IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 348 OF 2016

MASOLWA S/O SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mwanza)

(Ebrahim, J.)

Dated the 24th day of June, 2016
in
Criminal Appeal No. 25 of 2010

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JUDGMENT OF THE COURT

23rd October, 2019 & 25th February, 2020

MWARIJA, J.A.:

The appellant, Masolwa Samwel was charged in the High Court of Tanzania at Mwanza with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. The prosecution alleged that on 17/12/2007, at Welemasonga Village, within Kwimba District in Mwanza Region, the appellant murdered one Petro Luhigo. When the information was read over to him, the appellant pleaded not guilty. As a result, the case proceeded to a full trial.

The facts leading to the appellant's arrest and arraignment can be briefly stated as follows: In the dusk of 17/12/2007, Petro Luhigo (the deceased) was at his home in Welemasonga village within Kwimba District in Mwanza Region. He was with his wife and other relatives who included his sister, Devotha Luhigo. Together with them, was a group of persons who had gathered there to drink local brew prepared for them in appreciation of having assisted the deceased in his farm work.

At about 21.00 hrs, a group of bandits arrived at the deceased's house. They approached the deceased and attacked him by using a machete, a club and sticks. He consequently died from the injuries inflicted on him by the bandits. His body was later examined by Dr. Ally Sadick (PW3) who indicated in the postmortem report (Exhibit P.2) that the cause of death was severe hemorrhage. The deceased's sister, the said Devotha Luhigo who testified as PW1 was also attacked by the bandits as she attempted to prevent them from continuing to attack the deceased. Following the incident which was reported to the police in the same night, on 25/12/2007 the appellant was arrested and consequently charged as shown above.

Initially, the trial of the appellant was conducted before De - Mello, J. who, after hearing the evidence of two prosecution witnesses and the appellant who was the only defence witness, she found that the prosecution had proved its case beyond reasonable doubt and thus found the appellant guilty of the offence charged. She then proceeded to sentence him to suffer death by hanging. On appeal to this Court vide Criminal Appeal No. 206 of 2014, the Court quashed the proceedings and set aside the sentence meted out to the appellant on the grounds first, that the first trial Judge did not comply with the requirement of convicting the appellant before she sentenced him and secondly, that in summing up the case to the assessors, she did not address them on vital points of law involved in the case. Consequently, the Court ordered a trial *de novo* before another Judge and a different set of assessors.

Following the decision of the Court, hearing of the case commenced afresh before Ebrahim, J. (the trial Judge). At the trial *de novo,* the prosecution relied on the evidence of three witnesses, Devotha Luhigo (PW1), A/Insp. Leonidas Thomas Mtawala (PW2) and Dr. Ally Sadick (PW3).

According to the evidence of PW1, on 17/12/2007 at night time, while at the deceased's home, five persons invaded the deceased's house where the deceased and other persons including herself (PW1) were drinking local brew after having worked in the deceased's farm. The culprits approached the deceased who was seated and started to attack him using a machete, iron bar, a club and sticks. It was her evidence that, in the course of trying to help the deceased, she was also hit with an iron bar on her head, face and leg. As a result of the beatings, she suffered severe injuries which caused her to become unconscious. When she regained consciousness, she realized that she was in Bugando hospital.

The substance of her evidence was also to the effect that, after having been discharged from hospital, she went to police to record her statement. According to her statement, the incident occurred on 18/12/2007. It was her evidence further that, among the five culprits, she identified the appellant and two others; Shimbi Kusenza and Mashimbi Kusenza all of who, she said, were known to her before the date of the incident. She went on to state that, on the material date of the incident, the appellant had previously arrived at the scene before 21:00 hrs but declined the invitation extended to him by the deceased to join the group

and instead, he went away. Later on, he went back with the other four persons and attacked the deceased. On how she managed to identify the appellant, PW1 stated that she did so with the aid of moonlight. Elaborating on her contention that she had known the appellant before the date of the incident, she averred that she knew him from the time of his birth as they stayed in the same village.

On his part, PW2 who was at the material time of the incident stationed at Kwimba Police Station, testified on how the appellant came to be arrested and charged. It was his evidence that on 25/12/2007, he received information that, in an attempt to avoid arrest, the appellant was hiding himself in a certain house in Nkuhulungu Village. On that information, in the company of other police officers, he went to that village and arrested the appellant who was taken to the police station. On the same day, PW1 went on to state, he recorded the appellant's cautioned statement [Exhibit P.1] (inadvertedly marked as Exhibit P2.).

In his defence, the appellant denied the charge. He relied on the defence of *alibi*, the notice of which was given on 1/12/2015. He testified that he was arrested on 18/12/2007 at his home in Ngudu ya Lugulu. From

there, he was taken to police station where he was interrogated. According to his testimony, when he was asked whether he knew Mashimba, Nkwabi Masuka Shimbi and the deceased, he replied that he did not know any of them. He also denied the contention that he went to the scene of crime on the material date of the incident. With regard to exhibit P2, the appellant retracted it stating that what he remembered was that he thumb printed a piece of paper which had a written statement upon the instruction of PW2. It was his evidence further that PW2 required him to thumb print the paper after he (the appellant) had stated that he did not know how to read and write.

Having considered the evidence tendered by both the prosecution and the appellant as well as the closing submissions made by the counsel for the parties, the learned trial Judge found that the prosecution had proved the case against the appellant beyond reasonable doubt. She was of the view that the evidence of identification by PW1 was watertight. She found that the appellant was properly identified to be one of the culprits who attacked and killed the deceased. The learned trial Judge relied also on the cautioned statement (Exhibit P.1) which, as shown above, was retracted by the appellant in his defence. On the defence of *alibi* raised by

the appellant, the leaned trial Judge was of the view that the same did not raise any reasonable doubt in the prosecution case. She found also that the variance as regards the date of the incident in the charge and that which was stated by PW1 in her statement which was recorded at the police station, was not substantial. The learned Judge relied on *inter alia*, the case of **Shishobe Seni and another v. Republic** [1992] TLR 330.

On those findings, the learned trial Judge found the appellant guilty. She consequently convicted and sentenced him to suffer death by hanging. The appellant was aggrieved and therefore, filed this appeal. Initially, the appellant filed six grounds of appeal. Later however, the counsel who was assigned brief in this appeal, filed a supplementary memorandum of appeal consisting of five grounds.

At the hearing of the appeal, the appellant was represented by Mr. Godfrey Kange learned counsel. On its part, the respondent Republic was represented by Ms. Angelina Nchalla, learned Senior State Attorney. In his submission, Mr. Kange abandoned four out of the six grounds of appeal raised by the appellant in his memorandum of appeal. As a result, the learned counsel argued the remaining two grounds which can however, be

consolidated into one. The two grounds challenge the decision of the trial court for basing the appellant's conviction on the identification evidence of PW1. With regard to the grounds of appeal raised by the learned counsel in the supplementary memorandum of appeal, he abandoned two of them and thus argued the remaining three grounds. As a result, the learned counsel argued four grounds of appeal as paraphrased herein below:-

1. *That the learned trial Judge erred in law and fact in basing the appellant's conviction on insufficient evidence of identification.*
2. *That the learned trial Judge erred in law by conducting the trial with the aid of one of the assessors who sat with the first trial Judge in the proceedings which were nullified by the Court of Appeal.*
3. *That the learned trial Judge erred in law by basing the appellant's conviction on the cautioned statement which was recorded in contravention of the law.*
4. *That the learned trial Judge erred in law by convicting the appellant without taking into consideration that one of the suspects who was also alleged to have been identified by PW1 was discharged.*

For reasons which will be apparent herein, we wish to consider first, the 2nd ground of appeal. The basis of that ground is the order which was

made by the Court after it had nullified the proceedings conducted before the first trial Judge. In that judgment, the Court ordered as follows:-

> *"As a way forward, we shall invoke the revisional powers of this Court under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 (AJA) to quash and set aside the judgment of the trial court. We order the trial record to be remitted back to the High Court for a new trial to commence before another judge and different assessors."*

Notwithstanding that clear order of the Court, when fresh hearing commenced before the learned trial Judge, she sat with three assessors including Hadija Lubudya who sat with the first trial Judge in the proceedings which were nullified by the Court. The said assessor participated fully in the trial when PW1 gave her evidence and when PW2 gave his evidence in-chief. It was before PW2's cross-examination that the learned trial Judge realized that irregularity. She then made an order retiring the said assessor from her further sitting in the trial stating as follows at pages 72-73 of the record:-

> *"**Court**: Before we proceed, we have realized that one of the assessors, Hadija Lubudya, 46 years*

attended this case when it was heard before De-Mello, J. in ordering the re-trial of the case, the Court of Appeal specifically ordered that the case be tried de-novo with another judge and different assessors. In the circumstances therefore, I am obliged to release Hadija Lubudya as an assessor in this case and I shall remain with Samwel Someke and Scholastica Majinje. The court shall also disregard the questions put by Hadija Lubudya."

Submitting in support of the 2nd ground, Mr. Kange argued that the participation of the assessor who was disqualified from sitting in the retrial vitiated the proceedings. He contended that, although when discharging the said assessor, the learned trial Judge stated that she would disregard the questions asked by that assessor, the move was improper. He had two reasons for his stance; first, that it was not correct for the learned trial Judge to correct the irregularity arising from her own proceedings and secondly, that even if the assessor's questions are disregarded, the replies made thereto, which formed part of the proceedings, could not be altered.

In reply, although she did not dispute that the sitting by Hadija Lubudya as an assessor in the retrial contravened the decision of the

Court, Ms. Nchalla argued that such contravention did not vitiate the proceedings. She submitted that, even if the proceedings which were conducted in the presence of the assessor who was, by virtue of the Court's order, not qualified to sit with the trial Judge were to remain intact, from the nature of the questions asked by her, the appellant was not prejudiced. The learned Senior State Attorney thus urged us to dismiss that ground of appeal.

Having considered the nature of the irregularity, we agree with the learned counsel for the appellant that the contravention vitiated the proceedings. Both counsel for the parties agreed that by allowing the assessor who did not, by virtue of this Court's order, qualify to sit at the retrial, the High Court strayed into a procedural error. In our considered view, the statement by the learned trial Judge that she would disregard part of the proceedings resulting from the questions put to PW1 by the assessor who did not qualify to sit at the retrial, was improper. The reason is that the learned Judge could not have arbitrarily reviewed her own proceeding and decide to disregard part of it. Secondly, in our considered view, the sitting by the assessor who participated in the nullified proceedings offended one of the rules of a fair trial, that is; the rule

against bias which the Court intended to be observed when it ordered that a retrial should be conducted before another Judge and a new set of assessors. The requirement of abiding by the principles of a fair trial has been emphasized in a number of decisions of the Court. For instance, in the case of **Kanisilo Lutenganija v. The Republic**, Criminal Appeal No. 25 of 2010 (unreported) the Court stated as follows:-

> *"Lack of a fair trial contravenes a person's Natural as well as Constitutional Rights. A conviction emanating from such contravention is illegal and an appellate court such as the Court, is empowered to correct that illegality..."*

In the circumstances therefore, the contravention rendered the trial defective.

Having found that the trial of the appellant was defective, the way forward would have been to order a trial *de novo* which, if we make it, will be a second retrial as far as the appellant is concerned. The principle as regards retrial of cases was aptly stated in the case of **Fatehali Manji v. R** [1966] E.A. 343. In that case which has often been cited by this Court, the erstwhile Court of Appeal of East Africa stated as follows:-

"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.... each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

Having heard the learned counsel for the parties on the other grounds of appeal, we are of the considered view that, an order of retrial will not be appropriate in the circumstances of this case. As stated above, the crucial evidence upon which the appellant's conviction was founded is that of identification by PW1 and the cautioned statement which was retracted by the appellant.

On the identification evidence, it was argued by Mr. Kange that the same was not watertight. Since the offence was committed at night time, it is obvious that identification was made under difficult circumstances and for that reason, the conditions stated in the case of **Waziri Amani v. R**

[1980] TLR 250 ought to have been met. In that case, at page 252, the Court stated those conditions as follows:-

> *"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not."*

The requirement that the identifying witness must explain the intensity of the light which aided him to make identification is particularly crucial when the light relied on by the witness is moonlight. In the case of **Pontian Joseph v. The Republic**, Criminal Appeal No. 200 of 2015 (unreported), like in this case, the witness gave evidence that he identified the accused person by aid of moonlight but did not explain its intensity. He simply said that there was enough moonlight. Reiterating the requirement of complying with the requirement of explaining the intensity of moonlight which aided a witness to make identification, the Court stated as follows:-

> *"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 said there was moonlight, the complainant said there was enough moonlight. It is our considered view that it does not suffice to say there was moonlight.* ***Its brightness had to be explained.***" [Emphasis added].

In the present case, PW1 stated that he identified the appellant by aid of moonlight which "was still bright". She did not state the intensity of such moonlight and the other necessary conditions for a proper identification as stated in the **Waziri Amani case** (supra). It is of course, not disputed that one of the culprits attacked her as she wanted to assist the deceased and was for that reason, close to that person. However, in the absence of evidence as regards the intensity of the moonlight which allegedly enabled her to recognize the deceased's assailant, such close proximity would not eliminate the possibility of a mistaken identity. This is more so because the stated conditions apply also to recognition cases. The position was clearly stated in the case of **Issa Mgara @ Shuka v. R**,

Criminal Appeal No. 37 of 2005 (unreported) in which the Court stated that:-

> *"... even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence of light and its intensity is of paramount importance. This is because, as occasionally held, even when witness is purporting to recognize someone whom he knows... mistakes in recognition of close relatives and friends are often made."*

With regard to the evidence of the cautioned statement which was retracted by the appellant, it is trite principle that such evidence must have been corroborated before being acted upon to found the appellant's conviction. - See for example, the cases of **Wendelin John Luoga v. The Republic**, Criminal Appeal No. 235 of 2004 and **Joseph Keneth Ngole and 3 Others v. The Republic**, Criminal Appeal No. 99, 100, 101 & 102 of 1999 (both unreported). Following our finding that the evidence of PW1 lacked credence as regards identification of the appellant, there is no other piece of evidence on record which could be acted upon to corroborate the evidence of the appellant's cautioned statement.

It is on the basis of the above stated reasons that, as stated above, the order of retrial is inappropriate. In the event, we hereby allow the appeal. Consequently, the appellant's conviction is quashed and the sentence is set aside. He should be released from prison unless he is otherwise lawfully held.

DATED at **DAR ES SALAAM** this 7th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 25th day of February, 2020 in the presence of appellant appeared in person and Ms. Lilian Merry learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. H. Mahimbali
DEPUTY REGISTRAR
HIGH COURT OF TANZANIA MWANZA