IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 27 & 29 OF 2019

1. KASTO NYELENGA
2. EXAVERY KABWELA ....**APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

dated 4th day of January, 2019
in
Criminal Sessions Case No. 46 of 2015

JUDGMENT OF THE COURT

23rd November & 3rd December, 2021

MWANDAMBO, J.A.:

Before the High Court, sitting at Mbeya, the appellants stood charged with murder contrary to section 196 and 197 of the Penal Code [Cap 16 R. E. 2002]. According to the information, the appellants were accused of causing unlawful death of Jastin Paza Mwamlima (the deceased) on 31/07/2013 at a village called Nsenga, Mbozi District, Mbeya (now Songwe) Region. However, after hearing the evidence of both sides, the trial court (Levira, J.- as she then was) found the evidence insufficient to sustain the information of murder. Instead, the learned judge found the appellants guilty of lesser offence of manslaughter contrary to section 195 of the Penal

Code and convicted them with that offence followed by sentences of ten years imprisonment. Not amused by the conviction and sentences, the appellants have preferred the instant appeal protesting their innocence.

Briefly, the story told by the prosecution shows that on 31/07/2013 during night hours, a group of people stormed into the home of the deceased who was married to Neema Lamson Mnadi (PW1) with a view to tracing coffee beans allegedly stolen from one Kilio Nyetela Mwampashi from the same village. According to the record, the deceased was suspected to have stolen the coffee beans judged from footmarks leading to his house. Amongst the people from the group allegedly identified by PW1 and Gilbert Tusamari Mwamlima (PW2); the deceased's uncle, was Kasto Nyelenga (first appellant) and Wadi Muyombe and later on Kilio Nyetela Mwampashi, the owner of the allegedly stolen coffee.

Even though it was night with disputed source of light, the two witnesses alleged to have identified the first appellant because he was familiar to them as he hailed from the same village. Upon interrogation, the deceased denied having stolen the said coffee beans. Afterwards, he was taken by the group to a Peoples' Militia office at a place called Itumbi in a car driven by the first appellant. However, PW1 remained behind in the house as her husband was whisked away. Not surprisingly, PW2 and Denara Tusamara Mwamlima (PW3); another uncle of the deceased, felt

compelled to go after their nephew at the militia office where they found him in the office being interrogated by several people who were alleged to have been beating the deceased using a club in turns. Some of the people who were alleged to have participated in extracting confession from the deceased through torture included Michael Jonas Sababu, Bony Kusitwa and the first appellant and later on Exavery Kabwela, the second appellant, joined the group. It is common ground that all this happened during the night and that, PW2 and PW3 watched the interrogation from outside peeping through a window since they had no access to the room in which the interrogation was taking place. According to PW2, they were able to see what took place in that room through light illuminated by a lantern. In the process, the deceased is said to have confessed to have stolen the much-sought coffee beans and hid it in a heap of maize somewhere in PW2's farm near his house and that of the deceased.

Thereafter, the group moved to the said place in a car driven by the first appellant. The deceased who was already handcuffed, led them to the heap where he mentioned to have hidden the coffee. The noises of the arrival of the search party woke up PW1 who went close to the place where her husband stood whilst the people in the group were busy looking for the stolen coffee. PW1, yet again said that she was able to identify the first appellant from the group so did PW2 who was also around. As the coffee

was not found as anticipated, the group drove back taking the deceased to Mlowo Police station in the same car driven by the first appellant. According to PW1, her husband had sustained injuries in his hands and legs. Yet again, she remained behind until the following day when she went to Mlowo Police station where she was told that her husband was hospitalized at Vwawa Hospital. She thus went straight to the hospital where she found her husband in a critical condition unable to talk and open his eyes with swelling legs, knees and hands.

According to PW1, the deceased had two holes on his flank with blood oozing from the right-hand side of his body. PW2 had a similar narration in relation to the condition he found the deceased in the hospital ward when he visited him on 01/08/2013. Jastin was pronounced dead he following day. However, it was not until April and May 2015 when the appellants were arrested and arraigned in court on the information of the murder of the deceased to which they pleaded not guilty. Whilst admitting having been involved in driving a car which took the deceased to the police and hospital at the request of the village chairman, the first appellant denied having gone to the place where the deceased was alleged to have been beaten. The second appellant for his part told the trial court that he came back on safari on the material night in car driven by one Waziri Mwantanji and upon arrival in the village at about 22.30, he went to his home only to

learn of the death of the deceased the following day and participated in his burial. Both appellants told the trial court that they never moved anywhere after the death of Jastin Paza and were in April or May, 2015 and arraigned in court in connection with the death of the deceased.

As alluded to earlier, the trial court did not find sufficient evidence to convict the appellant of murder rather, manslaughter. It arrived at that verdict upon being satisfied that the appellants were properly identified as the persons responsible for the death of the deceased through the evidence of PW2 and PW3 who were recorded to have witnessed the appellants and other culprits who are at large inflicting injuries on the deceased at the militia office during the material night. Even though the appellant raised the defences of *alibi*, the learned trial judge found no purchase in it. She rejected it for not only being improperly raised but also unsubstantiated. Nevertheless, the trial court found insufficient evidence to prove malice aforethought in terms of section 200 of the Penal Code which finding reduced the offence from murder to manslaughter.

Initially, the appellants lodged a joint memorandum of appeal consisting of ten grounds. Ahead of the date of hearing, Mr. Isack Chingilile, learned advocate who appeared on their behalf during the hearing of the appeal lodged a supplementary memorandum of appeal containing three grounds which, upon consultation with the appellants, he substituted for the

previously lodged memorandum of appeal in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds of complaint in the substituted memorandum are premised on; poor evidence of visual identification on the basis of which the trial court convicted them, failure to evaluate evidence on record properly and weak evidence which did not prove the case against the appellants beyond reasonable doubt. With consent of the respondent Republic before the commencement of hearing, Mr. Chingilile was granted leave to argue an additional ground in terms of rule 81(2) of the Rules making a total of four grounds. The additional (fourth) ground faults the trial judge for failure to address the assessors on a vital point of law in summing up notes in relation to the appellants' defences of *alibi.*

Mr. Chingilie argued the fourth grounds ahead of the rest. His starting point was section 265 of the Criminal Procedure Act [Cap 20 R.E 2019] (the CPA) which requires criminal trials in the High Court to be with the aid of assessors which was duly complied with. The learned advocate contended that in terms of section 298(1) of the CPA, the trial judge prepared summing up notes to the assessors before inviting them to express their opinions. However, the learned advocate argued that meaningful participation of the assessors entails not only their participation throughout the trial but also being addressed by the trial judge on all vital

points of law and the evidence in the case. According to him, the summing up notes prepared by the trial judge did not meet the criteria for failure to address the assessors on the appellants' defences of *alibi*. Besides, the learned advocate argued that the learned trial judge discussed the appellants' defences of alibi in the judgment but rejected them.

The learned advocate was emphatic that that was a fatal irregularity vitiating the trial, conviction and sentences meted out to the appellants. As to the way forward, Mr. Chingilile impressed upon us that, guided by the oft quoted decision of the Court's predecessor; the Court of Appeal for East Africa in **Fatehali Manji v. R.** [1966] E. A. 343, the interest of justice dictates that the appellants be set free because the evidence by the prosecution is too weak to order a retrial.

Next, Mr. Chingilile addressed the Court on ground one dedicated to the evidence of visual identification. According to the learned advocate, the appellants' conviction was premised on the evidence of identification through PW1, PW2 and PW4 which did not meet the criteria set in **Waziri Amani v. R** [1980] TLR 250 referred in other cases including, **Dadu Sunano @ Kilagela v. R.,** Criminal Appeal No, 222 of 2013 (unreported). This is so, the learned advocate argued, the incident claimed to have been the cause of the deceased's death took place during night yet the witnesses

did not describe the source of light as well as its intensity to enable them positively identify the culprits.

On the other hand, relying on the Court's decision in **Juma Salis @ Jonas v. R.,** Criminal Appeal No. 262 of 2014 (unreported), the learned advocate contended that the evidence of recognition in this case was also doubtful because the atmosphere at the scene of crime was not favourable to pass the test of reliability. Elaborating, the learned advocate discounted the evidence of PW2 who, apart from claiming that he saw the appellant, he did not mention them to anybody. Instead, Mr. Chingilile argued, PW2 mentioned Kilio Nyetela, Boro and Michael as the persons responsible for the death of the deceased. So did PW3. The learned advocate submitted further that PW4 simply overheard the first appellant talking about what transpired to the deceased when the first appellant visited his (PW4's) grocery in the company of other people. To fortify his submission on the failure by the identifying witnesses to mention the culprit at the earliest, Mr. Chingilile cited our decision in **Marwa Wangiti & Others v. R** [2002] T.L.R. 39 and invited us to hold that as none of the appellants mentioned the appellants at the earliest opportunity, it was not safe for the trial court to rely on their evidence and convict the appellants as it did.

Mr. Chingilile argued grounds two and three conjointly. The two grounds are dedicated to the trial court's alleged failure to evaluate the

evidence properly and in consequence failing to hold that the prosecution did not prove the appellants' case beyond reasonable doubt. He had two arguments on these grounds. **One,** the learned advocate contended that the trial judge failed to find that there were contradictions in the evidence of the prosecution witnesses with regard to the residence of the deceased. **Two,** the learned trial judge ought to have found that the unexplained long delay in arresting the appellants had a bearing on the appellant's guilt; it raised a reasonable doubt on the prosecution evidence. Accordingly, Mr. Chingilile urged us to hold that by reason of the gaps in the prosecution evidence, it will be unsafe to order a retrial as doing so will afford an opportunity to the prosecution to fill in the gaps to the appellants' prejudice. He wound up his submissions by inviting the Court to set the appellants free before Mr. Njoloyota Mwashubila, learned Senior State Attorney representing the respondent Republic took the floor to submit in reply.

Whilst conceding on the defects in the summing up notes to the assessors, the learned Senior State Attorney was adamant in support of an order for a retrial. Mr. Mwashubila contended that there was sufficient evidence of identification through PW2 and PW3 which justified an order for a retrial. According to the learned Senior State Attorney, the incident took a long time which afforded an opportunity to the witnesses to properly identify the culprits right from the deceased's residence all the way to the

ward office where the deceased was beaten by the appellants and other people. Mr. Mwashubila argued further that it was not disputed that the first appellant was the driver of the car which took the deceased to the militia office and later to his house before he was taken to Mlowo Police station in handcuffs. Besides, there was the evidence of conversation by the first appellant and his colleagues at PW4's grocery proving the involvement of the first appellant in the torture and ultimately the death of the deceased. With regard to the unexplained delay in the appellants' arrest, Mr. Mwashubila contended that there was sufficient explanation on it through the evidence of PW5 who stated that the culprits fled to unknown places after the incident. On the other hand, Mr. Mwashubila conceded on the prosecution's failure to tender a post mortem report by a medical doctor with a view to proving the cause of death. Nevertheless, the learned Senior State Attorney was unrelenting that cause of death need not be proved by postmortem only.

In his short rejoinder, Mr. Chingilile argued that PW2 and PW3 were not credible witnesses because they mentioned different people who killed the deceased other than the appellants. In particular, the learned advocate contended that, PW3 never mentioned the appellants anywhere except in his testimony. On the other hand, Mr. Chingilile argued notwithstanding the long time the identifying witnesses had with the culprits, their evidence was

too weak to support a finding of positive identification of the appellants in a group of many people. Likewise, it was Mr. Chingilile's submission that despite PW4 claiming to have overheard the first appellant having participated in torturing the deceased, he never mentioned him anywhere prior to giving his testimony. Finally, Mr. Chingilile discounted PW5's evidence on the disappearance of the appellants and hence the delay in arresting them was in sharp contrast with their evidence that they were present in their village throughout.

Having heard the arguments for and against the appeal and upon examining the record of appeal and the impugned judgment, there is no longer any controversy with regard to the inadequacy in the summing up notes to the assessors. It is trite that a proper summing up is one which contains an explanation on the vital ingredients in the case, burden of proof and the duty of the prosecution to prove its case beyond reasonable doubt. Others include, elaboration on the cause of death, malice aforethought and main issues in the case amongst others; the nature of the evidence, credibility of the witnesses and the like. See for instance: **John Mlay v. R.,** Criminal Appeal No. 216 of 2007 followed in subsequent decisions of the Court in **Lazaro Katende v. R.,** Criminal Appeal No. 146 of 2018, **Respicious Patrick @ Mtanzangira v. R.,** Criminal Appeal No. 40 of 2019 (all unreported).

It may not be out of context to stress that proof beyond reasonable doubt entails an objective scrutiny of the prosecution evidence against the accused's defence be it general or specific. That means that the summing up notes should be all encompassing to incorporate the accused's defence to enable the assessors make their meaningful opinions to the trial judge consistent with the decision of the defunct Court of Appeal for Eastern Africa in **Washington s/o Odondo v. R.** (1954) 21 EACA. That decision has been followed in various decisions of this Court which we need not mention here. As rightly submitted by Mr. Chingilile and conceded by Mr. Mwashubila, the learned trial judge omitted to address the assessors on the appellants' defence of alibi yet, she considered it in her judgment but rejected it for being improperly raised and wanting in merit. With respect, that was improper and fatal to the trial, conviction and sentences, for it denied the assessors the opportunity to give their meaningful participation in the trial in accordance with section 265 of the CPA. Mr. Mwashubila made reference to our decision in **Alexander Stima v. R.,** Criminal Appeal No. 398 of 2017 (unreported) for the proposition that an improper summing up to the assessors renders the trial a nullity. To that decision we would add a few from the long list of the Court's decisions on the same issue represented by **Ferdinand s/o Kamanda & 6 Others v. The DPP.,** Criminal Appeal No. 390 of 2017, **Malambi Lukwaja v. R.,** Criminal

Appeal No. 21 of 2018 (unreported), **Chacha Matiko @ Magege V. R.,** Criminal Appeal No. 562 of 2015, **Mulokozi Anatory v. R.** Criminal Appeal No. 124 of 2014 (unreported), **Lazaro Katende v. R** (supra) and **Respicious Patrick @ Mtanzangira v. R** (supra).

Guided by the above decisions, we cannot but hold that the trial of the appellants was a nullity by reason of the trial judge's failure to address the lay assessors on the appellants' defence of alibi. Accordingly, we shall have no option other than quashing their conviction and setting aside the sentences meted out to them.

Having so held, the next question is the way forward on which counsel locked horns that is; whether to order a retrial or not. It is trite from the oft-quoted decision in **Fatehali Manji v. R.** (supra), a retrial should only be ordered where it is in the interest of justice doing so. A retrial should not be ordered where doing so will afford the prosecution opportunity to fill gaps in its otherwise weak evidence. That has been the position the Court has taken in similar cases including those cited hereinabove.

We heard Mr. Chingilile on the gaps in the evidence of identification on which he submitted that it was too weak to make a finding that the appellants were positively identified as the persons who tortured the deceased resulting into his death. We respectfully agree with him. The

record shows that PW1 mentioned the first appellant as one of the persons who stormed into her husband's house on the material night and later at the heap of maize in search of coffee beans. She never saw any of the appellants participating in torturing the deceased anywhere. The fact that there was no dispute about the first appellant's presence at the deceased's home was not enough to prove that he participated in beating her husband.

On the other hand, guided by our decision in **Waziri Amani, v. R.** (supra), the evidence of visual identification can only be acted upon in convicting an accused person where all possibilities of mistaken identity are eliminated. It is also settled law that the evidence of identification by recognition may be more reliable than visual identification of a stranger even though it is also true that such evidence is not entirely foul-proof particularly where the credibility of the identifying witnesses is in issue. As we held in **Marwa Wangiti,** the ability of a witness to name the culprit at the earliest lends more credence to his credibility and vice versa.

As rightly submitted by Mr. Chingilile, much as PW2 and PW3 claimed to have been familiar to the appellants before the incident, they never mentioned them anywhere before they testified before the trial court. Instead, both mentioned Boro, Michael and Kilio to the police as the persons responsible for the deceased's death. We agree with Mr. Chingilile that failure by PW2 and PW3 to name the appellants at the earliest

opportunity coupled with mentioning different people as responsible for the deceased's death dented their credibility. So was PW4 who claimed to have overheard the first appellant boasting of having participated in torturing the deceased for the coffee beans theft. To cap it all, whereas the incident took place on 31/07/2013, it was not until April and May, 2015 when the police arrested the appellants in their village. With respect, PW5's evidence claiming that the appellants fled to unknown places was not substantiated. Indeed, the fact that they were not mentioned by anyone to the police and their uncontroverted evidence of their presence in their village throughout having participated in the burial of the deceased speaks volumes on the weakness in the prosecution's evidence. In our view, the delayed arrest of the appellants cast doubt on the prosecution's evidence which should, as a matter of law, benefit the appellants.

Finally, whilst we are alive to the principle that death need not be proved by medical evidence alone as stated in **Mathias Bundala v. R.,** Criminal Appeal No. 62 of 2004 (unreported), the fact that there was no clear evidence as to the cause of death of the deceased created doubt in the prosecution evidence claiming that it resulted from torture. In the light of the glaring gaps in the evidence of the prosecution, we decline to order a retrial as argued by Mr. Mwashubila, for that will not be in the interest of justice. If anything, it will be prejudicial to the appellants as it

will afford the prosecution opportunity to fill in the gaps to secure conviction.

Consequently, we quash the conviction and set aside the sentences and order the immediate release of the appellants; Kasto Nyelenga and Exavery Kabwela from custody unless they are held therein lawfully for any other purpose.

It is so ordered.

DATED at **MBEYA** this 3rd day of December, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of December, 2021 in the presence of appellants in person and Ms. Zena James, learned State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.

D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL