IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A. And MGONYA, J.A.)

CRIMINAL APPEAL NO. 624 OF 2020

CHARLES ZEWANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Utamwa, J.)

dated the 25th day of September, 2020

in

Criminal Sessions Case No. 66 of 2017

JUDGMENT OF THE COURT

4th December, 2023 & 30th January, 2024

MWANDAMBO, J.A.:

The High Court, sitting at Mbeya, tried and convicted the appellant Charles Zewanga of the murder of Lazaro s/o Robert Kayange, a 10 years boy at a place called Insani village, Mbozi District, Songwe Region. He was accordingly sentenced to the mandatory death sentence. Aggrieved, he has preferred this appeal.

The appellant's conviction was upon the prosecution evidence which the trial High Court found to have proved the case against him.

Briefly, on 23 January 2015, the deceased was grazing cattle with his sibling, Robert Kayange (PW1) and other boys including PW2 around a cattle grazing field at about 5:00 p.m. along river Harungwe. To their surprise, the appellant emerged from the bush allegedly holding stones and a machete chasing them. While PW1, PW2 and other boys ran away hiding in the bushes, the appellant got hold of the deceased. According to the appellant, he did so because the boys had annoyed and insulted him calling him as a fool from Mbeya throwing stones as he was taking bath in the river. The evidence by PW1 and PW2 who were the eye witnesses was that, they got scared by the appellant who was holding stones as he was chasing them. Their further evidence was that each took a different direction and had the appellant under their observation from a distance which enabled them to see him attacking the deceased with the machete before he disappeared.

After the appellant's disappearance from the scene, PW1 and PW2 assembled at a place where the deceased was lying only to find him bleeding. A little later, they relayed the fateful message to Lucia Msukwa (PW3); the mother of the deceased who rashed to the scene where she found her son lying and bleeding from his head and neck.

Afterwards, the deceased was taken to Itaka Police station where a PF3 was obtained and to Mbozi Mission Hospital later that night. Dr. William Nikusuma Kibona (PW5) an Assistant Medical Officer pronounced the deceased's death after conducting an examination and posted his findings in a PF3 obtained from the Police. The trial court accepted PW5's finding from a post mortem report (exh P2) revealing head cut wounds by a sharp object which supported his conclusion that the deceased's death was caused by several head injuries.

In his defence taken upon oath, the appellant admitted having caned a certain boy but denied having cut him with a machete as claimed by the prosecution. According to him, on the material date, he was taking bath in a river whereupon, some boys threw stones and insulted him which prompted him to pursue them and apprehended one of them.

The assessors who sat with the learned trial judge returned a verdict of guilty after the summing up to them. The learned trial judge determined the case on two main issues, namely; whether or not the appellant caused the death of the deceased and if so, whether the killing amounted to murder. After evaluating the evidence for the

prosecution and defence, the trial judge answered both issues affirmatively. This he did notwithstanding contradictions between PW1 and PW2 on the distance from which each observed the appellant inflicting injuries on the deceased. The learned trial judge found the contradictions immaterial as to go to the root of the case.

Initially, the appellant lodged a memorandum of appeal based on five grounds. Subsequently, Mr. Isaya Zebedayo Mwanri, learned advocate who represented him at the hearing and in the High Court, lodged a supplementary memorandum of appeal containing four grounds substituting the appellant's own memorandum in terms of rule 73(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) with his (the appellant) consent. The grounds of appeal fault the trial court on four areas; **one**, failure to take into account available evidence from the prosecution witness that the appellant had an impaired state of mind; **two**, holding that the contradictions in evidence of the eye witnesses (PW1 and PW2) was minor and that they did not impair their credibility and reliability; **three**, failure to realize that the cause of death was doubtful since the Postmortem Report (exhibit P2) was prepared

a year after the death; and; **four,** failure to explain the assessors their roles and sum up to them on vital points of law.

Mr. Mwanri commenced his onslaught against the impugned judgment with the claim that the conduct of the appellant during the trial exhibited an impaired state of mind which was suggestive of insanity. To buttress his arguments, the learned advocate singled out some pieces of the evidence on record which, according to him, suggested that the appellant was not of sound mind when he committed the crime. The first of such pieces of evidence relates to PW3's testimony in cross- examination showing that the appellant used to set people's kraals on fire (page 35). The second involves the appellant's own conduct during the trial whereby, initially he indicated to be a pagan and thus going to give unsworn testimony only to change later.

According to the learned advocate, the appellant's conduct was sufficient to inform the learned trial judge that the appellant was not sane and thus had diminished criminal responsibility in terms of section 13 of the Penal Code. Relying on the Court's decision in **Thomas Pius v. Republic,** Criminal Appeal No. 145 of 2019 (unreported), the

learned advocate urged that the conduct of the appellant was incompatible with sanity warranting conviction of the offence charged. While conceding that the appellant did not raise insanity as a defence, Mr. Mwanri was adamant that his conduct was too telling not to have aroused the trial court's attention. He thus invited the Court to nullify the trial, quash conviction and set aside sentence with a direction for the appellant's mental examination before standing a trial.

Resisting the appeal, Ms. Revina Tibilengwa, learned Principal State Attorney appeared together with Ms. Prosista Paul, learned State Attorney who addressed the Court. The learned State Attorney invited the Court to dismiss ground one as baseless. She advanced several reasons for her stand point; (1) lack of evidence of the appellant's impaired mental health at the trial, (2) the appellant's ability to stand trial and follow up proceedings and to give evidence in defence, (3) failure to raise insanity as his defence and, (4) irrelevance of change of mind during hearing which was incapable of warranting the trial court to order his mental examination.

After hearing counsel's arguments and having examined the record of appeal, it is common ground that the appellant's complaint in

ground one appears to be premised on section 216 of the Criminal Procedure Act (the CPA). This is so because, as conceded by Mr. Mwanri, the appellant did not raise insanity as a defence in terms of section 219(1) of the CPA which could have triggered an adjournment of the hearing and detention of the appellant in a mental hospital for his medical examination in terms of section 220(1) of the CPA. The procedure is well set out in section 220 of the CPA captured in the Court's decisions, amongst others, **MT. 81071 PTE Yusuph& Another v. Republic**, Criminal Appeal No. 168 of 2018 cited in **Mwale Mwansanu v. Republic**, Criminal Appeal No. 105 of 2018 (both unreported) cited in **Thomas Pius** (supra). On the other hand, section 216 of the CPA comes into play where the trial court finds reasonable cause to believe that the accused is of unsound mind and incapable of making his defence. It provides:

> *216.-(1) Where in the course of a trial the court has reason to believe that the accused is of unsound mind and consequently, incapable of making his defence it shall, before inquiring into the fact of such unsoundness of mind and notwithstanding the fact that the accused may not have pleaded to the charge, call on the*

prosecution to give or adduce evidence in support of the charge.

It is plain as the Court underscored in **MT. 81071 PTE Yusuph Haji** (supra), that there is a clear distinction between cases where the accused raises a defence of insanity under section 219 (1) and where the trial court acts under section 216 (1) of the CPA having found reasonable cause to believe that the accused is of unsound mind and incapable of making his defence. Whereas the former relates to the accused's mental capacity at the commission of the offence charged, the latter relates to his soundness and ability to make a defence during the trial. There is no gainsaying that in the former case, the trial court is enjoined to adjourn the hearing pending medical examination to establish the mental health of the accused at the commission of the offence charged. Conversely, the latter serves a different purpose, that is to say; at establishing the soundness of the accused to make his defence upon the evidence by the prosecution establishing and the trial court finding the accused to have a case to answer.

The position in the instant appeal is that the trial court found nothing unusual suggesting that the appellant was of unsound mind

and incapable of making his defence. It thus proceeded with the trial to its finality resulting into the impugned conviction.

Like the learned State Attorney, we agree that neither the appellant's change of mind from giving unsworn evidence in defence nor PW3's evidence in cross examination could have informed the trial court to make a reasonable suspicion that the appellant was of unsound mind. The record bears testimony that the appellant who was represented by an advocate entered a plea of not guilty to the information of murder, followed the proceedings and entered his defence just as any other accused person would have done. The Court confronted a similar issue in **Ester Jofrey Lyimo v. Republic,** (Criminal Appeal No. 123 of 2020) [2022] TZCA 197 (14 April 2022 TanzLii). Just as in the instant appeal, the appellant was convicted of murder. One of the grounds in the appeal faulted the trial court for its failure to inquire into the mental status of the appellant considering evidence of cruel behaviour on the part of the appellant. The Court rejected that ground as an afterthought since neither was the insanity of the appellant raised as a defence nor was there any existence of reason to suspect that she was of unsound mind warranting invocation

of section 216 of the CPA. We respectfully take the same path in this appeal being satisfied that the evidence on record does not show that the appellant exhibited a conduct of a person of unsound mind. Consequently, we find no merit in this complaint and dismiss it.

Next for our consideration is ground four which faults the learned trial judge for failure to explain roles to the assessors who sat with him and inadequate summing up to them. Mr. Mwanri was emphatic that, the trial judge's failure to explain the roles of the assessors was fatal to the trial and resultant conviction citing the Court's decision in **Galula Nkuba @ Malago & Another v. Director of Public Prosecutions,** Criminal Appeal No. 394 of 2018 (unreported). Regarding inadequate summing up, it was Mr. Mwanri's submission that, the trial judge strayed into an error by his failure to direct the lay assessors on vital points of law, particularly, on what it meant by malice aforethought and the relevance of visual identification evidence to the prosecution case. The learned advocate urged that the irregularities pointed out were fatal to the trial and the resultant conviction. He thus invited the Court to nullify the trial, quash conviction which will result in setting aside the sentence. The learned advocate ruled out a possibility for a retrial since,

according to him, the evidence was too weak to sustain conviction if the Court were to order a retrial.

Responding, Ms. Paul conceded the omission by the learned trial judge to explain the role of the assessors. Nevertheless, she argued that the omission was inconsequential considering that the assessors fully participated in the trial by putting questions to the witnesses. Regarding the complaint on inadequate summing up, the learned State Attorney found nothing wrong to fault the learned trial judge's summing up notes to the assessors.

Having heard arguments for and against in the light of the record of appeal, there is hardly any doubt on the omission by the trial judge to explain the roles of the assessors before commencement of the trial as conceded by Ms. Paul. The only issue falling for our consideration and determination is whether such omission was fatal to have vitiated the trial warranting an order nullifying it as urged by Mr. Mwanri relying on the Court's decision in **Galula Nkuba @ Malago & Another** (supra). Like in the instant appeal, there was an omission to explain to the assessors' roles before participating in the trial. The court found that omission fatal. Indeed, that has been the position in many of its

decisions including, **Lazaro Katende v. Director of Public Prosecutions,** Criminal Appeal No. 146 of 2018 (unreported).

However, the Court was confronted with a similar issue in **Boniface Thomas Mwimbwa & Another v. Republic,** Criminal Appeal No. 325 of 2019 (unreported). An argument was advanced by the respondent Republic's Attorneys that despite the omission, there was clear evidence of the assessor's participation throughout the trial which was a clear distinction from the case cited in favour of nullification of the trial. The Court upheld that submission relying on its previous decision in **Ernest John @Mwandikaupesi & Another v. Republic** Criminal Appeal No. 408 of 2019 (unreported) where it stated:

> *"That cannot be said of the situation in the instant case. Having scrutinized the entire trial proceedings, our impression is that the assessors were fully alert and that they actively participated in the proceedings. Their incisive opinions and verdicts of not guilty recorded after the learned trial Magistrate's summing up, as shown at pages 132 to 134 of the record of appeal, confirm that the assessors knew their duties and that they devotedly discharged them despite having not been informed of them*

before the trial commenced. We would, therefore, dismiss the third ground of appeal as we find the omission complained of having not occasioned any failure of justice" [at page 15].

Apparently, no similar aspect featured in **Galula Nkuba's** case (supra) and so the same is clearly distinguishable from the instant appeal. We shall accordingly reject the invitation to nullify the trial on the omission to explain the roles of the assessors.

Regarding the alleged inadequate summing up, we agree with the learned State Attorney that the complaint is baseless. As the Court said in **John Mlay v. Republic,** Criminal Appeal No. 216 of 2016 (unreported), summing up is a matter of style which, regardless of whether it is detailed or otherwise, it must contain all essential elements in a case that is to say; all ingredients of the offence, burden of proof and duty of the prosecution to prove its case beyond reasonable doubt, elaboration on the cause of death, malice aforethought and main issues in the case.

The complaint against the learned trial judge's summing up notes is on two aspects; failure to define malice aforethought on the one hand and the relevance of the evidence of visual identification. It is significant

that the summing up notes appearing at pages 57 through 62 inclusive of the record of appeal was read out to the assessors. Although there is no indication that the trial judge did so in Kiswahili language, we are not oblivious of the obtaining practice that the proceedings are conducted in Kiswahili. Under normal circumstances, common sense, which we are entitled to take, dictates that the learned trial judge explained to the assessors the phrase malice aforethought in a language they understood. On the other hand, the question regarding the relevance of visual identification was not one of the main issues in the case considering that not only was the appellant known to PW1 and PW2, but also, the incident occurred before sunset at about 05:00 p.m. to be exact. Thus, the question of mistaken identity could not have arisen to require the trial judge's explanation on it. At any rate, there was no dispute as to the identity of the person who inflicted injury on the deceased rather, whether the act causing such death was a result of such injuries and if so, whether such death was with malice aforethought. We find no merit in this part of the complaint. Consequently, both complaints in ground four are baseless which results in the dismissal of this ground.

We shall now turn our attention to ground three in which the trial court is attacked for relying on a postmortem report (exhibit P2) prepared after one and a half years of the death incident, subject of the information. Mr. Mwanri sought to attack the credibility of exhibit P2 arguing, as he did, that it was doubtful and unreliable to prove the cause of the deceased's death. According to the learned advocate, it could not have been practically possible for PW5 who had examined the deceased's body on 23 January 2015 to have the findings of the examination posted in exhibit P2 on 23 June 2016 showing that the cause of death was head injury.

In her reply, Ms. Paul argued and rightly so in our view, that the delayed filling of exhibit P2 did not constitute any irregularity to have affected its reliability in view of PW5's evidence that the findings therein were extracted from a PF3 which was filled in at the time of the examination of the deceased's body. We equally agree with Ms. Paul that the deceased's death arose from severe cut wounds which resulted into nose bleeding as shown in exhibit P2. At any rate, there was no dispute that the deceased's death was unnatural and even that was not the case, consistent with the Court's previous decisions, in particular,

Mathias Bundala v. Republic, Criminal Appeal No. 62 of 2004 (unreported), that a postmortem report is not the only means of proving death. We accordingly find no merit in this ground and dismiss it.

Finally on ground two. The complaint in this ground is directed at the alleged contradictions in the evidence of PW1 and PW2; the key eye witnesses. According to the appellant's learned advocate, there were contradictions between PW1 and PW2 regarding the distance from which each saw the appellant cutting the deceased with a machete. He forcefully argued that, contrary to the learned trial judge, the contradictions on the distance between the two identifying witnesses were not minor but material weakening the witnesses' reliability on their identification of the culprit. The Court was referred to two of its decisions in **Hassan Khati Ali v. Director of Public Prosecutions,** Criminal Appeal No. 86 of 2018 (unreported) and **Waziri Amani v. Republic** [1980] TLR 250 to stress the point that the appellant was not properly identified.

Ms. Paul conceded the existence of the contradictions on the distance which PW1 and PW2 saw the appellant inflicting injuries on the

deceased. However, the learned State Attorney argued that such contradictions were immaterial as found by the learned trial judge and so they did not dent the credibility of the witnesses. Ms. Paul cited to us **Goodluck Kyando v. Republic** [2006] TLR 363 to argue that, each witness is entitled to credence and to be believed unless there are cogent reasons to the contrary. She too relied on the Court's decision in **Athuman Hassan v. Republic**, Criminal Appeal No. 292 of 2017 (unreported) on the test to be applied in determining credibility of witnesses. In her further submission, the learned State Attorney pointed out that the appellant's identity was not an issue during the trial as the incident occurred during day light involving a person who was known to the identifying witnesses.

From the foregoing learned arguments, it is obvious to us that the attack against the learned trial judge's finding is directed at the identity of the appellant. Addressing himself, the learned trial judge found undisputed from the evidence that the appellant met some boys looking after cows near a river who allegedly insulted him and he chased them. Within moments, he apprehended one of them and caned him. It was undisputed too that the incident occurred during day light and that the

appellant was a resident near the deceased's home. Addressing himself on the contradictions pertaining to the distance at which PW1 and PW2 observed the appellant, the learned trial judge had the following to say:

> *".... PW1 said, he was hiding with PW2 at adjacent points. But, he observed the accused cutting the deceased at distance of 10- 15 meters. On his part, PW2 said, the distance was about 100 meters. Again, for the same reasons stated above in discussing the discrepancies related to the number of the cuts on the deceased, I find the discrepancy related to the distance from where the two witnesses observed the accused cutting the deceased also minor. The important aspect here is that, they both saw the accused clearly cutting the deceased by a machete and they had seen him chasing them before he apprehended the deceased".*

[At page 79 of the record].

Like the trial judge, we are satisfied that, since the incident occurred during day light, the appellant was well known to the identifying witnesses, the appellant admitted having chased the boys and caned one of them who happened to be the deceased, the

contradiction based, on the distance from which PW1 and PW2 observed the appellant was too minor to dent their credibility. The attack against the trial court's finding is misplaced resulting in the dismissal of this ground.

In the event, the appeal lacks merit and we dismiss it.

DATED at **DAR ES SALAAM** this 29th day of January, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 30th day of January, 2024 in the presence of Mr. Baraka Mbwilo, learned advocate holding brief for Mr. Isaya Mwanri, learned advocate for the appellants, and Ms. Lilian Chagula, learned State Attorney for the Respondent/Republic, in the presence of the Appellant in person via Video link from High Court of Tanzania at Mbeya is hereby certified as a true copy of the original.

J. J. KAMALA
DEPUTY REGISTRAR
COURT OF APPEAL