IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MKUYE, J.A., GALEBA, J.A. And MASOUD, J.A.)

CRIMINAL APPEAL NO. 660 OF 2020

SHIMBI DAUD @ KULWA ..... 1ST APPELLANT
HAMISI ADAM @ MDODO ..... 2ND APPELLANT
NGADULA MAYALA @ KITULA ..... 3RD APPELLANT
JUMANNE LUBELA @ SANANE ..... 4TH APPELLANT
HARUNA SHABANI @ MTANI ..... 5TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khamis, J.)

Dated the 5th day of July, 2021
in
Criminal Appeal No. 09 of 2019

.....

JUDGMENT OF THE COURT

18th September & 30th November, 2023

MKUYE, J.A.:

The appellants, Shimbi Daud @ Kulwa, Hamisi Adam @ Mdodo, Ngadula Mayala @ Kitula, Jumanne Lubela Sanane and Haruna Shabani @ Mtani were charged and convicted of murder contrary to section 196 of the Penal Code, Cap 16 [R.E. 2002, now 2022]. Their trial at the High Court of Tanzania at Tabora (the trial court) was vide Criminal Sessions

Case No. 09 of 2019. It was alleged in the particulars of offence that on 29/1/2017 at Kapilimula Village within Nzega District and the Region of Tabora, the appellants in common occasioned the deaths of Athuman Shaban and Tabu Shija who were a couple. Consequent to the conviction, they were sentenced to suffer death by hanging.

Aggrieved by that decision, they have now appealed to this Court.

Before embarking on the merit of the appeal, we find it appropriate to narrate albeit briefly, the facts leading to this appeal. They go thus.

On the material day, Athuman Shaban and Tabu Shija (the deceased persons) were asleep in their home which they shared with two of their children. During that night they were invaded by certain people (assailants) who later came to be identified as the appellants. Upon gaining entrance into the house, those people attacked each of the deceased with a small axe which they had. It was alleged that while all this was happening Pili Athuman Shabani (PW6) was witnessing and later gave the description of the attire worn by one of the assailants to the village resident, who had responded to the scene of crime.

A search team was formed and manhunt for the culprits was mounted. The search party traced the footmarks and bicycle tiremarks heading away from the scene. After a lengthy search, the effort led to the arrest of the 1st, 2nd and 3rd appellants who upon interrogation, allegedly admitted to have participated in the killing of the deceased persons. It was also revealed that the 4th and 5th appellants participated in the incident.

Upon the conclusion of the trial, the trial court was convinced that the appellants had killed the deceased persons with malice aforethought on the bases of the cautioned statement of the 4th appellant (Exh. P1) and the extra judicial statements of the 2nd and 4th appellants (Exh. P13 and P14) which were corroborated by the evidence of PW6. As a result, they were all convicted of murder and sentenced as alluded to earlier on.

The appellants have each lodged a separate memorandum of appeal, which contain identical grounds of appeal save for few that appear distinct to the respective appellant. The said grounds can be extracted as follows:

1) *That, the prosecution case was not proved beyond reasonable doubt.*

2) *The learned Judge failed to arraign the appellants and record each of their plea immediately before the first witness for the prosecution started testifying.*

3) *The appellants were not afforded opportunity to state whether they had any objection to the selection of the assessors.*

4) *That, section 293 (2) (a) and (b) of the CPA was not complied with.*

5) *That, the trial Judge failed to take cognizance of the defence of alibi of the appellants, resulting into a miscarriage of justice.*

6) *That, the trial Judge erred in convicting the 3rd and 5th appellants on the confession of a co-accused, without corroboration.*

7) *That, exhibit, P13 and P14 neither contained a seal of the court to show that they were recorded by PW8, a declaration/certification on the correctness of the statements nor signatures of the 2nd and 4th appellants were appended to them.*

8) *That, the trial Judge erred in holding that exhibits P13 and P14 were recorded in compliance with the Chief Justice Guidelines.*

9) *That, the trial Judge erred in holding that exhibit P7 (the axe) was positively identified by PW6 while the conditions favouring identification were poor.*

10) *That, there is an inconsistence in the evidence of PW2 and PW4 on one hand, and PW9 and PW10 on the other hand, regarding the arrest of the 5th appellant.*

11) *That, exhibit P1 was made after the expiry of the period prescribed under section 50 and 51 of the CPA as per the evidence of PW9 and PW10, as the appellant was arrested on 4/3/2017.*

In addition to the above grounds of appeal, the appellants later on thorough their advocate, as we will soon indicate, lodged a supplementary memorandum of appeal challenging the manner the assessors were involved in the trial and that the trial was unfair

At the hearing of the appeal, Mr. Kelvin Kayaga, learned advocate appeared representing the appellants, On the other hand, Ms. Lucy Enock Kyusa, learned State Attorney, appeared representing the respondent Republic.

On being invited to expound the grounds of appeal, Mr. Kayaga prayed, and leave was granted to argue grounds 1 and 2 of the

supplementary memorandum of appeal both premised on the issue of unfair trial due to improper selection and involvement of the assessors in the trial. The learned counsel went on to assail the issue of assessors in three fronts: **One**, the appellants were not given an opportunity to object or comment to their selection; **two**, the roles of the assessors were not explained to them and **three**, the trial Judge failed to explain vital points of law during the summing up.

Elaborating the said issues, Mr. Kayaga took us to page 48 of the record of appeal and submitted that the assessors were just proposed and the trial commenced without giving the opportunity to the appellants to object or comment on their selection. Apart from that, the trial commenced without explaining to them as to their roles, he added. This, in his opinion, amounted to unfair trial.

Mr. Kayaga went on to argue that the assessors were not addressed on vital points of law during the summing up. He pointed out that, despite the fact that almost all appellants relied on the defence of *alibi*, the trial Judge did not say anything relating to such defence. To fortify his argument, he referred us to the case of **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017 (unreported). He argued that, since the trial Judge failed to explain the vital points of law to the

assessors, their participation had no value. In effect, the omission was fatal rendering the trial a nullity, he concluded.

Still on the unfair trial, the learned advocate submitted that, although PW6 testified with the aid of an interpreter, the appellants were not given an opportunity to object or comment on him much as the record shows that he was procured by the prosecution side. Besides that, it was argued that the roles of the interpreter were not explained to him. On that basis, the learned counsel was of the view that the appellants were not accorded a fair trial.

As to the remedy on those anomalies, Mr. Kayaga contended that it could have been to nullify the whole proceedings and judgment, quash the conviction and set aside the sentences with an order for a retrial. However, in this case, he was of the view that, that could not be a viable option to take, since the case was not proved beyond reasonable doubt on several grounds which cover the first ground in the substantive memorandum of appeal as shall be explained in due course.

On her part, Ms. Kyusa commenced her submissions by declaring her stance that she supported the appeal partially.

In the first place, she conceded that, indeed, the assessors were not properly selected since the appellants were not asked to comment on their selection. She equally conceded that after their selection, they were not told their roles. She pointed out that as shown at page 48 of the record of appeal, there was just a list of proposed assessors without more. This is a fatal irregularity, she said.

As to the remedy following such omission, she prayed for a nullification of the proceedings and judgment thereof, quashing the conviction and setting aside the sentences meted out against the appellants and that an order for a retrial be made since there is sufficient evidence to support the conviction.

Our starting point would be on the issue of assessors. The first complaint is that their selection was not proper since the appellants were not asked to object or comment on their selection.

It is clear that before the amendment of section 265 of the Criminal Procedure Act, Cap 20 [R.E. 2002 now 2022] (the CPA) through Written Laws (Miscellaneous Amendments) Act 2022, (Act No. 1 of 2022), all trials before the High Court were mandatorily required to be conducted with the aid of the assessors, who in terms of section 285 of the CPA are to be selected by the trial court. Upon being proposed, as a

rule of practice not of law, the accused has to be given an opportunity to object or comment on the proposed assessors – See **Hilda Innocent** (supra) and **Abdul Ibrahim @ Massawe v. Republic**, Criminal Appeal No. 319 of 2017 (unreported). For instance, the Court in the case of **Hilda Innocent** (supra), while citing the case of **Laurent Salu and 5 Others v. Republic**, Criminal Appeal No. 176 of 1993 (unreported) when faced with akin scenario, had this to say:

> *"Admittedly, the requirement to give the accused the opportunity to say whether or not to object to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the rule of the procedure in the proper administration of justice in the country ... the rule is designed to ensure that the accused person has a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he be informed of the existence of this right. The duty to inform him is on the trial Judge, but if the trial Judge overlooks this, counsel who are officers of this Court have equally a duty to remind him."*

Apart from that, whenever the assessors are selected it is desirable that their roles should be explained to them. Failure to do so is

tantamount to diminishing their level of participation as envisaged under the law to be meaningless – See **Hilda Innocent's** case (supra).

In this case, as both learned counsel submitted, it appears that the assessors were just proposed and not selected as was required by the law. Apart from that, the record of appeal is silent on the issue of calling upon the accused persons to object or comment on their selection. For clarity, we leave the record to speak for itself.

> ***"COURT:***
>
> *The following persons are proposed assessors.*
>
> *1) Renatus Kulwa*
>
> *2) Elisha Bundu*
>
> *3) Miriam Yohana*
>
> ***MS JULIANA MOKA, SENIOR STATE ATTORNEY***
>
> *My Lord, we are ready for trial as the case was adjourned yesterday.*
>
> *(signed)*
>
> *Amour Khamis*
>
> *JUDGE*
>
> *16/10/2020*
>
> ***MR. EDWARD MALANDO, ADVOCATE***

My Lord, we are ready to proceed.

(signed)

Amour Khamis

JUDGE

16/10/2020

MR. SALAH MAKUNGA, ADVOCATE

My Lord we are equally ready to proceed.

(signed)

Amour Khamis

JUDGE

16/10/2020

PROSECUTION CASE OPENS.

PW1 JACOB SALU CHALAMILA, 46 YEARS OLD, TANZANIA, CHRISTIAN, TAKES OATH."

As it can be gleaned from the record of appeal, it is crystal clear that what the trial Judge did, was to produce a list of the proposed assessors but did not ask the appellants to object or comment on their selection. This was a clear infraction.

Besides that, it is plain from the record of appeal that the assessors were not told their roles before the hearing commenced by taking the evidence from PW1. But again, although we are holding that it is mandatory for the assessors to ask questions for clarification, in this

case it is glaring that the assessors' involvement in terms of section 177 of the Evidence Act, Cap 16 [R.E. 2002 now 2022] (the Evidence Act), does not came out loudly because when all the witnesses for the prosecution and defence testified, none of the assessors asked them questions for clarification – see PW1 (pages 56 – 57), PW2 (page 118 – 119), PW3 (pages 135 – 136), PW4 (pages 157 – 158), PW5 (pages 172 – 173), PW6 (page 269), PW7 (page 207), PW8 (page 269), PW9 (pages 283 – 284), PW10 (pages 298), DW1 (pages 312 – 313), DW2 (page 320), DW3 (pages 326 – 327), DW4 (pages 335 – 336) and DW5 (pages 343 – 344). In other words, there were no questions for clarification asked by assessors to any of the witnesses, be it for prosecution or for defence.

Formerly, failure to address the assessors their roles before commencement of trial rendered the trial to be deemed to have been conducted without the aid of assessors as contemplated under sections 265 and 298 (1) of the CPA – see **Gerald Athanas Kiwango v. Republic,** Criminal Appeal No. 103 of 2019 (unreported). It resulted into nullification of proceedings and judgment and ordering a retrial depending on the circumstances of the case. With time, the situation changed. Thus, despite such infractions, the issue of involvement of

assessors in trial before the High Court being a procedural requirement, the Court considers whether there has been prejudice to the accused that has occasioned miscarriage of justice – see **Michael Luhiye v. Republic, [1994] T.L.R. 181** and **Safari Anthony Mtelemko and Another v. Republic,** Criminal Appeal No. 404 of 2021 (unreported).

In this case, despite the fact that the assessors were selected without involving the appellants or explaining to them their roles, it is notable that during the trial, the trial Judge availed the assessors an opportunity to ask questions for clarification to all the prosecution and defence witnesses only that they opted not to ask such questions to any of the witnesses. Besides that, the trial Judge summed up the case to the assessors and were given a chance to give their opinion which they did at length as shown from page 379 to 382 in the record of appeal, in which case, it cannot be said that the failure to explain their roles contributed to their remaining quiet or be said that there was prejudice on the appellants which occasioned miscarriage of justice – see **Safari Anthony Mtelemko** (supra). In our view, the infraction was not fatal and is curable under section 388 of the CPA.

The third limb of infraction on the assessors' participation is that during summing up, the trial Judge did not explain to them the vital

points of law relating the applicability of the defence of *alibi* particularly so, since almost all the five appellants relied on the evidence. Ms. Kyusa did not contest the complaint. Basing on the shortcomings, she urged the Court to quash and set aside the conviction and sentence and order for a retrial before a different Judge in accordance with the law.

We think this issue must not detain us much. It is clear from the record of appeal that out of the five appellants, three of them relied on the defence of *alibi*. Although none of them lodged a notice as required by the law, DW1, DW2 and DW3 gave a defence to the effect that they were not at the scene of crime on the fateful day. DW1 for instance, testified that on the material day of 28/1/2017 at 9:30 p.m. he was at his home with his young brother Elisha Daudi Kulwa and his three children because his wife had gone to her parents as an expectant mother. In the morning of 29/1/2017, he went to his paddy field where he saw a stranger DW3 in search of employment and he did employ him to plant the paddy in his field up to 2:00 p.m. when they took a break for lunch. Then, after having their lunch at about 3:00 p.m. three people came and arrested them.

DW2 testified on how on 28/1/2017, he went to a public auction in Ishihimulwa Village and then to Mambali Village where he arrived at

6:00 p.m. On the next day 29/1/2017, he sold his four cows and left with one cow and went to Ulyankulu where he arrived at 1:00 p.m. on the same date and that when he was approaching Ishihimulwa Village, the remaining cow got scared of a vehicle and ran in the bush. As he pursued it, he was arrested by a group of people who chased him while shouting. He said, after his apprehension he was taken to a certain village where people gathered together with policemen and thereafter was taken at Nzega Police Station.

DW3 also testified on how he was arrested together with DW1 at Ishihimulwa Village where he had secured a casual labour job from DW1 in his paddy field and they were arrested by three persons who arrived on a motorcycle.

As alluded earlier on, before the amendment of section 265 of the Evidence Act, it was mandatory for all criminal trials in the High Court to be conducted with the aid of assessors. In times without number, we held that the assessors' participation was very helpful only when they were properly informed and directed on vital points of law relating to the facts available before them. The requirement for the trial Judge to explain the salient features of law in the summing up is provided for under section 298 of the CPA which states as follows:

> *"When the case on both sides is closed, the Judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as to any specific question of fact addressed to him by the Judge, and record the opinion."*

Emphasizing the necessity for the trial Judge to comply with the requirement to explain to the assessors the vital points of law in summing up, the Court in the case of **Hosea Johan Mwaiselo v. Republic**, Criminal Appeal No. 524 of 2019 (unreported), while citing the case of **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported) had this to say:

> *"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on the High Court Judges who sit with the aid of assessors, to sum up adequately to those assessors on all vital points of law: There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgment."*

However, in a very recently decided case of **Safari Anthony Mtelemko** (supra), the Court has taken a different stance in relation to

such anomaly. Having keenly considered the issue and tracing the background of this previous position, we laid a hand in the provisions of section 298 (1) and (2) of the CPA, the gist of which is that: **One,** the role of the assessors in aiding the trial Judge is quite minimal as according to subsection (2) of that section, the trial Judge is not bound to conform with their opinion. **Two,** under sub section (1), the assessors are required to give their opinion generally after the evidence for both the prosecution and defence has been summed up to them. Also they are required to opine on specific questions of fact which the trial Judge may have addressed to them. See also **Washington Odindo v. Republic,** (1954) 21 E.A.C.A. 392. In fact, in the former cited case of **Safari Anthony Mtelemko** (supra), we categorically stated that:

> *"... In our view, the case of **Washington Odindo** (supra) is a strong and compelling authority that even without addressing anything to assessors, a trial cannot be vitiated, leave alone addressing assessors on vital points which is only necessary where a trial Judge wants to ask assessors any specific questions."*

Thereafter, we concluded that:

> *"... So, unless a trial Judge wants to put specific questions to assessors, he is under no obligation to*

address assessors on any salient points -See holding number (2) in ***Washington Odindo*** *(supra) and ... section 298 (1) of the CPA above."*

In the matter at hand, there is no doubt that the complaint is based on a procedural irregularity that the trial Judge failed to address assessors on vital points of law relating to the defence of *alibi* to enable them fully participate in a trial. However, as we have hinted earlier on, in order for a procedural irregularity to vitiate a proceeding, it should be shown that it is of such a nature that it occasioned a miscarriage of justice on the accused and as we have endeavoured to explain above it did not. Otherwise, even if there was such omission, it would be deemed to be inconsequential and thus, curable under section 388 of the CPA as per **Ernest Jackson Mwandikaupesi and Another v. Republic,** Criminal Appeal No. 408 of 2019 [2021] TZCA 585 (12 October, 2021 TANZLII) and **Amani Rabi Kalinga v. Republic,** Criminal Appeal No. 474 of 2019 [2022] TZCA 633 (18 October, 2022 TANZLII).

On top of that, much as the appellants' counsel complained that the trial Judge did not explain the defence of *alibi* to assessors resulting in the appellants' being unfairly tried, it was not explained as to how the failure by the Judge to address assessors on the *alibi* led to the unfair trial. In this regard, and in view of the foregoing discussion, we find that

the trial Judge's omission to address assessors on vital points of law, was not called for, particularly so, when taking into account that such requirement could not have arisen since the Judge did not ask assessors any questions in accordance with the provisions section 298 (1) of the CPA, (See also **Washington Odindo** (supra)). We also find that the irregularity can be cured by section 388 of the CPA. As a result, we find the second ground of appeal unmerited and we dismiss it.

The other complaint in ground no. 2 is in relation to the interpreter who assisted PW6 when testifying because the witness was not fluent in Swahili but in Sukuma language. It is argued that, the appellants were not asked if they objected to him after being selected. It is also argued that the said interpreter assumed his duty without being addressed his role and responsibility. Unfortunately, the learned State Attorney said nothing on this complaint.

Section 211 (1) of the CPA provides for the provision of an interpreter whenever there is evidence given in a language not understood by the accused and he is present in person in court, meaning that such evidence will be interpreted to him in a language he understands so that he can be able to understand the proceedings in the case he is involved. In the case of **Dastan Makwaya and Another v.**

Republic, Criminal Appeal No. 179 of 2017 (unreported), the Court expounded the provisions of section 211 (1) of the CPA as follows:

> *"Section 211 (1) of the CPA requires that, whenever it appears that an accused person does not understand the language spoken during the proceedings of the case, an accused person should be provided with an interpreter so as to enable him understand the proceedings of his case. The omission not to comply with the requirements of section 211 (1) of the CPA renders the proceedings of the case null and void."*

That is to say, the effect of such omission, as indicated above, has been held to be a fatal irregularity which vitiates the proceedings – See also **Mpemba Mponeja v. Republic**, Criminal Appeal No. 256 of 2009 (unreported).

Our perusal of the record of appeal has revealed that the interpreter surfaced in the proceedings for the first time on 21/10/2020 as shown at page 175 of the record of appeal when the learned Senior State Attorney Ms. Jane Mandago, informed the trial court about the witness who was next to testify, that she was only fluent in Sukuma and not Kiswahili language and prayed for an interpreter who was

conversant in both languages. It would appear that the prosecution had in mind the provisions of section 211 (1) of the CPA regarding the need of the provision of an interpreter since PW6 was not fluent in Kiswahili language, the language of the court. The learned State Attorney also informed the trial court of a pre-arranged interpreter who was to interpret the evidence of PW6 as shown in the proceedings dated 21/10/2020 at page 175 of the record of appeal. Then, at page 176 of the record of appeal, the trial court is recorded to have mentioned the proposed interpreter (without showing who proposed him) as Mr. Banzilio Lazaro Balola. What followed thereafter, was for the said Bazilio Lazaro Balola to be sworn and proceeded with the duty of interpretation of evidence of PW6 who was alleged to be the only witness at the scene of crime when the offence was allegedly committed. What is clear is that, the interpreter took his role without the appellants having been asked if they objected to his selection. Neither were his roles and responsibilities explained by the trial Judge to the interpreter before he assumed his duty. For ease of reference, we find it appropriate to reproduce what transpired on 21/10/2020 as shown at pages 175 – 177 of the record of appeal as hereunder:

"MS. JANE MANDAGO, SENIOR STATE ATTORNEY:

My Lord our next witness is Pili Athumani. She is more eloquent with Kisukuma than Kiswahili. We pray for an interpreter conversant with two languages.

(Signed)

AMOUR S. KHAMIS

JUDGE

21/10/2020

MR. EDWARD MALANDO AND MR. SALEH MAKUNGA, ADVOCATES

No objection my Lord.

(Signed)

AMOUR S. KHAMIS

JUDGE

21/10/2020

COURT:

The proposed interpreter is Mr. Basilio Lazaro Balola.

(Signed)

AMOUR S. KHAMIS

JUDGE

21/10/2020

INTERPRETER.

BAZILIO LAZARO BALOLA, TANZANIAN, 53 YEARS OLD, RESIDENT OF NZEGA,

CHRISTIAN, TAKES OATH *to faithfully interpret..."*

From Mr. Kayaga's submission and the above excerpt, it is crystal clear that the interpreter Bazilio Lazaro Balola was pre-arranged by the prosecution since it was the prosecution which informed the trial court that PW6 who was the next witness was not fluent in Kiswahili and therefore there was a need for an interpreter conversant in both languages. The issue of interpreter featured on 21/10/2020 and not before. Then, after having been no objection from the defence counsel what followed was that the court recorded the proposed interpreter as Bazilio Lazaro Balilo and then was sworn to interpret faithfully.

Much as it is clear that the prosecution brought the proposed interpreter, the trial court did not even inquire as to his qualification, likelihood of being conflicted in any how with the task he was to perform and where was he from. We think, this was important when considering that the issue of procuring the interpreter is a responsibility of the court under section 211 of the CPA – See also **Kigundu Francis and Another v. Republic,** Criminal Appeal No. 314 of 2010 (unreported) in which the Court placed the duty to the trial court in criminal matters, if it appears that the interpreter is required, to arrange for the provision of an interpreter to interpret the evidence of the accused person or from

witnesses who do not understand the language of the court. Being an emperor, it is not known why the trial court was not informed earlier to enable it procure such an interpreter. We say so, because this issue neither featured during committal proceedings nor preliminary hearing nor was such prayer made before such witness was prepared to testify, more so, when taking into account that PW6 was known to be among the intended witnesses for prosecution.

But again, according to the record, after the trial court had recorded the proposed interpreter, it is not shown if the appellants were asked to comment on him or object against him to take up the role of an interpreter. This is also clear from the record that after recording the proposed interpreter, what followed was to administer oath to him and proceed with interpreting the evidence of PW6, the key witness in this case. It is our view that, had the appellants been asked to comment, perhaps they could have given their opinion considering that he was pre-arranged by the prosecution.

One more crucial issue which is raised is that the interpreter took his office without being told his roles as an interpreter. It is clear from the excerpt reproduced earlier on that after the interpreter had taken oath, he assumed the role of interpreting PW6's evidence, without the

trial court, having told him his roles. Telling the interpreter his roles was essential because, that could have been the opportunity to the court to explain to him the difference of being a witness and an interpreter or even not to give evidence which suits his interests. Despite the fact that he took oath as an assurance of his trustworthy to both the court and the parties, we think, explaining to him his roles and what was expected of him was necessary.

Now, having regard to all these ailments, we cannot say with certainty that his interpretation of the evidence of PW6 was done faithfully, and the appellants were afforded a fair trial, in the circumstances.

There is unbroken chain of decisions of the Court relating to the flaws on interpreters. Such cases include **Mpemba Mponeja** (supra) in which the interpreter was provided in certain instances while in some was not provided; **Dastan Makwaya's** case (supra) and a very recent decided case of **Kalyehu Kadama @ Madaha and Another v. Republic,** Criminal Appeal No. 403 of 2021 (unreported) whereby the flaws in handling interpreters were held to be fatal irregularities vitiating the evidence so taken and eventually leading to its expungement.

Even in the case at hand, as the evidence of PW6 was interpreted by an interpreter who was not known on how he was procured and most importantly, after being pre-arranged by the prosecution, we think, it was a fatal omission which denied the appellants a right of fair hearing. Thus, the omission had the effect of vitiating the evidence of PW6 who was the only alleged key and eye witness for the prosecution. Hence, her evidence is hereby expunged.

As was hinted earlier on, despite all these infractions, Mr. Kayaga was of the view that this was not a fit case for ordering a retrial because the available evidence is not sufficient to prove the case against the appellants beyond reasonable doubt. This covers the first ground of the substantive memorandum of appeal.

In elaboration, Mr. Kayaga prefaced his submission by arguing that the conviction against the appellants was based on the cautioned statement of the 4th appellant (Exh. P1) and the extra judicial statements of the 2nd and 4th appellants respectively (Exhs. P13 and P14) which according to him, were not sufficient to prove the case. He contended that the same ought not to be accorded any weight because were wrongly admitted in court. He pointed out that the 4th appellant's statement was recorded by PW2 on 14/3/2017 on the pretext that there

were no police from Nzega. He said, Exh. P1 that was recorded by PW2, was recorded out of time because, although the 4th appellant was arrested on 13/3/2017 at King'wang'oro Village in Kaliua and taken at Kaliua Police Station and then on the same date to Urambo Police Station, the trial Judge ruled out that his cautioned statement could not be taken in the absence of a police officer from Nzega Police Station which means the trial Judge excluded the period illegally, contrary to section 50 (2) of the CPA. According to Mr. Kayaga, any police officer could have recorded the 4th appellant's cautioned statement in which case, the exclusion of time ought to be in favour of the appellant.

Regarding Exh. P13, it was Mr. Kayaga's argument that, there was no place where the 2nd appellant agreed that the statement (Exh. P13) was his or rather it was read over to him, and insisted that the accused ought to have acknowledged that the statement was read over to him.

As regards Exh. P14 which was the extra judicial statement of the 4th appellant, he argued that it had no acknowledgement by the 4th appellant that it was read over to him. In his view, the certification ought to have been made by the 4th appellant and not the recorder. He invited the Court to be inspired by the decision in the case of **Zabron Joseph v. Republic,** Criminal Appeal No. 44 of 2018 (unreported)

where the Court observed on the need for the appellant to show that the statement was read over to him as follows:

> *"The certification by PW3 or his oral testimony that he read to the appellant is not sufficient and that the trial court should not have accorded any weight. The anomaly is fatal as expounded in the case of* ***Ibrahim Issa and 2 Others v. Republic****, Criminal Appeal No. 159 of 2006 (unreported) ... The cautioned statement is thus liable to be expunged."*

In relation to the 5th appellant, Mr. Kayaga argued that the evidence connecting him with the offence was very weak as he was merely linked with a bicycle only which was not even mentioned in the statement and he urged the Court to acquit him.

In reply, Ms. Kyusa basically conceded that the trial court relied on the Exhs. P1, P13 and P14 in convicting the appellants. However, she was of a different view on the way forward to be taken considering the ailments raised.

Regarding Exh. P1, she submitted that it was not taken out of time based on the available evidence. She said, SP Aziz (PW4) at page 143 of the record of appeal explained that the 4th appellant was arrested at

King'wang'oro in relation to another crime. That, he was taken to the police station on 14/3/2017. And on the same day, he was taken to Urambo Police Station where he (the witness) arrived at 11:00 a.m. and his cautioned statement was recorded at 1:20 p.m. It was, therefore, her argument that the cautioned statement was recorded within time.

In relation to Exhs. P13 and P14, it was the learned State Attorney's submission that failure to indicate the certification by the appellants was not in the record of appeal. She contended that the recording of cautioned statements and extra judicial statements are governed by different recording rules. That, while the cautioned statements are governed by sections 57 and 58 of the CPA, the extra judicial statements are governed by the Chief Justice's Guide for the Justices of the Peace, 1964 (the Guide), and that certification or acknowledgment in extra judicial statements is not one of the requirements in the Guide.

In any case, the learned State Attorney argued that at the end of the extra judicial statements there are finger prints affixed by the respective appellants which signified that they knew and acknowledged the contents in the documents.

Apart from that, Ms. Kyusa argued that the said documents were corroborated by the evidence of PW5 and PW6 together with Exh. P7 and P11. She contended further that, PW6 who was at the scene of crime identified by face and gave description to PW5 who was among the people in the search party which followed the foot prints until they arrested the 1st and 2nd appellants, while having an axe, a hat with red and yellow colour. In her view, the evidence was sufficient to sustain the conviction.

In relation to the 5th appellant, she was in agreement with Mr. Kayaga that the evidence against him was not sufficient to sustain his conviction, thus she urged the Court to set him free.

As to the remedy, Ms. Kyusa was comfortable if an order of a retrial is issued rather than any other remedy.

We have examined the ground of appeal regarding the proof of the case and the rival arguments on this ground also perused the record of appeal. At the outset, we wish to state that, it is without question that in convicting the appellants the trial court relied heavily on among other pieces of evidence, the 4th appellant's cautioned statement (Exh. P1) and the 2nd and 4th appellants' extra judicial statements (Exhs. P13 and

P14) in which they are alleged to have confessed murdering the deceased persons.

The complaint against Exh. P1 which is contested by the 4th appellant, is that it was recorded out of time and the time purportedly excluded by the trial court is not provided under the law.

Section 50 (1) (a) of the CPA provides for four hours as the basic period available for interviewing a suspect commencing at the time when he was taken under police restraint in respect of the offence. Section 51 of the same Act provides for the situations for extending interrogation beyond the four hours – see also **Christopher Changula v. Republic,** Criminal Appeal No. 215 of 2010 (Unreported).

According to the record of appeal, the 4th appellant was arrested at Kaliua on 13/3/2017 by the police in connection with another offence. The cautioned statement was taken on 14/3/2017 from 1:20 p.m. to 3:05 p.m. meaning that it was recorded by PW2 beyond 4 hours prescribed by law from the time he was taken under police restraint. PW2 explained that it was not possible to record his statement immediately since the police at Kaliua had no investigation file and the file was at Nzega Police Station.

On the other hand, the 4th appellant testified to have been arrested on 4/3/2017 at his village of Konanne in Kaliua District and taken to Konanne Police Station before being transferred to Kaliua Police Station on 5/3/2017, where they stayed until on 14/3/2017 when they were transported to Urambo Police Station and then to Nzega Police Station where the statement was taken on 14/3/2017. We note that, in the said cautioned statement, the 4th appellant stated that he was arrested on a date he could not remember.

The issue is when was 4th appellant arrested and where was his cautioned statement recorded between Urambo and Nzega. This is relevant because PW2 said it was recorded at Urambo Police Station, while the appellant claims it to have been recorded at Nzega Police Station.

Here we have evidence of one witness against the other. However, having critically examined the evidence from both sides we agree with the prosecution evidence that the appellant was arrested on 13/3/2017 and not on 4/3/2017 as testified by 4th appellant, since in the cautioned statement he stated that he did not remember the date he was arrested in March, 2017. If at the time of recording his statement he did not know the date of his arrest how could he have been accurate

as to the date of his arrest when testifying in court on 19/10/2020 (a period of more than 3 years). We think, that was an afterthought.

Regarding the place where the statement was recorded, we agree with prosecution's evidence that it was recorded at Urambo because even the appellant's cautioned statement tends to agree with it in certain instances. According to his cautioned statement, after his arrest at Konanne, he was taken to Konanne Police Station then to Kaliua Police Station upon being linked with another offence and was arraigned before the District Court of Urambo at Urambo from where the police from Nzega came and picked him. This shows that, the possibility of his cautioned statement to be taken at Urambo cannot be overruled under the circumstances where the police from Nzega Police Station who had the relevant investigation case file came to pick him from. We think, the police at Urambo and Kaliua, much as they had contact with him, could not have been in a position to record his cautioned statement at the time as they were not versed with the offence at Nzega, taking into account that he was arrested in connection with a different offence.

This means therefore, that since PW2 together with his team having travelled from Nzega and arrived at Urambo at about 10:00 a.m. to 11:00 a.m. and recording the said statement was from 1:20 to 3:05,

then it was recorded within time. We thus dismiss this complaint for lack of merit.

Regarding the issue of certification of the cautioned statement and extra judicial statements, in the first place, we agree with the learned State Attorney that their recording procedures are governed by different laws. Certification in the cautioned statement is a requirement under section 57(3) of the CPA whereas in relation to the extra judicial statements such requirement is provided in para 3 appearing at page 6 of the Guide where it stipulates as follows:

> *"I believe that this statement was voluntarily made. It was taken down in my presence and was read over to the prisoner making it and agreed by him to be correct and it contains a full and true record of the statement made by him."*

So, unlike the learned State Attorney's contention that certification is not among the requirements in extra judicial statements, we find that it is one of them as we have shown above. And, we think, certification is important to guarantee accuracy and authenticity of the statement recorded. In this case, though the appellants may not have stated explicitly that the statements were read over to them as per the case of **Zabron Joseph** (supra), there were finger prints affixed by the

appellants at the end of the said extra judicial statements and a certification by the magistrate which signifies that the said appellants knew the contents, they signed. We, therefore, find that this complaint is devoid of merit, and we dismiss it.

Notwithstanding the above finding, the issue that is still nagging is whether the prosecution proved the case beyond reasonable doubt.

It is a settled principle of law in this jurisdiction that it is the duty of the prosecution to prove the case against the accused beyond reasonable doubt as per section 3 (2) (a) of the Evidence Act [Cap 6 R.E. 2022] – See also **Rutoyo Richard v. Republic**, Criminal Appeal No. 114 of 2017 (Unreported) [2020] TCA 298 (16 June, 2020 TANZILII). In the case of **Said Hemed v. Republic**, [1987] TLR 117, the Court clearly stated that:

> *"In criminal cases the standard of proof is beyond reasonable doubt."*

See also **John Nyamhanga Bisare v. Republic** (1980) TLS 6.

In this case, as alluded to earlier on, the trial court convicted the appellants on the bases of the evidence from the 4th appellant's cautioned statement and the extra judicial statements of the 2nd and 4th appellants which were all retracted or repudiated having found to have

been corroborated by the evidence of PW6 which, incidentally, has been expunged for having been wrongly received.

Regarding the confession evidence which remains, it is cardinal law that the court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated unless the court is fully satisfied that in all the circumstances of the case the confession is true – See **Tuwamoi v. Uganda** (1967) EA 84. The East African Court of Appeal in the said case went on the state that:

> *"The same standard of proof is required in all cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."*

It is also well settled that, where the cautioned statement is retracted, it needs to be corroborated. This stance was taken in the case of **Mabala Masasi Mongewe v. Republic**, Criminal Appeal No. 161 of 2010 (Unreported).

In this case, the trial court relied on the evidence of PW6 Pili Athumani who recounted on how two men invaded her late parents' bedroom on the fateful night. She testified on how the two men cut the deceased with a short axe and how one of them dressed in a red shirt and red head wear and identified the axe (Exh. P7) and a head wear (Exh. P5) put on by the assailant. This description by PW6 is said to have assisted William Charles Ndila (PW7) in tracing and arresting the 2nd appellant.

That, PW7 also testified on how they arrested the 1st and 3rd appellants at Ishihimulwa village while in possession of a Bob Marley bag (Exh. P9). This evidence was corroborated by PW9 No. H 1623 DC Saguda who recorded the 4th appellant's cautioned statement and the evidence of PW8 Severina Nicodemus Bideberi who recorded the extra judicial statements (Exhs. P13 and P14) of the 2nd and 4th appellants confessing their participation in killing the deceased persons in association with others at a fee of TZS. 5,000,000.00. And thus, found that all appellants together with the one who escaped during the arrest committed the offence.

On our part, having critically perused the evidence on record we, in the first place agree with both counsel that there is no evidence that

links the 5th appellant with the killing of the deceased persons. Apart from being mentioned by the 2nd and 4th appellants in their confessions, there is no other evidence showing his participation in the offence. Even if, for the sake of argument there was such evidence, the law is quite clear that, a conviction of one person cannot base on the confession by co-accused unless it is corroborated by other independent evidence – See **Asia Iddi v. Republic**, (1989) TLR 174 and **Thadei Mlomo and Others v. Republic**, (1995) TLR 187.

Secondly, upon expungement from the record of the evidence of PW6 which gave a clue of who might have participated in killing the deceased persons for being received unprocedurally, we find no other evidence which can be taken to have corroborated the appellants' repudiated and retracted confessions linking them with the offence. Even the evidence of PW5 and PW7 who were involved in the search party, cannot assist as it was hearsay evidence. On the other hand, the evidence of confessions alone in the circumstances of this case cannot sustain convictions.

In this regard, we are satisfied that there is no sufficient evidence to prove the case beyond reasonable doubt against the appellants to warrant this Court to order a retrial. Consequently, we allow the appeal,

quash the conviction and set aside the sentences meted out against the appellants. We order that all appellants be released forthwith from custodial sentence unless otherwise held for other lawful causes.

Order accordingly.

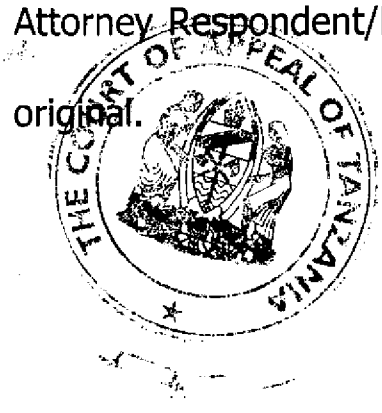
DATED at **DAR ES SALAAM** this 29th day of November, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

This Judgment delivered this 30th day of November, 2023 in the presence of 1st, 2nd, 3rd & 4th Appellants appear in person, 5th Appellant was dead and Ms. Aneth Makunja, learned State Attorney for the Respondent/Republic assisted by Ms. Salome Matunga, learned State Attorney Respondent/Republic, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL