IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A., And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 564 OF 2019

JOSEPH DEUS @ SAHANI ..... 1ST APPELLANT
MASUMBUKO BUGALI @ MWANAMBITI.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania, District Registry at Mwanza)

(Ismail, J.)

dated the 13th day of June, 2019
in
Criminal Sessions Case No. 157 of 2015

JUDGMENT OF THE COURT

5th & 11th July, 2022

KEREFU, J.A.:

The appellants, JOSEPH DEUS @ SAHANI and MASUMBUKO BUGALI @ MWANAMBITI were arraigned before the High Court of Tanzania sitting at Mwanza for the offence of murder contrary to sections 196 and 197 of the Penal Code, [Cap. 16 R.E 2002] (the Penal Code) in Criminal Sessions Case No. 157 of 2015. The information laid by the prosecution alleged that, on 2nd February, 2013 at about 22:00 hours at Gamashi Village within Geita District in Geita Region, the appellants murdered one DAUDI DONDOGORI (the deceased). The appellants pleaded not guilty to the charge. However, after a full trial, they were convicted and each was sentenced to suffer death by hanging.

The brief facts of the case that led to the appellants' arraignment, conviction and sentence as obtained from the record of appeal are not complicated. They go thus, the deceased was living at Gamashi Village with his family. On 2nd February, 2013, the house of the deceased was invaded by three people who murdered him by using a *panga* and ran away. The rumours of the deceased death came to the knowledge of one Aloyce Malando (PW1) who was the Gamashi Village Executive Officer at that material time. PW1 testified that, on 2nd February, 2013 at around 22:00 hours he received a phone call from one Fumbuka Nyeguswa who informed him that there was a murder incident in the village. He reported the matter to the police where F. 2642 D/CPL Boniface (PW5) together with other police officers went to the scene of crime and found the deceased body with a cut wound on the throat.

While still there, they were informed that the appellants were the perpetrators of the murder incident. PW5 and his team started to trace the culprits to no avail until on 19th June, 2013, when they were informed that the first appellant was seen at Gamashi Village. They went to Gamashi and arrested him. Upon being arrested, the first appellant led the team to Muhama Village where they also arrested the second appellant. Thereafter, the appellants were brought to Geita Police Station where they were interrogated by F.1230 D/CPL Saleh (PW3) and E. 8646 D/CPL Said (PW2) respectively, and recorded their cautioned statements. It was the evidence

of PW2 and PW3 that, both appellants confessed to have murdered the deceased together with one Selemani Busuna who is not a party to this appeal. The appellants' cautioned statements were admitted in evidence as exhibits P1 and P2 respectively.

Thereafter, on 20th June, 2013, the appellants were taken to Hamad Hussein (PW4) who was the Ward Executive Officer and a Justice of Peace where they recorded their extra-judicial statements. In his evidence, PW4 affirmed that the appellants were brought to him and each confessed to have participated in the killing of the deceased. The appellants' extra-judicial statements were collectively admitted in evidence as exhibit P3.

An autopsy on the deceased's body was conducted by Joseph Makuma (PW6), the Assistant Medical Officer who concluded that the cause of death was severe head injuries that cracked the deceased's skull. A post mortem report to that effect was admitted in evidence as exhibit P4.

In their respective defence, both appellants denied any involvement in the alleged offence. The first appellant, apart from admitting that he resides in Gamashi Village and that he knew the deceased as his neighbour and was at the scene of crime on the fateful date, he distanced himself from the offence charged. He thus repudiated exhibit P2 alleging that he was tortured and forced to sign it. He added that he was taken to the justice of peace where he was interviewed and finally caused to thumb print the document. The second appellant also repudiated exhibit P1

alleging that he was tortured and forced to sign it. He added that he did not know the deceased and had never been to Gamashi Village. He also admitted to have been taken to PW4 to record extra-judicial statement, though he stated that he did not know that PW4 was the justice of peace.

When the respective cases on both sides were closed, the presiding learned trial Judge summed up the case to the assessors who sat with him at the trial. In response, the assessors unanimously returned a verdict of guilty to both appellants on account of their own confessions. In his final verdict, the learned trial Judge agreed with the assessors and found the appellants guilty and convicted them as indicated above.

Dissatisfied, the appellants are now before us challenging the High Court's finding, conviction and sentence. In the memorandum of appeal, the appellants have raised five grounds of complaint.

When the appeal was placed before us for hearing, the appellants were represented by Ms. Rose Edward Ndege, learned counsel whereas the respondent Republic was represented by Ms. Sabina Choghoghwe, learned State Attorney.

Upon taking the floor and before advancing her arguments in support of the appeal, Ms. Ndege intimated that she will argue the five grounds of appeal in the following manner, (i) first and second grounds jointly, (ii) the third and fourth grounds jointly and (iii) the fifth ground

separately. The said grounds as grouped by the learned counsel raise the following grounds of complaints; **one,** that, the learned trial Judge wrongly acted on the evidence of PW2, PW3 and PW4 which was hearsay and had nothing to link the appellants with the offence charged; **two**, that, exhibits P1, P2 and P3 were illegally procured and unprocedurally admitted in evidence contrary to the mandatory provisions of the law and **three,** that, the charge of murder was not proved against the appellants beyond reasonable doubt.

Starting with the second ground, Ms. Ndege argued that exhibits P1 and P2 were un-procedurally admitted in evidence. To justify her point, she referred us to pages 30 and 44 of the record of appeal and argued that exhibit P1 was read before its' admission while exhibit P2 was erroneously admitted by the learned trial Judge in his ruling during trial within trial and was not admitted in the main trial. She thus urged the Court to expunge from the record exhibits P1 and P2 which were admitted in evidence contrary to the mandatory requirements of the law.

As for exhibit P3, which was the appellants' extra-judicial statements, Ms. Ndege argued that, the same were illegally procured and involuntarily recorded because, when the appellants were brought before PW4, they were not aware that PW4 was the justice of peace. To amplify further on this point, Ms. Ndege referred us to page 66 of the record of appeal where

the first appellant testified that the police who took them to PW4 told them that they are taking them to their superior and if they denied the charge they would have been beaten even more. She thus insisted that the appellants involuntarily recorded the said statements.

Upon being prompted by the Court as whether the issue of involuntariness of recording the said statements was raised during the trial and specifically, when exhibit P3 was being admitted in evidence, Ms. Ndege, though, conceded that the said issue was not raised at that stage, she insisted that since the statements were involuntarily recorded, she found it appropriate to raise the concern at this stage. She added that, at the time of recording the said statements, the first appellant was not in good health as he had swollen legs the fact which was also acknowledged by PW4 when cross-examined on that aspect. On that basis, Ms. Ndege also invited us to expunge exhibit P3 from the record of appeal. She was positive that after expunging exhibits P1, P2 and P3 from the record, the remaining evidence is insufficient to sustain the appellants' conviction.

As regards the first ground, Ms. Ndege contended that the prosecution case was not proved beyond reasonable doubt as the evidence of PW2, PW3 and PW4 was hearsay and was not corroborated because some of the material witnesses, such as, Fumbuka Nyeguswa who revealed the information to PW1 and one Timothy who was alleged to know the

appellants and their involvement in the incident, were not summoned to testify before the trial court. It was her argument that, failure by the prosecution to summon such material witnesses, without explanation, was sufficient to have moved the trial court to draw an inference adverse to the prosecution case. She contended that all these doubts would have been resolved in the favour of the appellants. In conclusion and based on her submission, Ms. Ndege urged us to allow the appeal, quash the conviction and set aside the sentence imposed on the appellants and release them from the prison.

In response, Ms. Choghoghwe resisted the appeal by arguing that the appellants' conviction was well founded. Starting with the second ground, Ms. Choghoghwe readily conceded that exhibits P1 and P2 were admitted in evidence contrary to the requirement of the law. As such, she also urged us to expunge the said exhibits from the record of appeal. However, she was quick to argue that expunging of the said two exhibits would not affect the strength of the prosecution case as the remaining evidence is sufficient to mount the appellants' conviction.

As regards exhibit P3, Ms. Choghoghwe disputed the argument by Ms. Ndege that the appellants' confessions were involuntarily made. She contended that the appellants' confessions were properly obtained, recorded and admitted in evidence. To verify her argument, she referred us to pages 50 to 54 of the record of appeal and argued that, before the

said statements were admitted in evidence, the learned advocates for the appellants were asked as to whether they had any objection and both expressed their views that they have no objection to the said statements to be admitted in evidence. She argued that, if the said confessions were involuntarily made, the said advocates would have objected to their admission at the time and not otherwise. It was her strong argument that, since the issue of involuntariness was not raised by the appellants at the point when the said statements were admitted in evidence, they cannot contend at this appellate level that they made those statements involuntarily. It was her further argument that the act of Ms. Ndege raising that issue at this stage, is nothing but an afterthought.

On the contention that some of the material prosecution witnesses were not summoned to testify before the trial court, she argued that, since in their own confessions the appellants clearly narrated how they planned and actively participated in killing of the deceased, there was no need to call those other witnesses as the appellants themselves were the best witnesses in this case. She thus concluded by arguing that the appellants' extra-judicial statements (exhibit P3) are cogent evidence which was properly relied upon by the learned trial Judge to convict them. As such, the learned State Attorney urged us to dismiss the appeal for lack of merit.

In a brief rejoinder, Ms. Ndege reiterated what she submitted earlier and insisted that the appeal be allowed.

Having duly considered the submissions made by the learned counsel for the parties in the light of the record of appeal before us, the main issue for our determination is whether the prosecution proved its case against the appellants beyond reasonable doubt. We shall consider the grounds of appeal in the manner they have been argued by the learned counsel for the parties.

However, before doing so, it is crucial to state that, this being the first appeal, it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrive at its own conclusion of fact - see **D.R. Pandya v. Republic** [1957] EA 336 and **Demeritus John @ Kajuli & 3 Others v. Republic,** Criminal Appeal No. 155 of 2013 (unreported).

There is no doubt that the prosecution case relied heavily on circumstantial evidence as there was nobody who witnessed when the offence was committed. Therefore, in resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of the circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic,** Criminal Appeal No. 159B of 2017, thus:

> *"In order for the circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilt. (See Simon Musoke v. Republic, [1958] EA 715). Sarkar*

on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:

1) *the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*
2) *those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
3) *the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else."*

In determining this appeal therefore, we shall be guided by the said principles to establish whether or not the available circumstantial evidence in the case at hand irresistibly points to the guilt of the appellants.

The appellants complaint, under the second ground of appeal in relation to exhibits P1 and P2, is straight forward and should not detain us, as both counsel for the parties were concurrent, rightly so, in our view that the said exhibits were un-procedurally admitted in evidence. Having thoroughly scanned the record of appeal, we entirely agree with them that the said exhibits deserve to be expunged from the record, as we accordingly, hereby do.

However, as for exhibit P3, we are mindful of the fact that, in her submission, Ms. Ndege challenged its admissibility on account that the appellants' confessions were involuntarily made. This argument was disputed by Ms. Choghoghwe who argued that it was an afterthought as the appellants did not raise that concern when the said statements were being admitted in evidence. To ascertain this matter, we have revisited the testimony of PW4 who tendered the said statements before the trial court. It is apparent, at pages 51 to 52 of the record of appeal that during the trial, when PW4 tendered the said statements for admission, both advocates for the appellants did not object to their admission in evidence and/or raise an issue that the same were involuntarily made. It is also clear that, even the appellants who were as well before the trial court, did not complain or indicate that they were forced to record the said statements.

It is a settled law that the contents of an exhibit which was admitted without any objection from the appellant, were effectually proved on account of failure to raise an objection at the time of its admission in evidence. In the case of **Emmanuel Lohay and Udagene Yatosha v. Republic,** Criminal Appeal No. 278 of 2010 (unreported), the Court, when faced with an akin situation, held that:

> ***"It is trite law that if an accused person intends to object to the admissibility of a statement/confession, he must do so before it is admitted*** *and not during cross-*

*examination or during defence – **Shihoze Semi and Another v. Republic** (1992) TLR 330. In this case, the appellants 'missed the boat' by trying to disown the statements at the defence stage. That was already too late. **Objections, if any, ought to have been taken before they were admitted in evidence.**" [Emphasis added].*

Being guided by the above authority, it is our considered view that, even in this appeal, the appellants have missed the boat long before they came here. It is our further view that, the above principle is also not without rationale, it is based on another principle that an appellate court cannot decide on matters that were not raised nor decided upon during the trial. See for instance the cases of **Abedi Mponzi v. Republic,** Criminal Appeal No. 476 of 2016 and **Bundala @ Swaga v. Republic**, Criminal Appeal No. 416 of 2013 (both unreported). Therefore, there is no doubt that, the act of Ms. Ndege's objection on the admissibility of the appellants' extra-judicial statements at this eleventh hour offends the settled principle in **Emmanuel Lohay and Udagene Yatosha** (supra).

For avoidance of doubt, we have thoroughly perused the contents of the said extra-judicial statements and found that they clearly describe the circumstances and the manner in which the deceased met his death. They are so detailed that the events described therein could have only been given by people who had the knowledge of the entire plan and the mission of killing the deceased. The said statements also show the role played by

each of them. For the sake of clarity, we have found it apposite to reproduce the extra-judicial statement of the second appellant as a good illustration of the above analysis. It is couched thus:

> *"Mimi nakumbuka kuwa...kuna mama mmoja alinipigia simu tukutane njiani. Nilipokutana naye alikuwa na jamaa mmoja anayeitwa Selemani Busuna. Basi nikamuuliza Mama unaniitia nini? ...akaniambia kuwa pale nyumbani nimekosana na baba yenu. Nikamuuliza mmekosana nini? Yeye akajibu kuwa tumekuwa tukigombana mimi na mume wangu kwani sisi wote ni waganga wa jadi na kwa sababu ya mali tulizopata. Basi mimi nikamuliza, wewe mama, kwa nini mgombanie mali? Yule mama akanijibu kuwa mimi nikiwa na shida ya kuuza hata mbuzi mume wangu huwa anakataa na kusema kwamba hii mali huna madaraka nayo, basi ndio wakaanza kugombana. Waliposhindwana kulikuwa na mtu anayetibiwa na yule mama aitwaye Selemani Busuna kumbe nao wameshapanga siku nyingi juu ya kumuua mume wake Daudi Dondogoli ndiyo wakaona wanishirikishe na mimi kwa kuwa na mimi nilikuwa natibiwa pale. Mimi ilibidi nimuulize yule mama ambaye jina lake in Gamaweshi yeye akanijibu kuwa yule kaka yenu Selemani kazi hii anaiweza ya kuuwa watu kwa kuwakata mapanga. Ikabidi nimwambie mama kuwa ngoja nirudi nyumbani kwanza... Ndio akaniambia kuwa twende kwake na mimi nikamwambia yule jamaa yangu Masumbuko Bugali kuwa twende kwa yule mama kwani analalamika sana. Ndipo tukakubaliana kuwa sasa twende tukaifanye ile kazi kwa kushirikiana na Selemani Busuna. Ilipofika usiku wa saa 2.00 usiku, tukiwa wote (3) watatu (1)*

Selemani Busuna (2) Masumbuko Bugali (3) Joseph Deus...Tuliwakuta wanakula nje kwenye moto (kikome) sisi wawili Joseph na Masumbuko tulikuwa na fimbo na Selemani Busuna yeye alikuwa na panga kali sana. Baada ya kufika Masumbuko alianza kumshambulia Mzee Daud Dondogoli kwa panga huku sisi tukiwa tunawasimamia wasikimbie huku tukiwa tumeshika fimbo. Baada ya kuhakikisha kuwa mzee Daudi kafa, ndiyo na sisi tukaondoka kila mmoja kwenda kwake..."

It is noteworthy that the second appellant's extra-judicial statement is couched in almost similar tones regarding appellants' involvement in the murder incident. In the circumstances, and taking into account that the appellants did not challenge the admissibility of the said statements during the trial, we agree with Ms. Choghoghwe that challenging them at this stage of an appeal, is nothing but an afterthought.

As for the last ground, on the failure by the prosecution to summon the material witnesses to testify during the trial, we equally agree with Ms. Choghoghwe that, since in their own confessions the appellants clearly narrated on how they actively participated in the killing of the deceased, there was no need to call those other witnesses. In the case of **Mohamed Haruna Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported), the Court observed that: *"The very best of the witnesses in any criminal trial is an accused person who freely confesses*

his guilt." It is therefore our considered view that, in the current appeal, what is contained in the appellants' confessional statements is the best evidence, we can have, on what happened on that fateful night.

Consequently, and looking at the totality of the evidence, we entertain no doubt that with the available circumstances, the trial court properly relied on the appellants' extra-judicial statements to convict the appellants and correctly held that the case against the appellant was proved beyond reasonable doubt.

For the foregoing reasons, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

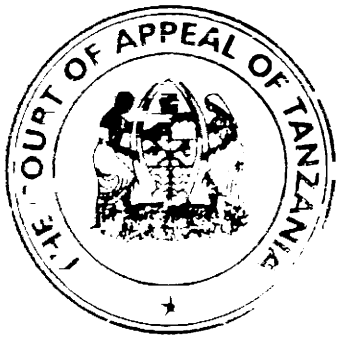
DATED at **MWANZA** this 11th day of July, 2022.

S. E. A MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 11th day of July, 2022 in the presence of Ms. Rose Edward Ndege, learned counsel for the Appellants and Ms. Maryasinta Lazara Sebukoto, Senior State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL