IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 426 OF 2019

LUCAS S/O SHIJA.....1ST APPELLANT

SIMON S/O MADUHU.....2ND APPELLANT

SAGUDA DENI.....3RD APPELLANT

MALONGO S/O SUNGWA.....4TH APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania,
(District Registry) at Tabora

(Bongole, J.)

dated the 11th day of October, 2019

in

Criminal Session Case No. 16 of 2019.

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JUDGMENT OF THE COURT

13th & 16th March, 2023

MUGASHA, J.A.:

Lucas Shija, Simon Maduhu, Saguda Deni and Malongo Sungwa , the 1st, 2nd, 3rd and 4th appellants respectively, were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. It was alleged by the prosecution that, on 18/7/2016 at Igunga District within Tabora Region, they did murder one Kulwa Richard. They all pleaded not guilty to the charge and in order to prove its case, the prosecution paraded a total of

eleven (11) witnesses and twelve (12) documentary exhibits. On the other hand, the appellants were the only defence witnesses and they categorically denied the prosecution's allegations that they murdered Kulwa Richard.

A factual background underlying this appeal is briefly as follows: The deceased one Kulwa Richard was employed as a pump attendant at the Lake Oil petrol station situated in Igunga District owned by one Nassoro Said who testified as PW6. The appellants were the employees of Magori Security Company and on the material evening, it is alleged that Lucas Shija and Simon Maduhu the 1st and 2nd appellants respectively, were deployed to the petrol station as security guards whereas the deceased, a pump attendant was on the night shift. It was alleged by the prosecution that, the appellants jointly colluded to steal the money from their employer and in order to accomplish the mission, they conspired to break the store where it was believed that the money was kept. They broke into the room where the deceased was sleeping, struck him on the head, he succumbed to death on the spot and his body was thrown into a deep water well which was around the petrol station. However, they could not accomplish their mission because they were interrupted by a motorist who came with a car to fetch petrol. Three of them fled leaving behind the 2nd appellant who reported to the police station that the deceased was missing.

The police went to the scene of crime and opted to look for the owner of the petrol station one Nassoro Said (PW6) who was informed about the missing deceased. Then, upon a mounted search a blood-stained mattress and coat which were used by the deceased were found in the vicinity as identified by PW6. He contacted the water authority and managed to get the diver one John Lucas (PW5) who on 18/7/2016, fished out the body of the deceased from the deep well. The body was identified by the relatives who were allowed to bury the deceased after the autopsy (Exhibit P3) which established that the cause of death was severe head injury and bleeding. This was followed by the arrest of the 2nd appellant. The 1st, 3rd and 4th appellants who were at large were arrested on different dates and locations and according to the prosecution, having confessed to have been involved in the killing incident, they were arraigned in Court to face the charge of murder. According to the cautioned and extra judicial statements of 1st, 2nd and 3rd appellants admitted in evidence as exhibits P2, P9, P10, P11 and P12, the appellants confessed to have murdered the deceased.

The appellants gave sworn testimonies and besides admitting that they were security guards, they denied the prosecution's allegations on the killing incident. The 1st appellant testified that on the material date he was on guard at Mwanzugi station and learnt about the fateful incident while at his home

and he joined those who were searching for the deceased and he was present at the funeral of the deceased. Then, on the following day, that is on 19/7/2016 he was arrested, tortured, kept in lock up and forced to admit that he was involved in the killing incident.

On his part, the 2nd appellant, the supervisor of the security guards in Magori Security Company, recalled that upon being approached by a motorist and told that he could not be attended at Lake Oil because people had assembled there, he notified the owner who reported the matter to the police. Then, accompanied by the police they went at the petrol station and there was neither the pump attendant nor any security guard. He claimed to have been arrested after embarking on a search which bore no results, and later others were arrested and they were all arraigned in court accused to have murdered the deceased. As for the 3rd appellant, for the whole of the 18/7/2016, he claimed to have been at home went to attend pigs and when he went to the office he was informed that Lake Oil petrol station was no longer safer. He decided to call his boss who directed him to report to the police, obliged and was arrested. The 4th appellant raised the defence of alibi claiming that on the fateful day he was not at the scene of crime.

After a full trial, the learned trial Judge summed up the evidence to the assessors who all returned a unanimous verdict of guilty to all the appellants.

Subsequently, relying on circumstantial evidence and confessional statements of 1st, 2nd and 3rd appellants, all appellants were convicted of the offence of murder and each was sentenced to suffer death by hanging. Aggrieved, the appellants have appealed to the Court each filing a separate Memorandum of Appeal comprising a total of 56 grounds of appeal. On 7/3/2023, through advocate Kamaliza Kayaga, the appellants lodged a supplementary Memorandum of Appeal fronting three grounds of grievances as follows:

1. *That the honourable Judge failed to inform the assessors on their role and responsibility in the trial and their participation was rendered meaningless.*

2. *That the statement of PW1 E 1433 DC THOMAS (exhibit P1); the cautioned statement of the 1st appellant LUCAS SHIJA (Exhibit P2); the extra judicial statement of the 1st appellant (Exhibit P9); the extra judicial statement of the 3rd appellant SAGUDA DENI (Exhibit P10); the extra judicial statement of the 4th appellant MALONGO SUNGWA (Exhibit P10) and the cautioned statement of the 3rd appellant SAGUDA DENI (Exhibit P12) were all improperly admitted in evidence and wrongly relied upon by the Hon trial Judge in grounding the conviction.*

3. That the defence of ALIBI for the 4th appellant MALONGO SUNGWA was not adequately considered by the Hon Trial Judge.

At the hearing, the appellants who were present in Court had the services of Mr. Kamaliza Kayaga, learned counsel whereas the respondent Republic had the services of Ms. Hannarose Kasambala and Ms. Veronica Moshi, both learned State Attorneys. The initial Memorandum of Appeal and the 3rd ground in the supplementary memorandum were abandoned and were so marked.

In the first ground, the learned trial Judge is faulted to have failed to explain to the assessors their role before the commencement of the trial. On this, it was Mr. Kayaga's argument that the omission diminished the level of participation of the assessors and that the trial was vitiated as it was not conducted with the aid of assessors. To bolster his argument, he cited to us the case of **GERALD ATHANAS @ KIVWANGO VS REPUBLIC,** Criminal Appeal No. 103 of 2019 (unreported). However, upon being probed by the Court, although he agreed that the participation of the assessors was not incapacitated, he still maintained that the law is settled that before the commencement of the trial, the assessors must be briefed on their role. Thus, he implored on us to find the omission incurable but urged us not to return

the case file to the trial court for a proper summing up on account of what is to unfold in due course.

In ground 2, the learned trial Judge is faulted for the irregular admission of the statement of PW1 E 1433 DC THOMAS who recorded the cautioned statement of the 1st appellant. On this, it was submitted by Mr. Kayaga that, after the learned trial Judge overruled the objection on the admissibility of PW1's statement, he ought to have recalled the witness to tender it instead of the court out rightly admitting the exhibit. This need not detain us because it is glaring on the record that, since PW1 initially had prayed to tender the statement which was objected, it was quite in order for the leaned trial Judge to admit the same after determining the objection. Thus, it was uncalled for to require PW1 to retender the statement.

That apart, in the same ground 2, the appellants are as well, faulting the trial court's irregular admission of the cautioned and extra judicial statements of the 1st and 3rd appellants which were relied upon to ground the conviction of the appellants.

As for the cautioned statements of the 1st and 3rd appellants, it was Mr. Kayaga's submission that, after the voluntariness was determined, the cautioned statements were admitted in evidence as exhibits P2 and P12 in the absence of the assessors who were yet to be recalled after the completion of

the trial within trial. Moreover, it was submitted that the cautioned statement of the 1st appellant was not legally procured in the absence of any certification that it was read over to the appellant by the officer who recorded the statement. On account of the said omission, it was Mr. Kayaga's argument that, the cautioned statements were not properly admitted and thus wrongly acted upon to convict the appellants. As such, he urged us to expunge exhibits P2 and P12 from the record. To support his propositions, he cited to us the case of **FRANCIS MASHARA MAKEWA VS THE REPUBLIC,** Criminal Appeal No. 215 of 2007 (unreported).

Next is on the complaint regarding the extra judicial statements of the Lucas Shija, Saguda Deni and Malongo Sungwa, 1st, 3rd and 4th appellants respectively, (Exhibits P9, P10 and P11). On this it was submitted by Mr. Kayaga that, the respective extra judicial statements were not initially introduced at the committal stage as per the dictates of section 246 (2) of the CPA as such, in the absence of the prosecution notice to introduce additional documents in terms of section 289 of the CPA, the extra judicial statements failed the test of being exhibited in the evidence at the trial. On account of the said omission, Mr. Kayaga argued that such evidence was wrongly acted upon to convict the appellants and implored on us to expunge exhibits P9, P10 and P11 from the record.

Ultimately, it was Mr. Kayaga's submission that if the documentary exhibits are expunged, the remaining sole oral account is that of Agata Paul Tobias (PW7) which is weak to sustain the appellants' conviction and thus the prosecution case is rendered not proven at the required standard. He thus urged the Court to allow the appeal.

In reply to the complaint on the trial Judge's failure to explain to the assessors their role, although the learned State Attorney made a concession, she was quick to point out that, the omission was curable because the assessors actively participated in the trial and gave informed opinion. To support her stance, she referred us to the case **of AMANI RABI KALINGA VS THE REPUBLIC,** Criminal Appeal No. 474 of 2019 (unreported). Thus, the learned State Attorney implored on the Court to find that, the omission to explain the role of the assessors did not vitiate the trial.

The learned State Attorney raised another point faulting the irregular summing up of the assessors arguing that the assessors were not directed on the meaning of malice aforethought which is a vital point of law and as such, the trial was vitiated. She urged us to return the case file to the High Court for it to conduct a proper summing up.

In relation to the extra judicial statements, exhibits P9, P10 and P11 which were not part of the committal proceedings, the learned State Attorney

readily conceded that, it was not proper for the trial court to act on those statements to convict the appellants. As such, like her counterpart, she urged us to expunge exhibits P9, P10 and P11. Pertaining to exhibits P2 and P12 which were admitted in the absence of the assessors, the learned State Attorney argued that the omission is curable because the exhibits were read out after resumption of the main trial and thus, the assessors understood the contents thereof. She further submitted that, since 1st appellant confirmed to have made such statement at the end that confirms that the statement was read out to him by the person who recorded it. To support her propositions, she cited to us the cases of **MICHALE MGOWOLE AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 205 of 2017 and **NZWELELE LUGAILA VS REPUBLIC**, Criminal Appeal No. 140 of 2020 (both unreported). Thus, the learned State Attorney urged us to find that Exhibits P2 and P12 were properly admitted and acted upon to convict the 1st, 2nd and 3rd appellants to have committed the murder of Kulwa. She argued that, whereas the 3rd appellant confessed to have been involved in the killing incident, the contents of the exhibit P2 are corroborated by the evidence of PW7 who placed the 1st and 2nd appellants at the scene of crime. However, she pointed out that, apart from being mentioned by the co accused, there is no corroborative evidence to implicate the 4th appellant with the killing incident. Finally, she maintained

that, on account of the irregular summing up the case file be returned to the High Court for it to conduct a proper summing up.

In rejoinder, Mr. Kayaga apart from reiterating on what he had earlier submitted, he maintained that, the omission to admit exhibits in the presence of the assessors was irregular and contrary to the procedure. He as well reiterated that, the certification of the cautioned statement must comply with the dictates of section 57 (3) of the CPA.

After a careful consideration of the grounds of appeal, submission of learned counsel for the parties and the record of appeal major issues to be determined are **one,** whether the trial was flawed with procedural irregularities on account of irregular admission of exhibits which were acted upon to convict the appellants; and **two**, whether the charge was proved against appellants beyond reasonable doubt. Pertaining to the failure by the trial judge to explain to assessors their role before the commencement of the trial, it is settled law that, they must be informed on that role prior to the trial. However, in a number of its decisions the Court has gone a step further and decided that the omission is not fatal unless it adversely affects their role at the trial. This was emphasized in the case of **ERNEST JACKSON @ MWANDIKA UPESI AND ANOTHER VS. REPUBLIC** where the Court held:

> *"Where... the trial judge or Resident Magistrate with extended jurisdiction, fails to brief the assessors at the beginning of the trial, on their role but they are alert during the proceedings and actively participate in assisting the Judge or Magistrate with extended jurisdiction, as the case may be, throughout the trial and properly give their opinion and return their verdict, the short coming does not occasion any failure of justice and may be glossed over".*

See also: **SALEHE RAJABU @ SALEHE VS. REPUBLIC**, Criminal Appeal No. 318 of 2017 and **SAMWELI JACKSON SABAI @ MN'GAWI & 2 OTHERS VS. REPUBLIC**, Criminal Appeal No. 193 of 2020 (both unreported).

Given that in the present matter, the assessors actively participated in the trial, to *wit* sought clarification from witnesses, gave their opinion and returned their verdict the failure by the learned trial Judge to brief assessors on their role, did not occasion a failure of justice. Thus, the 1st ground of appeal is not merited.

On the issue of non-direction of assessors which was raised by the learned State Attorney, we found it wanting in the wake of a detailed summing up which sufficed to enable the assessors to make informed opinions on the matter. Thus, we do not find any cogent reason to return the matter to trial court for the fresh summing up.

Pertaining to the propriety or otherwise of admission of the cautioned statements of the 1st and 2nd appellants, (exhibits P2 & P12) the learned counsel locked horns on the matter not complied with and they parted ways. While Mr. Kayaga held the view that the exhibits failed the test of admission having been admitted in the absence of assessors and the irregular certification of the 1st appellant cautioned statement, the learned State Attorney argued that the omissions are curable and the admission was proper.

In the case of **FRANCIS MASHARA MAKEWA VS REPUBLIC** (supra) which was cited to us by the appellant, the Court was confronted with a situation whereby after the trial judge had determined the voluntariness of the cautioned statement, proceeded to admit it without recalling the assessors. The Court held:

> *"The statement was admitted and marked exhibit P3 by the trial court in its ruling without being put in evidence by any witness, or before the assessors were recalled".*

Finally, the Court concluded that exhibiting the document in the absence of assessors was among the grounds which vitiated the trial within trial and expunged the respective exhibit. Thus, on account of the stated position of the law we are satisfied that, admitting exhibits P2 and P12 in the absence of assessor was irregular and the omission vitiated the trial. In that regard, P2

and P12 were wrongly acted upon to convict the appellants and we accordingly expunge the two exhibits from the record.

We disagree with the learned State Attorney who held the view that, the omission is curable because the exhibits were read out and thus made known to the assessors. Apart from this not being the proper procedure, the case of **MICHAEL MGOWOLE AND ANOTHER VS REPUBLIC** (supra) cited by the State Attorney is of no assistance to the prosecution case. In that case the complaint was that the exhibits were improperly tendered by the trial judge and the court held:

> *"We have determined that these exhibits were offered to be tendered as evidence by prosecution witnesses well before they were subjected to trial within trials. It was after overruling of objections following trial within trial when the trial judge, for each exhibit, ordered their admission.* ***The common pattern which followed was that the trial judge ordered the return of assessors back to the court, and the same witness who had offered the exhibit before being objected to, was objected to continuation of examination in chief followed by cross-examination..."***

[Emphasis supplied]

Thus, the Court concluded:

> *"It is therefore our finding that in the instant appeal before us it was the prosecution witnesses and not the trial judge who tendered exhibits".*

The bolded expression of the above cited case of **MGOWOLE'S** cements the settled position of the law that after the voluntariness of a cautioned statement is determined, the admission of the statement should be done in the presence of the assessors and not otherwise. Thus, given that in the present case the cautioned statements were admitted in the absence of assessors, we expunge exhibits P2 and P12 from the record.

We now turn to Exhibit P9, P10 and P11. All learned counsel held the same view that, as the three exhibits were not initially introduced at the committal stage, it was not proper to rely on such documentary account to convict the appellants. The essence of introducing the said documentary account at the committal stage is articulated under section 246 (2) of the CPA which stipulates as follows:

> *"246 (2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of*

the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial.

The cited provision imposes a mandatory requirement that the substance of the prosecution's evidence must be made known to the accused at the committal stage so as to enable the accused to prepare an informed defence before the trial and be accorded a fair trial. Given that the extra-judicial statements were not part of the committal proceedings, in the absence of any prosecution notice under section 289 of the CPA to introduce the extrajudicial statements as additional documents at the trial, we agree with both learned counsels that, the omission vitiated the trial and as such, we accordingly expunge exhibits P9, P10 and P11 from the record.

Having expunged the cautioned and extra-judicial statements, the issue for consideration is whether the remaining oral prosecution account is capable of sustaining the conviction of the appellants.

As it can be gathered from the record, there is no eye witness who witnessed the killing incident. So the follow-up question is whether the available circumstantial evidence irresistibly point to the guilt of the appellants. It is settled law that, **one,** circumstantial evidence under consideration must be that of surrounding circumstances which by undersigned coincidence is capable of proving the proposition with the accuracy of mathematics; **two,**

such evidence must irresistibly point to the guilt of the accused to the exclusion of any other person; **three,** each chain link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected and ultimately; and **four,** the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt. See: **ALLY BAKARI VS REPPUBLIC,** Criminal Appeal No. 69 of 2012, **LUCIA ANTHONY BISHENGWE VS REPUBLIC,** Criminal Appeal No. 96 of 2016, (all unreported) and **SAMSON DANIEL VS REPUBLIC** [1934] E.A.C.A.

We shall accordingly be guided to determine as to whether or not the available circumstantial evidence irresistible point to the guilt of the appellants. According to the evidence of PW7, she was on duty at the Petrol Station from 06:00 hours up to 20.00 hours when she went home and left the watchman present. She could not remember the names but recalled their faces and at page 114 of the record of appeal PW7 said the following:

> *"They are present in Court. Court: the witness identified the 2nd appellant at the dock. This watchman entered the night shift".*

When cross-examined at page 115 of the record of appeal she responded as follows:

"... The 2nd accused came near the pump so I saw him and that is why I managed to identify him. I used to see several security guards. One security guard used to attend in afternoon sessions/shift and two in the night shift".

From the above excerpts, besides, more details on identification surfacing during cross-examination, a disturbing feature is the PW7's oral account during the examination in chief that she could only recall the faces of security guards. This necessitated conducting the identification parade to enable PW7 to properly identify the 2nd appellant. It is unfortunate that the identification parade was not conducted. Thus, dock identification evidence relied upon by the learned trial Judge was irregular because the identifying witness ought to have mentioned the 2nd appellant before she had the opportunity to see him at the trial.

The aforesaid notwithstanding, it really taxed our mind as to who was deployed as security guard at the Petrol Station on the fateful night which leaves a lot to be desired. Although, it is on record that the appellants were security guards and employees of Magori Security Company and had a shotgun which belonged to the Company and it was found abandoned at the scene of crime. However, there is no clue from PW9, D.7997 D/SSGT Erasmus Mzengi, the investigator, if the owner of the security company was

interrogated about the register or roaster to show who was actually deployed as security guard at the Petrol Station on that fateful night. Furthermore, the person who was entrusted with the gun which was found at the scene of crime remains unknown, leaves a lot to be desired for such a weapon to change hands without its movement being properly documented. Such vital evidence could have probably added value on PW7's recount as to who was present at the petrol station on the fateful night. In this regard, the owner or manager of the security company were material witnesses and failure to parade them clouds the prosecution case with a heavy doubt, it entitles us to draw inference adverse to the prosecution. See: **AZIZ ABDALAH VS REPUBLIC** [1991] TLR 71 where the Court held:

> *"The general and well known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".*

Nothing was displayed by the prosecution to the effect that the material witnesses were not within reach or could not be found in order to adduce evidence. Thus, on account of the remaining shaky prosecution account, it

cannot be safely vouched that such evidence irresistibly point to the guilt of the appellants in order to prove the charge beyond reasonable doubt. Therefore, although it is evident that the deceased was brutally killed, there is no evidence on record to implicate the appellants on the charge of murder. In the wake of evident doubts on the prosecution case, the appellants are thus entitled to the benefit thereof.

All said and done, we find the appeal merited and it is hereby allowed. We quash and set aside the conviction and sentence meted on the appellants and order forthwith release unless they are held for another lawful cause.

DATED at **TABORA** this 15th 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 16th day of March, 2023 in the presence of Mr. Kelvin Kayaga, holding brief for Mr. Kamaliza Kamoga Kayaga, learned counsel for the appellants and Ms. Anastazia Elias, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL