IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., LEVIRA, J.A., And GALEBA, J.A.)

CRIMINAL APPEAL NO. 410 OF 2021

IBRAHIMU RAMADHANI @ ALLY ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Khamis, J.)

dated the 25th day of June, 2021
in
Criminal Sessions Case No. 82 of 2019
.....

JUDGMENT OF THE COURT

19th September & 6th October, 2023

GALEBA, J.A.:

The appellant in this appeal, Ibrahimu Ramadhani Ally, was arraigned before the High Court of Tanzania at Tabora, where he was charged with the offence of murder. Upon his trial, the appellant was found guilty and was convicted for having murdered Suzana Alex of Busomeke Village within Igunga District in Tabora Region. Consequent to the conviction, the appellant was sentenced to death. He was aggrieved by both conviction and sentence hence, this appeal.

The facts material to the case before the High Court were that the appellant, who originally was a resident of Bagamoyo in the Coast Region, moved to Igunga in search for labour work. For about a month, upon arrival in Busomeke village, he was staying at the house of John Mateo Kasubi's (PW1) neighbour called Bibiana Peter. Later on however, in April, 2017, the appellant was invited at the family of PW1, who was also the husband of the deceased, where he started his new life with the family of PW1. The compound of PW1 had several houses and the appellant was staying in one of the houses which was for boys, whereas PW1 and the deceased were occupying another house.

In the evening of 25th May, 2017 between 20:00 and 21:00 hours, PW1 wanted to go to the nearby water well to draw water. The well was about 200 meters away from PW1's compound. In going to the well, he was accompanied by the appellant. Quite unusually, however the appellant wrapped himself in a bed sheet around his body such that it was impossible for anyone to notice what he would be holding in his hands. Nonetheless, the duo went up to the well, drew the water and were now walking back home; PW1 leading the way and the appellant after him. Somewhere along the way home,

like 20 meters from the well, something very unusual and dangerous happened. In a completely unsuspecting and unpreparedness state, from behind the appellant struck PW1 with a deadly weapon whose blow sent him to the ground. He managed to ask him as to what he had done to the appellant, but he would not hear the response for he was soon rendered unconscious. The appellant cut PW1 about several times on the head and then dragged victim to a nearby cassava field, from where his body was recovered around 24.00 on the same day. PW1 regained consciousness at Nkinga Hospital the next day.

As the appellant left PW1 in the cassava field, he ran home and found the deceased at home where he attacked her with pieces of wood. In the course of the attack, the deceased managed to bite the appellant's finger, but all the same, she would not survive the deadly attack. The deceased fell down outside the house and was found bleeding immediately after the attack. Following the deadly assault, the appellant ran away in an attempt to escape. As fate would have it however, the path that he took when escaping from the scene of crime, is the same path that Enerico Zakaria (PW2), was coming along, when rushing to the scene of crime responding to the alarm that was raised. So, they met. PW2 asked the appellant as to what

was the alarm for and why was he running away. Not only that the appellant had no straight forward answers, but he attempted to run away from PW2, towards the main road. Suspecting something unusual, PW2 ran after him and arrested him. The appellant, who also had bruised on his body, blood stains and an injured finger, was brought back to the scene of crime.

At the home of PW1, they found the deceased on the ground oozing blood from the head and had died. The police came to the scene of crime the next day around 11:00 hours. On 26th May, 2017, Dr. Godfrey Bwire Augustine (PW4) found out that on top of the deceased's head there was a wound and beneath it, the deceased's skull was broken. He confirmed the cause of death to be excessive bleeding following a head injury and a smashed skull.

It is based on those facts that the appellant was charged, ultimately convicted and consequently sentenced to death as indicated earlier on. His appeal to this Court was originally based on seven grounds which were however abandoned by Mr. Kamaliza Kamoga Kayaga, learned advocate who appeared for him on 19th September 2023. Mr. Kayaga informed us that the appellant's appeal would only

be based on three grounds contained in his supplementary memorandum of appeal which was lodged on 14th September 2023.

The appellant's complaints in the supplementary memorandum of appeal were; **first**, that the learned trial Judge did not observe a requirement which ensured that assessors fully participated in the trial. **Second,** that exhibits P7, P8 and P9 were all wrongly admitted and therefore unlawfully relied upon in convicting the appellant. The **third** complaint was that the prosecution evidence was too weak to prove the case of murder beyond reasonable doubt.

Submitting on the above grounds, Mr. Kayaga started with the first ground of appeal which had two limbs. In respect of the first limb, he contended that, instead of selecting assessors after a charge was read to the accused person and a plea of not guilty entered, the trial Judge did the exact opposite; he selected assessors before the charge was read and before the appellant pleaded to it. He submitted that, the mix up offended the provisions of section 283 of the Criminal Procedure Act (the CPA). The learned advocate referred us to page 76 of the record of appeal where the omission was occasioned.

On the second limb, the learned counsel, argued that after the assessors were selected, the record is silent as to whether the lay

persons were addressed by the trial Judge as to their expected roles in the trial. Because of that, he added, assessors did not ask any questions to any witness and that to him, meant that the assessors did not know what to do. Mr. Kayaga referred us to this Court's decision in the case of **Gerald Athanas Kivwango v. R,** Criminal Appeal No. 103 of 2019 (unreported). In the final analysis the learned advocate prayed for retrial of the case without assessors before another Judge.

In reply, Ms. Veronica Moshi, learned State Attorney who was appearing together with Mr. Winlucky Mangowi, learned Senior State Attorney, for the respondent Republic, submitting on the first limb of Mr. Kayaga's first ground of appeal, contended that it is true, but there was no miscarriage of justice to the detriment of the appellant. That was so because, even his advocates at the trial did not raise any issue, when the assessors were being selected.

As to the issue of assessors not being addressed as to their roles, Ms. Moshi submitted that, although assessors were not addressed as to their roles, they fully participated as they were given opportunity to ask questions to every witness and at the end of the trial, they gave their opinion. So, according to the learned State

Attorney, the assessors fully participated in the trial and in any event, there was no prejudice on the part of the appellant. On this aspect Ms. Moshi referred us to this Court's decision in the case of **Amani Rabi Kalinga v. R**, Criminal Appeal No. 474 of 2019 (unreported).

We will start with section 283 of the CPA in addressing Mr. Kayaga's complaint in the first limb; the issue of selecting assessors before reading the charge to the accused, now the appellant. That section provides that:-

> *"Where the accused person pleads "not guilty" or if the plea of "not guilty" is entered in accordance with the provisions of section 281, the court shall proceed to choose assessors, as provided in section 285, and to try the case."*

On this limb, we agree with Mr. Kayaga that, by implication, assessors are supposed to come in the picture after the charge is read and a plea of not guilty entered. And it is true that at pages 75 of the record of appeal, assessors were selected before the charge was read and explained to the accused person. But the important issues in criminal trials is to always observe that an accused person is not prejudiced by any procedural lapse. That is what should always be kept in mind. In this case, assessors were selected before the charge

was to be read, then the charge was read and the trial started and continued.

In law, the issue of participation of assessors in criminal trials in the High Court being a procedural matter, unless a miscarriage of justice is demonstrated from any aspect of handling the assessors, any omission or lapse relating to assessors is curable under section 388 of CPA. See the case of **Amani Rabi Kalinga** (supra). Thus, we agree with Ms. Moshi, that because, the appellant was in no way prejudiced by the mix up of the procedure, the same is curable under section 388 of the CPA. In other words, the first limb of the first ground of appeal has no merit.

The second limb was that assessors were not addressed as to their roles at commencement of the trial, and because of that they did not ask any questions throughout the proceedings so the trial proceeded without the aid of assessors. **First**, it is true that assessors were not addressed as to their roles in the record of appeal particularly on 24th May, 2021 when the trial started. **Second**, it true also that no assessor asked any questions to any of the witnesses. Nonetheless, after summing up, the assessors gave their opinion unanimously returning a verdict of guilty. In doing so Renatus Mlyutu,

one of the assessors stated that, the evidence on record is wholly true. The accused killed the deceased intentionally. Mariam Yohana, another assessor opined; exhibit P7 show that the accused confessed to kill the deceased, he was promised to be paid TZS. 2,000,000.00 if he succeeded to kill the targeted family of the deceased. The third assessor, one Grace Damson stated that the prosecution proved the case beyond reasonable doubt. She added that the accused person confessed in writing in a cautioned statement that he killed the deceased, Suzana Alex.

In our view, assessors who participated in the appellant's trial knew their roles and they performed them. There is nothing on record suggesting that there are roles that were not performed that were pointed out to us, except the fact that they did not put any question to the witnesses. In our view, failure to ask questions to witnesses, does not, in itself mean that assessors did not participate in the trial, provided that they were given an opportunity to do so. In this case, the record bears testimony that all assessors were granted an opportunity to ask questions but they did not do so. We need to stress one point here, namely that, failure by an assessor to ask a question does not mean that the assessor does not know what to do

since, asking questions is not mandatory on every occasion. We therefore do not agree with Mr. Kayaga that assessors did not participate in the trial. To the contrary, the assessors fully participated in the appellant's trial. Thus, the first ground of appeal has no merit and we dismiss it.

Originally and looking at the second ground of appeal, there is challenged in that ground, the admissibility of exhibits P7, P8 and P9, however at the hearing, Mr. Kayaga abandoned any complaints relating to exhibits P7 and P8 and submitted in respect of exhibit P9 only. Exhibit P9 was an extra judicial statement of Richard Baraka Kiri, a Resident Magistrate at Igunga Urban Primary court as the justice of peace, however as the said justice of peace was admitted at Bugando Referral Hospital in Mwanza, he was not called to testify in order to tender the statement that he recorded. The statement was tendered by No. G 1745 DC Petro (PW6) at page 179. Mr. Kayaga's complaint was that, PW6 was not legally mandated to tender that exhibit, and worse still to tender it under section 34B (2) (a) of the Evidence Act.

In reply to that ground, Ms. Moshi was in agreement with the position taken by Mr. Kayaga and referred us to the case of **Khalifa Ramadhani v. R,** Criminal Appeal No. 131 of 2012 (unreported).

In resolving this ground of appeal, we have examined the record of appeal as well as the statutory provisions and the decided case pointed out to us by counsel for reference. Exhibit P9 is the extra judicial statement allegedly made by the appellant, so it is nobody else's statement, it is of the appellant, at least as per the prosecution. The person who recorded it, Richard Baraka Kiri was admitted in Mwanza so he could not be procured to appear and tender it. Because of that a custodian of the document PW6, tendered it. We agree that PW6 not being a recorder of the statement or a maker of it, had no mandate to tender it. Accordingly exhibit P9 was admitted irregularly, and we expunge it for the reasons above stated.

The third ground of appeal was a general complaint that the case was not proved beyond reasonable doubt. Briefly on this ground, Mr. Kayaga submitted that there is a possibility that the deceased was murdered by some other people, referring to the evidence of the appellant. According to the appellant, he was asleep and during the material night, he heard the deceased screaming, '*nakufa*', '*nakufa*'. He then woke up but when he wanted to get out of the house, he was in, he found the door to have been bolted from the outside. He struggled to open the door and by the time he managed to opened it

and got out, he heard movements of people fleeing from the scene. He saw the deceased laying down helpless, he got closer to her and noted that the deceased was bleeding, he made an alarm and the first person to arrive, according to the appellant was PW2 who, however arrested him. Mr. Kayaga's point was that, considering such a defence, the deceased was killed by those people whose movements the appellant heard disappearing in the dark night.

In reply to that ground Ms. Moshi submitted that, PW2 who arrested the appellant while running away from the scene was not cross examined which meant that, the appellant was not contesting the evidence of PW2. She referred us to the case of **Nyerere Nyague v. R**, Criminal Appeal No. 67 of 2010 (unreported). The learned State Attorney submitted that the case was proved and the appellant murdered the deceased by hitting her with a piece of wood with malice aforethought. She submitted that the case was, in the circumstances proved beyond reasonable doubt. She prayed for the appeal to be dismissed for want of merit.

In our view, a decision on whether the case was proved to the required standard or not, hinges on the evidence of PW1, PW2 and Inspector Banda Mwita Mtani, PW5.

PW1 was a person with whom the appellant went with to the well and was found injured unconscious in the cassava field following the appellant's deadly assault. The cross examination that was put to PW1, does not at all show that the appellant did not go to the well with him. PW2 is the one who arrested the appellant. He stated that he arrested the appellant running away and brought him back to the house of PW1 where they found the deceased killed a while ago. The testimony of this witness at page 94 of the record of appeal is that the appellant admitted to have murdered the deceased and that he hit PW1 with a bush knife. There is no credible cross examination that shook this piece evidence.

PW5 stated at page 119 of the record of appeal, that the appellant admitted to have hit PW1 on the way from the well. This policeman also at page 120 of the record of appeal, testified that the appellant confessed to him that he killed the deceased by hitting her with a piece of wood which got broken into seven pieces, exhibit P3. The appellant also told this witness that the yellow and red bed sheet, exhibit P5 which was found to be blood stained was his. The appellant admitted too, that exhibit P4, the bush knife which was found under his bed with blood was his. This witness tendered a certificate of

seizure, exhibit P2 which was counter signed by the appellant. This exhibit listing 7 pieces of wood, a bush knife, the bedsheet referred to above and open shoes made from car tire rubber, was tendered without objection at page 121 of the record of appeal.

The other evidence incriminating the appellant to the core is his own cautioned statement. He states clearly in that statement how he was hired by a person called Martine, who would pay him TZS. 2 million if he would kill PW1 and his wife and he details how he implemented the plan. However, as this cautioned statement was objected to, and was admitted as a result of a ruling in a trial with trial, the same needs corroboration. The confession is however corroborated by the evidence of PW1 who stated that he went with the appellant to the water well, the evidence of PW2 corroborates the confessions on the fact that he was arrested fleeing from the scene of crime to look for Martine so that he pays him his money (the Tshs 2 million). The confession is further corroborated by the evidence of PW5 and PW6. In the circumstances, it is clear that the case was abundantly proved beyond reasonable doubt against the appellant. Thus, the third ground of appeal has no merit and we dismiss it.

For the above reasons, this appeal has no merit, we therefore dismiss it.

DATED at **TABORA** this 5th day of October, 2023

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the appellant in person represented by Mr. Kelvin Kayaga, learned counsel for the appellant and Mr. Magonza Charles, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL