IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 445 OF 2019

NIMBONA SYLVESTI @ GWATA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Matuma, J.)

dated the 16th day of July, 2019

in

Criminal Session No. 11 of 2018

.....

JUDGMENT OF THE COURT

13th & 17th March, 2023

MWAMPASHI, J.A.:

In the High Court of Tanzania at Tabora sitting at Kigoma (the trial court), the appellant herein was charged with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2022] (the Penal Code). It was the case for the Prosecution that between 31.08.2016 and 01.09.2016 at Nduta Refugee Camp within the District of Kibondo in Kigoma Region, the appellant murdered one Nizigimana Divera (the deceased). When the information was read to him, the appellant denied to have committed the offence.

In proving the guilt of the appellant, the prosecution paraded a total of six witnesses namely; Ndailagize Bosco (PW1), Ndaizeye Yohana (PW2),

Paschal Baraka Fitie (PW3), Dr. John Paul Tirukaizire (PW4), WP. 3546 D/CPL. Frida (PW5) and F. 27 CPL. Winstone (PW6). In addition, the prosecution case had two exhibits, *to wit*, a post mortem examination report (exhibit P1) and the appellant's cautioned statement (exhibit P2). The appellant was a sole witness in his defence.

In brief, the evidence led before the trial court, beginning with the evidence for the prosecution, was as follows; According to PW1, the Chairman of the 7th Village in Zone 8 at Nduta Refugee Camp, on 31.08.2016 at about 21.00hrs, one Kajoro Ismail, who was one of the Village ten cell leaders, reported to him that his daughter, the deceased, was missing from home. The search for the missing deceased which was immediately mounted by PW1 did not bear any fruits. In the morning hours of the following day, PW1 was informed that the deceased body had been found in a certain farm and when he got there, he saw the deceased body with a huge cut wound at the back of the neck. PW1 also testified that the prime suspect was one Gervas. He explained that, Gervas and his wife had some serious misunderstandings and after several attempts to settle their differences had proved futile, it was resolved that, for the safety of the wife, she should leave her husband and relocate to live with the family of Kajoro Ismail. This angered Gervas who believed that Kajoro Ismail was having an affair with his wife and he thus started threatening him.

PW5's testimony was to the effect that, having visited the scene of crime and collected the dead body of the deceased and having learnt from the father of the deceased and other witnesses that the prime suspect was one Gervas, the police started looking for him together with the appellant who it was said was a relative and an ally to Gervas. The duo who was nowhere to be seen within the Refugee Camp of Nduta, remained at large and could not be found until when an informer tipped the police that the appellant had been seen at Mtendeli Refugee Camp in Kakonko District. Acting on that lead, PW6 was sent to go and arrest the appellant at Mtendeli Refugee Camp, which he did on 07.09.2016. After the arrest, the appellant was brought back to Nduta Police Station where he was interviewed and his cautioned statement recorded. In the cautioned statement which was admitted in evidence as exhibit P2, the appellant confessed to have murdered the deceased in collaboration with his friends including Gervas.

Another piece of prosecution evidence came from the appellant's friend, PW2, who, at the instance of the appellant, witnessed the appellant's cautioned statement being recorded by PW6 at Nduta Police Station. Furthermore, there is evidence from PW3 which is to the effect that PW3, was sharing a hut with the appellant at Nduta Refugee Camp each of them having his own room. PW3 did also tell the trial court that on 31.08.2016, the appellant's friend one Gervas visited the appellant.

According to PW3, at 22.00hrs the two friends were still together in the hut. That, while he was in his room sleeping, he was asked by them to switch off the light. PW3 claimed to be certain that it was Gervas who was with the appellant because he was familiar with his voice. At 05.00hrs PW3 heard the duo leaving. Finally, for the prosecution, there is evidence from PW4 who medically examined the deceased body on 01.09.2016. According to him, the neck of the deceased had been cut from back and the head was left hanging by a thread of skin. PW4 opined that the cause of death was a severe bleeding. A post mortem report to that effect, which had earlier been admitted without any objection as exhibit P1, was identified by PW4.

In his sworn defence, the appellant distanced himself from the offence. Though he admitted that he was sharing the hut with PW3, he denied to have been at home on 31.08.2016 as testified by PW3. He contended that in the morning hours of that day, he left for the market at Malenga where he spent the night at his friend's home before he went to visit his wife in Burundi. He further told the trial court that he did not return to Nduta till on 03.09.2016 and that on 04.09.2016 he was at Nduta market when he was arrested by PW6 who asked him the whereabouts of Gervas. When he told him that he did not know where Gervas was, PW6 took him by force to Mtendeli where they searched for Gervas but could not find him. After missing Gervas, PW6 took him back to Nduta Police

Station and on 07.09.2016, PW2 was brought and he witnessed him being tortured and forced to put his thumb print on the statement he knew nothing about. The appellant maintained that he neither committed the murder in question nor did he know who committed it.

After a full trial, in its judgment, the trial court differed with the opinion given by three assessors who had found the charge not proved beyond reasonable doubt against the appellant. However, the trial court was satisfied that the cautioned statement was made freely and voluntarily by the appellant in the presence of his friend PW2. It was also found by the trial court that there was sufficient circumstantial evidence pointing to the guilt of the appellant such as, the evidence which is to the effect that the appellant was seen with Gervas who was the last person to be seen with the deceased alive. The trial court lastly found it established that the appellant fled after the incident. As a result, the appellant was convicted and sentenced to the statutory penalty of death by hanging. Aggrieved the appellant has preferred the instant appeal.

At the hearing of appeal, the appellant was represented by Mr. Kelvin Kayaga, learned advocate whilst the respondent Republic had the services of Mses. Hannarose Kasambala and Veronica Moshi, both learned State Attorneys.

In support of his appeal, the appellant had initially filed a memorandum of appeal on 31.10.2019 comprised of five grounds. On 09.03.2023, in terms of rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), Mr. Kayaga filed a supplementary memorandum of appeal containing four grounds. However, when invited to expound the grounds of appeal, Mr. Kayaga abandoned the first four grounds in the memorandum of appeal and combined the remaining fifth ground with the four grounds in the supplementary memorandum. In our considered view, the five grounds of appeal raise two main issues; **first**, it is on the procedural irregularities aspect and **second**, it is on whether there was sufficient evidence to prove the case against the appellant.

Beginning with the issue on procedural irregularities, Mr. Kayaga referred us to pages 22 to 24 of the record of appeal covering part of committal proceedings conducted by the subordinate court. He pointed out that it is on record that, on 28.02.2018 when the appellant appeared before the subordinate court, the proceedings were conducted with the aid of an interpreter going by the name of Anna Nditiye who was not sworn for that purpose and whose role and duties in the proceedings were not indicated. Mr. Kayaga pointed out further that at page 24 of the record of appeal it was certified by the committal magistrate that the statements of the intended prosecution witnesses and the exhibits containing the substance of the evidence the prosecution intended to call at the trial, were

read over and explained to the appellant in Rundi language. He thus contended that it is on record that Anna Nditiye acted as an interpreter without first being sworn for that purpose. It was his argument that the omission fatally affected the committal proceedings because it cannot certainly be said that the interpreter who was not sworn properly performed her duty properly and enabled the appellant to understand the substance and nature of the evidence that was to be led against him during the trial. He insisted that the appellant was not accorded a fair trial and that the invalid committal proceedings vitiated the entire trial.

Mr. Kayaga argued further that ordinarily, he would have prayed for a fresh committal proceedings and retrial but the circumstances of this case dictate otherwise. He clarified that since the evidence on record is insufficient and cannot ground conviction, ordering a fresh committal proceedings and retrial would prejudice the appellant as the prosecution will grab that opportunity to fill in the gaps in the already weak and insufficient evidence to the detriment of the appellant.

Turning to the second issue on whether there was sufficient evidence to prove the case against the appellant, Mr. Kayaga submitted that according to the trial court, the appellant's conviction hinged on the appellant's cautioned statement (exhibit P2) and circumstantial evidence. He pointed out that the cautioned statement contravened section 57 (3) of the Criminal Procedure Act [Cap 20 R.E. 2022] (the CPA). It was explained

by Mr. Kayaga that the cautioned statement was certified by a stranger, one Ndaizeye Yohana (PW2) contrary to section 57 (4) of the CPA. Relying on the decision of the Court in **Zabron Joseph v. Republic**, Criminal Appeal No. 447 of 2018 (unreported) Mr. Kayaga insisted that the ailment on the certification of the cautioned statement is fatal and the statement was improperly admitted in evidence and wrongly acted upon by the trial court. He thus urged us to expunge the said cautioned statement from the record.

Regarding circumstantial evidence, it was argued by Mr. Kayaga that there was no circumstantial evidence supporting the appellant's conviction. He faulted the finding by the trial court that the appellant was seen together with Gervas who was the last person to be seen with the deceased alive because that finding is not supported by the evidence on record. Mr. Kayaga contended that the appellant was condemned only because he had been a close friend to Gervas. Mr. Kayaga concluded by urging the Court to allow the appeal and acquit the appellant.

At the outset, Ms. Moshi intimated that the respondent Republic was not opposing the appeal. She agreed that the committal proceedings were invalid to the extent of vitiating the whole trial because one Anna Nditiye who acted as an interpreter during the committal proceedings did not take an oath for that purpose. She insisted that the invalid committal proceedings have the effect of denying the appellant a fair trial as the

substance of the prosecution evidence was not let known to him beforehand. She thus insisted that the appellant was not accorded a fair trial as the proceedings were conducted in the language not understood by him. To cement her argument that the proceedings ought to have been conducted in the language the appellant understood, Ms. Moshi referred us to the decision of the Court in **Mariko Jidendele v. Republic,** Criminal Appeal No. 136 of 2018 (unreported).

Regarding the ailment on the certification of the cautioned statement, Ms. Moshi submitted that, apart from the shortfalls pointed out by Mr. Kayaga, the certification was made by PW6 under section 10 (3) of the CPA instead of section 57 (4) of the CPA hence rendering the said cautioned statement invalid. On this, the Court was referred to the case of **Juma Omar v. Republic,** Criminal Appeal No. 568 of 2020 (unreported).

Finally, it was argued by Ms. Moshi that in the absence of the cautioned statement, there will be no other evidence to support the case against the appellant. She thus agreed with Mr. Kayaga that, under these circumstances, the only fair remedy is for the appeal to be allowed and for an order that the appellant be set at liberty.

Having heard the arguments from the counsel for the parties, we propose to begin our deliberations with the first ground of complaint that the committal proceedings were faulty on account that the interpreter one

Anna Nditie did not take an oath for that purpose before acting as an interpreter from Swahili to Rundi language and vice versa hence occasioning a denial of fair trial to the appellant. We have subjected the record to a thorough examination and found that the complaint is baseless. We are of the settled mind that the appellant was not denied a fair trial because the evidence on record does not show that the appellant did not understand Swahili and that he could not follow the proceedings in the language the proceedings were conducted. We will demonstrate.

First of all, from the first day when the appellant appeared before the subordinate court on 16.09.2016, there was no complaint from him that he did not understand Swahili. He appeared before the subordinate court several times and even on 28.02.2018 when the committal proceedings were conducted, the appellant did not complain that he did not understand Swahili. What is on record, on that particular date, is that one Anna Nditiye appeared as an interpreter without any indication that she was so required to appear. Thereafter, the committal magistrate indicated that the list of intended prosecution witnesses and exhibits had been read and explained to the appellant in Rundi language but, as we have alluded to above, up to that point there was no request or complaint from the appellant that he could not follow the proceedings in Swahili or that the service of an interpreter was needed.

The appellant was committed to the High Court for trial on 12.04.2018 and on 12.07.2018 the preliminary hearing was conducted. When asked to enter a plea after the information had been read over and explained to him, the appellant pleaded not guilty in Swahili by stating ***"Siyo kweli"***. This is evident at page 30 of the record of appeal. At the conclusion of the preliminary hearing, the appellant's advocate one Mr. Sogomba, rose and stated that the appellant did not understand Swahili well and prayed for an interpreter of Swahili to Rundi language and vice versa, to be available during the trial. This request was however withdrawn by the advocate on 15.07.2019 when the case was called on for hearing. The appellant is also on record telling the trial court that, ***"I know Kiswahili and I can talk. I therefore need not the interpreter as I can hear and speak Kiswahili"***. From there the trial proceeded to its conclusion.

It is from the above clear position that we find that there was neither complaint from the appellant that he did not understand Swahili nor that an interpreter was required. The evidence on record, as we have amply demonstrated above, shows that the appellant was able to follow the proceedings in the language the proceedings were conducted. That being the case, the first ground of complaint fails.

Turning to the second ground of complaint, we observe that the evidence upon which the appellant's conviction was based is the appellant's cautioned statement (exhibit P2) and circumstantial evidence. On the

cautioned statement, we agree with the counsel for the parties that the certification of the same was faulty. Apart from the fact that the certification was also made by PW2 who for purposes of certification of the cautioned statements, was a stranger. In addition, the cautioned statement was irregularly certified by PW6 who recorded it because at the end of the statement he indicated that the certification was made under section 10 (4) of the CPA. The Court was confronted with an akin situation in the case of **Juma Omar** (supra) whereby, as it is in the instant case, the certification was made under section 10 (3) of the CPA. The Court held that:

> *"In this case, we agree with both attorneys that the certification of the appellant's cautioned statement was made under section 10 (3) of the CPA. This is clearly seen at page 29 of the record of appeal where the police officer No. G.3535 DC Damas made such a certification. However, the said provision is not only applicable to the cautioned statement but also it does not have a requirement of certification. This was a violation of the mandatory provisions of section 57 (3) of the CPA which provides for such a requirement. In our view, certification has a purpose of authenticating the truth of what the police officer had recorded and therefore, failure to do so or doing so under non-existent law, would render the same as if no certification was made at all".*

The Court went on to state that:

> *"In the case of **Christina Damiano v. Republic**, Criminal Appeal No. 178 of 2012 (unreported), in which the provisions of section 57 including sub section (3) were contravened, the Court found that such contravention affected the trial and proceeded to expunge the cautioned statement. [See also **Mereji Logori v. Republic**, Criminal Appeal No. 273 of 2011 (unreported)*
>
> *Even in this case, we are settled in our mind that failure to comply with the provisions of section 57 (3) of the CPA had an effect of affecting a fair trial of the appellant since the authenticity of the appellant's cautioned statement remains uncertain. We, thus, expunge the appellant's cautioned statement from the record".*

In view of the above settled position of the law, we find that the appellant's cautioned statement in the instant case, contravened section 57 (4) of the CPA. The statement is thus liable for expunction from the record which we hereby do. We also find that the trial court improperly admitted the statement in evidence and wrongly acted upon it to ground the conviction of the appellant.

Having discounted the cautioned statement, the immediate issue before us becomes whether the remaining evidence, and in particular the

circumstantial evidence, is sufficient to ground the appellant's conviction. It should also be pointed out that in the instant case it is common ground that there was no eye witness, who saw the murder in question being committed.

In determining the above stated issue, we are mindful of the settled position of the law that for circumstantial evidence to be relied upon and for conviction to be based on it, such evidence must, among other things, irresistibly point to the guilt of the appellant to the exclusion of any other person. See- **Shaban Mpunzu @ Mpunzu v. Republic,** Criminal Appeal No. 12 of 2002 (unreported). On this aspect our task is therefore to re-evaluate relevant pieces of circumstantial evidence on record and determine if we can irresistibly conclude that it is the appellant, and nobody else, who killed the deceased.

We find it appropriate to preface our determination of the issue on circumstantial evidence by pointing out that in convicting the appellant on the basis of circumstantial evidence, the trial court in its judgment at page 118 of the record of appeal, found as follows:

> *"The circumstantial evidence is that the accused person was seen with one Gervas who was the last person to be seen with the deceased alive and they both fled away after the murder".*

With due respect, the finding by the trial court that the appellant was seen with one Gervas who was the last person to be seen with the deceased alive, is not supported by the evidence on record. No evidence was led by the prosecution which is to the effect that one Gervas was the last person to be seen with the deceased. Even the evidence from PW3 which was to the effect that the appellant was with Gervas at the material night, is wanting and does not amount to material circumstantial evidence. In his evidence PW3, claimed to have identified Gervas by voice which is the weakest and most unreliable kind of evidence. See- **Mussa Maongezi v. Republic,** Criminal Appeal No. 263 of 2005, **Badwin Komba @ Ballo v Republic,** Criminal Appeal No. 56 of 2005 and **Stuart Erasto Yakobo v. Republic,** Criminal Appeal No. 202 of 2004 (all unreported). In the latter case the Court stated that:

> *"In our considered opinion, voice identification is one of the weakest kind of evidence and great care and caution must be taken before action on it...There is always a possibility that a person may imitate another person's voice. For voice identification to be relied upon, it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime".*

Furthermore, even if the appellant was with Gervas, as claimed by PW3, that cannot be an incriminating piece of circumstantial evidence to ground the appellant's conviction because there is no evidence proving that Gervas is the one who committed the murder in question. In our view the mere presence of Gervas with the appellant at the latter's hut in the material night, does not in itself mean that the appellant was the one who killed the deceased.

Regarding the claim that the appellant ran away after the incident, we do not see it as sufficient circumstantial evidence irresistibly pointing to the guilt of the appellant. It should be borne in mind that in his defence the appellant maintained that he did not run away but that he had left for Mtendeli market for his businesses.

We are of the view that the trial court did not properly approach and weigh the relevant pieces of circumstantial evidence hence reaching at a. erroneous conclusion that such evidence pointed at the appellant as the one who committed the murder in question. In the case of **Said Bakari v. Republic**, Criminal Appeal No. 422 of 2013 (unreported), the Court stated that:

> *"In determining a case centred on circumstantial evidence, the proper approach by a trial court is to critically consider and weigh all circumstances established by the evidence in their totality, and*

not to dissect and consider it piecemeal or in cubicles of evidence or circumstances".

In conclusion and for the above stated reasons, we are settled in our mind that there was no strong circumstantial evidence that could have been relied upon to ground the conviction of the appellant. We find no circumstances from which inference can be drawn in finding the appellant guilty. In totality we find that the case against the appellant was not proved to the hilt.

In the circumstance, we allow the appeal, quash the conviction and set aside the sentence imposed on the appellant by the trial court. We further order that the appellant be released from prison unless he is so held for any other lawful cause.

DATED at **TABORA** this 16th day of March, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 17th day of March, 2023 in the presence of the Appellant in person and Ms. Hannarose Kasambala, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL