IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J.A., MASHAKA, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 313 OF 2022

LEONARD BUNDALA MALULANYA @ RENA NGASA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Ngwembe, J.)

dated the 18th day of March, 2022

in

Criminal Sessions Case No. 5 of 2021

JUDGMENT OF THE COURT

3rd May, & 19th June, 2023

MASHAKA, J.A.:

The High Court of Tanzania (Ngwembe, J.) sitting at Morogoro, tried and convicted Leonard Bundala Malulanya @ Rena Ngasa, the appellant on the charge of murder contrary to sections 196 and 197 of the Penal Code. Following conviction, the appellant was sentenced to suffer death by hanging.

The particulars of the charge alleged that on unknown dates between 23rd June, 2019 and 6th July, 2019 at Mwanzi area, Lukande Village within the District of Ulanga in the Region of Morogoro, the

appellant murdered one Jeremia Daniel. He pleaded not guilty to the charge culminating in a trial in which the prosecution relied on six (6) witnesses and six exhibits to prove the charge namely; Silveri Kakenyeri (PW1) brother of the deceased, Venance David Mloka (PW 2) medical doctor, Prisca Ngole (PW3) guest house attendant, F.8620 D/CPL Mkama (PW4) and Ezekiel Tuntufya Mwamakusa (PW6) both police officers and Constantine Materine Likeperu (PW5) a villager. The exhibits were post mortem report (exhibit P1), sketch map of crime scene (exhibit P2), A handset with two lines/sim cards (exhibit P3), a phone cover with two sim cards from TIGO and AIRTEL (exhibit P4), cautioned statement of the appellant (exhibit) P5 and additional cautioned statement (exhibit P6). On the other side, the appellant fended for himself distancing himself from the accusation.

The prosecution case to prove the crime unfolded from the evidence of PW1 a resident at Kisesa, in the District of Meatu, Simiyu Region who received information on 28th June, 2019 from Deus Daniel Kakenyeri that his brother Jeremia Daniel was missing. PW1 travelled to Lukande village, Mwaya Ward in Ulanga District, Morogoro Region and upon his arrival went to the deceased's house and could not find him. PW1 reported to the Village Executive Officer (VEO) about his missing

brother and together they went to report the incident at the Mwaya police station.

On 6th July, 2019 PW1 received information from villagers of Lukande village that there was a 'sulphate' bag full of human body parts and went to the scene where the said bag which normally stored fertilizer was found. The police were informed and visited the scene on 7th July, 2019 accompanied with PW2 where the said bag was found. The bag was opened in the presence of PW1 and he identified the body of Jeremia Daniel by his face and clothes. PW2 conducted the autopsy and disclosed that the cause of death was a cut by a sharp instrument in the neck which separated the head and the rest of the body leading to loss of blood in which a post mortem report was admitted in evidence as exhibit P2. After the autopsy, PW1 was permitted to bury his deceased brother.

PW4 visited the crime scene where the body of the deceased was recovered, the grave and the house of the deceased. He recorded the statement of PW3 who testified that the appellant whom she knew by the name of Rena Ngasa had arrived at the guest house on 28th June, 2019 appearing in not a good state and requested her to charge his three mobile phones. In her evidence, PW3 testified that the next day

the appellant took one mobile phone and left two mobile phones which are one small handset make TECNO and a smartphone which he sought her assistance to flash it because he had forgot its patterns. After flashing the smart phone, the appellant came and collected it leaving behind the small handset phone with PW3. The next day, the technician who flashed the smartphone called PW3 informing her that she forgot to collect the cover of the phone and two sim cards from Airtel and TIGO providers and she collected them. It turned out that same evening, PW3 met PW4 informing him about the cover and sim cards which were left by the appellant. PW4 took one of the sim cards and inserted it in his handset, called and told her that it belongs to the deceased. PW3 took the exhibits P3 and P4 to Mwaya police station to a police officer by the name of Kidevu and was directed to report to PW4 at Mahenge police station.

PW3 gave PW4 the phone number 0789533285 alleged to have been the appellant's and PW4 used it to trace the appellant who was found in Shinyanga. Consequently, the appellant was arrested at Shinyanga and brought back to Morogoro where he was interrogated by PW4 on 6th January, 2020 and recorded exhibit P5. On 30th June, 2020, he recorded exhibit P6.

PW5, a villager at Lukande village testified that he knew the appellant as Rena Ngasa who lived at the same village. As he was engaged in courier services in carrying bags of crops, he was assigned a task by Mr. Laiton his boss to take his tractor and met the appellant at Mwaya village to transport sesame. PW5 met the appellant on 27/06/2019 and they transported 31 bags of sesame by his tractor from a certain house which he did not know the owner to Mr. Laiton's house. After two days he was called to Mwaya police post, regarding the task he had accepted to do for the appellant.

The last prosecution witness was a retired police officer (PW6) who was stationed at Mwaya police post. On 10/07/2019 he was informed of the murder incidence at Lukande village and that the appellant had slept in one of the guest houses at Mwaya. He met PW3 who informed him that the appellant slept at her guest house but left the next day leaving behind a small handset with two lines/sim cards and other two lines/sim cards with one phone cover. He stated that the lines/sim cards were three (3) from Airtel and one (1) from TIGO which were brought to the police by PW3. PW6 asserted that he took one of the sim cards, placed it in his handset and immediately a call came through from an unidentified person that the line belongs to the

deceased, thus it was taken as proof that the sim cards and handset were the properties of the deceased.

In his defence, the appellant testified that he was involved in the business of buying and selling sesame. Before travelling to Dar es Salaam on 27th July, 2019, he had bought several bags from different farmers and sold them in Dar. He later travelled to Shinyanga on 29th July, 2019 where he continued with another business of selling cows. He was arrested on 7th October, 2019. He denied to have slept at PW3's guest house and the accusation that he was not involved in the murder offence. Also, he claimed that due to the torture from the police officers at the police stations where he was kept under custody in Shinyanga and Mahenge from his arrest to 06th January, 2020 when his alleged confession (exhibit P5) was recorded and the additional cautioned statement (exhibit P6) recorded on 30/06/2020 and that he did not voluntarily confess to the offence.

After hearing both sides, the trial court found the prosecution evidence to have proved the charge against the appellant beyond reasonable doubt. It rejected the appellant's defence for being inconsistent with exhibits P5 and P6 which he had recorded voluntarily at the Mahenge police station. As alluded to earlier, the trial court

entered a finding of guilt followed by a conviction and sentenced him to death by hanging, which the appellant is challenging in this appeal.

The memorandum of appeal contains six (6) grounds of appeal which, can be condensed into two grounds as follows; **one**, that the conviction was wrongly arrived at as it was based on retracted cautioned statements (exhibits P5 and P6); and **two**, the prosecution failed to prove the charge beyond reasonable doubt.

At the hearing of the appeal, the appellant was present and represented by Mr. Ignas Sett Punge, learned counsel, while the respondent Republic was represented by Ms. Chivanenda Luwongo, learned Senior State Attorney assisted by Ms. Aveline Ombock, learned State Attorney.

In support of the appeal, Mr. Punge submitted in ground one that exhibits P5 and P6 were not voluntarily made by the appellant as the circumstances which led to its recording ruled out any possibility of having been made voluntarily. He argued that exhibit P5 was recorded on 6th January, 2020 at Mahenge police station by PW4 while the appellant had been under police custody since 7th October, 2019 when he was arrested in Shinyanga. He supported his arguments with the case of **Janta Joseph Komba and Three Others v. Republic**,

Criminal Appeal No. 95 of 2006 (unreported) where the Court observed that being in police custody for a period beyond the prescribed period of time results in torture, either mental or otherwise. Regarding the recording of exhibit P5 by PW4 being conducted in a room with five other police officers, Mr. Punge submitted that it was against the law. To strengthen his arguments, he relied on the decision of the Court in **Friday Mbwiga @ Kameta v. Republic**, Criminal Appeal No. 514 of 2017 (unreported) that a police officer recording a cautioned statement of an appellant in the presence of another police officer, such a statement was inadmissible, wrongly admitted in evidence and liable to be expunged from the record. He implored the Court to discount the evidence and exhibits P5 and P6 which were involuntarily recorded and be expunged from the record.

Moving to the second ground of appeal that the prosecution failed to prove the offence beyond reasonable doubt, Mr. Punge faulted the trial court to have relied on exhibits P3 and P4 in the absence of cogent evidence to prove that they belonged to the deceased. Also, he contended that the prosecution failed to prove that phone number 0789 533 285 belonged to the appellant. He argued that the admission in evidence of exhibits P3 and P4 was without proof from the AIRTEL and

TIGO service providers in which it was the duty of the prosecution to prove beyond reasonable doubt that the sim cards were registered in the names of the appellant and the deceased. He submitted that the said exhibits were inadmissible and wrongly admitted in evidence.

He further argued that there was non-compliance with section 38 (3) of the Criminal Procedure Act (the CPA) as the procedure in seizing exhibits P3 and P4 was not followed. He submitted that section 38 (3) of the CPA requires a receipt to have been issued to PW3 after the seizure of the said exhibits. Even the trial court had failed to satisfy itself on whether the procedure was followed, he argued. It was his contention that due to that failure; it was improper for the trial court to consider the exhibits.

He concluded that the prosecution failed to prove the charge beyond reasonable doubt and the appellant was wrongly found guilty, convicted and sentenced. He beseeched the Court to allow the appeal and the appellant be set free.

In reply, supporting the appeal, Ms. Ombock readily conceded to the inconsistencies and contravention of the law relating to exhibits P5 and P6 that they were recorded out of the prescribed time, that is within four hours upon the arrest of the appellant. According to the evidence

of PW1 that the appellant was arrested on 7th October, 2019 in Shinyanga, while PW4 recorded exhibit P5 on 06th January, 2020, she made it clear that there were no reasons advanced by the prosecution why it took three months to record exhibits P5 and P6. Further she argued that PW4 had testified that during interrogation and recording of exhibit P5, it was conducted in the presence of five police officers in which the appellant was not a free agent and it amounted to torture, which could have been mental or otherwise. She bolstered her arguments by citing the case of **Friday Mbwiga @ Kameta v. Republic** (supra) where the Court held that such recording of a cautioned statement in the presence of other police officers was not made voluntarily hence inadmissible. Regarding exhibit P6 which was recorded on 30th June, 2020, she argued further that it was recorded without providing a mandatory caution to the appellant as required under section 57 of the CPA. She concluded that exhibits P5 and P6 had no evidential value to have been considered to prove the charge.

Ms. Ombock further conceded to ground two of appeal that the prosecution failed to prove the charge beyond reasonable doubt because it was grounded on weak circumstantial evidence which was the basis of the appellant's conviction and sentence. Also, to grounds four and six of

appeal, she agreed that exhibits P3 and P4 were wrongly admitted in evidence by the trial court which formed the basis of conviction. Additionally, she submitted that during the committal proceedings in compliance with section 246 (2) of the CPA, the exhibits to be relied upon by the prosecution were listed. Nonetheless, she argued that during trial PW3 tendered two handsets with a cover and two sim cards from TIGO and AIRTEL which were admitted in evidence as exhibits P3 and P4, while the cover of a handset was not listed during the committal proceedings. Arguing further she submitted that there was no description of the handsets by PW3 and no proof adduced that they were the properties of the appellant and the deceased. In support of her arguments, she referred us to the case of **Musa Ramadhani Magae v. Republic**, Criminal Appeal No. 545 of 2021 (unreported). She urged us to expunge the exhibit which was not listed in compliance to section 246 (2) of the CPA and find that exhibits P3 and P4 lacked evidential value as it was not proved that they were the properties of the appellant and the deceased.

It was her contention that PW6 failed to provide any proof that one of the handsets was the property of the deceased though he had claimed so in his evidence. In a nutshell, Ms. Ombock admitted that the

circumstantial evidence relied upon by the prosecution was weak and failed to prove beyond reasonable doubt that the appellant committed the murder of Jeremia Daniel. She implored the Court to allow the appeal and set free the appellant. Mr. Punge had no rejoinder to the submission in reply.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and scrutinized the record before us, the contentious issue for our consideration and determination is whether the prosecution proved its case beyond reasonable doubt. At the outset, we wish to start by stating that, this being a first appeal it is in the form of a re-hearing, therefore the Court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and, if warranted, to arrive at its own conclusion of fact. See: **D.R. Pandya v. Republic** [1957] EA 336 and **Reuben Mhangwa and Another v. Republic,** Criminal Appeal No. 99 of 2007 (unreported). There is no doubt that the prosecution case relied heavily on exhibits P5 and P6 and circumstantial evidence as there was no eyewitness who witnessed the appellant committing the offence.

Commencing with ground one, is whether the cautioned statements were recorded within the prescribed time under section 50 (1) of the CPA and voluntarily given.

Section 50 (1) and (2) of the CPA stipulates:

> *"(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is : -*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-*

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;"

According to the evidence in the record of appeal, the appellant was arrested in Shinyanga on 7th October, 2019 and exhibit P5 was recorded on 06th January, 2020 while exhibit P6 was recorded on 30th June, 2020. There was no evidence adduced to this fact and it was in contravention of section 50 of the CPA which explicitly provides for the period allowed to interview the suspect before arraignment. These two exhibits were recorded three months later after the appellant was arrested.

In a number of our decisions, we have observed and emphasised on adherence to sections 50 and 51 of the CPA which strictly regulate periods for the police to interview a suspect who has been taken under police restraint. The law provides for extension of the time under certain circumstances where custodial investigations could not be completed within four hours under section 51 (1) (a) and (b) of the CPA:

"(1) Where a person is in lawful custody in respect of an offence during the basic period available for interviewing a person, but has not

been charged with the offence, and it appears to the police officer in charge of investigating the offence, for reasonable cause, that it is necessary that the person be further interviewed, he may —

(a) extend the interview for a period not exceeding eight hours and inform the person concerned accordingly; or

(b) either before the expiration of the original period or that of the extended period, make application to a magistrate for a further extension of that period."

It is apparently clear that the appellant was held under investigative custody for a longer time than it is provided for by the law. The appellant was held for three months and no application was made in compliance to section 51 (1) (a) or (b) of the CPA. In **Janta Joseph Komba and Three Others v Republic**, (supra), the Court underscored: -

"In the circumstances, the appellants having been held in police custody for such a long period it is doubtful that the appellants were free agents when they finally made their statements. The legislature must have had good reason for limiting the time under which a suspect could be held under police custody for investigative

purposes and the police are obliged to abide by the law like everyone else. The obtaining of the statements of the appellants while still under custody outside the time provided under the law for investigative custody, contravened the provisions of the law."

We agree with Mr. Punge and Ms. Ombock that exhibits P5 and P6 were wrongly admitted in evidence because they were obtained without adhering to the procedures laid down under section 51 (1) (a) and (b) of the CPA and ought to be expunged from the record.

As if the foregoing is not enough, exhibits P5 and P6 which were recorded by PW4 and admitted in evidence were retracted by the appellant that they were involuntarily obtained. We noted that when PW4 tendered the statements, the appellant had raised objection, a trial within trial ensued and it was ruled out that the exhibits were voluntarily obtained. It was the evidence of PW4 that when recording exhibit P5 there were other police officers in the interrogating room. It is our settled position that whenever voluntariness of an accused's confession is questionable, be it a cautioned or extra judicial statement, the trial court must conduct an inquiry to determine its voluntariness and it should be conducted before the confession is admitted in evidence which was conducted by the trial court. PW4 had admitted during cross

examination that he recorded the cautioned statement in the presence of other police officers namely; F. 8943 DC Geofrey, DC Arawu, DC Alinani, DC Kenneth and WP Gema without clearing the room first before he commenced the recording.

It is settled that, if a statement of an accused person is recorded in the presence of another police officer or officers, that statement is inadmissible in evidence. See: **Friday Mbwiga @ Kameta v. Republic** (supra) and **Charles Issa @ Chile v. Republic,** Criminal Appeal No. 97 of 2019 (unreported). In **Bakari Ahmed @Nakamo and Another v. Republic**, Criminal Appeal No. 74 of 2019 (unreported), the Court observed and held:

> *"Indeed, PW1 and PW2 who recorded the statements of the 1st and 2nd appellants did so while other police officers were also present in the same room, ... It is our firm conviction that, the action of recording the appellants' statements in the presence of other police officers has prejudiced the appellants in two ways: First; it cannot be ruled out that the appellants were not free agents when recording their statements. Secondly; the appellants' right to privacy was infringed. The effect of both*

shortcomings is to have the respective statement expunged from the record".

Being guided by the stance we took in the above mentioned cases; there is no gainsaying that PW4 recorded exhibit P5 in the presence of five other police officers. We find exhibit P5 was inadmissible, wrongly admitted in evidence and is expunged from the record.

The same applies to exhibit P6, it was an additional statement recorded by PW4 in the presence of many police officers in the room used to interrogate the appellant. The same stance is applied as we had with exhibit P5. We believe that had the High Court considered that the exhibits P5 and P6 were not voluntarily obtained, he would have found the statements were inadmissible. Similarly, exhibit P6 is expunged from the record.

Furthermore, the record of appeal is silent as to when and where exhibits P3 and P4 were left in the care of PW3 by the appellant. According to the appellant's evidence, he did not sleep at the guest house on 28th August, 2019 and never left anything as claimed by PW3. The prosecution failed to tender the guest register in evidence to prove that the appellant had slept at the guest house or a register for recording guest's property to prove that the appellant left the valuable

properties as alleged by PW3. More so, there was no evidence on the movement and exchange of hands of the exhibits from PW3 to PW4 and how they were stored until they were tendered in evidence.

In addition to that, there was no any seizure certificate tendered to prove that a search was conducted and the sim cards were retrieved. It is a requirement under the Police General Orders (the PGO) No. 229 that things connected to an offence its chain of evidence from its discovery and subsequent custody would be reduced to as few persons as possible and the police officer who first obtained possession of the exhibit will produce it in court. This did not happen as both PW4 and PW6 who were investigators and both came into contact of the exhibits and also tried to insert the sim cards in their mobile phones but they did not tender them before the trial court, rather it was PW3. Also, there is nowhere in the record showing that the exhibits were documented or stored by an exhibit keeper.

The connection between exhibits P3 and P4 which is alleged that the appellant is said to have left with PW3 is full of doubts as no evidence was adduced by the prosecution in terms of registration of the sim cards with the AIRTEL and TIGO service providers to prove beyond reasonable doubt that certainly the mobile phone and the sim cards

were owned by the appellant and the deceased. The evidence of the two exhibits was therefore, wrongly acted upon to convict the appellant.

In resolving this appeal, we deem it pertinent to initially restate the basic principles governing reliability of circumstantial evidence as discussed in the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159B of 2017 (unreported), where the Court pronounced: -

> *"In order for the circumstantial evidence to sustain a conviction, it must point irresistibiy to the accused's guilt. (See Simon Musoke v. Republic, [1958] EA 715). Sarkar on Evidence, 15th Ed. 2003 Report Vol. 1 page 63 also emphasized that on cases which rely on circumstantial evidence, such evidence must satisfy the following three tests which are:*
>
> > *1) the circumstances from which an inference of guilty is sought to be drawn, must be cogently and firmly established;*
> >
> > *2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and*
> >
> > *3) the circumstances taken cumulatively, should form a chain so, complete that there is no escape from the conclusion that within all human probability the crime was*

committed by the accused and no one else."

We shall be guided by the said principles to establish whether or not the circumstantial evidence in the appeal at hand irresistibly points to the guilt of the appellant.

It is a trite law that circumstantial evidence must lead to the irresistible conclusion that the appellant is the one who committed the offence. See: **Ally Bakari v. The Republic** (1992) TLR 10; **Hassan Fadhili v. Republic** [1994] TLR 89; **Shabani Mpuzu @ Elisha Mpunzu v. Republic,** Criminal Appeal No. 12 of 2002; and **Mark Kasimiri v. Republic,** Criminal Appeal No. 39 of 2017 (both unreported).

Having expunged exhibits P5 and P6 what remains is the oral evidence of PW1, PW2, PW3, PW4, PW5 and PW6. Among the witnesses, only PW3's evidence could be said to remotely connect the appellant with the commission of the offence with the exhibits P3 and P4 whose evidence has been found to be invalid. Nonetheless, there is no evidence which proves that on the material date the appellant had slept at the guest house and therefore, raising a possibility that he could have left the alleged properties. Further, the prosecution failed to produce

evidence of the register book from the guest house which is used to record each visitor who spends a night to conclusively support the argument that the appellant was at the guest house.

As we have pronounced in a number of our decisions that it is the duty of the prosecution to prove its case beyond reasonable doubt and that duty hardly ever shifts to the accused. See: **George Mwanyingili v. Republic**, Criminal Appeal No. 335 of 2016; and **Nchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 (both unreported). In the appeal, there was no eyewitness to the murder and the trial court relied on the controverted cautioned statements which we have expunged and weak circumstantial evidence to convict the appellant. Due to the weak circumstantial evidence, the prosecution failed to prove the charge beyond reasonable doubt, which should have been held in favour of the appellant as we so do. For the foregoing reasons, we find the trial court wrongly convicted the appellant as the prosecution did not conclusively prove that it is the appellant who murdered the deceased.

In the light of the above considerations, there is merit in this appeal. We thus allow it, quash the conviction and set aside the

sentence of death imposed on the appellant. We order his immediate release from prison unless held there for other lawful cause.

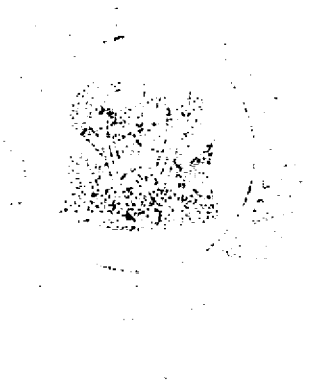
DATED at **MOROGORO** this 16th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

Judgment delivered on this 19th day of June, 2023 through Video conference linked at IJC Morogoro in the presence of Mr. Ignas Punge, Advocate for the Appellant and Mr. Emmanuel Kahigi, State Attorney for the Respondent, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL