IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J. A., KOROSSO, J.A And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 53 OF 2021

IJUMAA ISSA @ATHUMAN ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Siyani, J.)

dated the 19th day of October, 2020
in
Criminal Sessions No. 35 of 2016

JUDGMENT OF THE COURT

29th November & 7th December, 2022

MKUYE, JA:

The appellant, Ijumaa Issa @Athuman, was charged and convicted of the offence of murder contrary to section 196 and 197 of the Penal Code, [Cap 16 R.E 2002; now R.E 2019] by the High Court of Tanzania at Dodoma in Criminal Sessions Case No. 35 of 2016 and the mandatory sentence of death by hanging was meted out on him. The appellant being aggrieved, has sought to challenge that decision before this Court.

Briefly, the appellant was arraigned before the High Court in answer to an information for murder of one, Shaibu Iddi. It was the prosecution case that the appellant and the deceased were both

residents of Mwakisabe village within Chemba District and close friends who engaged in the business of buying and selling cattle for profit. According to PW1, on 25th March, 2015, two days prior to the incident, the appellant and the deceased had arrived at his residence where he sought to inquire from the deceased as to whether he had handed the appellant counterfeit money but the deceased denied. The appellant and the deceased then left together in the latter's motorcycle ridden by the appellant heading to a kraal owned by the appellant's father. That was the last time that PW1 saw the deceased alive.

It was further prosecution case that on 27th March, 2015 the body of the deceased was found with a noose on the neck and the appellant was suspected of having a hand in the killing of the deceased. Efforts to locate the appellant at the village, proved futile but later on, PW1 was informed that he had been seen at Njolo village within Kiteto District and the police were informed. A follow-up to apprehend the appellant at Njolo village revealed that he had gone to a place called Kambi ya Mkaa within that village enroute to Arusha. The appellant was then traced at that place and arrested.

The appellant, upon arraignment denied involvement in the commission of the offence but the trial court was convinced of his

responsibility in the killing and he was convicted and sentence as alluded before.

The appellant, aggrieved by the decision of the High Court, lodged both substantive and supplementary memoranda of appeal, but at the hearing, the appellant acting through his learned counsel opted to pursue the supplementary memorandum of appeal containing five grounds of appeal as follows:

1. *That, the learned trial judge erred in fact and law in convicting the appellant on the offence of murder which was not proved beyond reasonable doubt.*
2. *That, the learned trial judge erred in fact and law in grounding conviction based on misapprehended (extraneous) evidence not supported by record.*
3. *That, the learned trial judge erred in fact and law in grounding conviction based on singly uncorroborated evidence, which was also contradictory and incredible.*
4. *That the learned trial judge erred in fact and law in grounding conviction based on the improperly admitted exhibits.*
5. *That the learned trial judge erred in fact and law in grounding conviction based on a defective charge.*

When the appeal was called on for hearing, the appellant was represented by Mr. Leonard Haule, learned advocate; whereas the respondent was represented by Mr. Leonard Chalo, learned Principal

State Attorney teaming up with Mr. Ofmedy Mtenga, learned Senior State Attorney and Ms. Salma Uledi, learned State Attorney.

On taking the floor, Mr. Haule informed the Court that he will argue grounds No. 1, 2, 3 and 4 together under the head that the case was not proved beyond reasonable doubt and ground No. 5 will be argued separately.

The learned counsel then elected to commence with ground No. 5 in which the complaint is that the appellant was convicted on a defective charge. It was his submission that after the prosecution had prayed and granted leave to amend the charge by substituting the name of the deceased from Chaibu Iddi to Shaibu Idd, the amended charge was not read out to the appellant as it was ordered by the trial court - (see page 37 of the record of appeal). While relying on the case of **Ngalaba Luguga @ Ndalawa v. Republic,** Criminal Appeal No. 66 of 2019 (unreported), he maintained the stance that, whatever followed after the charge was amended without having being read out to the appellant, was a nullity.

On being prompted by the Court as to whether or not the defect could be cured by section 388 of the Criminal Procedure Act, Cap 20 R.E 2019 (the CPA), Mr. Haule was of the view that such defect is incurable as it goes to the root of the matter in that it affected the fairness of trial.

As to the way forward, he beseeched the Court to invoke the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2019 (the AJA) to nullify the proceedings and judgment of the trial court, quash conviction and set aside the sentence imposed on the appellant, coupled with an order for his immediate release from custody.

Mr. Haule took this view contending that although an order for a retrial could have been ideal, this is not a fit case for retrial given the circumstances obtaining in grounds Nos. 1, 2, 3 and 4, collectively. In elaboration, he contended that the Postmortem Report (Exhibit P.1) was unprocedurally admitted in evidence as it was not read over after its admission and that the same had been tendered by the State Attorney who had the conduct of the matter. On that basis, he argued that the same should be expunged from the record.

The learned counsel further submitted that the rope (Exh. P2) was tendered and admitted in court while it was not listed during committal proceedings and as a result the same should be disregarded. To fortify his position, Mr. Haule sought reliance in the case of **Mashaka Juma @Ntalula v. Republic,** Criminal Appeal No. 140 of 2022 (unreported) where the Court discussed at length on the importance of listing during the committal proceedings not only the potential prosecution witnesses

but also the documentary and physical exhibits which the prosecution would rely on during the trial.

In arguing the remaining grounds collectively, Mr. Haule assailed the trial judge for importing extraneous matters in the summary of evidence that, "*the deceased was found with a rope similar to the one carried by the accused*", while none of the witnesses testified on that aspect. To put the other way round, neither PW1 nor PW4 testified on that aspect.

It was further submitted that in terms of section 298 (1) of the CPA, the trial judge is required to sum up the evidence on record to the assessors – See **Amani Rabi Kalinga v. Republic,** Criminal Appeal No. 474 of 2019 (unreported). However, in the instant matter, he said, during summing up to assessors the trial judge imported extraneous matters which might have influenced the assessors when he stated that "*there were bruises on the deceased's neck*" and that "*the deceased had never returned to his residence since 25/3/2015*". He relied on the case of **Japhet Kalanga v. Republic,** Criminal Appeal No. 332 of 2016 (unreported) where the Court emphasized that when summing up to assessors the trial judge should desist from influencing the assessors by giving his/her opinion on the case. The learned counsel, therefore,

invited the Court to make a finding that such extraneous matters had influenced the assessors.

Besides that, Mr. Haule asserted that the prosecution witnesses contradicted each other on, **one,** the number of accomplices to the crime in that PW1 stated that they were five whereas PW4 stated that they were nine; **two,** the place where the body of the deceased was found, since PW1 stated that it was found in the bush whereas PW2 stated that it was found on the way; and **three,** the place where the appellant was interrogated, since PW1 stated he was interrogated in the vehicle while PW4 stated that the interrogation took place at the police station. He also assailed PW1's testimony contending that during examination-in-chief he stated that the deceased and the appellant visited him on 25th March, 2015 while during cross examination he reneged and stated that the visitation occurred on 23rd March, 2015. With these discrepancies, Mr. Haule stressed that ordering a retrial would give the prosecution an opportunity to fill in the above-mentioned evidential gaps in their case.

In response, Mr. Chalo readily supported the appeal by conceding that the trial court proceedings were a nullity on account of the charge having not been read out after it was amended. Due to this omission, Mr. Chalo argued that the appellant was not afforded a fair trial. He,

therefore, agreed with his counterpart that this anomaly rendered the proceedings and judgment a nullity and that in the circumstances, this was not a befitting case to order for a trial *de novo.*

He further submitted that, indeed, there were defects which go to the root of the matter, particularly, on the doctrine of the last known person to be seen with deceased in which the prosecution had failed to prove that the appellant was the last person to be seen with the deceased.

Apart from that, Mr. Chalo further challenged the prosecution evidence in that, PW1 had not reported the incident to the police immediately and from 25th March, 2015 when it was alleged that the deceased had left with the appellant to 27th March 2015 when the body of the deceased was discovered and the incident reported to the police, which was after two days had passed. The learned Principal State Attorney also submitted in agreement with Mr. Haule that there was a broken chain of events for failure to establish the doctrine of last known person. Ultimately, Mr. Chalo prayed that the appeal be allowed.

Having heard the submissions from both parties, the issue for determination is, whether the appellant was convicted on a defective charge; and if the answer is in the affirmative what would be the way forward.

As to the issue that the prosecution prayed and leave was granted to amend the charge with an order to be read over after amendment and that the same was not read over as ordered, is not in controversy. The record of appeal at page 37 bears out that the prosecution prayed to amend the charge sheet in order to correct the name of the deceased to read Shaibu Iddi in lieu of Chaibu Iddi. The defence side posed no objection, therefore, the prayer for amendment was readily granted. It is further on record that the trial court ordered for the fresh charge to be read out to the accused. The record then goes silent as to whether the fresh charge was read out, making it obvious that it had not been read over to the appellant as it was ordered by the court. The procedure to have the charge read out upon amendment is mandatory to enable the accused to understand the nature of amendment and make a fresh plea all together - See: **The D.P.P v. Danford Roman @Karani,** Criminal Appeal No. 5 of 2018 (unreported).

Both parties join hands that the failure to observe the above-mentioned mandatory requirement has the effect of vitiating the proceedings and the resultant verdict arising therefrom. In the case of **Diaka Brama Kaba and Another v. Republic,** Criminal Appeal No. 211 of 2017 (unreported), the Court observed that where a charge is amended the same has to be read out in order for the accused

person(s) to enter a fresh plea for which failure to do so, would render the trial a nullity. It was further observed that upon such failure, the appellants could not have been afforded a fair trial.

In yet another akin scenario in the case of **Renatus Nicolous Makenge @ Rwagachuma v. Republic,** Criminal Appeal No. 322 of 2017 (unreported), the Court held that failure by the trial court to take the appellant's plea after substitution of the first charge sheet rendered the trial a nullity and hence, the appellant was not properly tried.

In similar vein, in the instant matter, the appellant having not been called upon to enter a fresh plea to the amended charge, undoubtedly, he was not accorded a fair trial to the charge he was convicted of. We are, therefore, in agreement with both counsel that, failure to observe the said requirement, vitiated the proceedings.

Apart from the foregoing infraction, there was a misapprehension of evidence in which the trial judge raised extraneous matters that were not supported by evidence, which might have influenced the assessors. Admittedly, as observed at page 74 of the record of appeal, during summing up to assessors, the trial judge imposed on the assessors that PW1 had stated in evidence that the appellant had left with the deceased while carrying a rope with him. A perusal of PW1's evidence on record does not reveal any such statement, which then makes it an

extraneous matter not supported by evidence. Besides that, in the judgment, as revealed at page 85, the trial judge referred to that extraneous matter, once again. In our opinion, as rightly argued by Mr. Haule, the possibility that the assessors were influenced by such extraneous matters one way or the other cannot be ruled out. - See **Japhet Kalanga** (supra).

In the case of **Shija s/o Sosoma v. D.P.P,** Criminal Appeal No. 327 of 2017 (unreported), the Court underscored the importance of the opinions of assessors to emanate from true and accurate evidence on record. In particular, the Court stated that:

> *"Summing up the evidence under section 298 (1) of the CPA envisages evidence of witnesses as accurately recorded by the trial Judge. We think, opinions of assessors will only be useful to the trial High Court if these opinions are based on a true and accurate account of what the witnesses actually said in court."*

This Court has also on various occasions held that the importation of extraneous matters has the force of influencing assessors. In the case of **Monde Chibunde @ Ndishi v. The D.P.P,** Criminal Appeal No. 328 of 2017 (unreported), the Court stated as follows:

> *"in our considered view the trial judge clearly expressed his own findings of fact on the evidence and in doing so he misdirected the assessors and for that matter the summing up to the assessors was not proper to enable them to give a valuable opinion. For that matter the trial was vitiated."*

See also **Yustine Robert v. Republic,** Criminal Appeal No. 329 of 2017 and **Apolinary Matheo and Two Others v. Republic,** Criminal Appeal No. 436 of 2016 (both unreported).

Moreover, even in circumstances where the extraneous matters had not been raised in the summing up to assessors, having been raised elsewhere in the judgment, as it also happened in this case, still the Court observes that such irregularity, vitiated the trial. In the case of **Augustino Nandi v. D.P.P,** Criminal Appeal No. 388 of 2017 (unreported), the Court stated as follows:

> *"...since it is evident in the record of appeal and as was rightly argued by the both counsel that the trial judge added extraneous matters which did not feature in evidence adduced by witnesses, we agree with them that it was a fatal irregularity which vitiated the whole proceedings and the judgment thereof."*

In view of the above ailments, in exercise of our revisional powers under section 4 (2) of the AJA, we nullify the proceedings and judgment of the trial court. We further quash the conviction and set aside the sentence imposed by the trial court.

Next for consideration is whether this is a fit case to order a retrial. In making our determination on this matter, we will be guided by the position of law established by the defunct Court of Appeal for Eastern Africa in the case of **Fatehali Manji v. Republic** [1966] EA 341, where it was held that:

> ***"In general, a retrial will be ordered only when 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 the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial.*** *Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; 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."* [Emphasis added]

Based on the prevailing circumstances in the present matter, we are persuaded by the invitation by both counsel who urged us to allow the appeal and set the appellant at liberty on account that ordering a retrial is not the most ideal decision. We have reasons for such inclination and we shall explain.

Towards such endeavour, it is pertinent to determine a very crucial issue, that is, whether the doctrine of the last person to be seen with the deceased person was sufficiently proved to the conclusion that the appellant was responsible for the killing of the deceased.

It is glaringly clear that the trial court founded conviction on among others the doctrine of the last known person to be seen with the deceased. It is pertinent to note that the application of the doctrine of the last known person to be seen with the deceased alive is only based on a "presumption" that where no plausible explanation is given by an accused person as to circumstances leading to the death of the deceased, then, the accused is presumed to be the killer. In the case of **Mathayo Mwalimu and Another v. Republic,** Criminal Appeal No. 147 of 2008 (unreported), the Court stated that:

> "... *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."

Therefore, it is our considered view that, it is not always that where an accused appears to be the last person to be seen with the deceased, then, automatically he is the killer. The doctrine ought to be treated and applied with caution as was observed in the decisions of this Court in **Twaha Elias Mwandungu v. Republic** [2000] TLR 277 and **Nathanael Alphonce Mapunda and Another v. Republic,** [2006] TLR 395. Further to that, in the case of **Japhet Kalanga** (supra), the Court quoting with approval the decision of the Supreme Court of Indian in **Ramreddy Rajeshkhanna Reddy & Anr v. State of Andhra Pradesh** JT 2006 (4) SC 16, observed that the doctrine of the "last known person" has to be corroborated by other evidence.

In this case, there is evidence of PW1 that the appellant was last seen with the deceased when they left PW1's home together on 25th March, 2015 and that the deceased's body was discovered on 27th March, 2015. Also, as was rightly observed by Mr. Chalo that there was a passing of two days to the discovery of the body, we are of the view that the time lapse between 25th March 2015 to 27th March, 2015 in the absence of cogent evidence, it is possible that the deceased might have met his death not at the hands of the appellant. It is trite law that the

evidence on record must be such that it irresistibly leads to the conclusion that the appellant is the killer and not anyone else. In the case of **Shabani Abdallah v. Republic,** Criminal Appeal No. 127 of 2003 (unreported), the Court stated as follows:

> *"The law on circumstantial evidence is that it must lead to the conclusion that it is the accused and no one else who committed the crime."*

See also: Justine Julius and Others v. Republic, Criminal Appeal No. 155 of 2005; and **John Magula Ndongo v. Republic,** Criminal Appeal No. 18 of 2004 (both unreported).

We are inclined to hold the view that, the evidence on record only appears and not more, to raise suspicion that the appellant might have been the one who committed the murder. However, it is trite law that, suspicion however strong is not conclusive proof that the appellant killed the deceased. See: **James @ Shadrack Mhungilwa and Another v. Republic,** Criminal Appeal No. 214 of 2010 (unreported). There is no such cogent evidence irresistibly leading to the conclusion that the appellant occasioned the killing. In our view, any attempt to order a retrial would benefit the prosecution into filling gaps in its already weak evidence.

Under such circumstances, we entirely agree with both counsel that the appellant be set at liberty. Consequently, we refrain from ordering a fresh trial, and, instead, we order that the appellant be released forthwith from prison unless he is detained there for some other lawful cause(s).

It is so ordered.

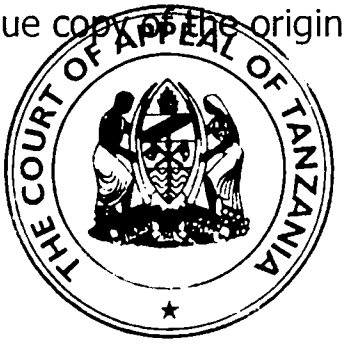
DATED at **DODOMA** this 7th day of December, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 7th day of December, 2022 in the presence of Mr. Majaliwa William, learned counsel for the Appellant and also holding brief of Mr. Leonard Haule, Advocate and Mr. Ahmed Hatibu, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL