IN THE COURT OF APPEAL OF TANZANIA
AT KIGOMA

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

CRIMINAL APPEAL NO. 523 OF 2021

NDAISENGA s/o VICENT..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Kigoma)

(Mlacha, J.)

dated the 27th day of September, 2021
in
Criminal Session Case No. 9 of 2021

.....

JUDGMENT OF THE COURT

29th May & 2nd June, 2023.

SEHEL, J.A.

This appeal is against the conviction and death sentence meted to the appellant, Ndaisenga s/o Vicent, by the High Court of Tanzania sitting at Kigoma (the trial court) in Criminal Session Case No. 9 of 2021. The appellant was charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2019 (now R.E. 2022). It was alleged by the prosecution that on 2nd April, 2020 at Nyangusu Village within Kasulu District in Kigoma Region, the appellant did murder one, Abasi s/o Mananga (the deceased). He pleaded not

guilty to the information hence a full trial ensued. At the end of the trial, the appellant was convicted as charged and sentenced to suffer death by hanging.

The brief facts of the case that led to the arraignment of the appellant, conviction and sentence as obtained from the record of appeal are such that; the appellant and the deceased were neighbours. According Moses Jonas (PW2), during the evening hours of the day of incident, when he was outside with his deceased father pealing maize together with Sakibu and Yoram, thereby came the appellant with his two unnamed children. The appellant needed a place to stay overnight. The deceased allowed him to stay and after having their dinner they retired to sleep. At midnight hours, PW2 was awakened by the sounds of beating outside the house. He quickly ran away together with Yoram and hid near the beans field while Sakibu went on his own.

While at his hidding place about 5 or 6 meters away from where the beating took place, PW2 said he managed to see the appellant beating the deceased with a stick through bright moon light. He also claimed to have seen the appellant moving the deceased in the house and set the house on fire. PW2 recounts that the appellant then left

heading to Kachira's place. On his way out, the appellant told PW2 to inform Kachira that the deceased had been killed by robbers.

Sakibu Japhet (PW3) gave a similar account of PW2 that while they were outside the house pealing maize thereby came the appellant with his two children seeking for a place to stay and the deceased let him stay. That, after having the dinner they retired to sleep but in the midnight hours, he was also awakened by the beating. PW3 ran and hid in the maize farm which was about 2 meters away from where the beating was taking place. With the help of the bright moon light, he said he managed to see the appellant beating the deceased on the head and ribs with a stick and then burnt him inside the house.

Fadhili Fanuel (PW1) recounted that Kachira and Issa arrived at his home on 3rd April, 2020 seeking for assistance concerning fire on the neighboring house. On the way, they met the appellant along Rupia's farm but seemed confused as he told them that he needed assistance. They suspected him hence put him under arrest. They went to the scene of crime. Upon reaching there, they found the deceased body lying inside the house partly burnt with a stick beside it. Beside the body there was blood. The deceased's children informed them that the

perpetrator was the appellant. The matter was reported to Heruushingo police post.

At the scene of the crime, a police officer with force number E. 7905 Detective Corporal Malaki (PW6) recovered therefrom a stick (exhibit P2) allegedly used to assault the deceased. The stick retrieved on 3rd April, 2020 was stored at Heruushingo police post until 17th April, 2020 when it was handed over to a police officer with Force number G.5951 PC Godlove (PW5), exhibits keeper. On 20th September, 2021, PW6 took the exhibit from PW5 and tendered it before the trial court. PW6 also drew a sketch map (exhibit P3).

Nebo Edson Mwamakamba (PW4), a medical officer at Nyamidaho Heath Center conducted an autopsy on the deceased's body and recorded his findings in the Post Mortem Examination Report that was tendered as exhibit P1. According to the doctor's expert opinion, the cause of death of the deceased was due to severe traumatic brain injury; assault by blunt object and third-degree burn.

In his defence evidence, the appellant completely denied the allegations. He also denied to know the deceased and his two children, PW2 and PW3. He claimed that on the incident night, he was at home sleeping with his two children and in the morning hours, his neighbours

Kachira and Fadhili arrived at his home, woke him up and put him under arrest without being told the reason for his arrest. He admitted to be sent to Makere police post and later on arraigned for the offence of murder.

At the end of the trial, the two assessors who sat with the presiding Judge returned own verdict. The first assessor returned a verdict of guilty after being satisfied with the evidence of PW2 and PW3. She was of the opinion that the appellant was familiar to the identifying witnesses and that their evidence was corroborated by the evidence of the doctor, PW4. She therefore was of the opinion that the appellant was responsible for the deceased's death. The second assessor had a different opinion that the prosecution did not prove the offence of murder against the appellant beyond reasonable doubt. Among the issues which he doubted was the name of PW2 and failure to state the reason as to why they did not raise an alarm. He therefore returned a verdict of not guilty in favour of the appellant.

The learned trial Judge concurred with the opinion of the first assessor that the prosecution proved its case beyond reasonable doubt through the evidence of PW2 and PW3 who told the trial court that they saw the appellant beating the deceased with a stick by the aid of a

bright moon light and then moved him to the hut which he set on fire. The learned trial Judge was further convinced with the evidence of PW2 and PW3 that they knew the appellant prior to the incident date as they said that he was their neighbour in the adjacent farm and used to visit them regularly. He found that the evidence of PW2 and PW3 was corroborated by the evidence of PW1, PW4 and PW6.

The learned trial Judge explaining the reason as to why he differed with the opinion of the second assessor on the issue of the name of PW2, he said:

> *"On the difference of name, I could not get difficult on my side because the issue was not whether he was his child or not. Whether he was his child or not did not matter but what he saw and said. Further, most people have more than one name. I think this was an area for clarification during "questions for clarifications from assessors" rather than an area of doubt. It is also likely that the deceased was called Jonas as well or the boy was born from another brother of the deceased."*

Consequently, the appellant was found guilty, convicted and sentenced as aforesaid. Aggrieved by the finding of the High Court, the appellant has preferred the present appeal advancing the following grounds:

1. *That, the case for the prosecution was not proved, against the appellant, beyond reasonable doubt as required by the law.*

2. *That, the trial High Court did not properly handle the issue of the language under which the trial was conducted whereas record is amply clear at page 40, 15th-17th lines of the record of appeal, that PW2 & PW3 were not conversant with Swahili save for Kiha, and that the interpreter affirmed to translate Burundi to Swahili and vice versa and not Kiha to Swahili an Burundi as in the case of PW2 & PW3 when the interpreter served both purposes when the witnesses (PW2&PW3) testified.*

3. *That, the learned trial judge erred in fact and law to find and hold that PW2 & PW3 properly identified the appellant to a* ***particep criminis*** *to the murder of the deceased while the circumstance obtaining at the scene of crime are such that the possibility of impeded observation was not removed given the areas they went to hide and observe the commission of the offence (farmland) coupled with the sketch map of the scene of crime.*

4. *That, amended charge sheet was not read to the appellant and his plea taken.*

5. *That, it was not resolved by the trial court, the issue of the names of PW2 and PW3 as can be revealed in the*

list of intended witnesses whose substances of their evidence was read at the committal proceedings, the list of intended witnesses at the time the preliminary hearing was conducted and the names of PW2 & PW3 when they testified in court.

When the appeal was placed before us for hearing on 29th May, 2023, the appellant had the legal services of Mr. Method Kabuguzi, learned advocate, whereas, Ms. Amina Xavery Mawoko, learned State Attorney, appeared for the respondent Republic.

At the very outset, Mr. Kabuguzi informed the Court that he had consulted his client and agreed with him to abandon the 2nd and 3rd grounds of appeal which he did. On the remaining 1st, 3rd and 5th grounds of appeal, Mr. Kabuguzi conveniently combined them into one ground of appeal that:

"The High Court erred in law and fact to convict the appellant while the evidence was not sufficient to warrant the conviction of the appellant on the offence of murder and the sentence of capital punishment."

Elaborating on the combined grounds of appeal, Mr. Kabuguzi submitted that the conviction of the appellant was based on the evidence of PW2 and PW3 which was found to have been corroborated

by the evidence of PW1, PW4 and PW6. However, he submitted that the evidence of Moses Jonas (PW2) and that of Sakibu Japhet (PW3) was wrongly received because the prosecution did not fully comply with the provisions of sections 246 (2) and 289 (1) of the CPA. Mr. Kabuguzi contended that Moses Jonas and Sakibu Japhet were not among the witnesses whose substance of evidence was read to the appellant in the committal proceeding hence the names of these two witnesses, he said, were not listed during the committal proceedings. He added that since the evidence of PW2 and PW3 was not made known to the appellant during the committal proceedings, the prosecution ought to have issued to the appellant or his advocate a written notice to parade them as additional witnesses but did not do so. In that regard, Mr. Kabuguzi urged the Court to disregard the evidence of PW2 and PW3. At the end, he impressed upon us to find that the appeal has merit and be pleased to release the appellant from prison custody unless he is held for any other lawful reason.

On her part, Ms. Mawoko supported the appeal by joining hands with the submission made by her learned friend, Mr. Kabuguzi. She added that even the substance of the evidence of PW5 was not read over to the appellant during the committal proceedings. She therefore

conceded to the prayer that the evidence of PW2, PW3 and PW5 be expunged from the record of appeal. She further contended that after expunging the evidence of PW2, PW3 and PW5 the remaining evidence was insufficient to sustain the conviction and sentence. She thus urged the Court to allow the appeal.

To the learned State Attorney's submission, Mr. Kabuguzi did not have any rejoinder.

We gather from the submissions of both counsel for the parties that the issue for our determination is whether the reception of the evidence of PW2, PW3 and PW5 was in compliance with the section 246 (2) and 289 (1) of the CPA.

We shall start with section 246 (2) of the CPA which stipulates that:

> *"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 agalnst 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."***
> *"[Emphasis added]*

The above provision of the law prescribes in mandatory terms that after an accused person has appeared before the committal court, the subordinate court is required to read and explain to such accused person the information, the statements or documents containing the substance of evidence of witnesses whom the prosecution intends to call during the trial of the accused's case.

If it happens that the statement or substance of the evidence of the witness was not read at the committal proceedings, the prosecution is barred to call such witness unless it complies with the provision of section 289 (1) of the CPA which provides:

> *"289 (1) No witness whose statement or substance of the 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."*

It follows then that a witness whose statement or the substance of his evidence was not read to the accused person and not listed in the committal proceedings, such witness is not competent to adduce both oral and documentary evidence at the trial court unless the prosecution has given a prior notice within a reasonable time to accused person or

his advocate that it intends to rely on the additional evidence of such witness.

In the case of **Hamisi Meure v. The Republic** [1993] T.L.R. 213, the Court was faced with akin situation. In that appeal, the evidence of PW2 was received while the statement of PW2 was not read during the committal proceedings nor reasonable notice was given to the appellant or his advocate before he was allowed to give evidence. The Court said:

> *"It having been accepted by the prosecution and the Judge himself that PW2 did not feature in the record of committal proceedings, he should have not been allowed to give evidence in contravention of the provisions of section 289 which are mandatory."*

Further, in the case of **Jumanne Mohamed & 2 Others v. The Republic**, Criminal Appeal No. 534 of 2015 (unreported), the Court held that such evidence ought to be expunged. It said:

> *"We are satisfied that PW9 was not among the prosecution witnesses whose statements were read to the appellants during committal proceedings. Neither could we find a notice in writing by the prosecution to have him called as an additional witness. His evidence was thus*

taken in contravention of section 289 (1) (2) and (3) of the Act ...In case where evidence of such person is taken as is the case herein; such evidence is liable to be expunged ...We accordingly expunge the evidence of PW9 including exhibits P6 and P7 from the record."

See also: the decision of the Court in the cases of **Samwel Henry Juma v. The Republic**, Criminal Appeal No. 211 of 2011[2016] TZCA 813 (5 May, 2016; TANZLII), **Mawazo Mohamed Nyoni @ Pengo & 2 Others v. The Republic**, Criminal Appeal No. 184 of 2018 [2021] TZCA 483 (16 September, 2021; TANZLII) and **Shilanga Bunzali v. The Republic**, Criminal Appeal No. 600 of 2020 [2022] TZCA 750 (1 December, 2022; TANZLII).

In the present appeal, as rightly submitted by the learned counsel for appellant and conceded by the learned State Attorney, the record of appeal at pages 27-28 indicates the names of the intended prosecution witnesses whose statements or substance of their evidence was made known to the appellant during the committal of the appellant. Part of the extract of the committal proceedings on that date is as follows:

*"**PP:** Your honour, the matter comes for mention. Today we have been served with*

information. I pray now for committal proceedings.

Court: *Prosecution prayer is allowed. Information and statements of witnesses intended to be called at the trial and substance of documents (if any) be read over.*

Court: *Information and statements of the following witnesses have been read over:*

1. *Moses Bazilikula*
2. *Zakibu Abbas*
3. *Doctor Nebo Mwamakamba*
4. *E.7905 Detective Corporal Malaki*
5. *975 Detective Corporal Emmanuel*
6. *Fadhili Fanuel*

Sgd; I. D. Batenzi, RM

18/05/2021."

From the above, it is obvious that the names of Moses Jonas, Sakibu Japhet and G. 5951 PC Godlove who testified as prosecution witnesses' number two, three and five respectively were not among the witnesses whose statements or the substance of their evidence was read over to the appellant at the committal stage. We understand that the second assessor who sat with the learned trial judge doubted the name

of PW2. Nonetheless, he did not go far to question if PW2 and PW3 were the ones listed in the committal proceedings. We strongly believe that if the issue of names listed at the committal proceedings had been addressed before the learned trial Judge he would have reached to a different conclusion. We say so because we gathered from the record of appeal particularly at page 48 that when PW2 was cross-examined on the name of "Bazilikula", he replied that he does not know such name of "Bazillikula". In that respect, we are satisfied that the statements or the substance of evidence of PW2, PW3 and PW5 was not read to the appellant at his committal. This is in contravention of the provisions of section 246 (2) of the CPA.

Further, in the entire record of appeal, we failed to find any notice issued by the prosecution to the appellant or his advocate of its intention to call Moses Jonas, Sakibu Japhet and G5951 PC Godlove as additional witnesses for the prosecution. In that respect, parading PW2, PW3 and PW5 to adduce evidence at the trial was against the mandatory dictates of the provisions of section 289 of the CPA. Since the evidence of PW2, PW3 and PW5 was taken contrary to the law, we expunge it from the record.

After we have expunged the evidence of PW2 and PW3 which the prosecution relied upon so much and the learned trial judge found conviction upon it, the question now is whether the remaining evidence supports the charge of murder. Beginning with the evidence of PW1, his evidence is pure hearsay. The same goes to the evidence of PW6 that it is hearsay. It is trite law that the court cannot rely on hearsay evidence to found a conviction because it has no evidential value-see: **Vumi Liapenda Mushi v. The Republic,** Criminal Appeal No. 327 of 2016 [2018] TZCA 197 (12 October, 2018; TANZLII). The other evidence is that of the medical doctor, one Nebo Edson Mwamakamda (PW4) that established the deceased's death was due to unnatural cause but it does not connect the appellant with the charged offence of murder. Therefore, we are in agreement with the learned counsel for both parties that the remaining evidence of PW1, PW4 and PW6 is insufficient to sustain the conviction for the offence of murder and the death sentence meted out to the appellant. We therefore find merit on this aspect of the ground of appeal and since it suffices to dispose the appeal, we shall not determine the remaining aspects of the ground of appeal.

At the end, we find that the appeal has merit. We therefore allow it and proceed to quash the conviction and set aside the death sentence imposed on the appellant. Accordingly, we order that the appellant, **Ndaisenga s/o Vicent** be released forthwith from prison, unless he is otherwise lawfully held.

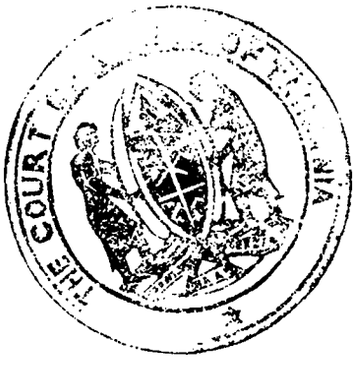
DATED at **KIGOMA** this 1st day of June, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The judgment delivered this 2nd day of June, 2023 in the presence of the appellant in person and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Edina Makala, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL