IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 282 OF 2019

ALIYU DAUDA @ HASSAN
RASHID MZEE ATHUMAN ..... **APPELLANTS**
NGESELA KEYA JOSEPH @ ISMAIL

VERSUS

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

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

(Mlacha, J.)

dated the 19th day of June, 2019
in
Criminal Sessions Case No. 66 of 2017

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JUDGMENT OF THE COURT

13th August & 9th September, 2021

MWAMBEGELE, J.A.:

The appellants were arraigned for four counts, and convicted of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002 and sentenced to death by the High Court (Mlacha, J.) sitting at Bukoba. They have now appealed to the Court seeking to challenge both convictions and sentences.

The background to this case may be set out briefly as follows: the appellants were alleged to have killed the deceased Vedasto Kaijage John and his paramour Anastella Paschal on 01.11.2015. We shall

henceforth refer to the late Vedasto Kaijage John as Kaijage and the late Anastella Paschal as Anastella. On the night of that date, at about 22:00 hours, the two deceased were on a drinking spree at Kilembo Internet Bar at Kashenge village, Katoma Ward within Bukoba District in Kagera Region. Little did the two lovers know that they were meeting for the last time. They imbibed there for quite some time and retired for their homes at around 23:00 hours. It was the evidence of Godwin Damian Byobangira (PW1); a *bodaboda* cyclist like the late Kaijage, that he was also at the bar with the two deceased, among others, but that left earlier. He had taken a customer to a place known as Kwa Mzee Kajilita where he had also spent some considerable time. While on his way home, he met four people who informed him about the murder of a woman, later realized to be Anastella, and that he saw blood stains on the road. While at the scene of crime with other people, they saw another dead body in the vicinity. It was covered with grass and later realized to be the body of the late Kaijage. PW1 reported the matter to the village Chairman, one Venance Ferdnand Bigambo who testified in court as PW2 who also went at the scene of the crime.

While still there, they received information that there were two dead bodies found at Aberia area in the same village. PW1 went thither

and found a lot of people. There, the body of his relative Emmanuel Joseph and another one of the late Evodius Aloyce were also recovered. The four killings were in the same manner of throats being slashed and bodies covered with grass or banana leaves.

The incidents were brought to the attention of the police who also went to the scenes of crime. All bodies of the deceased had their throats slashed and one of them (Anastella's) had several wounds in some other parts of the body. The bodies of the deceased were taken to Bukoba Referral Hospital where autopsies were conducted in respect of each and the cause of death of each of them established. However, for reasons that will come to light in the course of this judgment, we refrain from stating the cause of their deaths at this stage.

The police commenced investigations at once which unveiled that the deceased Kaijage and Anastella had mobile phones which also went missing. Assistant Inspector Banda Mwita Mtani (PW4) who was among the Police Officers who were in conduct of the investigations was given cell phone numbers 0785768363 and 0789990380 which were used by the deceased Kaijage and Anastella, respectively. Investigations showed that the cell phones used by those numbers under the two deceased, were being used by other persons in Bukoba. IMEI No.

3526120777899264 which was used by the deceased Kaijage was now used by cell phone number 0684186064 registered in the name of Rashidi Mzee, the second appellant.

It was Faustine Michael Mtui (PW6), Airtel Manager, Victoria Zone who told the Court that upon request by the Regional Crimes Officer (RCO) released information of who was communicating with the handset of the deceased. The printouts were tendered in evidence as Exh. P9 and P10 (at p. 73 of the record of appeal).

Having discovered the cellphone numbers, they started to monitor the communication and discovered that the second appellant was communicating with the first and third appellants on regular basis. A trap was set on 21.11.2015 and the third appellant was arrested and later the second appellant who took PW4 to the first appellant where he was also arrested. The second appellant was arrested in possession of a mobile phone which was used in communications. The certificate of seizure and the said cellphone were received in evidence and marked Exh. P5 and P6 respectively (at p. 53 of the record of appeal).

Upon arrest, the appellants were interrogated and admitted to have been involved in killing people and burning of churches. The investigation unveiled that there were fourteen death incidents and

thirteen incidents of burning churches. The appellants' houses were searched on 25.11.2015 and an assortment of items retrieved including a sword with blood stains found at the house of the second appellant. The search also unveiled three machetes which were suspected to have been used in the killings. Other retrieved items were three defective cellphones, a SIM card and compact cassettes.

The search order was received in evidence as Exh. P14, three defective cellphones as Exh. P15 collectively, the SIM card as Exh. P16 and the compact cassette as Exh. P17 (at p. 110 of the record of appeal).

The bodies of the deceased persons were exhumed and their samples taken. The samples from the deceased persons' bodies, sword and machetes as well as buccal swabs from the appellants were taken to the Chief Government Chemist for examination where Fidelis Segumba (PW9) examined them and made a report which was tendered in evidence as Exh. P11, the two machetes were tendered as Exh. P12 collectively and the sword as Exh. P. 13 (at p. 91 of the record of appeal). As testified at p. 88 of the record of appeal, the DNA in the two machetes matched with the DNA of the buccal swabs from the

second and third appellants. The samples on the sword and its cover showed similarities with the first appellant.

In defence, the appellants dissociated themselves with the charges levelled against them. The second and third appellants who allegedly made confessional statements in their cautioned state sought to retract them on allegations of torture.

Having heard both sides, the trial court was satisfied that the appellants were responsible for the murders of the four deceased and as such, they were sentenced to suffer death by hanging. We shall have a comment on the death sentences imposed on the appellants at the end of this judgment.

The appellants' appeal to the Court is comprised in two memoranda of appeal. The substantive memorandum of appeal which was filed by the appellants themselves comprises eight grounds of appeal while the supplementary memorandum of appeal drawn by their advocate; Mr. Mathias Rweyemamu, has eleven grounds. Each appellant was represented by a separate advocate at the trial who were assigned dock briefs by the Judiciary of Tanzania. In addition, Mr. Mathias Rweyemamu, learned advocate, had a private brief representing all the appellants.

The appeal was argued before us on 13.08.2021 during which the three appellants appeared and were represented by Mr. Mathias Rweyemamu, learned advocate. The respondent Republic had the services of Mr. Yamiko Mlekano, learned Senior State Attorney who had the assistance of Mr. Juma Mahona, learned State Attorney.

Mr. Rweyemamu, at the very outset of his submissions in support of the appeal, except for the eighth, abandoned all the grounds in the substantive memorandum of appeal. He also abandoned ground 8 the supplementary memorandum of appeal. The eighth ground in the substantive memorandum of appeal was argued together with the remaining ten grounds of appeal in the supplementary memorandum.

The learned counsel started with the eleventh ground in the supplementary memorandum of appeal which is a complaint to the effect that the appellants were convicted by the trial court on evidence by the prosecution which did not prove the case beyond reasonable doubt. In support of this ground, the learned counsel canvassed on the following aspects: **one**, that there was no proof that the cellphone which was allegedly found in possession of the second appellant was used by the deceased Kaijage. He contended that at p. 74 of the record of appeal, when cross-examined, PW6 testified that the cellphone which

used cellphone number 07857768363 and allegedly to have been used by the late Kaijage, was actually registered in the name of one Halima Kiwambwe. He added that the wife of the late Kaijage; Macrina Spirian (PW8), had testified that her husband deceased had no cellphone, for it had been lost some six months back. It was thus not true that the deceased Kaijage had a cellphone at the time of his death.

Two, G. 6826 D/C Zacharia (PW13) had no legal authority to edit the Compact Discs (CDs). He had no authority under section 202 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). There was no evidence produced that he had a certificate issued in terms of section section 202 of the CPA which appears in the third schedule to the CPA permitting PW13 to prepare CDs. Worse more, the CD was not in the original form hence inadmissible. To reinforce this point, the learned counsel referred us to our decision in **Nestory Simchimba v. Republic,** Criminal Appeal No. 454 of 2017 (unreported). Mr. Rweyemamu argued that, as PW13 was not gazetted, he had no authority to deal with such evidence. He thus urged us to expunge the evidence of this witness. To support this argument, the learned counsel cited to us our decision in **Matheo Ngua & 3 Others**

v. D.P.P., Criminal Appeal No. 452 of 2017 (unreported) and **Thobias Mbilinyi Ngasimula** [1980] T.L.R. 129.

Three, the retracted confessions by the second and third appellants which were tendered in evidence as Exh. P29 and P30 and used to convict the appellants as appearing at p. 445 of the record of appeal, were taken out of time contrary to section 51 of the CPA and no reasons were given under section 50 (2) of the same Act. He argued that the appellants were arrested on 21.11.2015 at about 17:00 hours and the statements were taken on 22.11.2015 in the morning. In the premises, the learned counsel argued, it was not appropriate for the trial court to rely on confessions which were taken out of time. The alleged confessional statements should be expunged from the record, he prayed.

Four, the trial Judge used the retracted confessions by the second and third appellants to convict the appellants without the same being corroborated by independent evidence and without warning himself as to the dangers of convicting on the strength of retracted confessions. In view of the fact that the second and third appellants alleged that they were tortured before making the alleged confessions, he submitted, the

trial court should not have convicted the appellants on such confessions without any corroborative evidence.

Mr. Rweyemamu then argued the first ground of appeal in the supplementary memorandum of appeal; the complaint that the postmortem examination reports (Exh. P1 – P4) were admitted in evidence under objection during preliminary hearing and the medical officers who conducted the respective autopsies were not called to testify during the trial. The learned counsel argued that the course of action taken by the trial court was not legally proper and prejudiced the appellants. He thus urged us to expunge the four exhibits.

Ground ten of the supplementary memorandum of appeal was argued next. This is a complaint that the trial Judge did not properly sum up to assessors thereby making the assessors unable to give an informed opinion. He clarified that the Judge relied on Exh. P1 – P4; the postmortem examination reports which were improperly admitted in evidence and the appellants have prayed to be expunged. Mr. Rweyemamu argued further that the trial Judge summed up to assessors that the said postmortem examination reports were not objected while in fact they were. The learned counsel added that the trial Judge also relied on the exhumation order allegedly issued by the

court but that the same was not part of the record in that it was not tendered and admitted in evidence. On this ground, the learned counsel submitted that this ground should be allowed but he was quick to submit that the way forward should not be to order a retrial as that course of action will not serve any useful purpose. He prayed that if this ground is allowed, the appellant should be set free because the evidence adduced at the trial was not sufficient to mount a conviction against the appellants thus making a retrial a useless endeavour.

On the totality of the above submissions, Mr. Rweyemamu implored the Court to allow the appeal, quash the conviction and set aside the death sentences imposed on the three appellants and set them free.

Responding, Mr. Mlekano started with the first ground of appeal in the supplementary memorandum. He conceded that that the four postmortem examination reports were wrongly admitted in evidence at that stage. That since the said exhibits were objected by the respondents during the preliminary hearing therefore the court ought not to have received them in evidence. In the premises, the learned Senior State Attorney had no qualms if the four postmortem examination reports would be expunged from the record. However, the

learned Senior State Attorney was quick to point out that there was ample evidence from the oral account of witnesses; PW1, Venance Ferdinand Bigambo (PW2) and Anamaria Respicius (PW3) to prove that the four deceased were indeed dead and that their deaths were not natural. To buttress the point that deaths may be proved by evidence other than the autopsy reports, the learned Senior State Attorney cited to us **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 and **Hamis Juma Chaupepo @ Chau v. Republic**, Criminal Appeal No. 95 of 2018, both unreported decisions of the Court. Along with this ground, Mr. Mlekano also submitted that the defect in the preliminary hearing did not vitiate the whole proceeding as Mr. Rweyemamu argued.

With regard to the second ground in the supplementary memorandum of appeal; a complaint that the certificate of seizure and mobile phones (Exh. P5, P6, P7 and P8) were inadmissible and therefore wrongly admitted in evidence, Mr. Mlekano submitted that the same were properly admitted in evidence. He reinforced his submission with our decision in **D.P.P. v. Kristina Biskasevskaja**, Criminal Appeal No. 76 of 2016 (unreported). He clarified that PW4 and ASP David Paulo Mhanaya (PW5) were competent to tender the exhibits and the certificate of seizure appearing at p. 339 of the record of appeal, shows

that PW4 signed. On the authority of **Goodluck Kyando v. Republic** [2006] T.L.R. 363, Mr. Mlekano submitted that PW4 was entitled to credence.

Mr. Mlekano combined grounds 3, 6 and 7 in his response. The gist of these grounds of appeal is that Exh. P9, P10, P19 and P20 were illegally obtained and therefore wrongly admitted in evidence. With regard to the cellphone number used by the late Kaijage being in the name of one Halima Kiwambwe, the learned Senior State Attorney submitted that PW6 testified in reexamination that a number is not lost and that if it is not on air for six months, it is reallocated to another customer. He added that the moment PW6 was testifying, six months had already elapsed and the number had already been reallocated to the said Halima Kiwambwe.

With regard to section 202 of the CPA, Mr. Mlekano argued that the same was applicable to photographic evidence and thus inapplicable in our case. He clarified that the exhibits were admitted under section 40A of the Evidence Act, Cap. 6 of the Revised Edition, 2002 (the Evidence Act) and having complied with the provisions of section 18 of the Electronic Transactions Act, 2015 (the Electronic Transactions Act). He clarified further that following the enactment of the Electronic

Transactions Act, section 3 defined the term "data message" and necessitated the amendment of the definition of "document" in the Evidence Act. He argued that the DVD in question, in view of the amendments, was a document and thus properly admitted in evidence. After all, he added, the DVD (Exh. P20) was admitted without any objection from the appellants (at p. 167 of the record of appeal) and thus challenging them at the stage of an appeal was but an afterthought.

The learned Senior State Attorney distinguished the cases of **Matheo Ngua** (supra) and **Thobias Mbilinyi Ngasimula** (unreported) cited by Mr. Rweyemamu in that the former was about the certificate and consent of the Director of Public Prosecutions in economic cases and the latter was about evidence of a handwriting expert. The ground of appeal was therefore misplaced, he argued.

Mr. Mlekano responded next to grounds 4 and 11 of the supplementary memorandum of appeal, a complaint on the admissibility of Exh. P28, P29 and P30. He submitted that Exh. P28 was not canvassed by Mr. Rweyemamu. As for Exh. P29 and P30, the learned Senior State Attorney submitted that they were admitted after trials within a trial were conducted. He added that the objection that the

documents were taken contrary to section 50 (1) of the CPA was sufficiently given an answer. He submitted that, reasons were given by the prosecution why the statements were not taken within the prescribed four hours that when they arrested the appellants, they never slept but proceeded with the investigation, as testified by PW4 at p. 49 of the record of appeal. He argued that PW5 supported the testimony of PW4 as appearing at p. 61 of the record of appeal to the effect that they were investigating the cases which comprised fourteen murders and thirteen events of burning churches. Mr. Mlekano submitted that the delay is excusable in terms of section 50 (2) of the CPA. He added that the trial Judge discussed the matter at p. 214 of the record of appeal and was satisfied that the delay was justified. The learned Senior State Attorney reinforced this argument by our decision in **Chacha Jeremia Murimi & 3 Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported).

