IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 293 OF 2020

KIMORA SARAWA @ LIMBU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tarime)

(Siyani, J.)

dated the 11th day of June, 2019

in

Criminal Sessions Case No. 139 of 2015

.....

JUDGMENT OF THE COURT

3rd & 10th May, 2024

KENTE, J.A.:

The appellant Kimora Sarawa @ Limbu was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code by the High Court of Tanzania (Siyani J, as he then was), sitting at Tarime on 11th June, 2019.

The particulars of the offence alleged that, the appellant along with another person, not a party to this appeal, on 5th July, 2014 at Park Nyigoti Village within the District of Serengeti in Mara Region, murdered one

Mchege Nyagyati @ Nyigoko. The appellant denied any involvement in the commission of the charged offence.

In support of their case, the prosecution called four witnesses whose circumstantial evidence on which the appellant's conviction was based, was to the following effect. PW4, namely Pili Kumaria @ Shironera, was a resident of Park Nyigote Village in Mugumu Serengeti. On the fateful day at about 9.00 a.m, she went to fetch water at Manchira stream. After fetching water and as she was leaving, she heard a sound of a moving motorcycle which, in quick succession, was followed by a doleful high-pitched voice of a man in a seemingly dangerous condition who was then screaming that he was dying. As the voice appeared to come from the direction of the stream from where she had fetched water in the immediate past, PW4 rushed back to see what was the unexpected and strange happening.

PW4 recounted further that, on the way, she met the appellant who had a motorcycle and when she asked him what the matter was, he quickly told her that he had been involved in a motorcycle accident. Still anxious, PW4 asked the appellant as to who then had been screaming that he was dying, whereupon the appellant hurled a retort which did not

convince her saying that, it was himself. Surely disquieted by the appellant's answers, PW4 asked him what was the source of the sound that appeared as if an object had been hit several times. In a quick reply, the appellant told her that it was himself who was repairing his motorcycle. According to PW4, as her queries lingered, the appellant then called one Nsubi @ Isube who was in the immediate vicinity of the crime scene and told him that they should leave that place but, seeing that Nsubi was taking his time, the appellant left in a hurry leaving Nsubi behind.

According to PW4, after a short while, one Jumanne Kafaransa who seemed to have got the wind of what was happening, appeared and asked her what the matter was whereupon she told him that, it was the appellant who had been involved in a motorcycle accident. However, still wary and believing that, that was probably the tip of the iceberg, Kafaransa could not buy that story. He told PW4 that there was something fishy going on.

In a short while, the appellant's companion Nsubi appeared and seemed to be wet with water up to the waist. He told them he was taking bath in the stream. But when they pressed him to show them what he was really doing, to their surprise, he took to his heels. PW4 said that, after she remained behind with Kafaransa, it immediately dawned on

them that they should go to the stream in a bid to find out what had really been going on. There they saw a lot of fresh blood spattered on the ground whereupon they immediately raised alarm to alert their fellow villagers who responded in mass. PW4 testified that, a search mounted by the worried villagers revealed a black jacket which, on being removed from the water, led to the discovery of a dead body afloat in the stream. Police were accordingly informed and they went to the scene of the crime where they retrieved the said body from the stream.

Following the information given by PW4 to the local leadership regarding the circumstances surrounding the deceased's murder, the appellant who was a prime suspect in the matter, was tracked to his hideout and arrested at the home of one Mboje in Mununo Village Serengeti District. That was on the early hours of the following day. On being questioned by Kiloya Edward (PW1) who was then the chairman of Nyigoti hamlet and leader of the search team, the appellant is said to have confessed to the offence saying that, it was one Kichuri Sigori who had hired him to kill the deceased. It may not be irrelevant here to mention that, the said Kichuri Sigori was alleged to be the architect of the plot to kill the deceased whom he suspected to have carnal connection with his two wives. Likewise, the appellant is said to have confessed to No. F 6733

Detective Corporal Faru (PW3) and one Bhoke Buhinda (PW2) a Justice of the Peace who respectively went on recording his cautioned and extra-judicial statements (Exhibits P3 and P4) as required by law.

The appellant's defence was that, on 5th July 2014, at about 5.00 a.m, he too left home and took out his aunt's cattle for grazing as was the norm. Further that, at about 10.00 a.m, he drove the said cattle to the Machira stream for drinking water and later on to the National Park area for further grazing. In the evening, he returned home where he was told by his aunt that the village chairman had wanted to see him. The appellant went on recounting that, on 6th July 2014, he went to the home of the said chairman where he found some youngmen who instantly and for no apparent reason began to attack him. He said that, in resistance, his aunt told the village chairman that she would not leave that place if he did not stop the youngmen from beating him. Following the chairman's intervention, the youngmen allegedly stopped beating him. From there he was whisked to Mugumu Police station where his cautioned statement was recorded. On 8th July, 2014 he was taken to the Justice of the Peace (PW2) who recorded his extra-judicial statement. However, the appellant denied knowing Kichuri whom he said, he met for the first time at Mugumu

Police station. All in all, he denied knowing anything about the deceased's brutal murder.

Like the gentlemen assessors who sat with him, the learned trial Judge accepted the circumstantial evidence given by the prosecution witnesses. In particular, he believed in what was contained in the appellant's cautioned and extra-judicial statements regarding the plot to murder the deceased and how and where it was hatched and finally carried out. The learned Judge reasoned that, PW4 was very positive that, she knew the appellant because they came from the same village and that, she met him as he was coming from the direction where the deceased had been heard screaming that he was being killed. He discounted the appellant's defence of alibi that at the time which is material to the commission of the offence, he was grazing cattle in the National Park area. He therefore concluded that the circumstantial evidence led in support of the prosecution case, placed the appellant at the crime scene. Consequently, the learned trial Judge found that the prosecution had proved their case against the appellant beyond reasonable doubt, and proceeded to find him guilty and convict him accordingly.

Dissatisfied, the appellant appealed to this Court citing eight grounds of appeal which, upon being stripped of all procedural technicalities, can be conveniently cut down into one ground of complaint, that:

> *The trial court erred in law and in fact when it convicted the appellant on circumstantial evidence which had not taken the prosecution case beyond the domain of conjecture as to permit no any other inference than that of the appellant's guilt.*

Moreover, immediately before the hearing of the appeal commenced in earnest, Mr. Deocles Rutahindurwa, learned advocate who appeared for the appellant prayed, in terms of Rule 81(1) of the Court of Appeal Rules 2009 (the Rules), to argue an additional ground of appeal in which it is contended that, the committal of the appellant for trial by the High Court was improper for non-compliance with section 246 (2) and (3) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA).

It is worthwhile to mention here that, pursuant to Rule 74 (1) of the Rules, the appellant had filed written submissions expounding on his grounds of appeal. It also deserves mentioning here that, after Mr. Rutahindurwa argued the additional ground of appeal and adopted the

submissions filed by the appellant, he informed the Court that in essence he had nothing to add. It appears to us that, it is only from this sole angle that, the learned counsel had prepared himself to attack the decision of the High Court.

In support of the foregoing additional ground of appeal, Mr. Rutahindurwa submitted that, while the committal procedure is clearly spelt out under section 246 (1) to (6) of the CPA, his concern was in respect of the requirements of sub-sections (2) and (3) which respectively provide that:

> (2) *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.*
>
> *(3) After complying with the provision of subsections (1) and (2) the court shall address the accused person in the following words or words to the like effect:*
>
> > *"You have now heard the substance of the evidence that the prosecution intends to call*

at your trial. You may either reserve your defence, which you are at liberty to do, or say anything which you may wish to say relevant to the charge against you. Anything you say will be taken down and may be used in evidence at your trial".

With regard to the requirements under subsection (2), Mr. Rutahindurwa contended that, what was certified by the committing magistrate as indicated on page IV of the record of appeal, was wrong because on that time, there were no exhibits properly so called, to be read out.

Moving forward to subsection (3), the learned counsel submitted that, likewise, the requirements thereunder were not complied with because the words in the inverted commas were not specifically read out to the appellant. In the circumstances, Mr. Rutahindurwa implored us to invoke our revisional powers in terms of section 4 (2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws, to nullify the proceedings before the lower courts, with an attendant order for the committal proceedings to be reconducted followed by a retrial. When we probed him, Mr. Rutahindurwa remained steadfast and seemed, by all

means, dogmatically opposed to our thinking that, the requirements of section 246 (2) and (3) of the CPA need not be fulfilled to the letter.

Responding to the additional ground of appeal, Ms. Magreth Mwaseba, learned Senior State Attorney who was assisted by Messrs. George Ngemera and Japheth Ngusa, learned State Attorneys appearing for the respondent Republic, did not oppose what was submitted by Mr. Rutahindurwa. To that end, she submitted that, what was read out in court during the committal proceedings was the list of the intended prosecution witnesses and not the intended documents or exhibits for the prosecution as required by law. The learned Senior State Attorney relied on our earlier decision in the case of **Malocha Kalinji @Venance and Another v. The DPP**, Criminal Appeal No. 238 of 2019 (unreported), in which we insisted on the need for the committal subordinate courts to comply with section 246 (2) and (3) of the CPA.

We have considered the additional ground of appeal which was certainly proffered and argued by Mr. Rutahindurwa in the alternative and which, as it turned out, has gone uncontested. The issue is whether or not the requirements of section 246 (2) and (3) of the CPA were materially complied with by the committal court. Germane to this, is the question as

to, if the answer to the above-posed question is in the negative, whether or not the omission had the effect of prejudicing the appellant or occasioning injustice to him as to justify Mr. Rutahindurwa's complaint and prayer for retrial.

We note from page IV of the record of appeal that, when the appellant who was then charged along with one Kichuri Sigori @ Murumbe appeared before the committal court on 14th August, 2015 and, after recording the list of the intended prosecution exhibits which were the postmortem report, a sketch map of the crime scene and the appellant's cautioned and extra-judicial statements, the learned Resident Magistrate of the committing court went on certifying thus:

> *"I hereby certify that the above list of intended prosecution witnesses and exhibits has been read over loudly in open court and explained to accused persons in Swahili language"*
>
> Sgd: DRM
>
> 14/8/2015
>
> *S. 246 (1) and (2) of the Criminal Procedure Act complied with.*
>
> Sgd: DRM
>
> 14/8/2015

Thereafter, the record shows that, adverting to section 246 (3) of the CPA, the learned Resident Magistrate put it on the record that:

> *"**Court:** The accused persons are asked if they have anything to speak before they are committed to the High Court for their trial"*
>
> Sgd: DRM
>
> 14/8/2015
>
> ***First accused's statement:** I will speak before the High Court during my trial.*
>
> ***Second accused's statement:** I will speak before the High Court during my trial.*
>
> Sgd: DRM
>
> 14/8/2015

We have on the one hand, considered the above excerpt regarding what transpired in the subordinate court during the appellant's committal for trial by the High Court. On the other hand, we have in mind the submissions made by Mr. Rutahindurwa whose central plank is that, the mandatory requirements of section 246 (2) and (3) of the CPA were not at all complied with.

With due respect, we do not agree with both Mr. Rutahindurwa and Ms. Mwaseba's criticism of the committal proceedings. This is because, as

opposed to the case of **Malocha Kalinji** (supra) in which the committing magistrate had merely enlisted the intended prosecution witnesses and exhibits and thereafter went on recording that "Section 246 (3) and (4) CPA Cap 20 R.E 2002 C/W", in the present case, the record is clear that, the mandatory requirements of section 246 (2) and (3) were duly complied with in that the statements of the intended prosecution witnesses and exhibits were read out as certified by the committing magistrate whereupon, the appellant together with his co-accused, were duly addressed in terms of subsection (3) upon which they opted to reserve their statements until the time of the trial. In these circumstances, it is not correct to say as did Mr. Rutahindurwa and Ms. Mwaseba that, the mandatory requirements of section 246 (2) and (3) of the CPA were not complied with by the subordinate court. On the whole therefore, we find the additional ground of appeal raised by Mr. Rutahindurwa on behalf of the appellant to have no merit and we accordingly dismiss it.

Regarding the consolidated grounds of appeal, the appellants complaint appears to be that, it was not correct and indeed a serious misdirection on the part of the trial court to convict him relying on circumstantial evidence which did not attain the threshold required by law.

In this connection, we wish to start with the appellant's cautioned statement (Exhibit P4) which was challenged for having been recorded by No. F1819 Detective Corporal Mauzi but for the reasons not disclosed, was tendered in court by PW3 Detective Corporal Faru who claimed to have recorded it. It is worth noting that, there were no contesting positions between Mr. Rutahindurwa and Ms. Mwaseba regarding the evidentiary value of the appellant's cautioned statement. Both of them urged us to disregard it following the appellant's complaint that it might have been doctored.

On our part, we entirely agree with the argument by the appellant's counsel as readily conceded by the respondent's counsel that, for the foregoing reasons, the said statement should either not have been admitted in evidence or else it should not have weighed heavily as it did in founding the appellant's conviction by the trial court. We find on that basis that, the testimony by PW3 concerning the confession allegedly made to him by the appellant was improperly received and acted upon by the trial Judge. We accordingly discard it.

Turning to the remaining circumstantial evidence which was relied on by the trial court to found the appellant's conviction, Mr. Rutahindurwa

submitted very briefly but casually that, once the appellant's cautioned statement was excluded, there was no other evidence that proved beyond reasonable doubt that the appellant killed the deceased.

In reply, Ms. Mwaseba countered Mr. Rutahindurwa's argument by submitting that, the evidence adduced by PW4 and Bhoke Buhinda (PW2) a Justice of the Peace who recorded the appellant's extra-judicial statement together with the appellant's oral confession to PW1 when viewed as a whole, connected the appellant with the deceased's murder. It was accordingly contended that, being circumstantial as it is, the said evidence had attained the degree of cogency that permitted only an inference of guilty against the appellant. It was the learned Senior State Attorney's position that the evidence showed that indeed the appellant murdered the deceased after he was hired to do so by Kichuri and on that account, we were urged by Ms. Mwaseba not to interfere with the trial court's findings.

We note from the record of the trial court that, the appellant's extra judicial statement which he made to PW2 was not objected during its introduction into evidence nor materially controverted by Mr. Onyago Otieno the then appellant's counsel, during cross-examination. PW2 was

only asked as to whether at the time of recording his statement, the appellant had any scars on his shoulder, when he was arrested and if he knew the whereabouts of Nsubi, his alleged confederate. Other questions put to PW2 by Mr. Otieno during cross-examination were as to how much time he had spent recording the appellant's statement, whether or not he closed the door when recording that statement and if the appellant had told him that he was literate. PW2's response was that the appellant had no scars, he was arrested at Manuna Village and that the appellant had told him that he did not know the whereabouts of Nsubi. PW2 went on telling the trial court that, he had spent thirty minutes recording the appellant's statement and that he did not close the door at the time of recording the said statement. He also said that the appellant told him he was literate but he requested him (PW2) to read over the statement to him.

On the other hand, the appellant's testimony regarding his extra-judicial statement was that, indeed on 8th July 2014 Detective Corporal Faru took him to the Justice of the Peace but he sat at the door to witness him make his statement to PW2. He claimed that, it was Corporal Faru who gave PW2 some papers from which PW2 allegedly copied the material contents into the purported extra judicial statement.

Considering the evidence led by the prosecution side on one hand, and he appellant's version on another hand, the learned trial Judge was of the view that, in essence, the appellant had not objected to admissibility of his extra judicial statement into evidence but he sought to challenge its admissibility on the apparent grounds that either it was involuntarily made or not made by him rather belatedly during his defence.

Relying on our earlier decision in the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported), the learned Judge took the position, correctly so in our view that, a confession or statement by a suspect of a crime will be presumed to have been voluntarily made until objection to it is made by the defence on the ground either that it was not voluntarily made or made at all. Thereafter, the learned trial judge underscored the second dictum of this Court in the above-cited decision that, if an accused person intends to object to the admissibility of an incriminating statement or confession allegedly made by him, he must do so before it is admitted in evidence and not during cross examination or defence.

If case law is anything to go by as it should, we cannot but entirely agree with the trial Judge that, in the absence of any objection to the

admissibility of the appellant's extra-judicial statement when the prosecution sought to have it admitted into evidence, the learned trial Judge could not on his own initiate and hold a trial within trial to test the voluntariness of the said statement. That in essence is what we held in the case of **Steven Jason & Two Others v. Republic**, Criminal Appeal No. 79 of 1999 (unreported). For, the holding of a trial within trial presupposes that the defence in a criminal case seeks to object the admissibility of the accused's statement on the ground either that, he did not make it at all or that the said statement was obtained through coercion or oppression in total defiance of the accused's will.

Upon the foregoing observations, we go along with the learned trial Judge that, by not objecting the admissibility of his extra-judicial statement, the trial court was entitled as per **Nyerere Nyague** (supra) to presume that the statement was voluntarily made and what remained was for the court to determine, in terms of the famous case of **Tuwamoi v. Uganda** (1967) E.A 84 if the confession was true as to establish the degree of certainty required in criminal cases.

Ms. Mwaseba alluded to in her submission that, the trial court found the confessions made by the appellant to PW1 and PW2 to be true based

on what the court heard and saw both in the said confessions and from, the two witnesses. It should be a very elementary position of the law for which we need not cite any authority in support of the established principle that, a finding of fact by the trial court, based on the credibility of a witness, cannot be replaced by any other finding unless it is shown to the satisfaction of a higher court that, the finding was erroneous. On our part, we have no plausible reason to interfere with the findings of fact by the trial court and we accordingly proceed on holding that, the appellant's confessions were nothing but true.

The above evidence, coupled with PW4's materially uncontroverted testimony that, at the time which was contemporaneous with the killing of the deceased, she met and talked to the appellant who was coming in haste from the direction where the deceased was heard screaming that he was being killed, placed the appellant within the vicinity of the crime. In view of the foregoing strands of circumstantial evidence, the inference that the appellant was the perpetrator of the crime, becomes unavoidable. Reverting to the question we posed hereinabove, we are satisfied that, the circumstantial evidence led by the prosecution is so cogent as to take the prosecution case out of the realm of speculation thereby permitting only one conclusion that it is the appellant who murdered the deceased.

In the circumstances, we find no merit in the appeal which we hereby dismiss in its entirety. Needless to say, we uphold the conviction and sentence imposed by the trial court.

DATED at **MWANZA** this 9th day of May, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 10th day of May, 2024 in the presence of the Appellant in person and Mr. John Simon Joss, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL