IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 395 of 2018

1. CHARLES S/O KIDAHA
2. KUZENZA S/O JENDESHA } **.....APPELLANTS**
3. JOSEPH S/O MTEMA @ MADIA

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mambi, J.)

dated the 5th day of November, 2018
in
Criminal Sessions Case No. 22 of 2016

.....

JUDGMENT OF THE COURT

17th & 27th September, 2021

SEHEL, J.A.:

This appeal is against the decision of the High Court of Tanzania sitting at Mpanda that tried and convicted Charles s/o Kidaha, Kuzenza s/o Jendasha and Joseph s/o Mtema @ Madia, (the 1st, 2nd and 3rd appellants respectively or "the appellants") of an offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019) (the Penal Code). The appellants were alleged to have murdered

Frank s/o Joseph @ Samwel (the deceased), a motorcycle taxi rider, commonly known as 'bodaboda".

According to the evidence of Godfrey Mongomongo (PW1), the deceased used to park his bodaboda near the District Hospital alongside his other bodaboda riders. That, on the 26th April, 2014 while at their usual pickup point waiting for prospective passengers, PW1 saw a man approaching the deceased. That man hired the deceased. After, they had agreed on the fare, the deceased left with the man and, on that day, he never returned to the pickup point. PW1 was able to mark the man by his attire that he had put a "Mazula" and a black coat.

The following day, Thomas Mango (PW2), a village executive officer of Katema Village received information that in his village, there is a dead body of a male person found lying near Pasua area. He went to the scene and indeed he found the body with wounds on its face. He reported the matter to Mpanda police station whereby a police officer, G. 7252 Detective Corporal Said (PW7) went to the scene of crime to collect the body and he also drew a sketch map (Exhibit P5).

The news of the dead boy reached to the deceased's mother, Beatrice Antony (PW8). As she did not see her son returning home in the previous night, she decided to go to the district hospital. At the

hospital she was shocked to see the dead body of her son. She collapsed thereat. When she woke up, she told the police that her son was a bodaboda rider of red in colour motorcycle and it had a brown cover with registration number T.704 DCQ.

In the evening of 21st May, 2014 Athuman Hamisi Nyamwite (PW5), also a bodaboda rider who used to park at Kasekese area, while at his pickup point waiting for passengers, saw three people with the deceased's motorcycle, SANLG make with registration number T.704 CDQ. PW5 approached the people and posed as a passenger and offered to pay them TZS. 20,000.00 as fare. Thereat, with the help with his colleagues, PW5 arrested the appellants and took them to the office of Kasekese village chairman, Justine Mbalamwezi (PW6).

A report concerning the appellants' arrest reached Mpanda police station. In that respect, Inspector Halifan William Ngonyani (PW4) went to collect the appellants and seized the motorcycle (Exhibit P4) vide a seizure certificate (Exhibit P5).

On 25th May, 2014 a justice of peace, Mkumbi R. Mkubi (PW3) recorded the 1st appellant's extra-judicial statement (Exhibit P2). In that statement the 1st appellant implicated the 2nd and 3rd appellants.

On their part, the appellants completely denied any involvement of the deceased's killing. The 1st appellant admitted to have been arrested with a motorcycle make SANLG at Kasekese area. He claimed that he bought it from Hamis Maduhu at a price of TZS. 1,000,000.00 and that he had already advanced him TZS. 600,000.00 leaving a balance of TZS. 400,000.00 to be paid at a later date. It was his further evidence that the registration card would have been handed over to him after clearing the whole purchase money. He also admitted that on the date when he was arrested, he was with the 1st and 3rd appellants as they had hired him to ferry them to Kayenza to attend a wedding ceremony.

The 2nd appellant also admitted that the three were arrested at Kasekese area. He told the trial court that he and the 3rd appellant were invited to a wedding party in Kayenza thus they hired the 1st appellant to ferry them there.

The defence story of the 3rd appellant was almost similar to that of the 1st and 2nd appellants. He said that they were arrested at Kasekese area when they were on their way to Kayenza to attend a wedding ceremony and that it was the 2nd appellant who hired the 1st appellant. He denied to have been involved in killing the deceased.

At the end of the trial, the three assessors who sat with the learned trial judge returned a unanimous verdict of guilty against the appellants. The 1st assessor was of the opinion that since the appellants were found in possession of the deceased's motorcycle and they failed to give a justifiable explanation on how it came into their possession, they are guilty as charged. The 2nd and 3rd assessors were of the opinion that PW1 positively identified the appellants as the persons who hired him and since they were last seen with the deceased, they were responsible for the death of the deceased. The 3rd assessor also opined that the 1st appellant admitted before PW3 and mentioned his co-appellants. Basing on the evidence of PW1, PW2, PW3, PW4 and PW5 which he termed as circumstantial evidence, the doctrine of recent possession and the extra-judicial statement, the learned trial judge, just like the three assessors, found the appellants guilty as charged. They were therefore convicted and sentenced as aforesaid.

Initially, the 1st appellant filed a memorandum of appeal containing seven grounds whereas the 2nd and 3rd appellants filed their joint memorandum of appeal comprising of six grounds of appeal. Later on, in terms of Rule 73 (2) of the Court of Appeal Rules, 2009 as amended, Mr. Ladislaus Rwekaza, learned counsel for the appellants, filed a

memorandum of appeal in substitution of the ones filed by the appellants. The learned counsel raised the following five grounds of appeal: -

1. That, the trial Judge erred in law by convicting the appellants relying on the extra-judicial statement which was involuntarily made and taken contrary to the law.
2. That, the trial Judge erred in law to rely and uphold a conviction on evidence of PW6 and PW1 who were neither committed nor being in the list of prosecution witnesses.
3. That, the trial Judge erred in law and fact for failure to select and explain to the assessors their roles and responsibilities in the trial.
4. That, the trial Judge erred in law and fact for failure to sum up vital points to the assessors as the result they gave incorrect opinion at the detriment of the appellant.
5. That, the trial Judge erred in law and fact, for failure to give the 2nd and 3rd appellants (being co-accused) an opportunity to cross-examine prosecution witness, the 1st appellant, during trial within a trial as the result denied them a right of fair hearing, contrary to the principle of natural justice.

At the hearing of the appeal, Ms. Mary Mgaya and Mr. Ladislaus Rwekaza, both learned advocates appeared for the appellants whereas Ms. Irene Mwabeza, learned State Attorney appeared for the respondent/ Republic.

Arguing the appeal for the appellants, Mr. Rwekaza first prayed to adopt the written submissions he had earlier on filed in this Court and intimated that he will only expound more on the third, fourth and fifth grounds of appeal. Due to the pertinent issues raised in the fourth and fifth grounds of appeal and that since these two grounds suffice to dispose of the entire appeal, we refrain to consider the remaining grounds of appeal. We thus wish to start with the fifth ground of appeal that faulted the learned trial Judge on his failure to give a chance to the 2nd and 3rd appellants to fully participate in the trial within a trial. Mr. Rwekaza pointed out that the record of appeal shows that after the 1st appellant had repudiated his extra-judicial statement, a trial within a trial was conducted. However, in that mini trial, the 2nd and 3rd appellants were not given a chance to cross-examine the witnesses. He submitted that, in the light of the decision of this Court in the case of **Elias Mwaitambila & 3 Others v. The Republic**, Criminal Appeal No. 414 of 2013 (unreported) the irregularity rendered the proceedings a nullity

because the 2nd and 3rd appellant were denied their basic fundamental right to be heard.

Ms. Mwabeza conceded to that apparent anomaly. She agreed that the basic right of the 2nd and 3rd appellants was infringed by the trial judge when he did not give them an opportunity to participate in the trial within a trial. She also agreed that the violation leads to a nullification of the proceedings.

On our part, having heard the concurrent submission from the counsel for the parties and after we have gone through the record of appeal, we entirely agree that the 2nd and 3rd appellant did not have a fair trial because they were not given chance to participate in the trial within a trial. It is on record that when PW3 was about to tender extra-judicial statement of the 1st appellant, Mr. Kifunda, learned counsel who was representing all three appellants in the trial court, objected to it. Therefore, the trial court stopped the main trial and constituted the trial within a trial to ascertain the validity and voluntariness of the extra-judicial statement. However, in that trial within trial, the 2nd and 3rd appellants were not given a chance to put any question to the witnesses, both prosecution and defence witnesses, although the document that was about to be admitted was injurious to their interest.

It happened so because they were all represented by the same counsel, Mr. Kifunda. He was representing the 1st appellant whose extra-judicial statement was about to be tendered. He was also representing the 2nd and 3rd appellants who were implicated in the extra-judicial statement that was about to be admitted in evidence. In that regard, it was presumed that Mr. Kifunda had taken care of their interests while it was not the case. This is clearly gathered from the fact that when 1st appellant was giving his evidence in the trial within trial, he was led by Mr. Kifunda but the 2nd and 3rd appellants were not given a chance to cross-examine the 1st appellant.

This Court faced a similar scenario in the case of **Elias Mwaitambila & 3 Others v. The Republic** (supra) cited to us by Mr. Rwekaza. In that case, the 1st and 3rd appellants raised an objection to the admission of their cautioned statements that implicated the 2nd and 4th appellants, Exhibits P4 and P11. Hence, the trial court conducted a trial within a trial to determine the voluntariness of the statements. Since the appellants were all represented by the same counsel, Mr. Lwambano, the second and fourth accused persons could not put any questions to both the prosecution and defence witnesses, although the

statements that were about to be admitted were injurious to their interests. The Court observed that: -

> *"...as a rule of natural justice, they (the second and fourth appellants) should also have been given opportunity to cross-examine."*

Due to that omission of affording the 2nd and 4th appellants a right to cross-examine the witnesses for both sides coupled with other irregularities, the Court held that the trial of the appellants was unfair thus it nullified the entire trial court proceedings.

A right to be heard is not only a cardinal principle of natural justice but also a fundamental right constitutionally guaranteed such that no decision should be left to stand in contravention of it, even if the same decision would be reached had the party been heard (See: **the Director of Public Prosecutions v. Sabini Inyasi Tesha and Another** [1993] TLR 237, **National Housing Corporation v. Tanzania Shoe Company Limited and Others** [1995] TLR 251, **Mbeya-Rukwa Auto Parts and Transport v. Jestina Mwakyoma** [2003] TLR 251, **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 and **Dishon**

John Mtaita v. The Director of Public Prosecutions, Criminal Appeal No. 132 of 2004 (both unreported)).

In **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy** (supra) the Court said:

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Thus, in this appeal, the learned Judge breached the basic rights of the 2nd and 3rd appellants when he proceeded to hear and determine on the admissibility of Exhibit P2 without giving an opportunity to the 2nd and 3rd appellants to cross-examine the witnesses for both the prosecution and the defence. Consequently, consistent with settled law, we are of the firm view that the decision of the trial court was reached in violation of the 2nd and 3rd appellant's constitutional right to be heard and it cannot be allowed to stand.

But before we proceed to nullify the judgment and the proceedings of the trial court, there is another irregularity committed by the trial court raised by the counsel for the appellants which we think also deserves our consideration. It is in the fourth ground of appeal that there was an improper summing up to the assessors for them to have a meaningful participation. Mr. Rwekaza submitted that the law requires, all criminal trials before the High Court to be with the aid of not less than two assessors. He added that for the assessors to have a meaningful participation, section 289 (1) of the CPA mandatorily requires the trial judge to sum up to assessors on the vital points of law relevant in the case. Mr. Rwekaza pointed out that the learned judge relied on circumstantial evidence, doctrine of recent possession and extra-judicial statement to find conviction on the appellants. That apart, he argued, the learned judge did not address the assessors on these vital points. He concluded that such an omission was fatal and vitiated the proceedings. He accordingly urged the Court to nullify the proceedings, quash the conviction and set aside the sentence.

On the way forward, he submitted that there should not be an order for a retrial because the available evidence is not enough to warrant the conviction of the appellants. In trying to convince us not to

order a retrial, Mr. Rwekaza argued the first ground of appeal that relates to extra-judicial statement. He discounted it by arguing that PW3 who recorded the extra-judicial statement did not adhere to the Chief Justice's instructions and procedure stated in the case of **Japhet Thadei Msigwa v. The Republic**, Criminal Appeal No. 367 of 2008 (unreported). It was his submission that since there was a flouting of procedure, the extra-judicial statement ought to be expunged from the record. He added that even the doctrine of recent possession does not apply to the appellants because by time they were found in possession of the motorcycle which was alleged to have been stolen from the deceased, there was a lapse of one clear month which could not amount to a recently stolen property.

Ms. Mwabeza concurred with the submission of Mr. Rwekaza that the assessors were not properly addressed on salient points of law which the learned judge used in in his judgment to base the conviction of the appellants. She however, had a different view on the way forward. She argued that the doctrine of recent possession perfectly applied to the appellants who failed to give a plausible explanation as to how the recently stolen motorcycle of the deceased was in their possession. She also argued that PW3 did comply with the laid down

procedure in recording the extra-judicia statement of the 1st appellant. For these reasons, she urged us to order a retrial.

On our part, we wish to start with the improper summing up to assessors. We have scrutinized the record of appeal and agree with the counsel that the summing up notes appearing at pages 41 to 135 show that the learned judge did not direct assessors on the vital points of law relevant in the case. For instance, he did not sum up to the assessors on extra-judicial statement as there was no mention of it in his summing up notes while he used it in his fifty-one paged judgment to found a conviction of the appellants. The same applies to the doctrine of recent possession where there was no mention of it all in the summing up although it was used by the learned judge to find the conviction on the appellants. Further, apart from mentioning, in the summing up notes, that there is circumstantial evidence, the learned judge did not direct assessors that they have to be satisfied that the facts from which an inference of guilt is drawn must lead to irresistible conclusion that the accused person was responsible and that there should not be any other conclusion. He ought to have directed assessors that in case they find that there was another possible conclusion, they had to return a verdict of guilty. However, the record is clear that this was not done to the

assessors. Failure by the learned judge to properly direct the assessors on some vital points of law rendered the proceedings a nullity. We therefore proceed to nullify the proceedings, quash the conviction and set aside the sentence.

On the way forward, we have heard the competing arguments but we refrain ourselves from discussing the issue as to whether there is enough evidence or not to order a retrial. It suffices to say that as a general rule a retrial would be ordered when the trial is found to be illegal or defective but it would not be ordered where the conviction is set aside due to insufficiency of evidence or for purpose of enabling the prosecution to fill up gaps in its evidence at the trial. However, each case is determined depending on its own facts and circumstances and an order for retrial would be made where the interest of justice requires to do so (See the case of **Fatehali Manji v. Republic** [1966] EA 343). Given the circumstances of the appeal before us, we are satisfied that the interest of justice in this appeal requires us to order a retrial.

At the end, we allow the appeal to the extent we have explained herein. Accordingly, we nullify the proceedings and judgment, quash the conviction and set aside the sentence. For interest of justice, we order that the appellants be immediately retried before another judge with

another set of assessors. We further order that each of the appellants to be assigned a separate counsel in order for them to have effective legal representation. In the meantime, the appellants are to remain in remand custody waiting for a retrial of their case.

Order accordingly.

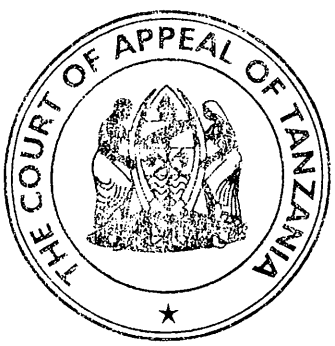
DATED at **MBEYA** this 27th day of September, 2021.

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 27th day September, 2021, in the presence of appellants in person, and represented by Ms. Rehema Mgeni and Ms. Jalia Hussein, both learned counsels holding brief for Ms. Mary Mgaya and Mr. Ladislaus Rwekaza, learned counsel for appellants and Ms. Annarose Kasambala, 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