IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUGASHA, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CRIMINAL APPEAL NO. 188 OF 2019

MALULA CHEMU @ MALULA.....1ST APPELLANT
MADAHA NDALAHWA.....2nd APPELLANT
MAKULA HOJA.....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Rumanyika, J.)

dated the 1st day of April, 2019
in
Criminal Sessions Case No. 86 of 2014
.....

JUDGMENT OF THE COURT

6th & 12th July, 2022

KIHWELO, J.A.:

The appellants herein, Malula Chemu @Malula, Madaha Ndalahwa and Makula Hoja (the appellants) were convicted and condemned to death by the High Court of Tanzania sitting at Mwanza (Rumanyika, J. as he then was) (the trial court) for the murder of Cosmas Seni, Gindu Sendeka and Mwashi Mhandi on 2/12/2012 at Shigangama Village within Kwimba District in Mwanza Region. Initially, the appellants were apprehended before the trial court along with three others not part to this appeal.

It was common ground that both Cosmas Seni, Gindu Sendeka and Mwashi Mhandi (the deceased) died violently on 2/12/2012 at Shigangama Village within Kwimba District in Mwanza Region. It was the prosecution evidence that both three deceased sustained multiple cut wounds in various parts of their bodies leading to severe bleeding which resulted into their sudden deaths. The question at the trial was, therefore, whether the appellants were the murderers.

To establish its case, the prosecution featured seven witnesses: Frank Mulunga (PW1), Assistant Inspector Banda Mwita Mtani (PW2), F.9940 D/SSGT Peter (PW3), Mwashi Salage (PW4), Jilala Gada (PW5), Bittony H. Mwakisu (PW6) and F. 8850 DC Leonard (PW7). Apart from the postmortem examination reports (exhibits P1, P2 and P3), the prosecution tendered a host of other exhibits namely the sketch drawing of the scene of the crime (exhibit P4), cautioned statements of the appellants (exhibits P5, P7 and P13) and statements of other prosecution witnesses (exhibits P6, P8, P9, P10, and P12) as well as extra judicial statement of PW6 (exhibit P11).

On the part of the appellants, they gave their respective evidence on oath and produced one documentary exhibit a PF3 of Malula Chemu (exhibit D1).

Briefly, the prosecution case which was believed by the trial court shows that, on the fateful day at around 02:00 hours, PW4 while sleeping along with the three deceased persons, suddenly he saw bandits who stormed inside the house while holding machetes and torches. The bandits went ahead to brutally murder the three deceased persons and fled away, but PW4 was able to identify one Salida Cosmas who is not part of this appeal. Terrified, PW4 informed PW5 who rushed to the scene of crime and found Cosmas Seni in a terribly bad condition fighting for his last breath while Gindu Sendeka and Mwashi Mhandi were already dead by then. PW5 then informed the neighbors and the following morning police arrived at the scene of crime.

PW1, a Medical Officer by then working with Kibitilwa Heath Center, at the request of the police went to the scene of crime and medically examined the bodies of the deceased and found out that all of them had multiple cut wounds in various parts of their respective bodies. He then filled exhibits P1, P2 and P3. On his part, PW2 from the Regional Crime Officer by then, was assigned to go to the scene of crime where he witnessed the corpse of three deceased brutally murdered. He also met PW4 who said she

properly identified the murders. On 8.12.2012, PW2 recorded the cautioned statement of the first appellant (exhibit P5).

PW3 who by then was working at CID Ngudu Police Station on 2.12.2012 visited the scene of crime, met and interviewed PW4 the prosecution eye witness who mentioned to him the first and the second appellants as the murderers who committed the barbaric incident. On 3.12.2012 PW3 was appointed as Chief Investigation Officer and on 12.12.2012 they arrested the second appellant and recorded his cautioned statement (exhibit P5) in which the second appellant confessed to have committed the murder in question and went ahead to implicate the first appellant and another person not part to this appeal.

PW6 a Resident Magistrate working at Ngudu Primary Court in Kwimba District by then, recorded the extra judicial statement of the first appellant (exhibit P11) in which the first appellant admitted to have murdered one male and two females sometimes in November without specifically mentioning the date and the year or even names of the victims.

On the other hand, PW7 from Ngudu Police Station in Kwimba District recorded the cautioned statement of the third appellant (exhibit P13).

On their defence, the appellants totally denied the accusation laid against them. The first appellant who testified as DW2 disassociated himself with the rest of the appellants and his evidence was to the effect that he was apprehended on 7.12.2012 by the local chairman and later was taken to the police where he was kept under custody and thereafter he was severely tortured while naked in order to obtain his confession which he was compelled to. DW2 testified further that, he signed the statement without even reading its contents. It was DW2's further telling that, on 17.12.2012 he was taken to the Justice of Peace (PW6) where he denied the charges against him but was taken back to the police where he was tortured once again and forced to confess. To fortify his allegations of torture he produced in court the PF3 (exhibit D1).

On the other hand, the second appellant who testified as DW3, his evidence was to the effect that he was arrested by the police at his home village Igungunya Kwimba District on 12.12.2012 while asleep and was taken to Ngudu Police Station. DW3 complained of being tortured by the police in order to confess to the crime he did not commit and denied any association with others he was charged with. The third appellant who testified as DW5 also disassociated himself with the crime he stood charged and testified that

he was forcefully made to sign the statement whose contents he did not know as he was asked by the police his personal particulars only and nothing more.

At the conclusion of the case for the prosecution and the defence, the learned trial Judge summed-up the case to the assessors who sat with him in aid. The three assessors returned a unanimous verdict of guilty against the appellants and other three not part to this appeal. Siding with the assessors, the learned trial Judge found it proven upon the evidence of the prosecution witnesses that the appellants were responsible for the murder of the deceased. Accordingly, they were convicted and sentenced as shown earlier. On the other hand, the learned trial Judge dissented with the learned trial assessors and found out that the prosecution did not prove the case beyond reasonable doubt against the other three who were charged along with the appellants and therefore the charges against them were dropped and set free.

In their quest for justice, the appellants lodged this appeal which was initially predicated on self-crafted eight- point joint memorandum of appeal lodged on 14.06.2019. Nonetheless, for a reason that will shortly become apparent, we think that it will be unnecessary for us to reproduce the joint

memorandum of appeal. On 29th June, 2022, the appellants' counsel, Mr. Geofrey Kange, filed a four-point supplementary memorandum of appeal which reads:

1. *That the recording of the evidence of PW1, PW3, PW7, DW1 and DW4 at the trial was irregular due to the failure by the trial Judge to append his signature at the end of the testimony of the witnesses.*
2. *The summing up to the assessors was irregular due to the failure by the trial Judge to address them adequately on vital points of law.*
3. *That the trial Judge erred in law by convicting the appellants basing on the cautioned and extra judicial statements of the appellants which were recorded and admitted in contravention of the requirements of the law.*
4. *That the trial Judge erred in law by convicting the appellants on contradictory evidence which did not prove the case beyond reasonable doubt.*

At the hearing of the appeal before us, Mr. Geofrey Kange, learned advocate represented the appellants while on the other hand, Mr. Ofmedy Mtenga Senior State Attorney, represented the respondent Republic.

At the commencement of hearing of the appeal Mr. Kange sought and was granted leave to abandon the joint memorandum of appeal which was earlier on lodged in Court by the appellants and in its place substituted it with the supplementary memorandum of appeal which he lodged in Court later on 29.06.2022. Furthermore, Mr. Kange sought and was granted leave to abandon the first and the second grounds of appeal and in due course, he also abandoned the fourth ground and therefore argued only the third ground of appeal.

In his oral account in support of the appeal, Mr. Kange prefaced his submission by arguing briefly that, the appellants were convicted on the basis of the cautioned statements of the appellants as well as the extra judicial statement which was tendered by PW6 (exhibit P11). For this proposition, he referred us to page 59 of the record of appeal. He further contended that, according to the learned trial Judge, PW4's evidence of visual identification fell short of the conditions which has long been settled in the most celebrated case of **Waziri Amani v. Republic** [1980] T.L.R. 250. It was on that basis, the trial Judge acquitted all those who were implicated based upon visual identification and remained with those who

were implicated on the basis of the cautioned statements and the extra judicial statement, Mr. Kange argued.

With regard to the admissibility of the cautioned statement of the first appellant (exhibit P5), Mr. Kange faulted the learned trial Judge by referring to page 8 of the record of appeal where PW2 prayed to tender the cautioned statement of the first appellant which was objected by Ms. Marina Mashimba, learned advocate for the first appellant on allegations that the first appellant was tortured by the police and therefore, it was involuntarily given, however, the learned trial Judge admitted it in an impromptu order without conducting a trial within trial to determine its voluntariness. Mr. Kange referred us to pages 9 and 10 of the record of appeal and contended that the manner upon which exhibit P5 was admitted in evidence was irregular since it ought to have been cleared first for admission through trial within trial. In the event, Mr. Kange impressed on us to expunge exhibit P5 from the record of appeal.

As regards to the admissibility of the cautioned statement of the second appellant (exhibit P7), Mr. Kange submitted that the procedure which the trial Judge adopted was inappropriate in that, when PW3 sought to tender for admission the cautioned statement, Mr. Prudence Buberwa, learned counsel for the second respondent objected to its admissibility for

the reason that the same was not prepared in compliance with section 58 (2) (a) and (b) and section 53 (2) of the Criminal Procedure Act, [Cap 20 R.E. 2002; now R.E. 2022] (CPA), the learned trial Judge instead of giving a reasoned ruling merely overruled the objection with a short order, he submitted.

Upon our inquiry on whether the order delivered by the trial court was not sufficient in view of the fact that the objection was not on voluntariness but rather non-compliance with the law and considering the fact that the second appellant certified to have read the statement before appending his right thumb print, the learned counsel admittedly argued that, the prescribed form does not require the recorder to indicate that he has complied with the law. He however, insistently argued that, failure to read exhibit P7 to the second appellant made the same inadmissible and therefore he implored us to expunge exhibit P7 from the record of appeal.

As regards to the admissibility of the cautioned statement for the third appellant (exhibit P13) which was tendered in court by PW7 without any objection, Mr. Kange was fairly brief, he contended that the same was irregularly admitted in evidence because it was not read to the third appellant as required by section 58 of the CPA. Mr. Kange referred us to page 29 of

the record of appeal and therefore prayed that exhibit P13 should also be expunged from the record.

Mr. Kange in further support of the appeal attacked the extra judicial statement of the first appellant (exhibit P11) which was recorded by PW6, contending that it did not comply with the Chief Justice's Guide for Justices of Peace (the CJ's Guide) in that it did not indicate that the same was read over to the first appellant. To support his proposition, he referred us to page 27 of record of appeal. Mr. Kange concluded his submission in respect of the third ground of appeal by urging us to find that the procedure of admitting exhibit P11 was irregular and therefore, the same should be expunged from the record.

On the part of the respondent Republic, Mr. Mtenga started by conceding that the admissibility of the cautioned statement of the first appellant, (exhibit P5) which was objected on allegations of torture was irregularly and illegally admitted as the learned trial Judge ought to have conducted a trial within trial in order to determine voluntariness of the confession. He therefore agreed with the submission of the learned counsel for the appellants that exhibit P5 should be expunged from the record of

appeal. Mr. Mtenga opted not to go into further details of the circumstances which led to the procedural irregularities complained of by the appellants.

Coming to exhibit P7, Mr. Mtenga argued very briefly that, the submission by the learned counsel for the appellants that PW3 did not read over the cautioned statement to the second appellant is without merit and baseless because PW3 testified that he read over the statement to the second appellant before the second appellant signed and that this testimony by PW3 was consistent to the appellants certification in exhibit P7. He referred us to page 13 of the record of appeal and argued that exhibit P7 should not be expunged from the record of appeal. The learned Senior State Attorney, further went on to submit that exhibit P7 implicated the second appellant himself and the other appellants and since the issue of voluntariness did not arise in relation to exhibit P7, it should link the second appellant and others to the offence of murder.

When prompted by the Court on whether there is any evidence corroborating the confession statement which implicated the co-appellants, Mr. Mtenga argued that, ordinarily corroboration would have been in the confession which was irregularly admitted, but curiously argued further that

given the circumstances of this case the Court may warn itself and convict the appellants on the basis of exhibit P7.

As regards the extra judicial statement (exhibit P11), Mr. Mtenga was very brief and contended that PW6 complied with the CJ's Guide as such there was nothing to fault the learned trial Judge for admitting it in evidence. When we prompted him on whether the extra judicial statement had any impeccable evidential value to link the appellants with the offence of murder subject of the present appeal, Mr. Mtenga admittedly argued that, exhibit P11 did not have any evidential value worth implicating the appellants for the offence they stand charged. Mr. Mtenga rounded up his submission by contending that since the second appellant implicated himself in the cautioned statement (exhibit P7) and because exhibit P7 was not objected when it was admitted in evidence, he prayed that exhibit P7 be used against the second appellant. Finally, Mr. Mtenga supported the appeal against the first and third appellants while opposing the appeal and supporting conviction against the second appellant.

In his brief rejoinder submission, Mr. Kange reiterated his earlier submission against the second appellant and repeatedly submitted that the

prosecution case was not proved to the hilt and therefore the appeal should be allowed and all the appellants be released forthwith.

From the foregoing submissions of the counsel of the parties, we propose to begin our deliberation with the concurrent submissions on the irregular and improper admission of exhibit P5. For clarity, we wish to let record of appeal at page 10 speak for itself:

> *"**Order:** Objection overruled. Reasons to be assigned in a ruling on a case to or no case to answer as the case may be, or judgment whichever comes latter. Copy of the cautioned statement admitted as Exhibit "P5"."*

It is a time-honored principle of law that whenever it is desired to tender any document in admission it has first to be cleared for admission before it is admitted and acted upon. Where an objection is raised on the admissibility of the cautioned statement or extra judicial statement on the basis that the statement was not made voluntarily or that was not made at all in terms of section 27 of the Evidence Act, Cap 6 R.E. 2002; now R.E. 2022 (the Evidence Act) the trial court is duty bound to conduct a min trial in the form of trial within trial if it is a High Court and an inquiry if it is a trial by the subordinate court in order to determine the admissibility or otherwise

of the statement. There is a considerable body of case laws on this. See for instance, **Godfrey Ambrose Ngowi v. Republic**, Criminal Appeal No. 13 of 2017, **Julius Charles and Another v. Republic,** Criminal Appeal No. 36 of 2017 and **Twaha Ali and Others v. Republic**, Criminal Appeal No. 78 of 2004 (all unreported). In the latter case we observed that:

> *"If that objection is made after the trial court has informed the accused of his right to say something in connection with alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or a trial within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence."*

Corresponding observations were made in the case of **Seleman Abdallah and 2 Others v. Republic**, Criminal Appeal No. 384 of 2008 (unreported).

It follows therefore that the procedure adopted by the learned trial Judge in the present appeal of delivering an impromptu order while there was an objection on the voluntariness of the statement was inappropriate. We don't find the approach taken to be legally sensible and correct because

the trial court did not determine the admissibility or otherwise of exhibit P5. We therefore expunge exhibit P5 from the record of appeal for being improperly admitted contrary to the requirements of the law.

Next, we will deliberate on the admissibility of the cautioned statement of the second appellant (exhibit P7) which we think should not detain us much. Mr. Mtenga was undeniably right to argue that, when exhibit P7 was tendered for admission it was cleared for admission as the only objection was on non-compliance with section 169 of the CPA which the respondent Republic, arguably was able to clarify. We are able to say at the outset, with respect, that the appellants' counsel complains that the learned trial Judge did not assign reason is not meritorious since the learned trial Judge clearly indicated the reasons for overruling the objection and because the objection was not on voluntariness which would have required a trial within trial. In the circumstances above and for the foregoing reasons the prayer to expunge exhibit P7 from the record of appeal is declined.

This brings us to the cautioned statement of the third appellant (exhibit P13) which was tendered in court by PW7. In his defence at the trial the third appellant stated that he never gave a cautioned statement and that he was forced to sign something he did not know. But as rightly stated by

Mr. Mtenga, exhibit P13 was produced and admitted in evidence without objection by the defence. In essence, the third appellant is now seeking to challenge the admissibility of the statement. With respect, it is too late in a day for him to do so because its admissibility or otherwise was never raised at the trial. As a matter of general principle an appellate court cannot decide matters that were not raised and decided upon by the court below. Our proposition stems from settled position of the law. See, for instance, **Festo Domician v. Republic**, Criminal Appeal No. 447 of 2016, **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 and **Julius Josephat v. Republic** Criminal Appeal No. 3 of 2017 (all unreported).

We think, with respect, that, if an accused person intends to object to the admissibility of a statement, he must do so before it is admitted in evidence and not during cross examination or during defence as doing so afterwards is an afterthought. In the case of **Vicent Ilomo v. Republic**, Criminal Appeal No. 337 of 2017 (unreported) in which we were faced with an akin situation when the counsel for appellant invited the Court to consider the admissibility of statements of witnesses under section 34B (1) and 2 (2) of the Evidence Act which statements were admitted before the trial court without objection, we cited a passage from the case of **Emmanuel Lohay**

and Another v. Republic, Criminal Appeal No. 278 of 2010 (unreported) in which the Court confronted with similar situation stated as follows:

> *"It is trite law that if an accused person intends to object to the admissibility of a statement/confession he must do so before it is admitted and not during cross- examination or during defence-* ***Shihoze Semi and Another v. Republic*** *(1992) TLR 330, In this case, the appellants "missed the boat" by trying to disown the statements at the defence stage. That was already too late. Objections, if any, ought to have been taken before they were admitted in evidence."*

For the foregoing reason, we are inclined to agree with Mr. Mtenga that exhibit P13 has to remain intact in the record of appeal and should not be expunged from the record, as the counsel for the appellants sought to invite this Court to do. As to its probative value we shall, at a later stage of our judgment, revert to this aspect.

Lastly, we will deliberate albeit very briefly on the extra judicial statement of the first appellant (exhibit P11) which in our considered opinion, we think, should not detain us much. A cursory glance to exhibit P11, it is conspicuously clear that PW6 complied to the letter and spirit of the CJ's

Guide which is in a prescribed format that was used by PW6 while recording it, and therefore, Mr. Mtenga is undeniably right to argue that the learned trial Judge should not be faulted for admitting in evidence exhibit P11. However, we must hasten to state that as admitted by Mr. Mtenga, exhibit P11 had no any impeccable evidential value to link the appellants with the offence of murder subject of the present appeal. We shall explain also this at a later stage of our judgment.

Now, having deliberated on the complaints regarding infractions on the recording and admission of cautioned statements and the extra judicial statement, the question that remains to be answered is whether in the circumstances of the appeal before us the prosecution proved its case to the hilt.

We are alive to the peremptory principle of law that on an indictment for murder, the burden is always on the prosecution to prove the case beyond reasonable doubt the link between the death of the deceased and the accused person. See, for example **Mohamed Said Matula v. Republic** [1994] TLR 3 and **Enock Yasin v. Republic**, Criminal Appeal No. 12 of 2012 (unreported). In the earlier case it was held that:

"The burden of proof in a criminal case rest on the prosecution and it never shifts. The accused person has no duty of establishing his innocence."

See also, **Aburaham Daniel v Republic**, Criminal Appeal No. 6 of 2007 (unreported).

Clearly, in the instant appeal the learned trial Judge expressly stated at page 59 of the record of appeal that the entire prosecution evidence hinged on the visual identification of PW4 on one hand, the extra judicial statement of the first appellant (exhibit P11) as well as the cautioned statements of the appellants (exhibits P5, P7 and P13) on the other hand. As rightly argued by Mr. Kange, the learned trial Judge did not give any credence to the visual identification evidence of PW4 on account that it did not meet the litmus test which has long been settled in the landmark decision in **Waziri Amani** (supra). Furthermore, PW4's evidence was defeated owing to the fact that she did not name the offender(s) at the earliest possible moment which would have been a reassuring factor in her credibility. Time without number this has been insisted. See, for instance **Jaribu Abdallah v. Republic** [2003] TLR 271.

Having expunged exhibit P5 from the record, it leaves us with exhibits P7, P11 and P13. Looking critically these exhibits, it leaves a lot to be desired and we will endeavor to explain. Starting with exhibit P11, the extra judicial statement of the first appellant, this evidence has no any probative value to the appeal before us because there is nothing to link the first appellant or any of the appellants to the murder in question. In short, the first appellant did not confess to have murdered the deceased in this case nor did he implicate the other appellants. Going to exhibit P13 the cautioned statement of the third appellant, it is too skimpy and in it the appellant neither confessed to have murdered the deceased nor did he implicate the other appellants despite the fact that he mentioned in passing about the first appellant being a notorious butcher in the locality which does not connect them with the charged offence. Therefore, exhibit P3 does not link the third appellant or any of the appellants to the murders of the deceased.

Finally, is exhibit P7 the cautioned statement of the second appellant. Admittedly, exhibit P7 implicates the second appellant as it explains in details how the murder incidence was planned and actually executed. The cautioned statement is so detailed such that the events described therein could have only been given by someone who had knowledge of how the deceased met

their deaths. However, we were unable to spot in the record whether the second appellant, apart from the alleged cautioned statement tendered, also gave evidence *viva voce* implicating himself. There is yet another disquieting aspect in exhibit P7 where the second appellant is alleged to have confessed that the first appellant after murder of the deceased, he chopped the hand of the deceased Cosmas Seni and took it to the witch-doctor, but quite surprising this was not consistent with the autopsy report exhibit P1 which revealed that "*the deceased's found lying down with multiple cuts wound, on the face and on the left hand big cut wound 2x3x5 leading to severe bleeding that resulted to death".*

Furthermore, this was not consistent with the evidence of PW1 who medically examined the deceased Cosmas Seni and did not mention any signs of amputation of any of the deceased's hands. The totality of this makes it unsafe to convict the second appellant using his cautioned statement exhibit P7 and therefore, there can be no better words to express our view and conclude as we hereby do that, given the totality of the evidence on record we are satisfied that, the prosecution did not prove the case against the appellants beyond any reasonable doubt.

In the final analysis therefore, we allow the appeal. We quash the conviction and set aside the sentences imposed on each of the appellant. We order that they be released from prison forthwith unless they are held on other lawful cause.

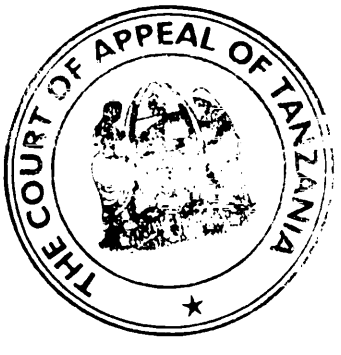
DATED at **MWANZA** this 11th day of July, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 12th day of July, 2022 in the presence of appellants in person and Mr. Deogratius Richard Rumanyika, learned State Attorney for Respondent/Republic, is hereby certified as true copy of the original.



H. P. Ndesamburo
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL