IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: JUMA, C.J., MKUYE, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO 102 OF 2019

VALLEL S/O PALUTALA.....APPELLANT

VERSUS

DPP.....RESPONDENT

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

(Mambi, J.)

dated the 5th day of April, 2019
in
Criminal Session No. 15 of 2017

JUDGMENT OF THE COURT

22nd & 24th February, 2022

JUMA, C.J.:

The appellant, VALLEL S/O PALUTALA, was charged before the High Court of Tanzania at Sumbawanga with murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2019]. The particulars of the offence were that on 7/9/2015 at Ng'ong'o village in Sumbawanga District of Rukwa Region, he murdered ADAM s/o CHEKWE. He pleaded not guilty

to the charge, and after trial, Mambi, J. convicted the appellant and sentenced him to suffer death by hanging.

Briefly, the evidence before the trial court is as follows. The deceased ADAM s/o CHEKWE had two wives who he visited on rotation. Sofia Elisante (PW1), his first wife, was asleep at night of 6/9/2015 when her husband paid a visit. According to PW1, around midnight, someone called her husband out. Moments later, PW1 heard her husband shouting, "my wife, I am dying!" She used her husband's phone light to check out on her husband. PW1 saw the appellant holding a "panga" while her husband lay down, bleeding. The appellant threatened her with death should she come out of her house. None of her neighbours came out to her aid. PW1 soon thereafter realized that someone had locked her door from outside and she could not come out. Early in the morning, PW1 looked through her window and saw a child passing. She asked this child to unlock the door lock. PW1 later learnt that someone had taken her husband's body to the graveyard and hung his body on a tree.

Also the following day, the deceased's sibling, Cleophas Chekawe (PW2), allegedly learned about his brother's death by hanging himself at the graveyard. According to PW2, he saw the deceased's body with

wounds. At the time the deceased died, David Victory (PW3) was the village chairman. He, too, was first informed about someone he did not then know, who had hanged himself at the graveyard. PW3 saw the deceased's body at the cemetery hanging with a rope at a tree. According to PW3, the deceased had a severe cut and injury on his head. When PW3 and others went to fetch the deceased's wife (PW1), they saw bloodstains at the door to her house. Like everybody else, Gaudencie Lyaba (PW4), who was village executive officer, went to the cemetery to see a body of a man who had hanged himself. After looking at the deceased's injured body, PW4 was sure that the deceased was killed elsewhere, before hanging his body to a tree at the village cemetery.

Almost seven months later, on 06/04/2016, Detective Constable Masanja (PW5) recorded the appellant's cautioned statement. According to PW5, the appellant admitted to him that he and his friend, who was still at large, killed the deceased. The trial judge overruled the objection of the appellant's counsel and admitted the cautioned statement in evidence as exhibit P3.

In his defence testifying as DW1, the appellant maintained his innocence, claiming that the prosecution witnesses were not telling the

truth. He faulted the evidence of PW1 as unreliable. He also disagreed with contents of his cautioned statement.

After analysing the evidence, the learned trial Judge concluded that the appellant was responsible for the deceased's death. He convicted the appellant as charged and sentenced him to death by hanging.

At the hearing of this appeal, the appellant was present in Court. Learned Advocate Mr. Simon Mwakolo who appeared for the appellant, informed the Court that he and the appellant had agreed to rely on the Supplementary Memorandum of Appeal that he filed on 15/02/2022. Ms. Irene Mwabeza, learned State Attorney, represented the respondent Republic.

The Supplementary Memorandum of Appeal discloses six grounds of appeal. The first ground faults the trial judge for relying on voice identification evidence to convict the appellant. In the second ground of appeal, the appellant contends that the visual identification evidence of PW1 which the trial judge relied on, was too weak to support the appellant's conviction. The third ground faults the trial judge for relying on contradictory evidence of PW1 and PW4. The fourth ground faults the trial judge, that at the close of prosecution case, he addressed the appellant

citing section 213 (1) of the Criminal Procedure Act Cap. 20 R.E. 2019 (CPA) instead of correct section 231(1) of the CPA. The fifth ground takes issue with the appellant's cautioned statement (exhibit P3), which the prosecution failed to list in the record of the Preliminary Hearing. Lastly, the appellant contends that the trial judge erred in law and fact for relying on the evidence of a witness (PW5), who the prosecution did not list during the Preliminary Hearing.

Mr. Mwakolo combined the first and second grounds and argued them together. He submitted on the third and the fourth grounds separately. He next combined and argued the fifth and sixth grounds together.

The fifth and sixth grounds of appeal relate to the evidence of detective constable Masanja (PW5) who recorded the appellant's cautioned statement which the trial Judge admitted as exhibit P3. The learned counsel for the appellant urged us to expunge the evidence of PW5 on the ground that the prosecution did not list his name during the committal proceedings as one of the witnesses for subsequent trial. He argued that because the Prosecution did not also read over his statement during the committal proceedings, we should in this instant appeal delete the evidence of PW5 under section 289 (1) of the CPA because he testified

without the Prosecution giving prior notice in writing to the accused person or his advocate. Section 289 (1) of the CPA which Mr. Mwakolo relied on to exclude the evidence of PW5 provides:

> *"**289**.-(1) No witness whose statement or substance of evidence was not read at committal proceedings shall be called by the prosecution at the trial unless the prosecution has given a reasonable notice in writing to the accused person or his advocate of the intention to call such witness."*

Apart from asking us to discard the evidence of PW5, Mr. Mwakolo also urged us to delete the cautioned statement (exhibit P3), which PW5 tendered at the time when he had no permission to testify under section 289 (1) of the CPA.

The learned counsel for the appellant next submitted on first and second grounds of appeal, which fault the trial judge for relying on the evidence of voice identification and visual identification to convict the appellant. He submitted that it was not sufficient for PW1 to merely state that she used mobile phone light to visually identify the appellant. He also doubted the ability of PW1 to identify the appellant's voice warning her to remain indoors lest he would kill her. Citing the principles governing visual

identification evidence in **WAZIRI AMANI VS. R.** (1980) TLR 250, the learned counsel faulted PW1 for failing in her evidence, to elaborate circumstances that facilitated her unmistaken identification of the appellant. In so far as the learned counsel was concerned, PW1 did not elaborate on the amount of time she took to observe the appellant. The PW1 did not explain the distance separating her from the appellant, and she said nothing about the intensity of the light from her husband's phone.

Referring to the case of **MKWAVI S/O NJETI V. R.**, CRIMINAL APPEAL NO. 301 OF 2015 (unreported), Mr. Mwakolo faulted the trial judge for acting on the voice identification evidence of PW1 without cautioning himself on the possibility of mistaken identification or even the possibility that another person imitating the appellant's voice.

Mr. Mwakolo used the third ground of appeal to cast further doubt on the credibility of the evidence of PW1. The learned counsel demonstrated how the evidence of PW4 contradicted that of PW1. He demonstrated how while under cross-examination, PW1 stated that she informed the village executive officer, Gaudence Lyaba (PW4), that it was the appellant who killed the deceased with a machete just outside his door. But under cross-examination, PW4 testified that PW1 did not mention the person who killed

the deceased. In so far as Mr. Mwakolo is concerned, the trial judge should have addressed this contradiction, but he did not. The learned counsel cited the case of **SHUKURU TUNUGU V. R.**, CRIMINAL APPEAL NO. 243 OF 2015 (unreported) to urge us to find that PW1's evidence is unreliable and not worth believing.

Mr. Mwakolo concluded by submitting that after we expunge the evidence of PW5 and cautioned statement (exhibit P.3), and after casting doubt in the evidence of PW1, there shall remain no other evidence sufficient to convict the appellant. He asked us to allow the appeal, quash the appellant's conviction, and set aside the appellant's sentence of death by hanging.

Through Ms. Mwabeza, the learned State Attorney, the Republic supported the appeal and agreed with all the submissions of the learned counsel for the appellant. She however, submitted that the trial of the appellant was marred with irregularities that vitiated the entire proceedings, making the entire proceeding's of the trial High Court a nullity.

She submitted that while the names of three assessors appear on page 57 to 58 of the record of appeal, the record does not show the trial

judge giving the appellant a chance to express his view on the selected assessors. Nowhere in the trial court record, she added, does the trial judge inform the assessors of their role to aid trials in the High Court per section 265 of the CPA. She submitted that the trial judge did not correctly guide the assessors who were selected by the High Court in terms of Section 285(1) of the CPA.

Our perusal of pages 56 to 58 of the appeal record bears out what the learned State Attorney argued regarding irregularities regarding failure to explain the the role of assessors in the trial High Court. She is correct to fault the learned trial judge for failing to give the appellant a chance to express himself on the names of three assessors the trial judge had selected.

In **GODFREY s/o WILLIAM @ MATIKO & THOMAS s/o MWITA @ NYAGANCHA,** CRIMINAL APPEAL NO. 409 OF 2017 [TANZLII], the record of the trial High Court was silent as to whether the trial judge allowed the appellants to express their view on the selected assessors. The trial High Court record was similarly silent whether the trial judge gave any direction to the assessors on their role and responsibility. The Court concluded that failure to allow the appellants to express their view on the

selected assessors and failure to give direction to the assessors on their role and responsibility amounted to an irregularity that vitiated the whole proceedings of the trial court.

The principle laid out in **GODFREY s/o WILLIAM @ MATIKO & THOMAS s/o MWITA @ NYAGANCHA** (supra) applies to the present appeal before us. We agree with the learned State Attorney that the failure of the trial High Court to address the assessors on their roles in the trial is an irregularity that vitiates the entire trial with the aid of assessors in the Criminal Appeal No. 102 of 2019.

Ms. Mwabeza next submitted on several extraneous matters, the trial judge introduced both in the record of proceedings and his decision which vitiated the trial leading to this appeal. She elaborated instances where the trial Judge added some extraneous matters, which even witnesses did not testify on. Ms. Mwabeza gave examples in the summing up notes of the trial judge on page 80 of the record of appeal. The trial judge added the following extraneous matters: *"The records show that on at about 22:00 hrs of the 6th September 2015 the accused was drinking local beer at the bar with the deceased and one MICHAEL s/o KWIMBA who has not yet been arrested. While enjoying at the bar the accused started quarrelling*

and ultimately the deceased left the place and went at his home." No witness on record had stated these worlds, she submitted.

The learned State Attorney referred to page 81, where the trial judge added extraneous facts in his summing up notes: *"It is also on the records that on March 2016 the accused person was arrested in Katavi Region and later brought to Sumbawanga."*

She submitted that extraneous matters extended right up to the trial court's judgment. She referred us to pages 99 and 100 of the record, where words are attributed to PW1, which PW1 did not testify on: *"The evidence of PW2 was corroborated by PW1 who testified that they saw and identified the accused person who invaded the deceased house. It is clear from the records that the accused person by his act of going to the deceased house with various weapons such as machete or bush knife with his colleague and came across closer to PW1 who had enough time to observe him...."*

On consequences that should be fall importing extraneous matters, the learned State Attorney referred us to our decision in **SHIJA S/O SOSOMA V. DPP,** CRIMINAL APPEAL NO. 327 OF 2017 (TANZLII). In that case the Court found that the trial Judge's summing up included matters of

fact which were not borne out of the evidence of witnesses on record. The Court quashed all the proceedings of the trial court from the stage when the assessors were selected. She urges us to follow similar path.

On our perusal of the record, as Ms. Mwabeza has demonstrated, the trial Judge indeed added extraneous matters of fact, which did not originate from witnesses or evidence. In **ATHANAS JULIUS V. R.**, CRIMINAL APPEAL NO. 498 OF 2015 (unreported), we stated that inclusion in judgments of facts which were not in the recorded evidence in the proceedings is a fatal irregularity that vitiates the entire proceedings, of a trial court.

In light of irregularities we have outlined, we are inclined to invoke our power of revision under section 4(2) of the Appellate Jurisdiction Act Cap 141 R.E. 2019 to nullify the trial High Court proceedings, quash the conviction, and set aside the sentence of death meted out against the appellant.

The remaining question to consider is whether we should order a retrial of the appellant. Both learned counsel, Mr. Simon Mwakolo for the appellant and Ms. Irene Mwabeza for the respondent, agree that the main prosecution witness, PW1 is unreliable and not a witness of truth. Mr.

Mwakolo rightly discredited both the evidence of PW5 and that of the appellant's cautioned statement, which PW5 recorded. In the circumstances, a retrial will not serve the best interests of justice.

For the above reasons, we allow this appeal, quash the conviction and set aside the death sentence. The appellant is set at liberty unless held for other lawful cause.

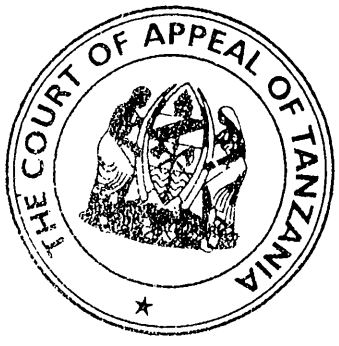
DATED at **MBEYA** this 23rd day of February, 2022.

I. H. JUMA
CHIEF JUSTICE

R. K. MKUYE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2022 in the presence of the Appellant represented by Mr. Simon Mwakolo, learned advocate and Ms. Rosemary Mgenyi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL