IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 540 OF 2019

FABIAN EDMUND .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mwanza)
(Rumanyika, J.)

dated the 18th day of September, 2019
in
Criminal Session No. 55 of 2015

JUDGMENT OF THE COURT

16th August & 23rd October, 2023

MKUYE, J.A.:

The appellant, Fabian Edmund, alongside three others were charged with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap. 16 R.E. 2019. The trial abated in respect of two accused persons upon being reported to have passed away. The remaining two proceeded with trial and upon its conclusion, the appellant was convicted while the other was acquitted for lack of sufficient evidence. The appellant was sentenced to death by hanging. Aggrieved he has preferred the present appeal to challenge both the conviction and sentence.

The brief facts leading to this appeal are as follows:

On 18/8/2013 evening, the deceased, Mariam Sahani, went to sell vegetables at Nyawilimilwa centre. Before going home, she visited Pendo Emmanuel's maternal aunt where she met Severia Thomas (the second accused) and then went home. On 19/8/2013 morning, Severia Thomas visited the deceased and they took breakfast together. Later, Fabian Edmund (the appellant) visited that place and left. At about noon, the appellant came back and took the deceased to the forest known as Kamulale on the pretext that they were going to look for local medicines in the forest where incidentally, the 2nd accused (Severia Thomas) was waiting. However, no sooner had they started plucking the herbs, two persons emerged and pounced on the deceased hitting her with a stone on the head, an attack that was joined by the other accused persons. They beat the deceased to death. The culprits then parted ways and left the scene.

Later on, it transpired that the deceased was not traceable at her home and upon inquiry by family members as to her whereabouts, it was revealed by one Pendo Emmanuel, her granddaughter, that she had last left with the appellant herein. Then, the appellant was located, restrained and handed over to the police.

During the trial, the prosecution marshalled three witnesses who were No. F. 1093 D/SGT Elia (PW1), No. E. 1754 D/Cpl Nuru (PW2) and No. WP 7277 Elizabeth (PW3) and produced five exhibits which are a sketch map (Exh P1), the 1st accused cautioned statement (Exh. P2), the 4th accused cautioned statement (Exh. P3), the copy of statement of Pendo Emmanuel (Exh. P4) and the Postmortem Report (Exh. P5).

On the defence side, two witnesses, that is, Fabian Edmund (DW1) and Mathias Lubinza (DW2) testified.

PW1 testimony was to the effect that he recorded the cautioned statement of 1st accused (Exh. P2) and drew the sketch map (Exh. P1).

PW2 testified to have recorded the cautioned statement of 2nd accused whereas PW3 who recorded the statement of Pendo Emmanuel was called as an additional witness under section 289 (1) to tender the statement of Pendo Emmanuel who could not be found under section 34 B (2) of the Evidence Act. The said statement was admitted as Exhibit P4 in which the said Pendo Emmanuel stated that the appellant was the person who had left with the deceased but did not come back until her dead body was discovered abandoned away in the bush.

In defence, the appellant denied involvement in the commission of the offence. He admitted to have been hired by the deceased and Severia to take them to Kamulale plots of paddy and maize where he left them only to be told in the evening of that day, that the deceased was killed in the very shamba. He testified further that he was then arrested on the same day and upon interrogation he denied involvement. He further testified that later, he was taken to the justice of peace but he denied the charges despite being given food to eat. Later, the police officers took him to a place where the deceased's body had been abandoned.

DW2 also denied the charges stating that he was arrested and charged as a Burundian for illegal immigrant which he denied but later the charge was changed to murder. That, he was forced to sign a certain document and that even when he was taken to the Ward Executive Officer (justice of peace) for taking statement he denied.

In convicting the appellant, the trial court was satisfied that there was sufficient circumstantial evidence derived from the appellant being the last person to have been seen with the deceased. Also, the trial court relied on the appellant's cautioned statement (Exh P2) and Pendo Emmanuel's Statement (Exh. P4).

The appellant, being aggrieved by the decision of the trial court lodged a substantive memorandum of appeal on 10/1/2020 comprising of eight grounds of appeal. On 3/11/2022, the appellant lodged a first supplementary memorandum of appeal consisting 3 grounds of appeal which was followed by a written statement of arguments filed on 11/7/2023. Yet, on 14/8/2023, the appellant's advocate lodged a second supplementary memorandum of appeal with five grounds. On the hearing date, the learned counsel sought leave to abandon the substantive memorandum of appeal and all grounds in the 2nd supplementary memorandum of appeal except ground no. 3 which, he sought to argue in which case the remaining grounds of appeal were as follows:

1. *The judgment of the trial court is a nullity, since it did not, conform to the requirement of the law as provided for under the provisions of sections 312 (2) and 322 of the Criminal Procedure Act [Cap. 20 R.E. 2022] and section 26 (1) of the Penal Code [Cap 16 R.E. 2022].*
2. *That the trial court erred in law to place reliance on invalid documentary Exhibits P1, P2, P3 and P5 which were not read over and explained to the appellant during the committal proceedings as required by law.*
3. *That, the trial court erred in law for not informing the assessors of their role and responsibility before they*

took part in the trial, and during the summing up the vital points of law were not explained to them, and, renders their participation which is a requirement of the law meaningless."

The remaining ground in the second supplementary memorandum of appeal is to the effect that:

"The trial judgment through which the conviction and sentence was founded did not conform to the legal requirements under sections 311,312 and 322 of the CPA and section 26 (1) of the Penal Code, Cap 16 R.E. 2002, hence a nullity."

When the appeal was called on for hearing, Mr. Stephen Kaijage, learned counsel appeared representing the appellant whereas the respondent Republic enjoyed the services of Mr. Robert Magige, learned Senior State Attorney.

Although, Mr. Kaijage took off his submission by seeking to adopt the first supplementary memorandum of appeal and the written arguments filed on 3/11/2022 and ground no.3 of the second supplementary memorandum of appeal filed by himself, on our part, having examined the grounds of appeal, written arguments and oral submission by the learned counsel for both sides, we find that only ground no. 2 of the substantive memorandum of appeal,

challenging the trial Judge's reliance on the evidence of PW1, PW2 and PW3 which was tainted with suspicion on the person who killed the deceased, suffices to dispose of the appeal without necessarily discussing the remaining grounds.

Mr. Kaijage argued that the trial court erred in relying on the appellant's cautioned statement while it was not properly recorded or rather it was taken in contravention of sections 50, 57 and 58 of the CPA. This is so because, he argued, the prosecution evidence does not show when the appellant was arrested. Although it was admitted without objection, it was in the form of a copy without any reason being assigned for tendering a copy. Moreover, the learned counsel assailed the cautioned statement for not being part of the committal proceedings since neither was it listed in the list of exhibits as required by sections 246, 289 (1) and (4) of the CPA nor was it read over during the committal proceedings. He argued that since the appellant's cautioned statement was not listed or read over, its evidence lacked evidential value and it is, therefore, liable for expungement.

Mr. Kaijage went on assailing the evidence of Exh P4 (statement of Pendo Emmanuel) and Exh. P5 (postmortem examination report) which was also relied on convicting the appellant. He contended that although they

were tendered under section 34 B of the Evidence Act, it was not explained why the respective witnesses could not be found to testify in court. He added that, there was no sufficient notice to tender the statement of Pendo Emmanuel and the Postmortem Examination Report in court. This, he said, was prejudicial to the appellant. In this regard, he prayed that Exh P4 and P5 be expunged from the record and that should they be expunged there would remain no evidence to sustain the conviction and sentence. He, thus, prayed for the appeal to be allowed and the appellant be set at liberty.

In response Mr. Magige registered his stance that he supported the appeal since the prosecution failed to prove the case beyond reasonable doubt on three fronts relating to the appellant's cautioned statement and Exh P4.

Firstly, the cautioned statement (Exh P2) that was heavily relied upon by the trial court to mount a conviction against the appellant was neither listed or read over during the committal proceedings as required under section 246 (2) of the Criminal Procedure Act (the CPA) so as to enable the appellant understand its substance. On that basis, Mr. Magige argued that, the prosecution ought to have added such exhibit under section 289 (4) of the CPA which they did not do. He argued that since the same contravened

the provisions of sections 246 (2) and 289 (4) of the CPA, it should be expunged from the record.

Secondly, Mr. Magige submitted that it is uncertain if Exh P2 was recorded within the prescribed period of time since PW1 who recorded it did not explain when the appellant was brought to the police station so as to show that the cautioned statement complied with section 50 (1) (a) of the CPA. It was elaborated that, PW1 said, he met the appellant on 20/8/2013 in the morning. But the appellant's cautioned statement was recorded at 01: 00 up to 01:40 without explaining what was recorded at that time. While relying on the case of **Ibrahim Mohamed v. Republic**, Criminal Appeal No. 176 of 2021(unreported), he urged the Court to expunge Exh P2 from the record.

Thirdly, the learned Senior State Attorney assailed the cautioned statement of the appellant contending that it was not properly admitted since it was not assigned its admission number although it came to be designated as Exh. P2. Also, he contended that the record does not show if it was read over after being admitted. While relying on the famous case of **Robinson Mwanjisi and 3 Others v. Republic,** [2003] TLR 218, he insisted that it be expunged for being admitted in contravention of the law.

Mr. Magige did not end there. He went on assailing the statement of Pendo Emmanuel which was tendered by WP Elizabeth (PW3) and admitted as Exh P4. He submitted that section 34 B (2) of the Evidence Act under which the statement was tendered requires such exhibit before being admitted to comply with the conditions set out under that provision (section 34 b (2) (a) to (f) cumulatively). However, he argued that, paragraph (f) of section 34 B (2) of the Evidence Act was not complied with since it does not show that it was read over to the maker or signed by both the maker and recorder. To bolster his argument, he referred us to the case of **Ibrahim Mohamed** (supra). In the end, he urged the Court to expunge Exh. P4 from the record.

Lastly, it was Mr. Magige's argument that, if the appellant's cautioned statement (Exh P2) and Pendo Emmanuel's statement (Exh. P4) are expunged, there remains no evidence to ground the conviction. He, thus, urged the Court to allow the appeal.

Having considered the grounds of appeal and the submissions from either side, we think, the crucial issue is whether the prosecution proved the case beyond reasonable doubt.

It is without question that in convicting the appellant, the trial court was satisfied that there was sufficient circumstantial evidence that the appellant was the last person to be seen with the deceased as per Exh. P4 (Pendo Emmanuel's statement) and the appellant's cautioned statement (Exh. P2).

Pertaining the complaint relating to the cautioned statement (Exh. P2), the first complaint is that it was neither listed nor read over during the committal proceedings. Both learned counsel are agreed on the shortcoming as it is vivid from the record of appeal that it is silent on whether there was compliance with the condition requiring the same to be so listed and read over.

Section 246 (2) of the CPA reads as follows:

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

Ideally, the above cited provision requires the subordinate court (inquiry court) to read or to explain to the accused the information levied against him and the statements or documents relating to the substance of witnesses' evidence intended to be used by the Director of Public Prosecutions at the trial. In the case of **The DPP v. Sharif Mohamed @ Athuman and 6 Others,** Criminal Appeal No. 74 of 2016 (unreported), when the Court was confronted with akin scenario where the documents intended to be tendered in court were not listed or read out, it stated that:

> *"Our understanding of the provisions of the section 246 (2) of the CPA is that, it is not enough for witness to merely allude to a document in his witness statement, but that the contents of the document must also be made known to the accused person (s). If this is not complied with,* ***the witness cannot later produce that document as an exhibit in court.*** *The issue is not on the authenticity of the document but on non-compliance with the law. We, therefore, agree that unless it is tendered as additional evidence in terms of section 289 (1) of the CPA, it was not receivable at that stage".*
> [Emphasis added]

In this case, we agree with both counsels' contention that, indeed, the documents consisting Exh. P4 and P5 were neither listed nor read over to the appellant during committal proceedings and that such documents ought not to be tendered in court. According to section 246 (2) of the CPA it was incumbent upon the inquiry court to ensure that it listed and read over the substance of the documents to the appellant before they each signed them. The main purpose of doing so is to ensure that the appellant understands the case or evidence to be relied by the prosecution so that he can prepare his defence. In other words, a document which fails to comply with section 246 (2) of the CPA would not be tendered and or admitted in evidence during trial. In this case, it is plain from the record of appeal that the witness statement of Pendo Emmanuel (Exh. P4) and the appellant's cautioned statement (Exh. P5) were not among the documents that were read over to the appellant during committal proceedings meaning that they contravened the provisions of section 246 (2) of the CPA.

In the case of **Fransis Rwiza Rwambo v. Republic,** Criminal Appeal No. 17 of 2019 (unreported), this Court when faced with a similar situation pronounced itself that the omission to read a document during committal proceedings is a defect which is incurable liable for its expungement.

We also note that this went against the provisions of section 289 (2) of the CPA since the substance of the evidence in Exh. P4 was not read to the appellant during the committal proceedings and as such even the names of the witnesses who made the statements were not listed in the proceedings. As was rightly argued by the learned Senior State Attorney as the evidence of Pendo Emmanuel and the Doctor who conducted the postmortem examination was not availed to the appellant, it was incumbent upon the prosecution to issue a written notice under section 289 (4) of the CPA so as to produce such documents as additional exhibits. This was not done, in which case, as Exh. P2 and P4 were tendered and admitted in evidence in contravention of section 289 (4) of the CPA, such evidence ought to be expunged from the record.

That notwithstanding, the other complaint in relation to Exh. P2 is that it was wrongly admitted since it was recorded in contravention of section 50 (1) (a) of the CPA because the time from when appellant was brought to the police station to the time of recording the cautioned statement was not explained. In terms of section 50 (1) (a) of the CPA, the period available for interviewing a person who is in restraint in respect of an offence is a period

of four hours commencing from the time of his restraint – see **Ibrahim Mohamed** (supra).

In this case, as was rightly argued by both counsel, there was no evidence showing, the time and day when the appellant was arrested. Although PW1 who recorded his cautioned statement said that he met him in the morning of 20/8/2013, the cautioned statement shows that it was recorded between 01:00 to 01:40 hrs. On the other hand, there was uncontested evidence by the appellant that he was arrested on 18/08/2013 (the date of incident). As it is, it cannot be ascertained if the cautioned statement was taken in compliance with section 50 (1) of the CPA.

In the case of **Emmanuel Stephano v Republic,** Criminal Appeal No. 413 of 2018 (unreported), the Court was faced with a similar scenario in which the cautioned statement of the appellant did not indicate the time when the appellant was arrested nor did the evidence from the prosecution witnesses explain it. The Court relied on the appellant's testimony as to the date of arrest and stated as follows:

> *"In view of the above, even if the appellant was recorded as admitting to the fact about the date of his arrest, we do not think it was thereby correct for the trial court to conclude that the date of arrest was*

undisputed when the prosecution itself was not consistent about it. As the cardinal principle of proof in criminal cases requires, we shall resolve that doubt in favour of the appellant and conclude that the prosecution did not prove the date of the appellant's arrest. There is therefore nothing to contradict the appellant's contention that he was arrested on 3/12/2012".

As alluded earlier on, the appellant (DW1) testified that he was arrested on 18/8/2013 in the evening hours and they arrived at the police station at about 10:00 a.m. The appellant's cautioned statement at page 30 of the record of appeal shows that it was recorded on 20/8/2013 at 13:00 hrs. It is therefore, clear that the cautioned statement was taken beyond the prescribed period under section 50 (1) (a) of the CPA. Unfortunately, no explanation was given for the delay such as to make it available for exclusion under section 50 (2) of the CPA. Given the circumstances, we are settled in our mind that Exh P2 ought not to have been relied upon by the trial court in the absence of explanation for delay in recording it and lack of extension of time under section 51 of the CPA being sought and obtained. Being guided by the cases of **Mohamed Juma @ Mpakama v Republic,** Criminal Appeal No. 385 of 2017 and **Bakari Mwalim Jembe v. Republic,** Criminal Appeal

No. 278 of 2017 (both unreported), we expunge Exh P2 from the record of appeal.

