IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 253 OF 2018

MAWASA s/o JEKI @ KAMANGA.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mambi, J.)

dated the 13th day of August, 2018
in
Criminal Sessions Case No. 27 of 2016

.....

JUDGMENT OF THE COURT

13th & 17th September, 2021

SEHEL, J.A.:

In the High Court of Tanzania sitting at Sumbawanga, the appellant, Mawasa s/o Jeki @ Kamanga was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) (the Penal Code) and was sentenced to death. Aggrieved by the conviction and sentence, he has appealed to this Court.

He was alleged to have murdered one Laiton s/o Pindua Kalunde (the deceased) at Kilangawana village within Sumbawanga District in

Rukwa Region on 17th day of April, 2014. He denied the charge. To establish its case, the prosecution called five (5) witnesses, and tendered three documentary exhibits, namely; the post mortem examination report (Exh. P1), sketch map (Exh. P2) and cautioned statement of the appellant (Exh. P3).

The facts leading to the appellant's arrest and conviction are such that; on the night of 17th April, 2014, the son of the deceased, one Michael Kazumba (PW1) received a phone call from his aunt, Teresia notifying him that his father was invaded by bandits. He went to his father's home and found him dead. He was chopped with an axe. He reported the matter to the village chairman and buried the deceased on the following day. On that date no one was arrested and there was no clue as to who killed the deceased.

After a week, that is on 22nd April, 2014 at 20:00 hours, when Yumbe Pindua (PW5) was passing through a certain local pub that was near the house of his uncle, one Tembo Kamanga, heard some people celebrating. He then overheard someone saying "let us drink all the beers and order more" and another voice saying "we have accomplished our job that will give us more." That conversation made him curious. He thus

went closer to the pub and stood at the door. He peeped through and saw people celebrating. He claimed, he was able to recognize the appellant, Paschal John and Claudi Kamanga. While still standing at the door, he overheard Paschal asking the appellant why he left behind a knife after he had cut the deceased with an axe. Boasting himself to Paschal, the appellant replied that he was an expert in killing people by an axe that he only cut once.

Having overheard their conversation, PW5 decided to relay the information to the deceased's children. Aran Pindua (PW3), one of the sons of the deceased told the trial court that on 22nd April, 2014 when he was at his father's house, PW5 called him. At that time, he was with Ernest Jordan (PW2). PW5 informed them that he overheard the appellant and his colleagues celebrating their accomplished mission of killing their father. PW2 and PW3 went to that local pub and found four people, the appellant, Gambi Jende, Claudia Kamanga and Paschal John, in a private room drinking alcohol. PW2 said, he managed to identify them with the aid of a light illuminated from a solar bulb and that while he was still there, he overheard the appellant saying "I did not face any problem in killing the deceased as I did when I killed Mzee Mwahamba." PW3 also

overheard the appellant saying "it was very easy to kill the deceased." PW2 and PW3 at that time were standing near a window peeping through and saw the appellant and his colleagues drinking and celebrating. The matter was then reported to the police and the appellant was arrested on 30th April, 2014. On 4th May, 2014 a police officer with police force number F. 1748 Detective Corporal Shabani, recorded the cautioned statement of the appellant. During trial, when PW3 wanted to tender the cautioned statement of the appellant, Mr. Baltazal Chambi, learned counsel representing the appellant raised an objection that the same was taken outside the period prescribed under section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019) (the CPA). In overruling the objection, the trial court said: -

> *"The law under section 50 (1) of the CPA requires that the period available for interviewing the suspect is four hours. However, there are exceptions under the same law section 50 (2) of the CPA that if the investigation is still on going and the police officer may refrain interviewing the accused within the four hours required time. The prosecution has argued that when the accused was first arrested at night, he mentioned other*

accused persons. The police officers decided to make further investigation to trace other suspects that is why they refrained from interviewing the accused. In my considered view this is a justifiable reason for the police to delay interviewing the accused as indicated under section 50 (2) of the CPA."

Consequently, the cautioned statement was admitted in evidence (Exh. P3).

In his defence, the appellant denied the accusation of murder though he admitted to know the deceased as his relative. On that night, when the deceased was murdered, the appellant claimed that he was at his home with his family.

At the end of the trial, the three assessors who sat with the presiding Judge unanimously returned a verdict of not guilty in favour of the appellant. They were all of the opinion that the appellant was not responsible for the deceased's death. The learned trial Judge (Mambi, J.) differed with the opinion of the assessors. He was convinced that the prosecution proved its case beyond reasonable doubt through the evidence of PW2, PW3 and PW4 who told the trial court that they saw

and heard the appellant celebrating the killing and that their evidence was corroborated by a cautioned statement, Exh. P3 where the appellant confessed to have killed the deceased with an axe. Consequently, the appellant was found guilty, convicted and handed down the mandatory death sentence. Aggrieved by the finding of the High Court, the appellant has preferred this appeal.

Initially, the appellant filed an eight-point memorandum of appeal. Later on, in terms of Rule 73 (2) of the Court of Appeal Rules, 2009 as amended, Mr. Chapa Alfredy, learned counsel for the appellant, filed a memorandum of appeal in substitution of the one filed by the appellant. The learned counsel raised four (4) grounds of appeal. However, he abandoned the third ground of appeal during the hearing of the appeal.

Basically, the first and second grounds of appeal focused on the trifling issues which were readily conceded by Ms. Scholastica Ansgar Lugongo, learned Senior State Attorney who appeared for the respondent/Republic.

The fourth ground of appeal raised a complaint that the learned trial judge erred in law and fact for including extraneous matters in the judgment which were not testified to by witnesses. Elaborating on this

ground, Mr. Alfredy took us through pages 41-42 of the record of appeal where, he said, the judge included matters which were not in evidence. On this, he strongly relied on the principle stated by the erstwhile Court of Appeal for East Africa in the case of **Okethi Okale and Others v. Republic** [1965] 1 E.A. 555 that:

> *"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches."*

He argued that the learned trial judge was influenced by the extraneous matters thus the appellant was found guilty, convicted and sentenced to death.

In reply, Ms. Lugongo conceded that the judgment of the trial court contained matters not in evidence.

Thereafter, parties focused on whether there is sufficient evidence for the Court to uphold the conviction and sentence. In trying to convince us that the evidence is wanting, Mr. Alfredy submitted that the conviction of the appellant mainly based on two pieces of evidence. The first piece is the evidence of PW2, PW3 and PW5 and second one is the cautioned

statement, Exh. P3. It was his submission that although PW2, PW3 and PW5 claimed that they overheard the appellant confessing to the killing, the words were not imputed to them. The three prosecution witnesses were not among the people whom the appellant was celebrating with in the local pub. He said, these witnesses were watching secretly from the outside through a window. He added that if it is true that the appellant uttered the incriminating words then the key witnesses were not called as witnesses. That is, the persons who were alleged to have been celebrating with the appellant and to whom the appellant made the alleged confession, namely, Paschal John and Claudia Kamanga. In that respect, he contended that the evidence of PW2, PW3 and PW5 had no probative value and in any event cannot be equated to a confession or admission. Mr. Alfredy also discounted the confessional statement, Exh. P3 that it was wrongly admitted. He said, it was recorded in contravention of section 50 (1) of the CPA that prescribes four hours period for interviewing a suspect under restraint as the appellant was arrested on 30th April, 2014 but his statement was recorded four days later, on 4th May, 2014 without there being any explanation. He contended that the learned trial judge erred in overruling the objection raised by the

appellant because the witness, PW4 did not state any reason as to why there was a delay in recording the appellant's statement. In conclusion, he beseeched us to allow the appeal.

On insufficiency of evidence, Ms. Lugongo supported the submission made by learned counsel that the evidence of PW2, PW3 and PW5 had no probative value and does not amount to a confession or admission since the incriminating words were not uttered to PW2, PW3 and PW5. That, the cautioned statement was recorded beyond the prescribed four hours period and there was no explanation for such a delay. She therefore supported the appeal and urged us to allow it, quash the conviction and set aside the sentence.

From the submissions, we find that the central issue for our determination is whether the evidence is sufficient to warrant and uphold the conviction of the appellant. In this appeal, there is no doubt that the prosecution relied on the evidence of PW2, PW3 and PW5 together with the cautioned statement, Exh. P3 that was recorded by PW4. There was nobody who witnessed the commission of the murder and in convicting the appellant, the trial court relied on the two pieces of evidence.

To start with the evidence of PW2, PW3 and PW5, we entirely agree with both counsel for parties that there was no confession or admission because the alleged incriminating words were not uttered to PW2, PW3 and PW5. According to the evidence, these witnesses stood near the window and eavesdropped on the conversation in a room where they said that the appellant and his colleagues were celebrating. If there was any admission made by the appellant then such admission, according to the evidence of PW2, PW3 and PW5 was made in the presence of Paschal John and Claudia Kamanga who were not called as the prosecution witnesses.

We used the word "if" because we doubt the credibility of these three witnesses. The story narrated by these witnesses as to how they came to overhear the appellant's admission is implausible. PW5 said that when he passed through a local pub, he heard people celebrating and then overheard someone saying "let us drink all the beers and order more" and another voice saying "we have accomplished our job that will give us more." PW5 drew closer to the door hence he claimed, he was able to see and recognize the appellant, Paschal John and Claudi Kamanga celebrating. He even eavesdropped on the conversation

between Paschal and the appellant about how they killed the deceased. Upon hearing that conversation, he decided to go and inform PW2 and PW3. PW2 and PW3 went to that pub and they also claimed to overhear the appellant. PW2 said he heard the appellant saying that "I did not face any difficulty in killing the deceased as I did when I killed Mzee Mwahamba" whereas PW3 claimed that he heard him saying that "It was very easy to kill the deceased". We wonder as to why two people who were at the same point in time watching together heard two different versions of the admission. We also find it very hard to believe that the appellant was repeating so many times the same incriminating words that he killed the deceased to his colleagues unless he was of unsound mind which we were not told so.

Similarly, we further find that the evidence on the visual identification of the appellant is wanting. PW3 said that he stood near the window where the appellant and others were drinking and celebrating. In other words, this witness was trying to explain the position they were when watching the celebrations. In identifying the appellant, PW2 claimed that they were aided by a "very clear light" illuminated from a solar bulb. We think that the prevailing conditions under which the identifying

witnesses ware at the time of identification were not favourable for a positive identification. It must be recalled that these witnesses were not inside the room where the celebration was taking place. They were outside, peeping through a window. It was through that window and by the aid of "a very bright light illuminated from a solar bulb", they said, they managed to see four people drinking and celebrating. Ordinarily, when people are celebrating do not stand in a still position. They tend to move from here and there. We thus take that the appellant and his colleagues were also moving from here and there but we were not told as to how PW2, PW3 and PW5 were able to pinpoint the appellant to be the person who uttered the incriminating words. They did not even give the description of the appellant's attire or physique. We were also not told as to whether the appellant was familiar to the witnesses. What we gathered from the record is that the appellant was familiar to PW1 and the deceased as they were relatives. Accordingly, we are satisfied that PW2, PW3 and PW5 did not identify the appellant on that night.

Having discounted the evidence of PW2, PW3 and PW5, we remain with Exh. P3 which was another piece of evidence relied upon by the trial court to convict the appellant. The record is clear that at the time the

cautioned statement was introduced for admission, the learned counsel for the appellant raised an objection that the same was recorded beyond the prescribed period of four hours for interviewing a suspect by the police officer as provided for under section 50 (1) of the CPA. In other words, the counsel suggested to the learned trial judge that the appellant was not a free agent at the time when he was recording the cautioned statement. Instead of conducting a trial within a trial to determine whether it was voluntarily made by the appellant, the learned trial judge brushed off the objection with a reason not canvassed by the witness and admitted it in evidence. We shall revert later to the issue of extraneous matters in the course of this judgment.

In the case of **Annes Allen v. The Director of the Public Prosecutions**, Criminal Appeal No. 173 of 2007 (unreported) the Court was faced with almost similar circumstances with the appeal at hand that, during trial, the appellant repudiated his cautioned statement, Exhibit P4. Nonetheless, the trial court overruled the objection without conducting a trial within a trial to satisfy itself as to whether it was made and if made whether it was made voluntarily. The Court said: -

> *"It was stated with sufficient lucidity by the Court of Appeal for Eastern Africa in the case of* ***MWANGI s/o NYANGE vs REG.*** *Court of Appeal for Eastern Africa in the case of* ***MWANGI s/o NYANGE vs REG.*** *[1954] 21 EACA 377 that a trial within a trial should be held to determine not only the voluntariness or otherwise of an alleged confessional statement but also whether or not it was made at all."*

It then concluded as follows: -

> *"It goes without saying, then, that exhibit P4 was improperly admitted in evidence, as no determination was made on whether or not it was made at all and if made whether it was made voluntarily. Since it was irregularly admitted in evidence, we hereby expunge it from the record."*

In the same vein, in this appeal, the cautioned statement of the appellant was improperly admitted in evidence, we thus proceed to expunge it from the record of appeal.

From the above reasons, we find that there is no cogent evidence to uphold the conviction and sentence. But before we conclude, we wish to briefly comment on the complaint that the learned trial judge acted on

extraneous matters. Indeed, our reappraisal of the record of appeal revealed that there are matters which were neither canvassed by the witnesses nor by the counsel's submissions. For instance, at page 47 of record of appeal the learned judge in his judgment said: -

> *"...the honourable assessors unanimously opined and proposed to this court that the accused should be found guilty of murder as he stand charged due to the clear evidence produced by the prosecution given the fact that even the three witnesses had similar evidence who testified that the accused went to report and inform them he killed his senior wife (the deceased) by alleging her as a witch whom he thought to have bewitched his child belonged to the young wife."*

That apart, we hold as we recently said in **Lucas s/o Venance @ Bwandu and Another v. The Republic**, Criminal Appeal No. 392 of 2018 (unreported) that the error is due to the learned trial judge's misapprehension of evidence but the recorded evidence is beyond reproach.

That said, we find that the appeal has merit. We therefore allow it and proceed to quash the conviction and set aside the death sentence

imposed on the appellant. Accordingly, we order that the appellant, Mawasa s/o Jeki @ Kamanga be released forthwith from prison, unless he is otherwise lawfully held.

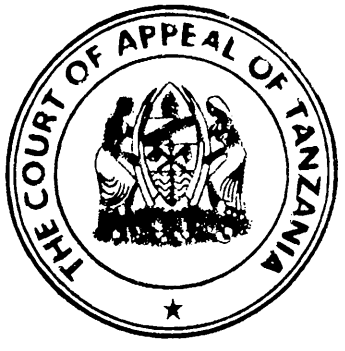
DATED at **MBEYA** this 16th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered on this 17th day September, 2021, in the presence of appellant in person and represented by Mr. Chapa Alfredy, learned Counsel and Ms. Irene Mwabeza, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL