IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MKUYE, J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 91 OF 2018

SAMSON BWIRE ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania, Shinyanga District Registry at Shinyanga)

(Kibella J.)

dated the 15th day of March, 2018
in
Criminal Sessions Case No. 3 of 2016

.....

JUDGMENT OF THE COURT

4th& 14th July 2022

MKUYE, J.A.:

The appellant, Samson Bwire was charged with murder contrary to sections 196 and 197 of the Penal Code, [Cap 16 R.E. 2002, now R.E. 2022]. In order to prove the offence, the prosecution marshalled nine (9) prosecution witnesses and produced seven (7) exhibits among them being the Postmortem Examination Report (PMER) which was tendered during preliminary hearing and was admitted as Exh. P1 without any objection from the defence side. For the defence, only the appellant testified and no exhibit was tendered on his side.

Briefly stated, the facts leading to this appeal go thus:

The appellant was a retired policeman and he lived with Happiness Elias (PW1) as husband and wife. Before living with the appellant, PW1 had been married to the appellant's brother with whom they were blessed with two children; Anna Juma and Devotha Gerald (now deceased).

On the material day (16th May, 2013), the appellant and PW1 had quarrelled whereby the appellant uttered threatening words to her. He even sharpened his machete openly with all signs suggesting a potential danger. In order to protect her life, PW1 decided to go to report to the local authorities of the incident while leaving the deceased, a child of four (4) years sleeping in the house. Meanwhile, the appellant who remained behind decided to burn PW1's clothes. He then entered and locked himself inside the house while depicting his intention to kill himself or his wife. It appears that the appellant's son arrived home and inquired from the appellant as to why he locked himself inside the house but there was no response.

The neighbours were informed of the unusual happenings and responded to the scene of crime and later the police also were informed and arrived at the scene as well. They pleaded with the appellant to open the door but he declined. According to No. F.2548 D/Cpl. Mussa

the front metal door was of the nature that one could view inside from outside and, hence, he managed to see the appellant attacking the deceased with a machete. PW8 ordered the rear window of the house to be broken so as to gain ingress into the house. Upon breaking the window, the appellant emerged outside through that opening while wielding a machete which made the crowd of people who had started throwing stones at him to disperse. The appellant then ran and took refuge in the police motor vehicle. The police rushed him to the police station for his safety although while on the way he made an attempt to escape by jumping from the motor vehicle and sustained injuries which led to his hospitalization. Later, he was arraigned before the court for the offence of murder.

In his defence, the appellant generally denied involvement to the offence. He testified that, the deceased was killed by pieces of dressing table mirror which was thrown by his wife (PW1) after they had quarrelled whereby it hit the wall. Upon the conclusion of the hearing of the case, the trial court was satisfied that the prosecution proved the case beyond reasonable doubt and the appellant was convicted of the offence of murder and sentenced to a mandatory sentence of death by hanging.

Aggrieved with the decision of the trial court, the appellant has appealed to this Court on four (4) grounds of appeal as follows:

> *" 1. The appellant was denied a fair trial as part of the prosecution evidence in particular Exh. P1, the Postmorterm Report was not read over and explained to the appellant.*
>
> *2. The appellant was denied a fair trial as his evidence was neither adequately summed up to the assessors nor considered in the judgment.*
>
> *3. That, there were contradictions among the evidence of the prosecution witnesses and the charge against the appellant was not proved beyond doubt.*
>
> *4. That in convicting the appellant, the honourable trial judge failed to specify the section of the law in which the appellant was convicted in breach of the mandatory provisions of section 312 (2) of the Criminal Procedure Act, Chapter 20 R.E. 2002."*

When the appeal was called on for hearing, the appellant was represented by Mr. Kamaliza Kamoga Kayaga, learned counsel whereas the respondent Republic had the services of Ms. Mercy Ngowi and Ms. Wampumbulya Shani, both learned State Attorneys.

Amplifying on the 1st ground of appeal, Mr. Kayaga took us at page 8 of the record of appeal and argued that the PMER which was admitted as Exh. P1 was not read out in court. Apart from that, he contended that it was wrong for the counsel for the appellant to state the undisputed facts instead of the appellant himself. To bolster his argument, he referred us to the case of **Jumanne Mohamed and 2 Others v. Republic,** Criminal Appeal No. 534 of 2015 pg. 19 – 20 and **Evarist Nyamtemba v. Republic,** Criminal Appeal No. 196 of 2020 pg. 11 – 12 (both unreported) in relation to the requirement to read out the document admitted in evidence as exhibit.

As regards the 2nd ground of appeal relating to inadequate summing up to assessors and failure to consider the defence evidence, he firstly abandoned the 2nd limb of his complaint and argued the 1st limb relating to inadequate summing up to assessors. He argued that although the evidence by the appellant was from page 54 to 60 of the record of appeal, the trial judge summed it up in only one paragraph with seven lines as shown at page 78 of the record of appeal. To aggravate the matter, he argued, the trial judge at page 84 of the record of appeal required the assessors to make reference on Exh. P1 which was not read over them.

On the 3rd ground of appeal concerning contradictions on prosecution witnesses, it was Mr. Kayaga's argument that although both PW6 and PW8 testified to the effect that they saw the appellant cutting the child (deceased), PW8 said he saw appellant cutting the deceased thrice then the police vehicle which came with PW6 arrived. On the other hand, he said, PW6 also stated that he saw the appellant cutting the deceased with a sword. He wondered how could both see the appellant cutting the deceased while PW6 arrived later. According to Mr. Kayaga this raised doubt that the possibility that the pieces of the dressing table mirror which was thrown to him by his wife could have injured the deceased cannot be overruled.

In relation to the 4th ground of appeal, Mr. Kayaga argued that the trial Judge's failure to specify the section under which the appellant was convicted contravened the provisions of section 235 and 312 of the Criminal Procedure Act [Cap 20 R. E. 2002; now R.E 2022] (the CPA). To fortify his argument, he referred us to the case of **Oroondi Juma v. Republic,** Criminal Appeal No. 23 of 2012 (unreported). He, then, implored the Court to find the appeal merited and allow it.

In reply, Ms. Ngowi in the first place prefaced her submissions by declaring their stance that they do not support the appeal. Responding

to the 1st ground of appeal, Ms. Ngowi argued that the PMER was admitted during preliminary hearing conducted under section 192 of the CPA and was admitted without any objection from the defence counsel. While relying on the case of **Mgoncholi (Bonchori) Mwita Gesine v. Republic**, Criminal Appeal No. 410 of 2017 (unreported), the learned State Attorney contended that when a document is admitted during preliminary hearing it is taken to have been proved and therefore there is no need of reading it. In relation to the complaint that, Mr. Somi stated the undisputed facts instead of the appellant, Ms. Ngowi, countered it contending that, the fact that the learned advocate who represented the appellant admitted to the undisputed facts, it was believed that he did so while representing the appellant. And, at any rate, she said, the appellant signed the memorandum of undisputed facts including the fact that the deceased was dead which was prepared by the trial Judge.

On the 2nd ground of appeal, Ms. Ngowi submitted that according to section 298 (1) of the CPA, after the prosecution and defence side have closed their cases, the trial judge is required to sum up the evidence. It was her view that, that is what the trial Judge did. In any case, she argued that the assessors understood it thus they gave their opinions.

With regard to the 3rd ground of appeal, Ms. Ngowi argued that, there were no contradictions between the evidence of PW6 and PW8 to the effect that each saw the appellant cutting the child since PW8 went to the scenes of crime by a motorcycle at 16:00 hrs and saw the appellant with a sword while PW6 arrived at that place at about 16:40 hrs by a police motor vehicle. She stressed that the two witnesses arrived at the scene of crime differently and each witnessed the appellant cutting the deceased differently.

In relation to the 4th ground of appeal relating to the trial Judge's failure to comply with section 312 of the CPA, Ms. Ngowi relied on the case of **Butongwa John v. Republic,** Criminal Appeal No. 450 of 2017 (unreported) and argued that the appellant was not prejudiced by such anomaly. The learned State Attorney went on to argue that the case of **Oroondi Juma** (supra) cited by Mr. Kayaga was distinguishable to this case as in that case there was no conviction entered at all while in this case the conviction was entered without stating the section creating the offence. At any rate, she was of the view that the position in **Butongwa John's** case (supra) is the correct position of the law since it was determined recently compared to the case of **Oroondi Juma** (supra). In this regard, she urged the Court to find that the appeal is not merited and dismiss it in its entirety.

In rejoinder, Mr. Kayaga stressed that the case of **Mgonchori (Bonchori) Mwita Gesine** (supra) was distinguishable because the issue was failure to read out the PMER to assessors and not to the appellant. He further argued that should the **Mgonchori (Bonchori) Mwita Gesire** case (supra) differ with **Evarist Nyantemba's** case (supra) which was decided later, then **Evarist Nyantemba's** case (supra) should be taken as the correct position of the law. He insisted that the appeal be allowed.

We have considered the memorandum of appeal and the submissions from either side. We will consider the appeal basing on the approach taken by both learned counsel.

Regarding the complaint that the PMER was not read out to the appellant, it is apparent from the record of appeal at page 7 that the PMER was tendered during preliminary hearing stage and incidentally the defence counsel did not object to its admission in court. It is also true that the same was not read out after being admitted in court; and yet at page 8 of the record of appeal it bears out that on the basis of the said PMER it was established as undisputed fact that the deceased was actually dead.

The issue on whether or not a document admitted during preliminary hearing stage has to be read over in court (particularly to assessors) was discussed in the case of **Mgonchori (Bonchori) Mwita Gasire** (supra). In the said case the appellant's complaint before the Court was that the cautioned statement and extra judicial statement which were admitted during preliminary hearing conducted under section 192 of the CPA in the absence of assessors were not read over in court and to the assessors. It was argued that since the content of the said documents was not read over in court, the assessors did not know the gist of their evidence.

In considering whether the admission of exhibits during preliminary hearing denied the assessors right to know the substance of those documents, the Court observed that there is no law that required the documents admitted during preliminary hearing to be read over in court, the reason being that on being admitted at that stage they are deemed to have been ascertained or proved in terms of section 192(4) of the CPA. Although in **Mgonchori (Bonchori) Mwita Gasire's** case (supra) the issue was that the documents were not read over to the assessors, it can be deduced that even failure to read a document admitted at the stage of preliminary hearing to the appellant cannot have a different effect. Such document has to be taken as proved which

is in tandem with the spirit of the procedure under section 192 of the CPA which is geared towards shortening the proceedings and accelerating trials in criminal cases. See **Jackson Daudi v. Republic,** Criminal Appeal No. 11 of 2002 (unreported). That is not to say that we not alive that in **Evarist Nyamtemba's** case (supra) the exhibits which were tendered and admitted without being read over in court were expunged by this Court. But we find that the said case is distinguishable to this case because in the said case the exhibits were admitted during hearing or as witnesses were testifying in court unlike in this case where the exhibits were admitted during preliminary hearing and, therefore, proved.

In this regard, in this case we are of a settled view that the PMER (Exh. P1) after having been admitted during preliminary hearing was deemed to have been proved. In essence, Exh P1 was intended to prove that the deceased was dead of unnatural death. Much as there is no law requiring the exhibit admitted during preliminary hearing to be read out to the appellant, we think that the appellant might not have been prejudiced since the issue relating to the death of the deceased was not a matter in dispute. (See **Butongwa John's** case (supra)). This is clearly reflected at page 6 of the record of appeal where at some point the appellant had offered to plead guilty to a lesser offence of

manslaughter. Moreover, the fact that Devotha Gerald was dead was not disputed as shown in the memorandum of matters not in dispute at page 8 of the record of appeal and signed by among others the appellant himself. This implies that the appellant had knowledge of the gist of the PMER and more, so, as he was represented by an advocate.

Of course, we are mindful that Mr. Kayaga took an issue that Mr. Somi, the advocate who represented the appellant wrongly stated the facts which were undisputed instead of the appellant. However, we go along the learned State Attorney's line of argument that the advocate acted on the appellant's behalf being his representative. Apart from that, to show his acknowledgement to the agreed undisputed facts, the appellant signed the memorandum of undisputed facts (see page 8 of the record of appeal). In any case, the learned advocate did not explain how the appellant was prejudice. With that said, we find the 1st ground of appeal unmerited and we hereby dismiss it.

On the complaint in the 2nd ground of appeal on the failure by the trial Judge to adequately sum up the defence evidence to the assessors, we wish to first restate the relevant provision on this aspect. Section 298 (1) of the CPA provides as follows:

"Where the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion".

In this case, as was correctly submitted by Mr. Kayaga, the evidence of the appellant is found at page 54 to 60 of the record of appeal in which the appellant gave a general denial of his involvement in the offence contending that the deceased was injured by the pieces of glass from the dressing table which was thrown by PW1 to him during their scuffle. It is equally true that at page 78 of the record of appeal it is clearly shown that the trial judge summarized the defence evidence in one paragraph in the summing up to assessors as follows:

"The accused in his defence stated that on the fateful date he quarrelled with his wife (wife to be) as were in the process of getting married, whereby his wife PW1 Happiness Elias took a dressing mirror and threw it to the accused who escaped it and it hit the wall of the house at the sitting room and break it. The broken pieces of that dressing mirror injured the child (deceased) who was near there when they were fighting."

Looking at the above excerpt in view of the provisions of section 298 of CPA, we are of a considered view that the trial Judge summed up on what was material to the case as the said provision does not require a summary of each and everything that was stated by a witness. Apart from that, we think that nothing could have gone amiss since the assessors heard the whole evidence including that of the defence thus they managed to give their opinions. In any case, the learned counsel for the appellant did not state what exactly was missing in the summing up to assessors which could be taken to have influenced the assessors, in not making an informed opinion. In the circumstances, we agree with the learned State Attorney that the summing up of the defence evidence to assessors was adequately done and, thus, we find this ground is devoid of merit and we dismiss it.

We now move to the 3rd ground of appeal on the contradiction between the evidence of PW 6 and PW8. We have examined the record of appeal in relation to the alleged contradiction. At page 41 – 46 of the record of appeal PW8 stated as follows:

> *"On 16/5/2013, at 16:00 hours we were on motorcycle patrol together with my co-police officers. While on patrol we were informed by the OC CID's office and directed us to go at the home of Samson*

Bwire, Nyasubi area as the citizen needed our help. I informed my co-police officers ... and proceeded to the area as directed. At the scene of crime, we found crowd of people who most of them were crying ... I went near to the main gate where I saw Samson Bwire coming out of the room wielding a sword (sime) which was sprawled with blood. The door was with open space at its upper place and covered at its bottom. He asked me whether we were asked to go there to arrest him. He then stated:

"Subiri sasa muone"

He entered inside the room and I saw him cutting the child with that sword ...

I informed the OC CID through radio call upon the incident ... then the police vehicle arrived ..."[Emphasis added]

On the other hand, at page 32 – 35 of the record of appeal, PW6 stated as follows:

"On 16/5/2013 at 16:40 hrs I was at my office at Kahama Urban. On that date I received directives together with other police staff to visit at Nyasubi Sango area at the home of an Ex-police officer one Samson Bwire where there was an incident and the policemen there were overpowered. Together with my police staff left in police motor vehicle up to the accused's home. At the scene we

found the accused locked himself from inside. He was wielding a sword (sime). When I asked, I was informed that inside there was a child assaulted by the deceased...

The accused then proceeded to the door which was closed just by a cloth curtain and the same was a bit removed to its other side.

Thus I managed to see a girl lying on the ground/floor and ***I observed the accused cutting that child with the sword (sime)... Therefore, I observed the accused cutting the child three times, I told those people who were there that the accused is killing the child..."*** [Emphasis added]

We have extracted the evidence of PW 6 and PW8 so as see as to whether there is such a contraction or not. However, having examined the said testimonies, we agree with Ms. Ngowi that there was no such contradiction. This is so because, although both testified on seeing the appellant cutting the child with a sword, each arrived and witnessed the incident at different time. It is clear in their testimonies that while PW8 went to the scene of crime by a motorcycle after he was directed to go there at about 16:00 hours, PW6 went by a police motor vehicle after having being directed to do so at about 16:40 hrs. This is a reason why PW8 testified to have witnessed the appellant cutting the child even before the police vehicle which came with PW6 had arrived and also it is

important to note that PW6 testified that he was directed to go there after the police who were there were overpowered. In our view, since the incident took a considerable time it was possible for PW6 who came later to have witnessed him cutting the deceased thrice after PW8 had already witnessed him cutting the same child. In this regard, we find that the appellant's complaint relating to contradiction to have no merit and we therefore, dismiss it.

In the 4th ground of appeal the appellant's complaint is that the trial Judge did not specify the section or the provision to which the appellant was convicted. Indeed, at pages 137 to 138 of the record of appeal the trial court after having found that the prosecution had proved the case beyond reasonable doubt against the accused person, it proceeded to convict him as hereunder:

> *"Therefore, I find him guilty of the offence of murder and hereby convict him forthwith."*

We are mindful of the provisions of sections 235 (1) and 312 of the CPA which were relied upon by Mr. Kayaga to build up his case. However, we wish to point out here that section 235 (1) may not be relevant to this case as it falls under Part VII of the CPA which specifically deals with procedure in trials before subordinate courts. For clarity, section 235 (1) of the CPA provides as follows:

"The court having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused person and pass sentence or make an order against him according to law or shall acquit him or shall dismiss the charge under section 38 of the Penal Code."

On the other hand, section 312 (2) of the CPA which was also relied upon by Mr. Kayaga provides as follows:

"In the case of conviction, the judgment shall specify the ***offence of which, and section of the Penal code or other law under which, the accused person is convicted*** *and the punishment to which he is sentenced."* [Emphasis added].

In the case of **Oroondi Juma** (supra) which was also relied by Mr. Kayaga the Court discussed the import of section 312(2) of the CPA in view of the fact that there was no conviction entered in the case against the appellant as was required by the law. In the end, after having been satisfied that there was no conviction it found that the irregularity was fatal and ordered the matter to be sent back to the trial court in order to prepare and deliver a judgment which will comply with the law.

However, we agree with Ms. Ngowi that, the case of **Oroondi Juma** (supra) is distinguishable to this case because unlike in this case

where conviction was entered with the omission of citing the relevant charged section, in that case there was no conviction at all.

But again, in the case of **Butongwa John** (supra) pg 9 when the Court was faced with a scenario where the trial court omitted to convict an accused person before sentencing him, it discussed the issue at length and upon having taken note of the two schools of thought on the way forward, it ignored the fact that there was no conviction and proceeded with the determination of the appeal on merit based on the test there was no prejudice occasioned to the appellant.

Nonetheless, it is our considered view that the said case of **Butongwa John** (supra) is still distinguishable to the case at hand because in the former case there was no conviction on the offence of murder before the accused was sentenced. In this case it is clear as we have quoted above that the trial court entered a conviction with an exception of not specifying the provision of the law which constituted the offence he was charged with. In the circumstances of this case, it is our settled view that since the appellant was convicted, failure to state the provision of the law could not have prejudiced the appellant, more so, since at the beginning of the judgment at page 118 of the record of appeal, the trial court had clearly indicated the provision of the law

(section 196 of the Penal Code) to which the appellant stood charged. Our reasoning is that, so long as the relevant section which constituted the offence was mentioned in the judgment, then the conviction for the offence of murder at page 138 of the record of appeal related to the same section to which he was charged with. After all, there is no any other provision of the law which creates the offence of murder other than section 196 of the Penal Code. In this regard, we find this ground of appeal to be devoid of merit and we dismiss it.

In the final analysis, we find that the whole appeal is not merited. We therefore, dismiss it in its entirety.

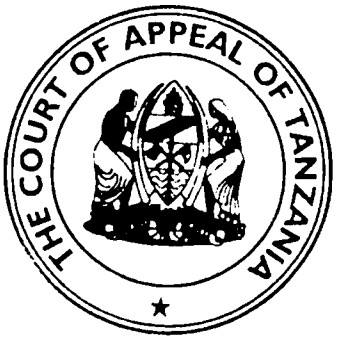
DATED at **SHINYANGA** this 14th day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 14th day of July, 2022 in the presence of the appellant in person, and Ms. Verediana Peter Mlenza, Senior State Attorney assisted by Ms. Rehema Sakafu, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL