IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: LILA, J.A., KITUSI, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 596 OF 2017

1. **MAYAMBA MJARIFU**
2. **WARIOBA KICHELE NYATEGE MAGWEGA @ FOGO**
3. **ADAM MICHAEL ALLY @ MAIGA**
4. **MASHAKA KASHIRI**

.... APPELLANTS

VERSUS

THE REPUBLIC .... RESPONDENT

[Appeal from the Judgment of High Court at Musoma]

(Ebrahim, J.)

dated the 17th day of November, 2017

in

Criminal Sessions Case No. 181 of 2015

JUDGMENT OF THE COURT

23rd November & 1st December, 2021

KITUSI, J.A.:

Mayamba Mjarifu, Warioba Kichele Nyatege Magwega @ Fogo, Adam Michael Ally @ Maiga @ Adam Adam and Mashaka Kashiri, respectively the first, second, third and fourth appellant, were charged with murder under section 196 and 197 of the Penal Code. It was alleged that they murdered one Makenya Matapali, a security man at Kotra Mini supermarket in Musoma Municipality, in the course of executing armed robbery at that shop. That was on 1st

day of April, 2013, and it was further alleged that among the items stolen during that incident, was a mobile phone belonging to the deceased.

Following that robbery, on 8/4/2013 D/Sgt Charles (PW1) who had been assigned to investigate the case, interviewed one Laizer, also a security man and surviving victim of the robbery, who gave him the number of the deceased's stolen telephone. It was a Tigo number 0715 600344. Thereafter, PW1 made inquiries from offices of service providers of Tigo where he obtained the contact's IMEI number, a unique identity of every mobile phone. On the basis of the IMEI number it was detected that the stolen phone was still in use by a person known as Kulwa John (PW2) who had by then inserted a different sim card using Vodacom.

PW1 working with officials of the mobile company set a trap for PW2 by calling him to their offices pretending that he had won a prize of Shs. 50,000/= which he needed to collect.

In his testimony, PW2 gave an account of how he came by the phone in question. He stated that one day he went back home to find the phone on the table. His wife Waseje James (PW3) told him that Fogo (the second appellant) who was previously their co-tenant

therefore an acquittance, had requested for Tshs.10,000/= for his child's medication and had left the phone with her as security. He had to collect the money from PW2 the following day. On the next day, the second appellant turned up at PW2's business premises and collected the money. PW2 later changed the sim card by inserting his own with a different number, which was 0767 605394 – a Vodacom.

So, when PW2 got to the Vodacom offices unaware that it was a trap, he found himself being arrested instead of collecting the promised prize. When he was interrogated about the phone, he readily told the police that the phone was at his home. He was however put in police custody and later on the same day, the second appellant was arrested and kept in the same cell with PW2. Only when the police placed the suspected phone among other phones on the table and the second appellant picked out the very one he had pawned to PW2, were they satisfied that PW2 had been an innocent receiver, so they released him.

PW1 testified that in the course of interrogating the second appellant, he mentioned the 4th appellant as among the perpetrators of the offence. The 4th appellant was thereafter arrested. Then one

thing led to the other, so that the first and third appellants were also arrested subsequently.

It is significant to point out that all appellants allegedly made cautioned statements in which they are said to have confessed to the crime. The first appellant's cautioned statement was recorded by D/CPL Yusuph (PW6), the second appellant's by D/CPL Mbwana, the third appellant's by D/Sgt Arnold (PW4) and the fourth appellant's cautioned statement was recorded by PW1.

It is equally relevant, for the determination of this appeal, to also point out that the first, third and fourth appellants repudiated their respective cautioned statements, leading to trials within trial, one for each. All cautioned statements were however admitted in evidence; PE7 for the first appellant, PE8 for the second appellant, PE4 for the third appellant and PE3 for the fourth appellant.

When the prosecution had adduced evidence, including the confessions, in support of the charge, the appellants mounted defences that had a common denominator in that they all said they had nothing to do with the robbery and the resultant murder of the security man at Kotra supermarket. They went on to reiterate the repudiation of the cautioned statements alleged to have been made

by them. The learned trial Judge dismissed the defence versions as afterthoughts and convicted the appellants principally on the strength of the cautioned statements. They were sentenced to death each, the only sentence as per law.

The appellants were aggrieved by the convictions and sentences and preferred this appeal. They entered appearance at the hearing and each appellant had a lawyer to prosecute the appeal. Mr. Kassim Gilla, learned advocate represented the first appellant, whereas Mr. Deocles Rutahindurwa, also learned advocate represented the second appellant. Mr. Constantine Mutalemwa, learned advocate, stood for the third appellant and Ms. Rose Edward Ndege, learned advocate, acted for the fourth appellant. The respondent Republic enjoyed services of Ms. Monica Hokororo, learned Senior State Attorney and Mr. Frank Nchanila, learned State Attorney.

As the learned counsel braced to argue their respective grounds of appeal, we drew their attention to two aspects of the proceedings before the High Court, and wanted them addressed. Both are in relation to the trials within trial that were conducted to

determine admissibility of the cautioned statements, allegedly made by the first, third and fourth appellants.

The first aspect is that after hearing evidence from both sides in the trials within trial, the learned Judge held the respective statements admissible but deferred the reasons for the decision to a later date. We called upon the appellants counsel and the learned State Attorneys to address the propriety of that procedure.

The second aspect is that the ruling giving reasons for admitting the repudiated cautioned statements was delivered when the prosecution and the defence had closed their respective cases and made closing submissions. And further that this ruling was delivered in the presence of the assessors. We wanted counsel to address the propriety of that procedure too.

Mr. Mutalemwa, learned counsel, made a brief address on behalf of the other advocates for the appellants after they had agreed to approach the matter in that style. First, he submitted that a trial within a trial is an independent procedure which needed to be concluded by a decision right there before proceeding with the main trial. In that regard he faulted the procedure adopted by the learned trial Judge of deferring the reasons to another date.

Secondly, he submitted that assessors ought not to be part of a trial within a trial, but the learned Judge violated this procedure by delivering the reasons for the admissibility of the statements in their presence thereby making them part of the said trials within trial. He added that the adopted procedure denied the appellants a fair hearing because they had to prepare their respective defences and closing submissions without the benefit of knowing the reasons for admitting the cautioned statements which they had earlier repudiated. Mr. Gilla, Mr. Rutahindurwa and Ms. Ndege as well as the learned State Attorneys nodded in agreement. They all prayed that we should invoke revisional powers to nullify the proceedings and judgment, quash the convictions and set aside the sentences, after which we should order a retrial.

We need to start by pointing out that trial within a trial is an established rule of practice that has evolved from court decisions. **[Bakram vs. Republic,** [1972] I EA 92]. It is, of course, common knowledge that *"a trial within a trial has to be conducted wherever an accused person objects to the tendering of any statement he has recorded."* **[Masanja Mazambi vs. Republic,** [1991] T.L.R 200]. All this was done in this case, and there is no qualm about it. It is

the manner in which the trials within trial were conducted, that caught our eye, and forms a subject of this decision.

The Court has previously been called upon to determine the propriety of a trial within a trial in **Ngwala Kija vs. Republic,** Criminal Appeal No. 233 of 2015 (unreported). We cannot avoid doing what the Court did in that case, that is, reproducing extensively from the case of **Kinyori Karuditi vs. Reginam,** (1956) 23 EACA 480, detailing the procedure: -

> *"For the avoidance of doubt, we now summarize the proper procedure at a trial with assessors when the defence desires to dispute the admissibility of any extra-judicial statement, or part thereof, made by the accused either in writing or orally. This same procedure applies, equally of course, to a trial with a jury. If the defence is aware before the commencement of the trial that such an issue will arise, the prosecution should then be informed of the fact. The iatter will therefore refrain from referring in the presence of the assessors to the statement concerned, or even to the allegation that any such statement was made, unless and until It has been ruled admissible. When the stage is reached at which the issue must be tried, the defence should*

mention to the Court that a point of law arises and submit that the assessors be sked to retire. It is important that should be done before any witness is allowed to testify in any respect which might suggest to the assessors that the accused had made the extra-judicial statement. For example, an interpreter who acted as such at the alleged making of the statement should not enter the witness box until after the assessors have retired. The assessors having left the Court the Crown, upon whom the burden rests of proving the statement to be admissible, will call its witnesses, followed by any evidence or statement from the dock which the defence elects to tender or make. The Judge having then delivered his ruling, the assessors will return. If the statement has been held to be admissible, the Crown witness to whom it was made will then produce it and put it in, if it is in writing, or will testify as to what was said, if it was oral. The defence will be entitled, and the Judge should make sure that the defence is aware of its rights, again to cross-examine that Crown witness as to the circumstances in which the statement was made and to have recalled, for similar cross-examination, the interpreter and any other Crown witness who has given evidence on the issue in the absence of the assessors. Both in

the absence and again in the presence of the assessors the normal right to re-examine wili arise out of any such cross-examination. When the time comes for the defence to present its case on the general issues, if the accused elects either to testify or to make a statement from the dock thereon he will be entitled also to speak again to any questionable circumstances which he alleges attended the making of his extra-judicial statement and to affirm or to reaffirm any repudiation or retraction upon which he seeks to rely. Indeed, if the accused desires to be heard in his defence either in the witness-box or from the dock he will not be obliged to testify in chief or to speak, as the case may be, to anything more than the matters touching on the issue of admissibility; but, once he elects to testify, however much he then restricts his evidence in chief he will be liable to cross-examination not only to credit but also at large upon every matter in issue at the trial. The accused will also be entitled to recall and again to examine any witness of his who spoke to the issue in the assessors' absence, and to examine any other defence witness thereon."

It is plain from the above passage that once an objection to admissibility of a statement is raised on ground of voluntariness,

assessors must take leave and a trial within a trial is then conducted. At the end of the trial within a trial, a ruling has to be made whether the statement was voluntarily made or not, hence admissible or not. After the ruling, the assessors are recalled, and the main trial proceeds. In **Janeroza Petro vs. Republic,** Criminal Appeal No. 269 of 2016 (unreported) we said and we emphasize: -

> *"We wish to point out that a trial within a trial is a separate trial from the main trial as such the procedure of conducting trials should be observed."*

The above view aims at promoting the objects of trial within a trial as stated in **Bakran vs. Republic** (supra). One *"to avoid prejudice being caused to the accused person if the jury or assessors should hear evidence which will subsequently be ...... inadmissible."* Two is *"to avoid prejudice being caused to an accused person if the court subsequently holds, in coming to its decision, that the statement was properly admitted."*

Therefore, we agree with the learned counsel for both the appellants and the Republic, that the procedure adopted by the learned trial Judge was, with respect, unorthodox. Although the learned Judge made short rulings overruling the objections, the

deferring of reasons to another date and rendering those reasons during the main trial in the presence of the assessors, was out of the ordinary.

Obviously, not every irregularity would be fatal to the case. [**Nyerere Nyague vs. Republic,** Criminal Appeal No. 67 of 2010 (unreported)]. It will always depend on whether the accused was prejudiced. We will therefore determine the fate of the proceedings in this case depending on whether or not it prejudiced the parties particularly the appellants.

We think Mr. Mutalemwa is right in submitting that the appellants were prejudiced because by mounting their defence before knowing the reasons for the decisions in the trials within trial, they were denied relevant information to properly challenge the prosecution case. This, in our view, is what the defunct East Africa Court of Appeal said in **Mr. Muraira Karegwa vs. Republic,** (1954) 21 E. A. C. A 262 at page 264 cited in **Bakran vs. Republic,** that: "*There is obviously a very real danger of prejudice here the defence may be caught on horns of a dilemma ......*" in addition, in our view, the above position applies to closing submissions by both the defence counsel and the State Attorneys. They addressed the

trial court without the benefit of knowing the reasons for admitting the cautioned statements so the possibility that they were on the horns of dilemma too cannot be overruled. To demonstrate that, an excerpt from the submissions of Mr. Mweya, learned counsel for the third appellant, at page 93, shows that voluntariness was still at issue. -

> *"In this case the 3rd accused vigorously denied the commission of the offence in his cautioned statements it is seen that the accused thumb printed it. However, he was forced by Police called Arnold. The same with the statement at Justice of Peace. There is a statement of 1st accused and PW4, both did not mention the 3rd accused. Therefore the 3rd accused should be found not guilty."*

What is worse, as submitted by Mr. Mutalemwa, is that the assessors were made to take part in the trials within trial by being present in court when the deferred reasons for the rulings in the trials within trial were being delivered, on 6th November, 2017. The record shows this: -

> ***"LIST OF ASSESSORS***
>
> *1. Monika Maruru – 54 years*
>
> *2. Faustine Magembe – 53 years*

3. Peter Paiemo – 56 years

Mr. Nchaniia, State Attorney: The matter is coming for summing up to assessors and we are ready.

Court: Before summing up to assessors reasons for the ruling in respect of the cautioned statements of the 1st, 3rd and 4th accused persons are read out in the open court today in the presence of all accused persons, all three counsels for the accused and the State Attorney.

....

Signed

Court: Summing up to the assessors is read in the open court today 6th November, 2017

....

Signed

There is no indication on the record that the assessors had taken leave prior to the learned Judge reading out the reasons for the earlier decision in the trials within trial. This means that the trials within trial were not separately conducted as emphasized in **Janeroza Petro vs. Republic** (supra) but overlapped into the main case. This must have disoriented and prejudiced the prosecution, the appellants as well as the assessors who heard reasons for the

decision while they had not heard the evidence before. Discussing violations in conducting trials within trial in the **Director of Public Prosecutions vs Sabinis Inyasi Tesha and Another** [1993] T.L.R 237 the Court held, inter alia: -

> *"The learned Judge certainly had his reasons, rightly or wrongly, in conducting the proceedings in the way he did, however, the four errors pointed out are uncomfortably glaring. Justice must be seen to be done to the accused person as well as to the prosecution".*

Similarly, in this case we are satisfied that the unfortunate errors that have been identified are grave, however good intentioned the learned Judge may have been. We still hold the view as we have done previously that although speed is good, justice is always better. [**Mathias Abel vs Republic**, Criminal Appeal No. 439 of 2017 and; **Masuke Malugu & Another vs Republic**, Criminal Appeal No. 308 of 2015 (both unreported)].

For all those reasons, we, in the exercise of our powers of revision under section 4 (2) of the AJA, nullify the proceedings from page 20 of the record where the first trial within a trial commenced,

to the end, as well as the judgment, quash the convictions and set aside the sentences.

We order an immediate retrial of the appellants before another judge sitting with a different set of assessors.

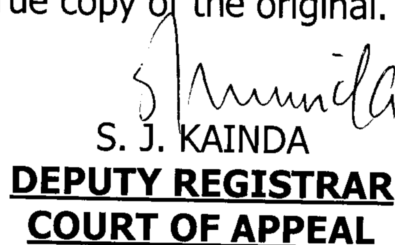
DATED at **MWANZA** this 30th day of November, 2021.

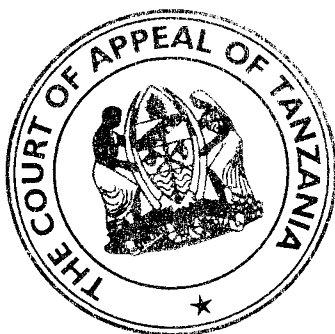
S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of Mr. Deocles Rutahindurwa, learned counsel for the 2nd Appellant also hold brief for Mr. Kassim Gilla for the 1st Appellant. Mr. Constantine Mutalemwa, learned counsel appeared for the 3rd Appellant, Ms. Rose Ndege, learned counsel for the 4th Appellant and Ms. Marysinta Lazaro, Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.





S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL