IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 38 OF 2019

HALFAN ISMAIL @ MTEPELA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Twaib, J.)

dated the 14th day of December, 2017
in
Criminal Sessions Case No. 12 of 2015

JUDGMENT OF THE COURT

25th February & 1st April, 2020

MWANDAMBO, J.A:

Jafari s/o Seleman Mniwalila lost his life on 1st July, 2013 in a horrible and brutal manner. His body was found burning at a place called Kirumbe, Samora Newala District in Mtwara Region. One of the suspects to the murder was Halfan s/o Ismail @ Mtepela (the appellant) who, together with Juma s/o Samli Mwarabu (second accused) stood charged with the murder of Jafari Selemani before the High Court sitting at Mtwara. The High Court acquitted the second accused of the charge but convicted the appellant. Aggrieved, the appellant has appealed to this

Court against conviction and the mandatory death sentence meted out to him.

The appellant's arraignment, trial and ultimate conviction stem from the following factual background. The deceased was a resident of Kirumbe Village Samora in Newala District. He was a close relative of Ramadhani Halfani, (PW1) as well as Mohamed Mwahali (PW2).

On 1st July, 2013, PW2 was destined to travel to a place called Mkunya, a distance taking about two hours from Samora Village. On his way to Mkunya he met four persons who were familiar to him including the appellant and the deceased at a nearby area known as Kirumbe. According to PW2, the deceased was pulling a bicycle and having greeted them, he continued with his safari to Mkunya. However, no sooner had he arrived at his destination than he heard that Jafari Seleman had been burnt to death. PW2 reported the incident at a nearby police station where he met his brother, Juma Rashid. He thereafter dashed to the scene where he found the body of the deceased lying down and burning. One of the remarkable features was a rope tying the deceased's hands and beside his body, was a plastic bag containing a slaughtered chicken. A moment later, the police arrived accompanied by Juma Rashid and a doctor. The doctor examined the deceased's body and turned it

whereupon it was noted that his (deceased's) eyes had been pierced. PW2 heard from the doctor that the deceased had been beaten and burnt. After the examination, the relatives were allowed to take the body for burial which took place on the same evening.

Earlier in the day, PW1 had seen the deceased with the appellant, Shaibu Pepekale and Juma Tangale who had told him that Jafari Seleman had stolen cashew nuts pumping machine and were heading towards Mkunya. Later, PW1 saw the appellant, Shaibu Juma and Juma Samli in the company of the deceased heading towards the farms in Kirumbe. A moment later, PW1 is said to have followed the appellant and his group in the company of the deceased whom he referred to as his uncle towards their destination where he found them beating the deceased. One of the persons beating the deceased is said to be Juma Namwena who is claimed to have emerged from the bush whilst the appellant was holding the deceased facilitating beating by his colleagues. Since PW1's attempt to plead with the assailants to stop beating his uncle so they could go for the pump where he had kept failed, he left ten minutes later and thereafter, he hired a boda boda rider to rescue his uncle. However, it was too late, for upon return, the boda boda rider informed PW1 that his uncle had been burnt and was already dead. After the death of the

deceased some people gathered at the scene of crime joined by No. F. 239 Cpl Mawazo (PW3), the Police Investigative Officer accompanied by the medical officer who examined the deceased's body.

In the process, some people mentioned some of the culprits including Juma Salum, the appellant, Shaibu Mohamed and Juma Rajabu. Two of the persons mentioned as culprits were arrested, whilst others went at large. Those who the Police arrested were Juma Samli and the appellant. These stood charged with the murder of the deceased contrary to section 196 of the Penal Code, [Cap. 16 R.E. 2002] to which they pleaded not guilty.

After the trial consisting of three prosecution witnesses and three by the defence, the trial court found the case sufficiently proved against the appellant on the charged offence. It convicted him as charged followed by the mandatory death sentence. The trial court arrived at that conclusion because it was satisfied with the evidence of PW1 that he witnessed the beating of the deceased by a group of people which included him on the material date and later on he was found dead having succumbed to beatings and burning.

It was the trial court's view that out of the three (prosecution) witnesses, the case for the prosecution hinged on PW1 who had seen

four people beating the deceased and later on reported having been burnt to death. Having regard to the dictates of section 143 of the Evidence Act [Cap 6 R.E. 2002], the learned trial Judge reasoned that there being no statutory minimum number of witnesses required to prove a fact, he was satisfied that the evidence of PW1 was sufficient because it passed the test of credibility and reliability. He placed on the Court's decision in **Anangisye Masendo Ng'wang'wa v. R** [1993] TLR 202 in support of that proposition. All the same, the learned trial Judge took the view that apart from PW1's evidence, there was also evidence from PW2 who, though he did not see the appellant attacking the deceased, he had met him with other two persons two hours earlier before he heard about the deceased's death later on the same day. According to the learned trial Judge, PW2's evidence was circumstantial which was sufficient to corroborate the direct evidence by PW1 to support the finding of guilt against the appellant.

Subjecting the prosecution's evidence to that of the defence, the trial court sustained the defence of *alibi* fronted by the second accused who had served a notice in that regard and called his wife Fatma Ismail (DW1) to his aid. However, the trial court rejected a similar defence by the appellant not merely because it was not properly raised but because it

was too weak to displace the prosecution's case. As highlighted earlier, the trial court found the case against the appellant proved to the hilt and convicted him as charged while acquitting the second accused on the basis of his defence of *alibi*.

Challenging the decision of the High Court, the appellant has lodged a memorandum of appeal containing five grounds premised on the following areas of grievances:

1. *Material contradictions in the prosecution witnesses in relation to the cause of death of the deceased person casting doubts on the appellant's guilt.*
2. *Conviction based on the evidence which was not credible and unreliable.*
3. *Failure by the prosecution to prove its case beyond reasonable doubt and trial Judge grounding his decision on the weakness of defense side and not on the strength of the prosecution's case.*
4. *Trial judge's error in convicting and sentencing the appellant by disregarding his defence of alibi.*
5. *Trial judge's misapprehension of evidence and failing to hold that the appellant's defence raised*

reasonable doubt in the prosecution's case which should have been in the appellant's favour.

Subsequently, Mr. Hussein Mtembwa, learned Advocate lodged a supplementary memorandum of appeal pursuant to rule 73 (2) of the Tanzania Court of Appeal Rules, 2009 (as amended by G. N. No. 344 of 2019 (the Rules). Skipped of unnecessary details, the supplementary grounds run as follows:

1. *That the Honourable trial Court erred in law and in fact by not finding and holding that there was no evidence proving that it was the appellant who caused the deceased's death.*
2. *That the Honourable trial Court erred in law and in fact by its failure to hold that there was no evidence proving that the death of the deceased was caused by beating and burning.*
3. *That the trial Court erred in law by convicting the appellant on the weakness of the appellant's defence rather than on the strength of prosecution evidence thereby disbelieving the defence of alibi raised by the appellant.*
4. *That the Honourable trial court erred in law and in fact by arriving at the decision that the appellant was among the culprits identified by PW1 at the scene of crime.*

5. *That the Honourable trial Court erred in law and in fact by failure to hold that the delay in arresting the appellant had effect on the prosecution's case considering that he was not initially named as one of the culprits who caused the death of the deceased.*

6. *That the Honourable trial Court erred in law and in fact in failing to hold that there was mistaken identity as to the appellant's participation in the crime considering the failure to disclose the scene of crime.*

7. *That the Honourable trial Court erred in law and in fact in not drawing adverse inference against the prosecution for not calling key witnesses to prove its case.*

At the hearing of the appeal, Mr. Mtembwa, appeared for the appellant who was also in attendance whilst Mr. Abdulrahman Msham, learned Senior State Attorney appeared for the respondent Republic resisting the appeal. At the very outset, Mr. Mtembwa informed us that he was pursuing the grounds of appeal in the memorandum lodged by his client as well as the supplementary memorandum he had the lodged subsequently. However, he prayed to abandon grounds 1 and 5 in the memorandum of appeal and ground 5 in the supplementary

memorandum. Due to their close relationship, counsel combined his arguments as regards the remaining grounds 2, 3 and 4 in the supplementary ground. In the course of hearing, the learned advocate canvassed ground three separately as well as the rest in the supplementary memorandum. In effect, the first cluster of the grounds boils down to the complaint on the cause of the death of the deceased and the persons behind it.

Mr. Mtembwa began his address by the contention that the prosecution did not prove the cause of the deceased's death be it by beating, piercing of his eyes or burning. It was his submission that from the prosecution's evidence, the deceased met his death in the hands of his killers through beating (PW1), piercing of his eyes and burning (PW2 and PW3). Nevertheless, apart from the evidence of PW3 which was found to be unreliable by the trial court, neither PW1 nor PW2 adduced any evidence proving that the deceased died from any of the causes. To amplify, Mr. Mtembwa argued that it is not clear whether the death occurred out of beating as claimed by PW1 or piercing of eyes and burning as claimed by PW2. This is more so, the learned advocate argued, the prosecution did not call the medical doctor who examined the deceased to testify and establish the actual cause of death be it by

beating, burning or piercing if eyes. In addition, Counsel argued, the prosecution did not tender any post-mortem report which it indicated to produce during the preliminary hearing. On the latter argument, counsel invited us to hold that since the prosecution did not offer any explanation for its failure to call the medical doctor to give evidence on the cause of the death of the person he examined on the material date neither did it offer any reason justifying the non-production of a post mortem report, the trial court ought to have drawn adverse inference against the prosecution on the authority of **Azizi Abdallah v. Republic,** [1991] TLR 71.

Otherwise, the learned advocate argued that on the available evidence, there are several possibilities behind the death of the deceased namely; beating, piercing of eyes and burning or a combination of all or any of the three. Seeking refuge from our decision in **Swalehe Wadi v. R,** Criminal Appeal No. 206 of 2010 (unreported), the learned advocate contended that in such circumstances, the trial court ought to have resolved the uncertainty in favour of a possibility favouring the appellant. He, in the end implored us to sustain the grounds of appeal in this cluster.

In his reply, Mr. Msham took issue with the appellant's contention and argued that it is not the law that proof of death is a necessary requirement in every trial. He placed reliance in his argument on the Court's previous decision in **Mathias Bundala v. R**, Criminal Appeal No. 62 of 2004 (unreported). According to Mr. Msham, the beating which was closely connected to the burning was sufficiently proved by PW2 and PW3. As the trial court believed PW1 as a credible witness who saw the appellant and his colleagues beating the deceased, it is not open for this Court to interfere with that finding which was solely in the domain of the trial court. To buttress that point, the learned Senior State Attorney brought to his aid our decision in **Rashid Kaniki v. R** [1993] TLR 258. Further reference was made to **Goodluck Kyando v. R** [2006] TLR 393 for the proposition that every witness is entitled to be believed and his evidence accepted unless there are compelling reasons doing otherwise. Mr. Msham further argued, since no compelling reasons for doing otherwise have been proved to be existing, the Court should decline the invitation to disbelieve PW1 and instead, concur with the trial court that his evidence was both credible and reliable and sufficient to sustain conviction.

Submitting in rejoinder, Mr. Mtembwa stood firm and unmoved by the submissions made by the learned Senior State Attorney on the deceased's death. He distinguished the decision in **Mathias Bundala v. R**, (supra) as being inapplicable because, unlike in the instant appeal where there are several possibilities, proof of death in Bundala's case (supra) was held to be unnecessary because there was strong circumstancial evidence that the deceased met her death at the behest of the appellant.

Ordinarily, after hearing the submissions by the learned counsel on the first cluster of the appellant's grounds of appeal, we could have proceeded with our determination on the merits or demerits thereof on the first cluster of the grounds of appeal. However, considering that we heard counsel on an issue of law regarding the adequacy of the trila Judge's summing up to the assessors, we shall determine that issue at this stage. Our discussion on the grounds of appeal will follow depending on the outcome of the issue we raised.

Both Messrs Msham and Mtembwa were at one that the summing up notes were deficient in material respects. Mr. Msham conceded that the summing up notes appearing at pages 32 to 51 of the record of appeal did not direct the assessors on the key ingredients of the offence

and so it deprived the assessors the opportunity to give informed opinion on the guilt of the accused persons. Counsel admitted too that improper summing up is fatal to the trial for it derogates from section 265 of the Criminal Procedure Act, [Cap 20 R.E 2002] (the CPA) which requires criminal trials before the High Court to be conducted with the aid of assessors.

Notwithstanding the foregoing, Mr. Msham submitted that the defect was curable under Section 388 of the CPA read together with Section 3A and 3B of the Appellate Jurisdiction Act, [Cap 141 R.E.2002] as amended by the written Laws (Miscellaneous Amendments) (No. 3), Act No. 8 of 2018. The latter sections deal with newly introduced principle of overriding objective aimed at dispensing substantive justice. For his part, Mr. Mtembwa submitted that the deficient summing up to the assessors was fatal in that it was tantamount to the trial having been conducted without the aid of assessors and thus the proper course was to order a fresh trial.

Having heard arguments from counsel, the issue for our determination is whether the summing up to the assessors was proper and if not, what effect it had on the trial.

It has been held that a proper summing up must direct the assessors on vital points of law particularly the key ingredients of the offence of murder, burden and standard of proof, elaborate on the cause of death, main issue in the case, credibility of witnesses etc. See for instance: **John Mlay v. R**, Criminal Appeal No. 216 of 2007 (unreported).

With respect, we agree with the learned counsel that the learned trial Judge's summing up notes fell below the well-established standard of a proper summing up. We also agree with Mr. Mtembwa that the trial Judge's remarks in the summing up that the prosecution case hinged on the evidence of PW1 was potentially influential to the assessors to give their opinions freely. The deficient summing up had the effect of depriving the assessors the opportunity to give their informed opinion on the case freely. In **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014 (unreported) the Court held that:-

> *"Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

That notwithstanding, Mr Msham invited the Court to find that the defect is curable under section 388 of the CPA having regard to overriding objective expressed under section 3A and 3B of Cap. 141. We

do not think we need to be detained by Mr. Msham's argument whether the defect is curable or not.

It is thus clear to us that the summing up to the assessors was inadequate with the net effect that the trial was not properly conducted with the aid of assessors in terms of the dictates of section 265 of the CPA thereby vitiating the trial and the resultant judgment. The defect cannot be made good by the application of the overriding objective as submitted by Mr. Msham because doing so will be tantamount to circumventing the mandatory provisions of section 265 which compels the High Court to conduct criminal trials with the aid of assessors. In **Njake Enterpises Limited v. Blue Rock Led and Rock and Venture Co. Ltd**. Civil Appeal No. 69 of 2017 (unreported) the Court held that:

> *".. the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the Objectives and Reasons in introducing the principle in the Act...." [at page11]*

The upshot of the foregoing compels us to exercise our power of revision vested on the Court under section 4(2) of the Appellate Jurisdiction Act, [Cap 141 R.E 2002] ("the AJA") by nullifying the trial before the High Court. Corollary to the order we have just made, the judgment of the trial court and the resultant conviction are hereby

quashed and the sentence is set aside. The approach we have taken is consistent with our numerous previous decisions, amongst others, **MT. 81071 PTE Yusuph Haji@ Hussein v. R**, Criminal Appeal No. 168 of 2015(unreported) followed in **Francis Alex v. R,** Criminal Appeal No. 185 of 2017(also unreported).

Having nullified the trial whose judgment resulted into this appeal, the next question for our decision relates to the way forward. Fortunately, this is not the first time the Court is dealing with the issue. Generally, in cases in which a trial is nullified on account of inadequate or improper summing up to the assessors as it were, the Court has ordered a fresh trial before another judge with a new set of assessors. See for instance: **Khalifa Ajibu Museven v. R,** Criminal Appeal No. 162 of 2016 and **Charles Lyatii @ Sadala v. R,** Criminal Appeal No. 290 of 2011(both unreported).

In **Fatehali Manji v. R** [1966] EA 343 which has been followed in many of our previous decisions, the defunct East African Court of Appeal held that a fresh trial will only be ordered when the original trial was illegal or defective and not when conviction is set aside by reason of insufficiency of evidence or where doing so will enable the prosecution to fill gaps in its evidence at the first trial. The defunct regional court took

cognisance of the oft cherished principle that each case has to be decided on its own facts and circumstances regard being had to the overriding interest of justice.

Fatehali Manji's case (supra) was cited in our judgment in **Rashid Kazimoto and Another v. R**, Criminal Appeal No. 458 of 2016 (unreported) on a more or less similar circumstances obtaining in the instant appeal. The summing up to assessors was found to be deficient on vital points of law including asking assessors to give opinions on exhibits which were not shown to them during the trial. The Court came to the conclusion that the trial was vitiated. However, relying on **Sultan Mohamed v. R.** Criminal Appeal No. 176 of 2003 (unreported) which had similarly cited **Fatehali Manji v. R** (supra) it declined to order a fresh trial.

Guided by the above, we are inclined do alike in the instant appeal. We have taken this approach considering several factors including the burden of proof and the applicable standard in criminal cases. It is trite that the burden of proof is on the prosecution on the standard which is higher than mere preponderance of probabilities applicable in civil cases. It is equally the law that the prosecution has to prove its case beyond reasonable doubt. As we stated in **Magendo Paul & Another v. R** [1993]

TLR 220 and later on in **Chandrakant Joshubai Patel v. R**, Criminal Appeal No. 13 of 1998 (unreported), by proof beyond reasonable doubt we do not mean allowing fanciful possibilities. It is also trite law that suspicion alone however strong, is not sufficient to found conviction. See for instance: **MT. 60330 PTE Nassoro Mohamed Ally v. R.,** Criminal Appeal No. 73 of 2002 (unreported).

Subjecting the above to the instant case, it is plain that the trial court believed the prosecution's evidence that the appellant was seen by PW1 twice in the company of his colleagues on the material date. During the second time, PW1 saw the appellant with his colleagues beating up the deceased on the alleged theft of cashew nuts pumping machine. However, PW1 did not stay longer to rescue his uncle. He left and sent a boda boda driver to rescue him instead, only to be informed that Jafari Seleman had been burnt to death.

PW2's evidence was to the effect that he met the appellant in the company of other persons together with the deceased pulling a bicycle somewhere in Kirumbe on his way to Mkunya. However, PW2 did not witness any beating unlike PW1 neither did he witness any of the people he met burning the deceased or piercing his eyes. PW2 learnt about the death of his relative two hours later and found him burning upon his

appellant. However, it is not clear from the record on what date w
appellant arrested in connection with the crime. By his ow
mission, PW1 was one of the suspects who the police arrested
nection with the murder of the deceased but was released on
ruary 2014. According to PW1, that was a period of about half a ye
s equally unclear to us if it is true the appellant had recorded a
tion statement confessing to the killing of the deceased, why t
secution did not tender it as part of its documentary exhib
sistent with its intent expressed during the preliminary hearing. In t
ence of any further evidence, it is too tempting to dismiss t
ument by Mr. Mtembwa, that the cause of death was not proved
the appellant with it by reason of the beating.

In our view, unlike Mr. Msham, proof of cause of death in t
ant appeal was necessary because of the existence of seve
sibilities namely; beating; piercing of eyes or burning. That mea
Mathias Bundala v. R, (supra) may be of no assistance to t
ondent Republic to justify an exception to the general rule requiri

proof of the cause of death. In the same vein, much as we do not find it necessary to delve into any discussion regarding credibility of the prosecution witnesses, we agree with Mr. Msham that this Court sitting as a first appellate court should not lightly interfere with the trial court's findings on credibility of witnesses but the Court has power to make fresh evaluation of evidence and come to its own conclusions. If any authority will be required, **Patric Jeremiah v. R,** Criminal Appeal No. 34 of 2006 (unreported) and **Deemay Daati & 2 Others** v. **R** [2006] T.L.R 132 will suffice.

From our own evaluation based on the evidence the prosecution adduced during the trial, none of the three possibilities behind the deceased's death was proved. Worth for what it is, if it was beating as claimed by PW1, no medical doctor was called to testify on that neither did the prosecution tender any post-mortem report it indicated to tender during the preliminary hearing. Although the record shows at page 56 that the post mortem report was admitted on 28th November, 2017 as exhibit P1, the proceedings of the trial court on that date do not support it. Perhaps that explains why the trial Judge did not make any reference to any documentary evidence in his judgment.

Whoever sneaked documents in the record did so illegally because the said documents found their way into the record without any backing of a court order and that is what the Court frowned upon in **Armand Guehi v. R**, Criminal Appeal No. 242 of 2010 (unreported) at page 11. Indeed, Mr. Mtembwa seems to be right when he submitted that failure to call the medical doctor and produce the post-mortem report to prove cause of death attracted the making of adverse inference against the prosecution on the authority of **Azizi Aballah v. R**, (supra). The adverse inference must favour the appellant more so because as submitted by Mr. Mtembwa, the prosecution failed to prove that the death was caused by beating which PW1 claimed to have witnessed.

The learned advocate is correct too that as the case was not determined on circumstancial evidence rather on the direct evidence of PW1, that witness did not prove that he saw the appellant and his colleagues burning the deceased so as to arrive at a conclusion that the deceased's death was a combination of beating and burning.

In the event we are satisfied that notwithstanding the nullification of the trial, the appellant's conviction will not stand given the insufficient evidence the prosecution is likely to present if were mind to order a retrial. This is more so because the only evidence will come from PW1 on

whom the trial court found the case for the prosecution was hinged. That being the case, ordering a retrial will only enable the prosecution to seize the opportunity by filling gaps in the already insufficient evidence.

In consequence, we order the appellant's immediate release from custody unless he is held lawfully for any other purpose.

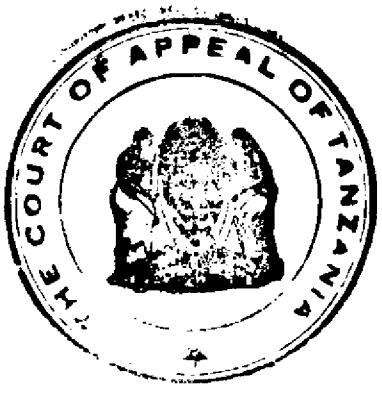
DATED at **MTWARA** this 11th day of March, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2020 in the person presence of the Appellant, Mr. Wilbroad Ndunguru, learned Senior State Attorney, for the respondent / Republic also holding brief for Mr. Mtembwa, Advocate for the Appellant, is hereby certified as a true copy of the original.



A. K. RUMISHA
DEPUTY REGISTRAR
COURT OF APPEAL