**IN THE COURT OF APPEAL OF TANZANIA**
**AT TABORA**

**(CORAM: MKUYE, J.A., LEVIRA, J.A. And MASOUD, J.A.)**

**CRIMINAL APPEAL NO. 357 OF 2021**

**MUHONYIWA MHONYI @ KITUNGURU ..... 1ST APPELLANT**

**JOSEPH RAMADHAN ..... 2ND APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Tabora)**
**(Bahati, J.)**

**Dated the 31st day of May, 2021**
**in**
**Criminal Sessions Case No. 25 of 2018**

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## JUDGMENT OF THE COURT

20th September & 4th October, 2023

**MKUYE, J.A.:**

The appellants, Muhonyiwa Mhonyi @ Kitunguru and Joseph Ramadhan, were charged with murder contrary to section 196 of the Penal Code, Cap. 16 [R.E. 2002 now 2022]. It was alleged that on 25/1/2017 during night hours at Kiza Village within Kaliua District in Tabora Region, did occasion with malice aforethought the death of one, Kashindye d/o Kulwa. Upon the conclusion of the trial, they were both convicted and sentenced to death by hanging.

The brief background of the matter leading to this appeal is as follows:

On the material date, 25/1/2017, Jeremia Nguvumali (PW1) received information via his mobile phone that an old woman had been killed. He immediately headed to the scene. According to him, on arrival, he found the deceased dead while her body is surrounded by a pool of blood. He informed the police who arrived at the scene with a doctor, one William Benedict Kaijage (PW2). PW2 conducted postmortem examination on the body of the deceased whereby it was revealed that her death was due to severe bleeding caused by a sharp object.

Meanwhile, H. 1623 DC Saguda (PW3) received information from an informer that there were certain persons who were involved in murdering the deceased. That tip off led to the arrest of the appellants. Among the witnesses marshalled to testify for the prosecution, Chilemba Chikawe (PW4) testified to have recorded both appellants' extra judicial statements (Exh. P2 collectively) in which they, purportedly confessed to have committed the offence.

In convicting the appellants, the trial court relied on, among others, the extra judicial statements of both appellants (Exh. P2 collectively) and were sentenced to death by hanging as hinted earlier on.

Aggrieved, the appellants have each lodged separate memoranda of appeal which, essentially, contain identical grounds of appeal to the effect that: **one**, there was improper summing up to assessors by failure of the trial judge to direct them on the danger of convicting basing on confession without corroboration. **Two**, the case was not proved beyond reasonable doubt. **Three,** PW4 testified on the contents of extra judicial statements (Exh. P2) before the same was cleared for admission. **Four**, the extra judicial statements (Exh. P2) upon which conviction of the appellants was premised were not in respect of the charge preferred against them.

Yet, on 15/9/2023, the counsel for the appellants lodged a joint supplementary memorandum of appeal containing two grounds as follows:

1. *That, the appellants were denied a fair trial as they were convicted before they gave their defence.*

*2. That, there was an improper summing up to assessors for failure by the trial Judge to direct them on the vital point of law.*

When the appeal was called on for hearing, Ms. Stella Thomas Nyaki, learned counsel, appeared representing the appellants, whereas the respondent Republic was represented by Mr. Emmanuel Luvinga, learned Senior State Attorney.

Onset, Ms. Nyaki informed the Court that, although each appellant had lodged a separate memorandum of appeal containing four (4) identical grounds of appeal, she sought to abandon grounds nos. 3 and 4 thereof and remain with grounds nos. 1 and 2 together with the grounds in the joint supplementary memorandum she had lodged on 15/9/2023.

In arguing the appeal, she sought and leave was granted to begin with the grounds in the supplementary memorandum of appeal. In relation to ground no. 1 thereof, the complaint is that the appellants were denied a fair trial since they were convicted before they gave their defence. Ms. Nyaki argued that, in the ruling of case to answer the trial Judge pronounced that she was of a considered opinion that there was evidence that the accused persons (appellants) committed the offence. In her view, this was tantamount to convicting them before giving their

defence. To bolster her argument, she cited to us the case of **Kabula Luhende v. Republic**, Criminal Appeal No. 281 of 2014 (unreported) where the Court, upon been faced with a similar scenario, ruled out that the learned trial Judge openly exhibited bias against the appellant when he unequivocally ruled, at the stage of determining whether or not the appellant had a case to answer, that he considered that the appellant had murdered the deceased adding that the trial Judge could not approach the defence case with an open mind.

On the other hand, Mr. Luvinga did not agree that the appellants were denied a fair trial in the ruling of a case to answer. He pointed out that, what the trial Judge did was in compliance with section 293 (2) of the Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA) in which case the trial Judge did not convict them as argued by the learned advocate for the appellant. He added that, this is why the appellants were called upon to defend themselves. In the end, he invited the Court to find out that this ground is not merited and dismiss it.

Our perusal of the record of appeal, particularly, at page 47 has revealed that the trial Judge made her ruling on a case to answer. A portion of the said ruling reads as follows:

*"I have carefully considered the evidence which ... and* ***I am of the considered opinion that there is evidence that the accused persons committed the offence.****" [Emphasis added]*

As it is, in the finding that the appellants had a case to answer, that the trial Judge used among other words "*there is evidence that the accused persons committed the offence*". However, the wording of section 293 (2) of the CPA is not far from what is in the ruling. It is clear that, the provisions of section 293 (2) of the CPA are couched in the similar wording as used by the trial Judge. For ease of reference, we reproduce the said section as hereunder:

*"293 (2) Where the evidence of the witnesses for the prosecution has been concluded and the statement, if any, of the accused person before the committing court has been given in evidence, the court, if* ***it considers that there is evidence that the accused person committed the offence or any other offence of which****, under the provisions of section 300 to 309 he is liable to be convicted, shall inform the accused of his right-*

*(a) to give evidence on his own behalf; and*

*(b) to call witnesses in his defence,*

*and shall then ask the accused person or his advocate if it is intended to exercise any of those rights and record the answer; and thereafter the court shall call on the accused person to enter his defence save where he does not wish to exercise of those rights."* [Emphasis added]

This is not the first time for the Court to be confronted with akin scenario. In the case of **Sano Sadiki and Another v. Republic**, Criminal Appeal No. 623 of 2021 (unreported), a similar complaint was raised. However, we held that the trial Judge did not make a predetermined conviction because the language used by the trial Judge in the ruling was the same as the wording used in section 293 (2) of the CPA – See also **Mohamed Ally @ Sudi v. Republic**, Criminal Appeal No. 274 of 2017 (unreported).

Apart from that, we have noted that the appellants were given an opportunity to defend themselves which is an assurance that they were not convicted unheard or rather there was unfair trial against them. Moreover, there is no complaint that there was miscarriage of justice

occasioned by unfair trial as complained. Of course, we are aware of the decision in **Kabula Luhende's** case (supra), that was cited by Ms. Nyaki. However, having gone through the said case, we find that it is distinguishable from the instant case since in that case the Court was not appraised on the wording of section 293 (2) of the CPA. We are of the view that, had the Court been availed with such information it could have decided otherwise. In this regard, we find this ground unmerited and we dismiss it.

Next is ground no. 2 of the supplementary memorandum of appeal and ground no. 1 of the substantive memorandum of appeal in which the appellants' complaint is that there was improper summing up to assessors since the trial Judge did not direct them on vital points of law, particularly, on reliance of confession without corroboration. Ms. Nyaki, submitted that, despite the fact that the learned trial judge talked about retracted or repudiated confession, she did not explain to the assessors that, it required corroboration in order to mount a conviction. The learned counsel was of the view that, had the trial Judge done so, perhaps the assessors would have understood the matter and opined otherwise. While referring to the case of **Mwadu Abedi v. Republic**, Criminal Appeal No. 448 of 2018 (unreported), she maintained that this

was an irregularity leading the trial to have been conducted without assessors. The remedy for such a situation, she said, would have been to nullify the proceedings and the judgment thereof, quash the conviction and set aside the sentence with an order for retrial from the summing up stage. However, due to insufficient evidence, she was of a different opinion on the way forward.

On his part, Mr. Luvinga conceded to this ground contending that the assessors where not addressed by the trial Judge on the issue of retracted and repudiated confessions. He was also in agreement with his counterpart that the remedy for this anomaly would have been to nullify the summing up and the judgment thereof and to order for a retrial from that stage. However, he was hesitant to take that route due to other anomalies exhibited in the proceedings as would be elaborated in the due course.

Regarding the complaint on the summing up to assessors, we wish to begin by revisiting section 265 of the CPA before its amendment vide Written Laws (Miscellaneous Amendments) Act, (Act No. 1 of 2022), which set out the requirement to the High Court to sit with assessors when conducting trials. It provides:

*"All trials before the High Court shall be with the aid of assessors, the number of whom shall be three."*

Apart from that, section 298 (1) of the CPA requires the trial judge upon the closure of the case on both sides, to sum up the evidence for the prosecution and the defence and require each of the assessors to state his/her opinion orally, which opinion shall be recorded. This is important so as to enable the assessors to give an informed opinion which would only be of great assistance to the trial Judge if they understand the facts of the case in relation to the relevant law. This position was emphasized in numerous cases such as **Washington Odindo v. Republic**, (1954) 21 EACA 392 and **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 (unreported). It implies that, if the assessors are to give a correct opinion, the trial Judge in summing up must explain the applicable law in relation to the facts and the vital points of the law involved.

In this case, as was submitted by both counsel, it is crystal clear that in convicting the appellants, the trial judge solely relied on the repudiated and retracted extra judicial statements (Exh. P2 collectively) as shown from pages 100 to 105 of the record of appeal. In summing

up, however, the trial Judge just mentioned in passing without directing the assessors on how such confessions could be relied upon to mount a conviction. The consequences of failure to direct the assessors on vital points of law is to reduce the value of the assessor's opinion as was stated in **Washington Odindo's** case (supra). The effect of failure to explain the vital points of law to the assessors, is that it is a fatal irregularity with the effect of vitiating the proceedings. In consequence, the trial proceedings are to be nullified. See **Mandu Abedi** (supra) and **Charles Lyatii @ Sadala** (supra).

Picking from the above proposition, if the assessors are not addressed on vital points of law, it cannot be said that the trial was with the aid of the assessors. This position was taken in the case of **Rashid Othman Ramadhan and 3 Others v. Republic**, Criminal Appeal No. 305 of 2017 (unreported) while citing the case of **Mara Mafuge and 6 Others v. Republic**, Criminal Appeal No. 29 of 2015 (unreported) where the Court when confronted with akin scenario stated that:

> *"...we are of well-considered view that the summing up to assessors in the present case fell short of the minimum threshold required under the law...*

***Therefore, the proceedings are as good as if the trial was without the aid of assessors."***

[Emphasis added]

In this regard, we agree with both learned counsel that the trial Judge contravened section 298 (1) of the CPA by not addressing the vital points of law to the assessors and, therefore, it connotes that the assessors could not have been in a better position to give an informed opinion to the case. Thus, the trial was vitiated.

Given the outcome to the above issue, we would have nullified the summing up, quashed the conviction and set aside the sentence and ordered for a retrial, however, as was hinted earlier on, both counsel were at one that, that might not be the proper course to take.

Mr. Luvinga went on assailing appellants' confessions on three fronts. **Firstly**, he took us to page 49 of the record of appeal and argued that both the appellants' extra judicial statements were not properly admitted in evidence. He elaborated that, when PW4 was testifying, the learned State Attorney who prosecuted the case, prayed to tender the said statements if the defence counsel had no objection instead of the witness who was testifying. To him, this was not proper

and to fortify his proposition, he referred us to the case of **Athuman Almas Rajabu v. Republic**, Criminal Appeal No. 416 of 2019 (unreported), where the Court held that, it was wrong for the prosecutor to tender an exhibit since he is not a witness sworn to give evidence.

**Secondly**, Mr. Luvinga challenged the confessional statement arguing that, although the defence counsel objected to the said statements to be tendered based on willingness or voluntariness of the same, the trial Judge admitted them without conducting trial within trial to ascertain such complaints. This, he said, was against the well-established principle of law whenever there is such an objection raised.

**Thirdly**, the learned Senior State Attorney argued that the two confessions were tendered simultaneously without showing which one belonged to whom and when they were recorded. This, he said, implied that both confessions were taken while appellants were together which is not allowed by law.

With all these ailments, Mr. Luvinga urged the Court to expunge them from the record but he did not end there. It was his argument that, since this was the only evidence which was mainly relied in convicting the appellants, if the statements are expunged from the

record, there would remain no other evidence to sustain the conviction. He, therefore, implored the Court to allow the appeal, quash the conviction and judgment and set aside the sentence meted out against the appellants.

On her side, while conceding to what was submitted by Mr Luvinga, the learned counsel for the appellants had nothing to add.

Our perusal of the court record has shown that, Chilemba Chikawe (PW4) was a witness who testified in relation to extra judicial statements of both appellants because he recorded them. At page 49 of the record of appeal, PW4 explained on how he recorded the statement of each appellant and identified the documents in view of tendering them in court. However, upon their being identified, it was the State Attorney who prayed to tender them in the court as exhibits if the defence counsel did not object. The trial court admitted them outrightly notwithstanding that the same were tendered by the State Attorney. We, think, this was not proper.

This is not the first time for the Court to be confronted with a situation where the prosecutor tendered an exhibit in court. The Court dealt with such issue in the case of **Athuman Almas Rajabu** (supra),

where it cited the case of **Thomas Ernest Msungu @ Nyoka Mkenya v. Republic**, Criminal Appeal No. 78 of 2012 (unreported) in which the public prosecutor tendered the ballistic expert's report. In condemning such practice, the Court stated that:

> *"Under the general scheme of the Criminal Procedure Act ... particularly sections 95, 96, 97, 98 and 99 thereof, it is evident that the key duty of a prosecutor is to prosecute. A prosecutor cannot assume the role of a prosecutor and witness at the same time. In tendering the report, the prosecutor was actually assuming the role of a witness. With respect, that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined on the report."*

Even in the matter at hand, we need to emphasize that it was wrong for the learned State Attorney to tender the appellant's extra judicial statements in evidence instead of PW4 who was testifying on them. As was stated in **Athuman Almas Rajabu** (supra), the

prosecutor could not assume the role of a witness as he could not be capable of being examined or cross examined upon oath or affirmation. Under the law, the roles of a prosecutor and a witness are quite distinct. In this regard, we agree with the learned State Attorney that Exh. P2 collectively were improperly admitted and are liable for expungement.

In relation to the issue that the trial Judge admitted the extra judicial statements without conducting a trial within trial although the defence side had raised an objection for their being tendered, we wish to begin our discussion by revisiting the conditions for conducting trial within trial. In the case of **Stephen Johas and Another v. Republic**, Criminal Appeal No. 337 of 2018 (unreported), where the appellant had objected to the statement that he did not write it, but the trial Judge did nothing, the Court observed that:

> *"After the appellant had raised objection, the trial court ought to have stopped everything and conducted an inquiry to determine the voluntaries of the cautioned statements."*

See also **Twaha Ali and 5 Others v. Republic**, Criminal Appeal No. 78 of 2004 (unreported).

According to the record of appeal, particularly at page 49, it is crystal clear that, the learned State Attorney prayed to tender both appellants' extra judicial statements as exhibits after PW4 had testified on how he recorded them. Then, the defence counsel objected to their admission questioning their voluntariness. What the trial judge did was to rule out that they met the Chief Justice's Guidelines and admitted them. The learned trial Judge did not conduct a trial within trial in order to ascertain their voluntariness. Failure by the trial Judge to conduct a trial within trial after the defence side had objected was a fatal irregularity as their voluntariness remained unresolved.

In this regard, we agree with Mr. Luvinga that they were illegally admitted in evidence.

Regarding the issue that both extrajudicial statements were tendered together, we think, it should not detain us much. It is vivid as shown at page 53 of the record of appeal that the statements were admitted as Exhibit P2 collectively. However, our perusal of the record has revealed that, PW4 explained on how he recorded each appellant's statement. The reason for testifying on both statements could have been because he was the one who recorded them.

Be it as it may, tendering of more than one exhibit collectively, may not be such a fatal irregularity culminating into vitiating the proceedings. This position was taken by this Court in the case of **Hamis Said Adam v. Republic,** Criminal Appeal No 529 of 2016 (unreported). In that case, a number of items including a fire arm, five rounds of ammunition, a wallet, a voter's card, a techno phone were admitted collectively as Exh PE1 but the Court took a stance that the irregularity in admitting exhibits collectively, did not occasion any miscarriage of justice on the appellant.

In the circumstances, we would agree with the learned Senior State Attorney that tendering and admitting the statements collectively, might have been irregular when considering that each statement ought to have been tested separately on its admissibility or otherwise. Nevertheless, we think that despite the fact that the said statements were collectively admitted, it did not occasion any miscarriage of justice on the appellant.

Nevertheless, in view of our findings on the other limbs of complaint on the extra judicial statements, we expunge both statements from the record.

The last complaint from the substantive memorandum of appeal is that the offence against the appellants was not proved beyond reasonable doubt. If we may add, we ask ourselves if upon expungement of exhibit P2 collectively, an order for a retrial would stand. This is so because the appellants conviction based solely on confessions (Exh. P2 collectively) taken by the justice of peace.

As already alluded to earlier on, the appellants' conviction based solely on evidence of their confessions. However, in view of their expungement due to several anomalies, we do not see how the remaining evidence can sustain the conviction. In the case of **Fatehali Manji v. Republic**, [1966] EA 343, the defunct East African Court of Appeal held that a retrial will only be ordered where the original trial was illegal or defective and there is sufficient evidence and not where the conviction is set aside for insufficient evidence. This is important to avoid the prosecution to fill gaps in its evidence at the first trial. In this regard, we are in agreement with both learned counsel that even if the proceedings and judgment of the trial court are nullified, the appellants' conviction may not stand due to inadequate evidence which the prosecution may rely upon should a retrial be ordered. At most, if we order a retrial, the prosecution will strive to fill gaps in the evidence

which is insufficient. That is to say, having expunged the confessional statements, there remains no other evidence to prove the case beyond reasonable doubt as required by law.

Consequently, we refrain from ordering a retrial and order that the appellants be released from custody unless they are held for other lawful reasons.

It is so ordered.

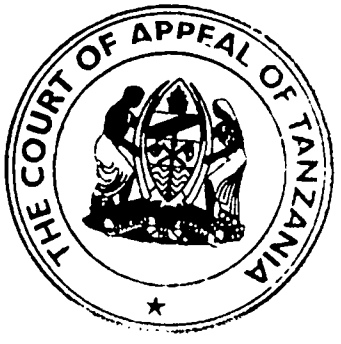
**DATED** at **TABORA** this 4th day of October, 2023.

R. K. MKUYE
**JUSTICE OF APPEAL**

M. C. LEVIRA
**JUSTICE OF APPEAL**

B. S. MASOUD
**JUSTICE OF APPEAL**

The Judgment delivered this 4th day of October, 2023 in the presence of Ms. Stella Thomas Nyaki, learned counsel for the appellants and Mr. Dickson Swai, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.




S. P. MWAISEJE
**DEPUTY REGISTRAR**
**COURT OF APPEAL**