Still on the Exh. P2, the other limb of complaint is that, its admission was unusual as it was not assigned the number of admission. Further to that, it was argued that the same was not read over after its admission.

Our perusal of the record of appeal at page 12 has revealed that witness, PW1 prayed to tender the statement as exhibit. In order to appreciate what transpired, we leave the record of appeal to speak for itself.

> *"... I pray to tender the statement as exhibit.*
> *Mr. E. Rutahanga advocate: No objection*
> *Mr. Makame advocate: No objection*
> ***Court: Copy of the 1st accused's caution statement".*** [Emphasis added]

As it is, whether the said statement was admitted is uncertain. Even assuming it was admitted, the trial court did not show or assign the Exhibit number. However, in the later stage it came to be known as Exhibit P2. We think, prudently and according to the practice, when an exhibit is tendered and admitted in evidence, the trial court has to mark it properly to establish it to have been admitted and assign the number of its admission (Exhibit number). This is important to distinguish one exhibit from another. At any

rate, much as we think it was not proper to omit to assign the number to the admitted exhibit, the same is cured by the stamp that was affixed to the exhibit itself showing that it was admitted as Exh. P2. In the sense that, the omission was curable. Regarding the issue that the same was not read out after being admitted, we think, the complaint is misplaced since the record bears out that it was read over loudly in court. (See page 12 of the record of appeal).

The other complaint relating to Exh. P4 is that it was not properly admitted because the provisions of section 34B (2) (f) requiring the same to be read over and signed by the maker and recorder was not complied with. Both learned counsel urged us to expunge it from the record.

It is cardinal principle of law that, in order for a statement made by a person who cannot be called or be found to give evidence in court to be admitted in evidence, such statement must meet the requirements set out under section 34B (2) (a) to (f) of the Evidence Act cumulatively. Paragraph (f) of section 34B (2) of the Evidence Act provides for the witness statement to be read over to the maker and signed by both the maker and recorder. In the matter at hand, we agree with both counsel that, indeed, in the impugned Exh. P4, at page 39 to 49 of the record of appeal, the requirement

under section 34B (2) (f) of the Evidence Act was not met since it does not feature in the record of appeal if it was read or caused to be read over to the maker and signed by both the maker and recorder as required by the law. Pendo Emmanuel did not indicate that it was read over to her. Neither did PW3 explain that it was read over and none of them signed it. As was prayed by both learned counsel, failure to do so rendered it to be invalidly or improperly admitted and it is liable for expungement.

From the foregoing, since the said documents were tendered and admitted in evidence in contravention of the provisions of section 34 B (2) (H) of the Evidence Act and sections 246 (2) and 289 (4) of the CPA, they were not properly received as exhibits. We, thus, expunge them from the record of appeal.

Ultimately, in view of what we have discussed above, we agree with the learned counsel that if Exh. P2 and P4 are expunged from the record there remains no other evidence to sustain the conviction. This, therefore, leads us to answer the issue we had raised earlier on, that the prosecution failed to prove the case beyond reasonable doubt.

In the event, we allow the appeal, quash the conviction and set aside the sentence meted out against the appellant. We order that he be released

forthwith from the custodial sentence unless otherwise held for other lawful reasons.

It is so ordered.

DATED at **MWANZA** this 18th day of October, 2023.

R.K. MKUYE.
JUSTICE OF APPEAL

W.B. KOROSSO.
JUSTICE OF APPEAL

O.O. MAKUNGU.
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of October, 2023 in the presence of Mr. Steven Kaijage, learned counsel for the appellant and Appellant in person vide video conference facilities linked from the High Court of Tanzania Mwanza Registry, and Mr. Chistopher Olembile State Attorney, for the Respondent appeared vide video conference facilities linked from the High Court of Tanzania Mwanza Registry, is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL