IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 681 OF 2021

VITALIS KAMBILANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Morogoro at Morogoro)

(Hon. Mushi, SRM – Ext. Juris.)

dated the 28th day of April, 2021
in
Criminal Sessions Case No. 11 of 2019

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JUDGMENT OF THE COURT

17th & 29th March, 2023

NDIKA, J.A.:

The appellant, Vitalis Kambilanga, was convicted of murdering his nephew, Kipawa Kambilanga, and, consequently, sentenced to death. He now appeals against the conviction.

The testimonies of the prosecution witnesses, knitted together, present the following narrative: on 1st July, 2016 around 16:00 hours, Norbert Elias Kambilanga (PW1), the appellant's elder brother, returned to his home in Tanganyika Masagati village within the District of Kilombero in Morogoro region. His seven-year-old son, Kipawa, henceforth the

deceased, was not there. He learnt later from Jentalida Kambilanga (PW3) that the deceased had left earlier that day with the appellant to River Mfuji. As by nightfall, the deceased was still missing, PW1 together with his sister-in-law Domisiana and younger sister Neema Kambilanga went to the river and adjoining areas searching for the child. The search went on until 23:00 hours without success. On resuming the search along the river the following morning, PW1 and Domisiana saw a pair of trousers known as jeans, a flashlight and slippers that belonged to the appellant. On moving across the river, they made a harrowing discovery; they saw the deceased's lifeless body, with a visible injury on the head, lying on the ground.

PW1 left the scene of the crime and reported the distressing discovery to the Kitongoji Chairman Richard Cyprian Manga (PW5) and Adhabu Sadiki Lyoko (PW8), who was the Village Executive Officer. Accompanied by the two leaders and several people, PW1 went back to the scene. At that point, it was learnt that the appellant's expedition the previous day also involved his stepdaughter, PW2 Erenensia Kambilanga, and that both were missing. A search for them was conducted without success. Around the same time, it was established that the appellant's wife, Lustika Njewike (PW4), was attacked and injured on the same day.

The deceased's death was reported to the police on 2nd July, 2016 and later in the evening the deceased's body was removed from the scene and taken to PW1's home.

On 3rd July, 2016, SSP Magnus Milinga (PW6), who was the OCS Mlimba Police Post at the time, and E.22 Detective Sergeant Nicas along with Dr. Samwel Lema (PW9) drove to PW1's home in Tanganyika Masagati village. On the way, they stopped over at Ipinde village and picked the appellant who, they had been informed, was arrested the previous day. As PW9 conducted an autopsy on the deceased's body at PW1's home, the appellant admitted having killed the deceased and PW2 and accepted taking the police officers and the village leaders to the scene of the crime.

True to his word, the appellant initially took the police officers and a group of people who included PW1, PW5 and PW6 to the bank of River Mfuji where the pair of trousers, a flashlight and slippers were found. He said they belonged to him. Then, he led the team to a spot where the deceased's body was found, admitting that he, indeed, killed him there. From that place, the appellant led the team to a tree about ten kilometres away where they found PW2 lying unconscious on the ground. She was

naked and had a large penetrating wound on the head. After being administered with first aid, she was taken to Mlimba Health Centre where she was admitted for treatment.

What exactly happened on the fateful day was narrated by PW2. She recalled that around lunchtime on that day, the appellant, holding a machete, led her and the deceased to the river to collect fish. He had the deceased carry a spear. Upon arriving at the riverbank, he ordered the deceased to stay there and then he took PW2 to another place near a bush and left her there. Then, he walked back to where he had left the deceased. A few moments later, PW2 heard the deceased crying in agony. She sensed that the deceased must have been seriously hurt. She was surprised that a little later the appellant came back alone and pretended to ask her where the deceased was. Subsequently, he took her all the way to a certain tree where he stripped her off, tied her with a rope and hacked her with the machete on the head. She collapsed only to regain consciousness days later while she was at Mlimba Health Centre.

The appellant's wife (PW4) told the trial court that her marriage was not a happy one and that the appellant and her were contemplating divorce. On 1st July, 2016, she left home with the appellant around 09:00

hours for the Ward Tribunal at Taweta over their matrimonial disagreement. On the way near a bush, he suddenly attacked her, almost gouging out one of her eyes before leaving her for dead. It appears that the alleged attack on PW4 was a prelude to what happened later to the deceased and PW2.

The medical witness (PW9), who examined the deceased's body as hinted earlier, said that the death was due to a head injury caused by a heavy object that led to excessive loss of blood. He detailed that the deceased sustained a wound on the head as well as a fracture on the left occipital skull bone and ear canal. The post-mortem examination report on the deceased was admitted as Exhibit P1.

The appellant, on the other hand, denied the accusation in his sworn defence. However, he admitted being entangled in a bitter conflict with his wife (PW4), blaming it on the act by his elder brother (PW1) philandering with her. He averred that on 30th June, 2016, he found his brother and wife in a farm in a compromising situation and that it was PW2 who was standing near the scene that gave a sign to the flirting twosome whereupon they fled the scene.

Furthermore, the appellant claimed that he followed his wife on the following morning as she was going to Taweta and that on the way she verbally abused him to which he responded by beating her up slightly. He admitted leading the deceased and PW2 to the river on the fateful day for the purpose of collecting fish but denied point blank to have killed the deceased. He testified that the deceased just disappeared and that when he asked PW2 where the deceased was, she answered him contemptuously whereupon he angrily hacked her on the head causing her to faint. Believing that she had died, he fled to Taweta village where he was arrested on the following day. Although he denied being the owner of the items allegedly recovered from the scene, he admitted having led the police officers and certain village functionaries to the place where he "left" the deceased and where he assaulted PW2.

The three lady assessors who sat with the learned trial magistrate returned a unanimous verdict of guilty. In convicting the appellant, the learned trial magistrate found it undisputed that the deceased died an unnatural and violent death. He was alert, in the setting of the case, that what was in dispute was whether the appellant was the deceased's assailant and if so, whether he killed him with malice aforethought. On the first issue, the learned trial magistrate held that although there was no

direct evidence on the killing, circumstantial evidence as adduced by PW2 and PW3 coupled with oral confession and the evidence that the appellant led the search party that included the police to the scene of the crime and the discovery of PW2 lying unconscious was sufficient to hold that the appellant killed the deceased. As to whether the killing was intentional, the learned trial magistrate answered the question positively in terms of section 200 of the Penal Code in view of the nature and scope of the injury the appellant inflicted on the deceased as well as the kind of weapon used.

The appellant initially predicated his appeal on six grounds but at the hearing his learned counsel on a dock brief, Mr. Musa Mhagama, canvassed grounds 1 and 5 but abandoned the rest. The first ground faults the trial judge for failing to sum up the case to the assessors adequately by omitting to explain to them the essential ingredients of murder and circumstantial evidence. The contention in the fifth ground is that the trial court erred in law and in fact to convict the appellant on circumstantial evidence that was not incompatible with the appellant's innocence. Mr. Kissima Adolf learned State Attorney, who was accompanied by Ms. Monica Ndakidemi, also learned State Attorney, strongly opposed the appeal on behalf of the respondent.

It is logical to begin with the first ground. In support of it, Mr. Mhagama faulted the learned magistrate for failing to address the assessors on the basic ingredients of murder and the essence of circumstantial evidence. He took us through the summing up notes at pages 113 through 125 of the record of appeal, submitting that the learned trial magistrate's non-direction on the aforesaid vital points vitiated the trial. To bolster his submission, he cited **Kato Simon & Another v. Republic**, Criminal Appeal No. 180 of 2017 (unreported) for the principle that the opinions of assessors could be of great value only if they fully understood the facts of the case before them in relation to the law.

Mr. Adolf graciously conceded that the summing up was inadequate but hastened to say the error did not go to the root of the case because the assessors, as shown at page 127 of the record, gave informed opinions. He added even if it is decided that the error was fatal, the defect could be remedied by remitting the case to the same trial magistrate and his set of assessors for re-summing up after the proceedings from the summing up stage as well as the judgment are nullified. He based his submission on **Erick Gabriel Kinyaiya v. Republic**, Criminal Appeal No. 668 of 2020 (unreported).

We begin by acknowledging that until recently in terms of section 265 of the Criminal Procedure Act ("the CPA"), every criminal trial before the High Court or the Resident Magistrate's Court presided over by a Resident Magistrate with extended jurisdiction had to be conducted with the aid of, at least, two assessors. Pursuant to section 298 (1) of the CPA, the trial judge or magistrate is required to sum up the case to the assessors once the case on both sides is closed. It is settled that for assessors to make meaningful participation by rendering informed opinions at the trial, the trial judge or magistrate must provide them with a proper and adequate summing up covering all vital points of the case – see **Washington s/o Odindo v. R** (1954) 21 EACA 392; **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007; and **Respicius Patrick @ Mtanzangira v. Republic**, Criminal Appeal No. 70 of 2019 (both unreported). Non-directions or misdirections in a summing up can vitiate the trial proceedings and the decision thereon.

We have carefully examined the record of appeal in the light of the contending submissions of the learned counsel. At the forefront, we agree with both learned counsel that the summing up, spanning over thirteen pages, reveal the non-directions complained of. The learned trial magistrate neither directed the assessors on the basic ingredients of

murder nor did he explain to them the law on circumstantial evidence upon which the prosecution case was mainly founded. Indeed, we may also add that there was a further non-direction on legality and reliability of an oral confession in view of the evidence that the appellant allegedly made such confession to the village leaders. The aforesaid issues feature prominently in the trial court's judgment and that they had a bearing on the final verdict.

Nonetheless, we do not think that non-directions or misdirections in a summing up would always result in a mistrial. For instance, in **Asha Mkwizu Hauli v. Republic**, Criminal Appeal No. 80 of 1985 (unreported) where the Court found that the learned trial judge (Bahati, J.) had not directed the assessors on the burden of proof and standard of proof in a case resting on circumstantial evidence, it ignored the infraction. The Court trod that path because it was satisfied that had the trial judge properly directed the assessors and himself, he would have come to the same conclusion in view of the cogency of the evidence on record. The sticking question before us, then, is whether the non-directions in the case rendered the trial invalid.

In the circumstances of this case, we think that the non-directions complained of were inconsequential. Having examined the assessors' opinions at pages 127 and 128 of the record of appeal, we are satisfied that the assessors were alert and fully informed as they gave well-versed and incisive opinions to the facts of the case. To illustrate the point, we wish to let the first lady assessor's opinion speak for itself:

> *"... the accused is guilty for the following reason: on [the] day of the event ... the accused left with the two children .... Indeed, they moved away going to the river with a machete and a spear. Nobody witnessed the accused killing the child, but he admitted to the leaders and he led them to the scene of the crime."*

On the part of the second lady assessor, she was equally alert that the appellant was the last person to be seen with the deceased and that he led the police officers to the scene of the crime. Perhaps, most tellingly, she reasoned that *"although nobody witnessed the killing, ... the circumstances are suggesting that the accused is the one that did kill Kipawa."* The third lady assessor approached the evidence on record upon the same reasoning and reached the same verdict. In the premises, the first ground of appeal fails.

We now interrogate the contention in the fifth ground faulting the cogency and reliability of circumstantial evidence on record as the basis of the appellant's conviction.

Mr. Mhagama's submission on the above ground was, quite surprisingly, very brief. He contended, without much elaboration, that the circumstantial evidence on record was not strong to found conviction and that it was not corroborated.

Mr. Adolf strongly disagreed with his learned friend. He submitted that the circumstantial evidence was cogent on three grounds: one, that as adduced by PW2 and PW3 the appellant was the last person to be seen with the deceased. Two, that the appellant did not report the disappearance of the deceased nor did he give any plausible explanation on how he parted company with him. Thirdly, that the appellant initially lied as to the whereabouts of the deceased before he backtracked and admitted having been responsible for the deceased's death as well as assaulting PW2 and his wife (PW4). Bolstering his submission, he relied on **Emmanuel Kondrad Yosipati v. Republic**, Criminal Appeal No. 296 of 2017; and **Rajabu Taratibu v. Republic**, Criminal Appeal No. 237 of 2014 (both unreported) on the application of the doctrine of last seen.

Mr. Adolph was unwavering that besides the circumstantial evidence, the appellant made an incriminating oral confession owning up liability for the deceased's death.

To begin with, it is undoubted that the deceased met a violent death. According to PW9 and as unveiled by the autopsy report (Exhibit P1), the death was due to a head injury caused by a heavy object leading to excessive loss of blood. It is common ground that he was found dead at the scene of the crime after going missing for almost a day. None of the prosecution witnesses testified having seen the appellant killing the deceased.

In his testimony, the appellant admitted the evidence by PW2 and PW3 that he led the deceased and PW2 to the scene for a supposed mission of collecting fish. Although he also acknowledged at the trial having assaulted his wife and PW2, he flatly denied killing the deceased. Going by the testimony of PW2, the appellant was the last person to be seen with the deceased while he was still alive. His conviction by the trial court was partly based on the doctrine of the last seen, which, as stated by the Court in, for example, **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported) goes as follows:

"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."

See also **Makungire Mtani v. Republic** [1983] T.L.R. 179; **Nathaniel Alphonce Mapunda & Another v. Republic** [2006] T.L.R. 395; **Emmanuel Kondrad Yosipati** (*supra*); and **Rajabu Taratibu** (*supra*).

In stating how he parted company with the deceased and what followed thereafter, the appellant testified as follows:

"I left Kipawa with the exercise of spreading grasses that could be brought up by Erenensia. Then, I crossed to the other side of the river to collect fish nets.... When I got back, I did not find Kipawa. I followed Erenensia and questioned her where Kipawa was, she answered in a tone of highest grade of disrespect that she did not know where he was.... I became very furious ... I held her and pulled her to the ground for some distance.... I assaulted her by using a machete.... She fainted and I thought I had killed her then I ran away ... to the village of Taweta."

Like the trial magistrate, we do not believe the above version. Soon after the appellant had remained alone with the deceased, PW2 heard the deceased crying in agony and suspected that he had been seriously hurt. As nobody else was in the area, it is most probable that the deceased was attacked by the appellant. Surprisingly, the appellant appeared a little later, pretending to ask her where the deceased was. If he subsequently attacked PW2 due to anger at her act of disrespect as he claimed, the manner of the attack raises eyebrows as it was not a spur-of-the-moment act. For it is in the evidence that he took her all the way to a tree where he stripped her off, tied her with a rope and hacked her with a machete on the head causing her a serious injury that required a lengthy hospitalisation. She was found unconscious two days later about ten kilometres away from the place where the deceased's body was found. Granted that the appellant's claim that he fled to Taweta thinking that he had killed PW2 could obviously explain why he did not report to anybody the disappearance of the deceased. However, looking at the events of the fateful day, beginning with the appellant's vicious attack on his wife (PW4) in the morning ending with the brutal assault in the afternoon on his stepdaughter who was, at the material time, ten years old, it is reasonably inferable that the appellant carried out a planned mission of reprisal.

Besides the foregoing, it was in the evidence that the appellant, in the presence of PW8, orally confessed to the killing when he was interviewed by local leaders at Taweta village before he was transferred to the custody of the police officers (PW6 and PW7). Such a confession was clearly incriminating and rightly acted upon – see, for instance, **Director of Public Prosecutions v. Nuru Mohamed** [1988] T.L.R. 82; **Mboje Mawe & 3 Others v. Republic**, Criminal Appeal No. 86 of 2010; **Posolo Mwalyego v. Republic**, Criminal Appeal No. 613 of 2015; and **John Shini v. Republic**, Criminal Appeal No. 573 of 2016 (all unreported).

It is also significant that the appellant confessed to the offence before the police officers (PW6 and PW7) in the presence of a group of people who included PW1, PW5 and PW6. Thereafter, he led them to the scene where the deceased's body had been found the previous day as well as the place where PW2 was found unconscious. In essence, this was a *"confession leading to discovery"* that can be relied upon in consonance with section 31 of the Evidence Act. This provision states as follows:

> ***"31.*** *When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a*

police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant."

See also **Mboje Mawe** (*supra*); **Ibrahim Yusuph Calist @ Bonge & 3 Others v. Republic**, Criminal Appeal No. 204 of 2011; and **Michael Mgowole & Another v. Republic**, Criminal Appeal No. 205 of 2017 (both unreported).

Based on the foregoing discussion, we entertain no doubt that the appellant killed the deceased.

Turning to the question whether the appellant was actuated by malice aforethought in killing the deceased, we should begin by noting that, in his judgment, the learned trial magistrate referred to section 200 of the Penal Code defining the circumstances in which malice aforethought would be inferable. He took the view that the circumstances of the case fit neatly within paragraph (a) of section 200 in that the killing was committed with an intention to cause death of or to do grievous harm to the deceased. He sought guidance from our decision in **Elias Paul v. Republic,** Criminal Appeal No. 7 of 2014 (unreported). In view of the evidence that the deceased was hit by a heavy object at the back of his

head, surely a vulnerable part of the body, resulting in a fracture on the left occipital skull bone and ear canal, he correctly inferred that the appellant intended to kill the deceased. Consequently, we find no merit in the fifth ground of appeal.

For the reasons we have given, we entertain no doubt that, on the evidence on record, the learned trial magistrate rightly convicted the appellant of murder and sentenced him to suffer death by hanging. In consequence, we uphold the conviction and dismiss the appeal.

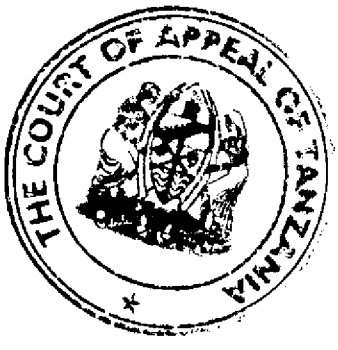
DATED at **DAR ES SALAAM** this 28th day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of March, 2023 in the presence of the appellant vide video conference from Ukonga Prison and Ms. Dorothy Massawe, Principal State Attorney, for the Respondent is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL