appellant in her defence. He referred us to page 38 of the record where the trial judge stated:

"Therefore, under the provisions of section 293 (2) (a)

(b) of the Criminal Procedure Act.., I hereby inform the accused Jackrine Exsavery of her rights to give evidence on her own behalf under oath and to call witnesses in her defence."

Mr. Rweyemamu blames the trial judge's statement as amounting to compelling the appellant to testify under oath in her defence. He submitted that the appellant was left with no choice other than to testify under oath. As his proof that the trial judge compelled and the appellant obliged to testify under oath, he referred us to the appellant's response to the trial judge: "My *Lord, I will defend myself under oath, and I have no any other witness."*

In the second complaint in the supplementary memorandum of appeal, Mr. Rweyemamu blames the trial judge for failing to adequately address the assessors on their role during the trial. Mr. Rweyemamu referred to page 11 of the appeal record to show an irregularity when the trial judge failed to inform the three assessors (Didas Laurent, Ismail Nkuba, and Paschazia Nyamziga) about their roles and responsibilities. He urged us to nullify the proceedings on account of this irregularity. For support, he cited the case of **ABDALLAH JUMA @ BUPALE V. R.,** CRIMINAL APPEAL NO. 537 OF 2017 (unreported). Page 9 of this decision, the

Court stated that it was not adequate, for purposes of explaining the duties of assessors, for the trial judge to merely state that their duties are explained accordingly, that is: *"Assessors are required to take their seats,* ***and their duties explained accordingly."*** [Emphasis added]

In the understanding of Mr. Rweyemamu, the words ***their duties explained accordingly*** were inadequate under section 293(2) (a) (b) of the CPA, to inform the appellant of her statutory rights. He argued that this non-compliance alone, amounts to fatal irregularity that vitiates the entire proceedings in the trial High Court.

Also, on the second ground of appeal, the learned Advocate for the appellant faulted the trial judge for failing to give the three assessors a chance to ask questions. He pointed out that after the testimony of PW1, only Didas Laurent (Assessor No. 1) asked questions. He referred to pages 23 and 33, where not all the three assessors present appears not to have asked questions. Mr. Rweyemamu relied on the case of **ABDALLAH JUMA @ BUPALE V. R** (supra) to urge that because some assessors did not ask questions, it implied that the trial judge did not allow them to ask questions.

In the third ground of supplementary memorandum of appeal, the appellant complained that the trial judge failed to adequately sum up to the assessors on the most vital legal points of law and facts hence was unable to comply with section 298 (1) of the CPA. To support his submission, Mr. Rweyemamu cited the case of **R. V. REVELIAN NAFTALI & MARICK EMMANUEL,** CRIMINAL APPEAL NO. 570 OF 2017 (unreported). He criticized the trial judge's summing up appearing from pages 44 to 51 of the record of this appeal. He pointed out that pages 44 to 48 are a narration of evidence and from page 49 to 51 covers ingredients and standard of proof. Mr. Rweyemamu blamed the trial judge for discussing the marital status of PW2 in his judgment, which he did not in the summing up.

Mr. Rweyemamu finally submitted on the fifth ground of the appellant's memorandum, which faulted the trial court for rejecting the appellant's defence, which the learned Advocate considered to be weightier than the doubtful evidence of the prosecution. He suggested that the appellant had the defence of provocation, which the trial judge did not consider.

Mr. Emmanuel Kahigi, learned State Attorney, opposed the appeal. He argued

that at the close of the prosecution case, the trial judge informed the appellant of her right to give evidence on her behalf and call witnesses in her defence. The trial judge, he submitted, complied with section 293 (2) (a) and (b) of the CPA. He further urged that there is no reason to doubt the trial judge who recorded on page 38 of the record that, *"I hereby inform the accused Jackrine Exsavery of her rights to give evidence on her own behalf under oath and to call witnesses in her defence."*

Responding to the claim that the trial judge did not give the assessors chance to ask questions, Mr. Kahigi submitted that because all the three assessors were present when the prosecution and defence witnesses testified, nothing should prevent the trial judge from recording only the answers to the questions of those assessors who asked. He submitted that the number of assessors did not at any time fall below a minimum of two prescribed under section 265 to warrant a nullification of the proceedings of the trial court.

Mr. Kahigi next responded to the complaint that the trial judge failed to include some vital points of law and facts in his summing up. Like Mr. Rweyemamu, he faulted the trial judge for discussing the status of the appellant's marriage in the final judgment and not in his summing up to the assessors. He

was not so sure whether this irregularity should attract nullification of proceedings to allow a retrial. In case we nullify the proceedings and order a new trial, he would rather urge that we return the matter to the same trial judge directing him to sum up adequately to the same set of assessors.

On the substantive appeal, Mr. Kahigi submitted that the prosecution proved all the essential ingredients of the offence of murder beyond reasonable doubt. He submitted that the appellant committed premeditated murder because she went to the deceased's house and committed the offence of murder in front of witnesses. The learned State Attorney urged us to dismiss Mr. Rweyemamu's prayer for the defence of provocation. He asked us to dismiss a suggestion by the learned Advocate that the appellant, and the deceased, had a fight that resulted in the deceased's death.

In a brief rejoinder, Mr. Rweyemamu reiterated his submissions on the grounds of appeal. He prayed for a new trial before another judge and a different set of assessors.

Because this is a first appeal both on facts and law, we shall rehear the evidence on record and come to our own decision. We shall however

recognize the vantage position the trial court had, in seeing and hearing witnesses first hand. (See—**LUKANGUJI MAGASHI V. R.,** CRIMINAL APPEAL NO. 119 OF 2007 and **JOHN BALAGOMWA, HAKIZIMANA ZEBEDAYO & DEO MHIDINI V. R.,** CRIMINAL APPEAL NO. 56 OF 2013 (both unreported).

We shall begin with supplementary grounds whose essence was to invite us to nullify the trial proceedings and order a new trial.

Mr. Rweyemamu learned Advocate for the appellant urged us to nullify the entire proceedings of the trial court because of non-compliance with the provisions of section 293 (2)(a)(b) of the CPA. These provisions require the trial Judge to address an accused person and explain his or her rights to testify and call witnesses. The relevant provision provides:

> *"293 (2) Where the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person committed the offence or any other offence of which, under the provisions of sections 300 to 309 he is liable to be convicted, shall inform the accused person of his right-*
> *(a) to give evidence on his own behalf; and*
> *(b) to call witnesses in his defence, and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court*

shall call on the accused person to enter on his defence save where he does not wish to exercise either of those rights."

When the Court prodded Mr. Rweyemamu how the alleged failure to comply with section 293(2) (a) (b) of the CPA prejudiced the appellant, he explained that the trial judge left the appellant with no choice other than to comply with the order to testify under oath.

On our part, we do not think the trial judge forced the appellant to testify under oath. First, Mr. Zeddy Ally learned advocate represented her during her trial. We believe the appellant's learned Advocate very well looked after her interests at the trial High Court. We agree with Mr. Kahigi; there is no reason to doubt the record of the trial proceedings where the trial judge indicated that he informed the appellant of her rights under section 293 (2) (a) and (b) of the CPA. We must trust our trial judges, who still write in longhand the record of voluminous court proceedings. We should not ask too much from trial judges who write down all what transpires in court without

any assistance of appropriate functioning technology of verbatim electronic court recorders. We shall dismiss Advocate Rweyemamu's complaint.

We also heard the ground of appeal complaining that the trial judge failed his duty to adequately address the assessors on their role during the trial. As regards the case of **ABDALLAH JUMA @ BUPALE V. R** (supra) which Mr. Rweyemamu

cited to us, we agree with him that this case underscores the duty of trial judges to explain to assessors their roles and responsibilities in the trial. We do not however, think that our decision in **ABDALLAH JUMA @ BUPALE V. R** (supra) demands that trial judges should record in minute details of their explanation of the roles and responsibilities of assessors in the trial. We think trial judges are at liberty to use different wordings and communication styles to explain the role and responsibilities of assessors. There is no one set of adequacy or sufficiency on how trial judges explain to the assessors their roles and responsibilities. The words *"their duties explained accordingly"which* the trial judge used, are sufficient indication that the trial judge explained to the selected assessors their functions and duties in the trial and what the court expected of them in the conduct of the hearing and after the evidence. As a result, *we* shall decline the invitation by Mr. Rweyemamu to nullify the proceedings and order a retrial.

On the issue whether trial judge failed to invite the assessors to ask questions, we do not think we can nullify the proceedings and order a retrial on this complaint. The record of the trial court shows that all the three assessors were present when five prosecution witnesses testified on 18/09/2019. At the

conclusion of PWl's testimony, all the three assessors asked questions. Only Ismail Nkuba (Assessor number 2) and Paschazia Nyamziga (Assessor number 3) asked questions after the testimony of PW4. Again, only Assessor number 3 followed with Assessor number 1, asked questions after the evidence of PW5. We do not agree with Mr. Rweyemamu that we should nullify the proceedings in the High Court and order a retrial simply because some assessors were not recorded that they did not ask questions. To do so is to inject more technicalities in the proceedings at the time when the principle of overriding objective provisions of sections 3A and 3B of the Appellate Jurisdiction Act, Cap 141 R.E. 2019 which now direct courts to deal with cases justly, and to have regard to substantive justice is in place.

We accept Mr. Kahigi's observation that it is a plausible explanation that the assessors whose answers were not recorded had nothing to ask in the circumstances; and the trial judge was fully justified to record only answers of those assessors who had questions to ask.

The learned Advocate for the appellant made big issue out of the summing up notes, arguing that the trial judge missed out on the vital points of law. In

SAMITU HARUNA @ MAGEZI V. R., CRIMINAL APPEAL NO. 429 OF 2018 (unreported), we emphasized that section 265 of the CPA requires summing up to assessors. Summing up takes place when the prosecution and the defence close their respective cases. It is after summing up when the trial judge invites the assessors to offer their opinion as provided under section 298(1) of the CPA. Summing up helps the assessors to understand the facts of the case in relation to the ingredients of the offence which require proof to the required standard.

We have looked at the summing up notes appearing from page 44 to 51 of the record, which the learned trial judge prepared and which he presented before the assessors. These summing up notes indicated that the trial judge summed up the evidence, and also expounded the ingredients of the offence of murder in relation to the evidence. Our conclusion is, in his summing up, the trial judge covered the vital legal points of law and facts relevant for the offence of murder which the appellant faced. We note from the record, that Exsavery Johakim (PW2), the appellant's husband, exercised his legal rights to decline to testify for the prosecution. In this regard, after re-evaluating the appellant's defence during her trial, we do not agree with Mr. Rweyemamu's submission that PW2's marital status

was a vital point of law in the charge of murder which the appellant faced.

The main issue that still requires our determination is whether, the prosecution proved the offence of murder against the appellant beyond reasonable doubt.

We think the evidence on record bears out the trial judge's conclusion that the prosecution proved the charge of murder beyond reasonable doubt. The trial judge looked at the act of the appellant arming herself with a sharp knife; covering herself under a shawl (Kanga) and walking up the deceased's house. The trial judge was not in any doubt that the appellant visited the deceased's house for no other reason, other than to either kill or cause grievous harm to the deceased. That, the appellant completed her unlawful act by stabbing the deceased before escaping from the scene. The evidence of the hamlet chairman (PW4), the trial judge noted, proved how the appellant surrendered and admitted stabbing the deceased. From the nature of the weapon used in stabbing the deceased, the trial judge concluded that the appellant intended to, and caused the death of the deceased.

In her evidence, the appellant denied she killed the deceased. She was passing

by PW2's house when she heard people quarrelling inside. She saw her husband blocking the deceased from exiting the home before both fell; Tansiana was bleeding. The appellant was surprised when PW3 arrived at the scene and accused her of starting the fight. Because PW3 wanted to assault her, she ran to the hamlet leader, PW4. The appellant maintained that she did not stab the deceased. She also stated that PW3 was not present during the fight between PW2 and the deceased, leading to the latter's death. We think it is asking too much to expect the trial judge to consider the defence of provocation where the appellant herself, not only denied killing the deceased, but also did not raise that defence at all.

Prosecution witnesses gave a detailed and consistent account of how the appellant committed the offence of murder. That fateful morning, PW3 paid a visit to his neighbour, PW2. He found his neighbour (PW2), his neighbour's wife (the deceased) and another Yohana Joakim. About ten minutes later, the appellant arrived, clad in shawl (khanga). According to PW3, the appellant suddenly unveiled her shawl (khanga), pulled out a knife and stabbed the deceased on the right side of her stomach before escaping from the scene. PW3 saw the appellant pierce PW2's wife (Tansiana Joakim).

Under cross examination by learned Advocate for appellant, Mr. Zeddy Ally, PW4 disclosed that he is the one who arrested the appellant together with her husband, PW2. At the time when PW4 received a call from PW3, informing him that one of PW2's wives had stabbed another wife, the appellant was already at PW4's compound. PW4 instructed the appellant to show PW3 where the knife she used against the deceased is. The appellant returned back to PW4, carrying the knife.

Two ingredients, *actus reus* and *mens rea,* constitute the offence of murder under section 196 of the Penal Code. *Actus reus* is unlawful action or conduct. The second ingredient is the intention or knowledge of wrongdoing, better known as malice aforethought *{mensrea).* The evidence of PW3 and PW4 established all the essential ingredients of murder against the appellant. PW3 witnessed how the appellant arrived at PW2's house, how she stabbed PW2's wife on the stomach, how the appellant ran away, and how the appellant showed PW4 the murder weapon. All these left no doubt that it was the appellant who killed the deceased. We cannot fault the trial judge's conclusion that it was the appellant who killed the Tansiana Exsavery. From the nature of the weapon used (knife) directed on

the vulnerable part of the body (stomach) and resulting grievous injuries the deceased suffered from, the appellant had malice aforethought and that her conviction for murder cannot be faulted. We do not believe the appellants defence that she just happened to be passing by her husband's house when she heard him fighting with his senior wife (the deceased). We do not believe her version that PW2 pushed the deceased and she fell down bleeding.

There is no evidence of the deceased doing any unlawful act or insulting the appellant to justify her walk into the house and attacking Tansiana w/o Exsavery using a knife. We agree with Mr. Kahigi that the defences of provocation and that of death resulting from a fight are not open to the appellant. PW3 testified that the appellant walked into PW2's house, pulled out a knife and stabbed the deceased; no witness testified on any fight or provocative act to allow us to consider a defence of provocation or a defence that deceased died as a result of a fight. Our re-evaluation of the appellant's evidence does not support Mr. Rweyemamu's robust contention that the appellant raised a defence of provocation, which the trial judge failed to highlight in his summing up, and which he did not consider before convicting the appellant.

Given what we have said above, we find no merit in this appeal. We accordingly dismiss it.

DATED at **BUKOBA** this 26th day of August, 2021.

I. H. JUMA
CHIEF JUSTICE

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 27th day of August, 2021 in the presence of the Mr. Joseph Mwakasege, learned State Attorney for the Respondent/Republic and Mr. Josephat Rweyemamu, learned Counsel for the Appellant, is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR

COURT OF APPEAL