As regards the alleged torture, Mr. Mlekano submitted that the complaint was considered in the trials within a trial and ruled out to be unfounded hence the admission of the confessional statements. He added that the trial Judge discussed the complaint in the judgment at pp. 446 – 447 of the record of appeal and found that the confessional

statements were voluntarily made and corroborated by the CD in which the first appellant narrated how they acted together to kill the deceased persons.

Mr. Mlekano responded next to ground 9 which is about circumstantial evidence not being sufficient in establishing the guilt of the appellants, that the appellants were not convicted on that evidence only. He submitted that there was expert evidence on printouts and DVD as well as the DNA evidence on the strength of which the appellants were also convicted. He added that the appellants lied in evidence and that, their lies may be used to corroborate the prosecution evidence as was the case in **Felix Lucas Kisinyila v. Republic,** Criminal Appeal No. 129 of 2002 (unreported). He argued that the appellants lied on even trivial matters which were otherwise true, hence corroborating the prosecution story with their lies.

The complaint by the appellants on the assessors not being summed up properly met a strenuous objection from Mr. Mlekano. He argued that the summing up to assessors by the trial Judge as appearing at p. 299 through to p. 320 of the record of appeal was very exhaustive. He argued that the assessors were directed on the ingredients of the offence of murder, circumstantial evidence, electronic

evidence, confessions in the cautioned statements, the doctrine of recent possession, lies of the appellants to boost the prosecution case, corroboration and the defences of the appellants, and more especially their defences of alibi. He submitted further that the trial Judge did not skip anything in his summing up to assessors. He argued that, in the circumstance, if the Court is minded to hold that the summing up to assessors was deficient, a retrial order would be apposite as from the summing up stage. He premised his prayer on the reasons that, **one**, PW4 was no more as he passed away on 07.06.2021, **two**, C. 9895 D/Ssgt Laurent (PW7) was aged 58 when he testified on 26.02.2019 and thus he must be above 60 today and retired and thus may be difficult to procure, **three**, John Kessy (PW10) and G. 6539 DC Sarafina (PW14) were procured from other Regions and may be difficult to trace, **four**, there are more than thirty real and documentary exhibits some of which have been received collectively. If a retrial is ordered, he argued, the court will be required to keep the exhibits until the retrial and perhaps an appeal thereby turning it into an exhibit keeper. That is the reason why he argued that if the Court is minded to order a retrial, then it should order from the summing up stage as it was in **Mashaka Athumani Makubi @ Makubi v. Republic**, Criminal Appeal No. 107 of 2020 (unreported). That course of action will serve the interests of

both parties to the appeal, he argued. He insisted that the prayer was made in the alternative to the one for dismissal of the appeal in its entirety.

In a short rejoinder, Mr. Rweyemamu reiterated that there was a mistrial at the preliminary hearing stage which vitiated the whole proceedings of the trial court. He added in his reiteration that PW8 testified that the late Kaijage lost the phone sometime back before the killing thus the one referred to in evidence could not have beeen the late Kaijage's. He thus insisted that the case against the appellants was not proved to the hilt. He reiterated his prayer to the effect that the appellants should be set free.

We have considered the rival arguments by the parties to this appeal. We have also considered the uncontested arguments in respect of the first ground of appeal in the supplementary memorandum of appeal; on the postmortem exhibits being admitted in evidence during preliminary hearing despite the objection from the appellants. Indeed, Mr. Mlekano agreed that the same were not procedurally admitted in evidence. Worse more, the doctors who conducted the autopsies were not called to testify so that they could be cross-examined by the appellants as indicated by their advocate at the preliminary hearing. In

the premises, the learned State Attorney had no problem if the same would be expunged from the record. We agree with the learned counsel for the appellants on the one hand and the learned Senior State Attorney for the respondent Republic, on the other, for the legal stance they have taken. As to what transpired in the High Court on 22.02.2018 during preliminary hearing is vivid at pp. 11 - 12 of the record of appeal that when Mr. Ngole, learned Principal State Attorney, read over the facts of the case, he intimated to the court that he wished to tender the four postmortem reports as exhibits. That prayer was objected by Mr. Bengesi who represented the appellant on the ground that they needed "to cross examine the makers". The objection was overruled by the Judge under the pretext that the documents proved that the deceased were indeed dead and that their cause of death was haemorrhage. Even if the makers would be called for cross examination, the High Court Judge reasoned, they would not change that hard fact that the deceased were indeed dead and that their deaths were due to haemorrhage. Having so said, the learned Judge proceeded to admit in evidence the four postmortem examination reports as exhibits P1, P2, P3 and P4.

With profound respect to the learned Judge, we think he fell into error. The path taken deprived the appellant of the opportunity to cross-examine the makers of the postmortem reports. That is perhaps the reason why the exhibits were not among the matters which were not disputed as appearing in the memorandum of matters not in disputed prepared and appearing at pp. 13 – 14 of the record of appeal.

We had an opportunity to comment on the procedure like the one in the case at hand in **Sprianus Angelo & 6 Others v. Republic,** Criminal Appeal No. 481 of 2019 (unreported). In that case, at the preliminary hearing, counsel for the accused persons objected to the production of, *inter alia,* the postmortem examination report because he intended to cross-examine the makers at the trial. The High Court Judge overruled the objection under the pretext that there was "no dispute that the deceased died as a result of being burnt and her body was obvious found on the scene". The learned Judge thus did not find it "necessary to summon the Doctor who examined the deceased's body to come and testify on the obvious". In the judgment we rendered to the parties on 24th ultimo, we made the following observation:

> *"With profound respect to the learned High Court Judge who conducted the preliminary hearing, we respectfully think, for this stance, he*

slipped into error. How did he know that the deceased's death and sketch plan were not disputed? If anything, disputed they were and that is the reason why counsel for the appellants objected to their being tendered at that stage. It was not "obvious" as the learned Judge put it. With unfeigned respect, we are of the view that the High Court Judge not only denied the appellants' right to cross-examine the makers of the medical document and the sketch plan, but also downplayed the very essence of conducting the preliminary hearing which is, inter alia, to deduce matters which are not in dispute."

We hold the same view in the appeal under consideration. We think the course of action taken by the High Court Judge deprived the appellants' right to cross-examine the doctors who conducted the autopsies and filled the postmortem examination reports. That right is provided for under the mandatory provisions of section 291 (3) of the CPA. For easy reference, we take the liberty to reproduce the section hereunder:

"(3) Where the evidence is received by the court, the court may, if it thinks fit, and shall, if so requested by the accused or his advocate, summon and examine or make available for

cross-examination, the person who made the report; and the court shall inform the accused of his right to require the person who made the report to be summoned in accordance with the provisions of this subsection."

The Court has often times placed upon the courts the mandatory duty to tell the accused persons of their right under section 291 (3) of the CPA to have the doctor who conducted the postmortem called. In **Dawido Qumunga v. Republic** [1993] T.L.R. 120, for instance, this Court held:

"The provisions of section 291 Criminal Procedure Code are mandatory and require that an accused must be informed about his right to have the doctor who performed the postmortem called to testify in order to enable him decide whether or not he wants the doctor to be called"

The court followed **Dawido Qumunga** (supra) and restated that stance in **Elias Mtati @ Ibichi v. Republic**, Criminal Appeal No. 65 of 2014 (unreported) in the following terms:

"Often times it is forgotten that just as is the case with section 240 (3) of the CPA, its kith, section 291 (3) of CPA, also carries with it the requirement under which the court is

imperatively enjoined to inform the accused of his/her right to have the medical officer summoned for examination."

In view of the above, we agree with both parties that the postmortem examination reports were wrongly admitted in evidence and, consequently, expunge them from the record as prayed.

As an extension to the above discussion. We agree with Mr. Mlekano that there was ample evidence to prove that the four deceased are indeed dead and that their deaths were not natural. All the bodies had their throats slashed in the same manner. It should now be elementary that death and its cause may be proved by evidence other than medical. There is a string of decisions of the Court on the point – see: **Mathias Bundala** (supra), **Hamis Juma Chaupepo @ Chau** (supra), **Armand Guehi v. Republic**, Criminal Appeal No. 242 of 2010 (unreported) and **Jeremiah John & 4 Others v. Republic**, Criminal Appeal No. 416 of 2013 (unreported). In **Armand Guehi** (supra) we reproduced the following excerpt from our previous unreported decision in **Joseph Hamisi & Another v. Republic**, Criminal Appeal No. 13 of 1990 which excerpt we think merits recitation here:

"... We are firmly of the view that where cause of death is not medically established, that is not

necessarily fatal to the charge. This is so if there is other cogent evidence, direct or circumstantial, from which to arrive at a conclusion as to the cause of death."

In the case at hand, it is in the testimony of PW1 that the bodies of Kaijage and Anastella had cut wounds on their respective throats. He testified at p. 24 of the record of appeal thus:

"The neck of Stella was cut. Her body was full of blood. There was a deep cut. The neck of Kaijage was also cut. There was also a deep cut."

PW2 testified at p. 30 of the record of appeal as follows:

"The police uncovered the dead bodies. Anastella had three wounds – on the neck and on both shoulders. The neck of Kaijage was cut deeply like a slaughtered cow."

In describing the bodies of Evodius Aloyce and Emmanuel Joseph, PW2 had this to say at p. 31 of the record of appeal:

"The neck of the first person had been cut. His hand was also cut. The second person had one cut wound on the neck .... The first guy was Evodius Aloyce. The second person was my neighbor, Emmanuel Joseph."

Similarly, PW3 testified at p. 39 of the record of appeal that the body of Emmanuel Joseph had its neck cut. PW7 also testified at p. 83 of the record of appeal that the body of her husband Kaijage had its throat cut.

The foregoing is an explanation of witnesses on how the four deceased's bodies looked like proving the deaths and their causes. On the authorities cited above, it is our considered view that even after expunging exhibits P1, P2, P3 and P4, there is evidence of PW1, PW2 and PW3 as well as that of PW7 to prove that the four deceased are indeed dead and that they died after their throats were slashed.

Next for consideration is the second ground. This is a complaint to the effect that the certificate of seizure and mobile phones (Exh. P5, P6, P7 and P8) were inadmissible and therefore the trial court erred in admitting them in evidence. The exhibits under reference are the certificate of seizure (Exh. P5) received in evidence at p. 53 of the record of appeal and the phone (Exh. P6) also received in evidence at p. 53 of the record of appeal. These were in respect of the second respondent. Another certificate of seizure (Exh. P7) received in evidence at p. 60 of the record of appeal and another phone (Exh. P8)

also received in evidence at p. 60 of the record of appeal. These were in respect of the third appellant.

The concerns raised by Mr. Rweyemamu on this appeal regarding admissibility of Exh. P5 and P6 were also raised as objections at the trial when the said exhibits were admitted in evidence but were overruled by the trial Judge. In a ruling appearing at pp 51 – 52 of the record of appeal, the trial court overruled the objection in respect of Exh. P5 and P6 and the trial Judge gave reasons why the objection was overruled. On the same reasons, at p. 60, the objection in respect of Exh. P7 and P8 was overruled. We are of the considered view that the basic prerequisites of admissibility of evidence in a court of law; relevance, materiality and competence of a person tendering set out in **D.P.P. v. Kristina Biskasevskaja** (supra) were met. We thus find nowhere to fault the trial Judge on the reception of these exhibits as PW4 and PW5 were competent to tender them. We therefore find the complaint the subject of the second ground of appeal as misconceived and dismiss it.

We now turn to consider grounds 3, 6 and 7 whose gist is a complaint that Exh. P9, P10, P19 and P20 were illegally obtained and therefore wrongly admitted in evidence. Exh. P9 and P10 are printouts tendered by PW6. Exh. P19 and P20 are the DVDs recorded by PW13

wherein the appellants went to show the scene of the crimes and how they killed (Exh. P20) tendered at p. 167 of the record of appeal.

With regard to the cellphone number used by the late Kaijage being registered in the name of one Halima Kiwambwe, we agree with the learned Senior State Attorney that PW6 gave sufficient explanation that it was reallocated to another customer after six months had elapsed after it was not on air. At the time PW6 was testifying, over six months had already elapsed and the number had already been reallocated to the said Halima Kiwambwe. We find no merit in Mr. Rweyemamu's complaint on this point and dismiss it.

Mr. Rweyemamu complained of the provisions of section 202 of the CPA, being flouted. We have examined the section and having so done we agree with Mr. Mlekano that the same is applicable to photographic evidence and thus inapplicable in in the present case. The section as well as the form in the Third Schedule to the CPA speak for themselves. For clarity, we reproduce the section here:

> *"202.-(1) In any inquiry, trial or other proceeding under this Act a certificate in the form in the Third Schedule to this Act, given under the hand of an officer appointed by order of the Attorney-General for the purpose, who shall have prepared*

a photographic print or a photographic enlargement from exposed film together with any photographic prints, photographic enlargements and any other annexures referred to therein, shall be evidence of all facts stated in the certificate."

The section speaks for itself. It deals with photographic prints or photographic enlargement from exposed film. We agree with the learned Senior State Attorney that the section is inapplicable in the case at hand. The complaint by Mr. Rweyemamu on this aspect is therefore misplaced. We dismiss it.

We also agree with the learned Senior State Attorney that the cases cited by Mr. Rweyemamu on that aspect are distinguishable. While **Matheo Ngua** (supra) was decided on a certificate and consent of the Director of Public Prosecutions in economic cases, **Thobias Mbilinyi Ngasimula** (supra), the decision of the High Court, was about admissibility in evidence of a handwriting expert's report. Likewise, **Nestory Simchimba** (supra) dealt with oath or affirmation of witnesses before adducing evidence. This complaint is also misplaced and we equally dismiss it.

Next for consideration are grounds 4 and 11 of the supplementary memorandum of appeal; a complaint on the admissibility of exhibits P28, P29 and P30. These are the sketch plan (Exh. P28), cautioned statements of the second appellant (Exh. P29) and third appellant (Exh. P30). As rightly put by Mr. Mlekano, Mr. Rweyemamu did not argue in respect of exhibit P28. Regarding the complaint that exhibits P29 and P30 were made in blatant disregard of the provisions of section 50 (1) of the CPA, we think the prosecution gave sufficient explanation why the section was not complied with. Likewise, the trial court, at p. 214 of the record of appeal, believed the prosecution story that after they arrested the appellants in the evening of 21.11.2015, they did not sleep as they were going on with investigations. That is what PW4 testified at p. 49 of the record of appeal. The same was testified by PW5 at p. 61 of the record of appeal to the effect that the investigations were about fourteen murders and thirteen events of burning churches. That mishap, we respectfully think, was excusable delay in terms of section 50 (2) of the CPA. We thus find no merit in this complaint as well. We dismiss it.

The complaint about the alleged tortures was sufficiently considered by the trial court and dismissed. The confessional

statements were admitted in evidence after it was resolved in a trial within a trial that the complaints of torture were unfounded and therefore not meritorious. Resurrecting the complaint at this stage, in our considered view, will not serve any useful purpose. We dismiss it.

Ground 9 is a complaint that circumstantial evidence was not sufficient to prove the guilt of the appellants. We agree with Mr. Mlekano that the appellants were not convicted on circumstantial evidence only. The appellants were convicted on other evidence as well such as; **one**, confessions in the cautioned statements, **two**, the confessions in the DVD on how they executed the murders, **three**, expert evidence on DNA which implicated the appellant as well as, **four**, their lies which corroborated the prosecution case.

The trial Judge reproduced from the cautioned statement of the second respondent the following excerpt at pp. 444 – 445 of the record of appeal:

> *"Nimekuwa nikimiliki line namba **0684186064** kwa muda mrefu na nimesajiliwa kwa jina langu **RASHID S/O MZEE ATHUMANI.** Ninakumbuka mnamo jana tarehe 21/11/2015 siku ya jumamosi nikiwa katika msikiti wa Jamia uliopo mjini kati ya majira ya saa 16:40 hrs*

baada ya kumaliza kusali alasiri nilikamatwa na watu waliojitambulisha kuwa ni askari poiisi na kwa kipindi hicho nilikuwa na simu mbili mfukoni ambazo ni Itel moja yenye line mbili ***0684280064*** *pamoja na line moja ya Halotel ambayo sikumbuki namba yake. Pia nilikuwa na simu Nokia Mbovu ....* ***Niiipata hofu sana kwani simu hiyo niliipata Katoma baada ya kuua watu wanne ambao ni wanaume watatu na mwanamke mmoja. Na katika tukio hilo mimi nilichukua simu moja na mwezangu Aiiyu Dauda alichukua simu moja. Tuklo hiio tulifanya tarehe 1/11/2015.*** *Baada ya tukio hilo sikutumia simu hiyo mpaka ilipofikia tarehe* ***15/11/2015*** *ndipo nilianza kutumia.* ***Katika mauaji haya ya Katoma tuiikuwa mimi, Aiiyu Dauda na Ngeseia Keya yeye aiikuwa anakata majani ya migomba na kufunika maiti hizo .... Kwa imani yetu tunaamini kuwa ukiharibu mali na kuua kafiri unaandikiwa thawabu ....*** *Pamoja na kufanya tukio hilo pia tumefanya matukio mengi katika Wilaya za Misenyi na Muleba."*

Literally translated the excerpt would read:

*"I owned line number **0684186064** for a long time and it has been registered in my name **RASHID S/O MZEE ATHUMANI.** I remember yesterday on Saturday 21/11/2015 at about 16:40 hrs while at Jamia Mosque located at the town centre after I was done with the afternoon prayer I was arrested by people who identified themselves to be police officers and at that time I was in possession of two cell phones make Itel one of them accommodating two lines one being **0684280064** together with another line of Halotel whose number I cannot recall. I also had another phone make Nokia which was defective .... **I was very much worried because I got that phone at Katoma after killing four people who were three males and a woman. In that incident I took one cell phone and my colleague Aliyu Dauda took one cell phone. We did that on 1/11/2015.** After that incident, I did not use that cell phone until **15/11/2015** when I started to use it. **In those Katoma killings I was with Aliyu Dauda and Ngesela Keya who was plucking banana leaves to cover the dead bodies .... In our belief, if you destroy the property of, and kill a kafir, you get blessings ....** In*

addition to that incident, we have done many others in Misenyi and Muleba districts."

Similarly, the following excerpt was reproduced by the trial court at pp. 445 – 446 of the record of appeal from the confessional statement of the third appellant:

"Mahusiano yangu mimi na Rashid Mzee Athumani Hassani ni ya muda mrefu .... Kuhusiana na tukio la mauaji yaliyotokea tarehe 1/11/2015 majira ya saa 23:00 hours usiku huko maeneo ya Katoma ***mimi nafahamu watu wanne ambao waiiuawa siku hiyo kwa kukatwa na panga sehemu za shingoni. Watu hao mmoja alikuwa mwanamke ambaye simfahamu kwa jina na alikuwa na simu moja aina ya Itel iliyochukuliwa na Rashidi Mzee Athumani. Watu wengine watatu ambao ni wanaume na waliuawa kwa kukatwa na panga sehemu za shingoni na kichwani ... waiiuawa na Rashid Mzee Athumani kwa kushirikiana na Aliyu Dauda @ Hassan*** *– mimi nilichukua na* ***Kukata majani ya migomba na kufunika."***

Our literal translation would be:

"My relationship with Rashid Mzee Athumani Hassani started long time back .... About the incident of killings of 1/11/2015 at about 23:00 hours at Katoma, ***I know four people who were killed on that day by being slashed their necks. One of them was a woman whose name I do not know. She had one cell phone make Itel which was taken by Rashidi Mzee Athumani. Other three people who were males were also killed by their necks being slashed with a machete and hacked in the head ... they were killed by Rashid Mzee Athumani in collaboration with Aliyu Dauda @ Hassan*** *– I was* ***plucking and preparing banana leaves with which to cover the bodies.***

In the DVD the appellants had taken PW13 to the crime scenes and showed how they killed the four deceased. In addition to that, the appellant's lies in their defence corroborated the prosecution story. As we held in **Felix Lucas Kisinyila** (supra) and reiterated in **Nkanga Daudi Nkanga v. Republic**, Criminal Appeal No. 316 of 2013 and **Miraji Idd Waziri @ Simwana & Another v. Republic**, Criminal Appeal No. 14 of 2018 (both unreported), lies of an accused person may corroborate the prosecution case.

The complaint by the appellants on the assessors not being summed up properly was the subject of ground 10 of the supplementary memorandum of appeal. We have closely examined the summing up to assessors by the trial Judge as appearing at pp. 299 - 320 of the record of appeal. Having done so, with due respect to Mr. Rweyemamu, we are unable to agree with him that it was deficient of important points of law. With equal due respect to Mr. Mlekano, we are prepared to agree with him that it was exhaustive enough. The trial Judge summed up to assessors on the ingredients of the offence of murder, circumstantial evidence, electronic evidence, confessions in the cautioned statements, the doctrine of recent possession, lies of the appellants to boost the prosecution case, corroboration and the defences of the appellants. We think the trial Judge left no stone unturned as to render the summing up to assessors deficient of any important point. We would dismiss this complaint as well.

In view of the above discussion, we are of the considered view that the case against the appellants was proved to the hilt. Their convictions were therefore apposite and we find no legal reason to differ with the verdict of the trial court.

With regard to sentence, we promised earlier in this judgment to comment on the sentence imposed on the appellants by the trial court. We wish to point out that the sentence meted out to the appellants was omnibus. In sentencing the appellants, the following is apparent in the judgment of the trial court at p. 454 of the record of appeal:

> *"That said and done, I find you ALIYU DAUDA @ HASSAN, RASHID MZEE ATHUMANI and NGESELA KEY JOSEPH @ ISMAIL guilty of Murder c/s 196 of the Penal Code, Cap. 16 RE 2016 as charged and convict you accordingly".*

After the convictions "as charged", the trial court passed the following sentence as appearing at p. 455 of the record of appeal:

> *"There is only one sentence for murder which is death by hanging. I sentence you the said ALIYU DAUDA @ HASSAN, RASHID MZEE ATHUMANI and NGESELA KEY JOSEPH @ ISMAIL to suffer death by hanging."*

This sentence was certainly omnibus. In **Agnes Doris Liundi v. Republic** [1980] T.L.R. 46 the Court was confronted with an akin situation and observed that once an accused person is convicted of murder on more than one count, a sentence should be imposed on only one count. In that case, like in the instant, the High Court convicted the

appellant on three counts of murder and sentenced the accused person Agnes Doris Liundi to death on each of the three counts. The Court held at p. 50:

> *"The appellant was convicted on three counts of murder. Sentence of death should only have been passed on one count. The convictions on the other two counts being allowed to remain in the record. We accordingly amend the sentence to refer to the conviction on the first count only".*

In **Apolinary Matheo & Two Others v. Republic**, Criminal Appeal No. 436 of 2016 (unreported), we explained the wisdom behind that standpoint. We observed:

> *"The logic encapsulated in this position is not far to seek; once a sentence in respect of the first count is executed, there will be no person against whom to execute the sentences in respect of the other counts."*
> [see also: **Yustine Robert v. Republic**, Criminal Appeal No. 329 of 2017 (unreported)]

Adverting to the case at hand, on the authority of **Agnes Doris Liundi** (supra), we hold that the learned trial judge should have convicted the appellants on the all four counts but should have passed the sentences on only one count. In the premises, we accordingly

amend the sentence to refer to the conviction on the death of Vedasto Kaijage John only; the subject of the first count.

Apart from the foregoing correction and our verdict on the first ground of appeal, this appeal stands dismissed.

DATED at **DAR ES SALAAM** this 7th day of September, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 9th day of September, 2021, in the Presence Juma Mahona, learned State Attorney for the Respondent/Republic, Mr. Rweyemamu learned counsel for the appellants, and appellants in person who are linked via video facility, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL