IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 474 OF 2019

AMANI RABI KALINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mbeya)
(Mambi, J.)

dated the 16th day of September, 2019
in
Criminal Sessions Case No. 43 of 2014

.....

JUDGMENT OF THE COURT

28th September & 18th October, 2022

MWAMBEGELE, J.A.:

The appellant Amani Rabi Kalinga was on 16.09.2019 convicted by the High Court of Tanzania sitting at Mbeya for the murder of Heron Kalinga at Mpanda Village in Mbozi District, Mbeya (now Songwe) Region. He was awarded the mandatory sentence of death by hanging. He has come to the Court on a first and final appeal to assail the conviction and sentence.

The background facts leading to his arraignment, as gleaned from the record of appeal, may briefly be stated: on 07.11.2011, the deceased was

grazing cattle with his friends Joel Mwashilindi (PW2) and Joseph E. Yala (PW4) at the said Mpanda village. While still there, the appellant arrived wielding two knives. He told the deceased to go with him in the forest in search for the latter's missing head of cattle. The deceased agreed. They went in the forest where, in a bizarre twist of things, the appellant attacked the deceased; stabbed him with the knives he wielded. Joseph Emmanuel Lyala (PW4) witnessed the incident and took to his heels immediately to save his life. Thereafter, it appears, the appellant disappeared leaving the deceased there; idle. He was arrested later. After interrogation, he took Yuweni Kalinga (PW1), the deceased's father and Gaston Chisunga (PW3) to the scene of crime where they found the body of the deceased with, *inter alia*, a big cut wound in his neck which had damaged the throat. They also found out that his private parts had been chopped off. Dr. Leonce Mwenda (PW5) conducted an autopsy of the deceased's body and opined that his death was due to severe bleeding. The autopsy report was tendered and admitted in evidence as Exh. P2.

The appellant was taken to the Police Station where, upon interrogation, he admitted before Insp. Lameck Chinuka (PW6) to have killed

the deceased on instructions from a certain Mkama of Vwawa township, Mbozi who was in need of private parts of a human being.

The prosecution fielded six witnesses to support the information for murder against the appellant. The appellant did not call any witness. He was the only defence witness. After a full trial, the trial court found him guilty as charged, convicted and sentenced him as already stated above. His appeal to the Court comprises six grounds of appeal. Also, his advocate filed four grounds of appeal on 23.09.2022.

When the appeal was called on for hearing, the appellant appeared and was represented by Ms. Jennifer Alex Biko, learned advocate. The respondent Republic appeared through Ms. Prosista Paul and Mr. Joseph Mwakasege, learned State Attorneys.

When we gave the floor to Ms. Biko to argue the appeal, she first abandoned the grounds of appeal lodged by the appellant and opted to remain with the four grounds she filed on 23.09.2022 referred to hereinabove. She also sought to adopt the written submissions she had filed earlier in support of the grounds of appeal without more.

In the written submissions, the learned counsel submitted on the first ground that the record of appeal at p. 48 shows that the trial Judge never explained the role of assessors after selecting them. Failure to do so was an incurable irregularity which makes the proceedings a nullity, he argued. She supported her argument with our unreported decision in **Msigwa Matonya and 4 Others v. Republic**, Criminal Appeal No. 492 of 2020. She added that the trial court did not avail an adequate opportunity to put questions to witnesses and to clearly record their answers. She also made reference to p. 55 of the record of appeal where Mr. Sunday Seme is not recorded thus not being clear if he was present in court or not. Ms. Biko, also attacked the trial court for not requiring individual opinion of assessors as appearing at p. 103 of the record of appeal. The learned counsel thus urged us to exercise our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2022 to nullify the proceedings and quash the judgment and conviction and set aside the sentence. She also invited us to set the appellant free as there was no sufficient evidence to prove the case against them to the hilt.

Arguing ground two, Ms. Biko submitted that the prosecution evidence was contradictory from the first to the last witness. She submitted that while PW2 testified that the appellant went with the deceased into the bush to look for lost head of cattle, PW4 who was also there testified to have seen the appellant attacking the deceased. This, she argued, is a contradiction which goes to the root of the matter. She added that PW3, PW5 and PW6 also differ on the date the *locus in quo* was visited, while PW3 and PW6 say it was 08.11.2011, PW 5 says it was 09.11.2011.

Ms. Biko also contended that the High Court erred in making reference to and relying on the cautioned statement which was not tendered in evidence. She referred us to p. 139 of the record of appeal where the High Court made such reference. She also accused PW6 as not being a witness of truth for telling the court that he interrogated PW4 who said he witnessed the appellant killing the deceased while even PW4 himself did not adduce such evidence.

Having submitted as above, Ms. Biko argued that the High Court failed to evaluate the evidence properly which led to miscarriage of justice. To buttress this proposition, she cited our decision in **Leonard Mwanashoka**

v. Republic, Criminal Appeal No. 226 of 2014 (unreported) in which we held that:

> *"Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and, or biased conclusions or references resulting in miscarriage of justice".*

Arguing on the third ground of appeal which assails the High Court for convicting the appellant on circumstantial evidence that the appellant was the last person to be seen with the deceased, Ms. Biko submitted that it is in evidence that the appellant just passed by where PW2 and PW4 were grazing cattle together with the deceased while he was on his way to Antesia village where he went to buy sugarcane. She went on to submit that it was wrong for the trial court to convict the appellant on circumstantial evidence which did not attain the threshold stated in **Joseph Deus @ Sahani v. Republic**, Criminal Appeal No. 564 of 2019 (unreported). She, however did not state those benchmarks.

Ms. Biko argued the fourth ground which is a complaint that the appellant's defence was not considered, that the appellant just passed by the deceased, PW2 and PW4 where they were grazing cattle while going to

Antesia village to buy sugarcane. She argued that on his way back, he found the cattle scattered and decided to take them to PW1. She added that the appellant also testified that it was the dogs which led the villagers to where the body of the deceased was found. That evidence was not considered by the trial court. The learned counsel relied on **Leonard Mwanashoka** (supra) to submit that failure to consider the appellant's evidence was a fatal ailment.

The learned counsel also argued that the trial Judge imported extraneous matters which was not borne out in evidence. She referred us to p. 139 line 8 to 15 where the trial Judge stated that PW2 saw the appellant pushing the deceased down while he was armed with the two knives. All what PW2 said, she submitted, was that the appellant found them there and left with the deceased going into the bush. She relied on our decision in **Ezra Peter v. Republic**, Criminal Appeal No. 409 of 2019 (unreported) to argue that the importation of such evidence was fatal and occasioned injustice. It thus vitiated the trial, she argued.

Having submitted as above, the learned counsel argued that the case against the appellant was not proved beyond reasonable doubt and prayed that the appeal be allowed.

Ms. Paul responded to the grounds of appeal. She expressed her stance at the very outset that the appellant's conviction and sentence were quite appropriate; the Republic supported it.

Responding to the first ground of appeal, Ms. Paul conceded that at the beginning of trial, the assessors were not told of their role. She, however, was quick to submit that the infraction did not prejudice the appellant in that a glance at the record of appeal shows that the assessors participated well throughout the trial. Thus, despite not being told their role, they played their part well in assisting the Judge during the trial and therefore no miscarriage of justice was occasioned.

Responding to ground three which is a complaint that the High Court erred in upholding the conviction of the appellant on circumstantial evidence and the principle of the last person to be seen with the deceased, Ms. Paul agreed that the trial Judge erred in invoking the principle of the last person to be seen with the deceased. She, however, was quick to state that there

was ample evidence to incriminate the appellant even without invoking the principle of the last person to be seen with the deceased.

On the fourth ground of appeal, a complaint that the appellant's defence was not considered, Ms. Paul submitted that the appellant's defence was considered and rejected. She submitted that if the Court finds that the defence of the appellant was not considered, the Court should be at liberty, as a first appellate court, to re-evaluate the evidence and come to its own conclusion.

Responding to the second ground which is a general ground that the case against the appellant was not proved beyond reasonable doubt, Ms. Paul submitted that the prosecution proved the case to the required standard; beyond reasonable doubt in that the incident was eye-witnessed by PW4 who saw the appellant attacking the deceased and ran away from the crime scene. The appellant also confessed before PW1, PW3 and PW6, that he killed the deceased and chopped off his private parts and took them to another person. He also led them to where the body of the deceased was. That is an oral confession which should be relied upon to convict the assailant as was the case in **Posolo Wilson @ Mwalyego v. Republic**,

Criminal Appeal No. 613 of 2015 (unreported), she argued. She contended that the witnesses were found to be credible by the trial court and implored us to find them as such.

She thus urged us to uphold the finding of the High Court and dismiss the appeal in its entirety.

In a brief rejoinder, Ms. Biko repeated her argument that the evidence of PW2 and PW4 are at variance in material particulars in that while PW2 said the appellant and deceased left going in the bush, PW4 testified that he saw the appellant attacking the deceased. She reiterated that it is the dogs which recovered the body of the deceased and not that it is the appellant who led them to where the body of the deceased was found.

We have examined the record of appeal and keenly considered the contending submissions by the learned advocate and learned State Attorney as well as the authorities cited to us. Having so done, we now embark on the determination of the appeal by considering the four grounds argued by the parties.

We shall start with ground one, a challenge on the High Court that the assessors were not told their role in the trial. Ms. Paul conceded to this

complaint but submitted that no injustice was occasioned in that the record of appeal shows that the assessors participated fuily in their role to assist the Judge during the trial. We have scanned the record of appeal and find the argument by Ms. Paul quite convincing. The record bears out that throughout the trial, the assessors were given opportunity to ask witnesses questions of clarification and at the end they were asked to give their opinion. They all returned the verdict of guilty and on which the trial Judge concurred and convicted the appellant. We think, though the trial Judge omitted, at the beginning of the trial, to brief them on their role, they sufficiently discharged their duty of assisting the trial Judge in the trial of the appellant. In the premises we agree with Ms. Paul that the inadvertency did not occasion any failure of justice. As good luck would have it, it is not the first time we are confronted with this issue. We have traversed it before in a number of our decisions – see: **Salehe Rajabu @ Salehe v. Republic,** Criminal Appeal No. 318 of 2017, **Ernest Jackson @ Mwandikaupesi and Another v. Republic**, Criminal Appeal No. 408 of 2019 and **Samweli Jackson Sabai @ Mng'awi and 2 Others v. Republic**, Criminal Appeal No. 138 of 2020 (all unreported), to mention but a few.

In **Salehe Rajabu @ Salehe** (supra), like here, the trial Judge overlooked to tell the assessors on their duty in assisting him during the trial. We held:

> *"... we agree with the learned Senior State Attorney that though there was such irregularity, it was not prejudicial to the appellant since the assessors participated in the whole trial as they heard the witnesses of both the prosecution and defence, asked them questions and gave their opinion."*

Likewise, in **Ernest Jackson @ Mwandikaupesi** (supra), we were confronted with an akin situation; that is, the trial court did not inform the assessors of their role and duties during the rrial. We observed:

> *"Having scrutinized the entire trial proceedings, our impression is that the assessors were fully alert and that they actively participated in the proceedings. Their incisive opinions and verdicts of not guilty recorded after the learned trial Magistrate's summing up, as shown at pages 132 to 134 of the record of appeal, confirm that the assessors knew their duties and that they devotedly discharged them despite having not been informed of them before the trial commenced. We would, therefore, dismiss the third*

ground of appeal as we find the omission complained of having not occasioned any failure of justice."

Similarly, in **Samweli Jackson Sabai @ Mng'awi** (supra), the trial Judge fell into the same error; after the assessors were selected, he did not explain to them their role and responsibilities in the trial. Relying on our previous decision in **Salehe Rajabu @ Salehe** (supra) and **Ernest Jackson @ Mwandikaupesi** (supra), we held:

"Accordingly, considering the circumstances of the instant case, we agree with the learned State Attorney that the anomaly is not fatal and did not prejudice the rights of the appellants for the following reasons: One, the record of appeal reveals that after their selection the assessors were invited to question each of the prosecution and defense witnesses, a role they exercised fully. Two, at the end of the trial, the trial judge did sum up to the assessors in compliance with section 298 (1) of the CPA and they gave their verdicts as found on pages 64 and 65 of the record of appeal. The opinions of the assessors are detailed and show their deliberation on the adduced evidence and conclusions in the factual settings. Three, the

appellants failed to clearly outline how the anomaly prejudiced their rights. For the foregoing, we hold that the anomaly is curable under section 388 of CPA".

Given the position we took in **Salehe Rajabu @ Salehe** (supra), **Ernest Jackson @ Mwandikaupesi** (supra) and **Samweli Jackson Sabai @ Mng'awi** (supra), we find comfort to hold, as we hereby do, that where, like here, the trial Judge or the Resident Magistrate with extended jurisdiction, fails to brief the assessors at the beginning of the trial, on their role but they are alert during the proceedings and actively participate in assisting the Judge or the Resident Magistrate with extended jurisdiction, as the case may be, throughout the trial and properly give their opinion and return their verdict, the shortcoming does not occasion any failure of justice and may be glossed over. We thus find ground one lacking in merit and dismiss it.

Ground two is a complaint that the case by the prosecution was not proved beyond reasonable doubt. Encapsulated in this ground are the complaints that the prosecution evidence was discrepant, that the evidence of PW1 was hearsay, that the cautioned statement of the appellant was not

tendered in evidence but the trial Judge relied on it to found a conviction, that PW6 was not a witness of truth.

We start to consider the first limb in this ground that the prosecution evidence was discrepant. The discrepancy complained of is between the testimonies of PW2 and PW4 as to what exactly transpired at the grazing area when the appellant arrived and the testimonies of PW1, PW3 and PW6 on the date the crime scene was visited. We agree that there is a somewhat discrepancy on what actually transpired at the scene of crime when the appellant arrived. Admittedly, PW2 is more detailed in his account on what actually transpired. PW4 is not. We take note on the fact that the offence was committed on 07.11.2011 and the two witnesses, who were thirteen years old then, testified on 19.08.2019, about seven years later when they were twenty-one. That is a long span of time which could not make the witnesses remember every detail of what actually transpired. In the premises, we take the discrepancy in their testimonies as a minor one which does not go to the root of the matter. The same will be our argument and conclusion in respect of the dates on which PW1, PW3 and PW6 testified. They also testified about seven years after the commission of the offence.

The difference of one day is also excusable due to frailty of human memory. In the unreported **Daniel John Mwakipesile v. Republic**, Criminal Appeal No. 449 of 2019, we rendered a judgment on 28.09.2022 in the just ended sessions of the Court at Mbeya, we held that due to frailty of human memory, discrepancies which are on details are excusable. We relied on our previous decisions in **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1991, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017, **Deus Josias Kilala @ Deo v. Republic**, Criminal Appeal No. 191 of 2018 and **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (all unreported) to so hold. We hold the same today. We thus find the complaint that the prosecution evidence was discrepant as lacking in substance and dismiss it.

The second limb of complaint in the second ground of appeal is that the evidence of PW1 was hearsay. We have failed to comprehend this complaint by the appellant. PW1 is the father of the deceased who testified that on the material date, the deceased had gone grazing but never came back. His livestock were brought home by the appellant and upon being asked where was the deceased, he told them that he was still in the bush

picking fruits locally known as *makusumakusu*. On the following day in the morning, he asked one Joel who was with the deceased grazing the previous day and was told that the deceased had gone with the appellant in the bush. Knowing that the appellant had a fame for being "troublesome", PW1 reported the matter to the village authority, the appellant was arrested and upon interrogation, he led them to where the body of the deceased was, in the bush near the *makusumakusu* fruit trees. The deceased body looked like it was slaughtered and its private parts were chopped off. Given this account by PW1 we fail to understand why the appellant claims that the witness's evidence was hearsay. We find and hold that the relevant part of PW1's evidence was not hearsay and dismiss this limb of complaint in the second ground of appeal.

The third limb of complaint in the second ground of appeal is on the cautioned statement of the appellant being relied upon by the trial Judge to found a conviction while it was not tendered in evidence. We agree that the trial Judge referred to PW6 as the person who recorded the cautioned statement of the appellant in which he confessed to have killed the

deceased. We will let the record paint the picture. The trial Judge stated at p. 139 of the record of appeal:

> *"... my views are similar with the assessors' opinion who opined that the evidence of PW6 who recorded the cautioned statement of the accused who admitted his charge and mentioned one person who instructed him to bring the deceased's private parts shows that the accused is responsible."*

We agree that by referring to the cautioned statement which was not admitted in evidence, the trial Judge slipped into error. This course of action was prejudicial to the appellant and offended the ends of justice. We thus find merit in this complaint and expunge this part of evidence from the record.

There was another complaint on the trial Judge's importation of extraneous matters into evidence. This complaint is connected to this limb and stated at p. 139 of the record of appeal that PW2 also saw the appellant pushing the deceased down while he was armed with the two knives. We agree that PW2 did not see the appellant attacking the deceased. All what PW2 testified was that the appellant found them grazing and left with the deceased going into the bush in search of the alleged lost head of cattle.

We agree that this piece of evidence is not born out in evidence. This was inappropriate – see: **Lucas Venance @ Bwandu and Another v. Republic**, Criminal Appeal No. 392 of 2018 (unreported). We also expunge this piece of evidence from the record.

Under this ground of appeal, we also wish to address the complaint by Ms. Biko that one assessor, Mr. Sunday Seme does not appear to have been present at the hearing. He referred us to P. 55 of the record of appeal. This complaint will not detain us. We have seen the record of appeal. The part complained of shows at p. 55 as follows:

> *"**Clarification from assessors:***
> ***PW3***
> *When the incident occurred, I was more than 20 years old. The accused was our neighbour.*
> *2. Christina – No*
> *3. Oliver - "*

A look at the record with a sober mind would reveal that the assessor, Mr. Sunday Seme, was present and he is the one who asked the first question whose answer was "*When the incident occurred, I was more than 20 years old. The accused was our neighbour*". It was out of inadvertency, we

respectfully think, that the trial Judge did not indicate that was a question of clarification from Mr. Sunday Seme. We thus dismiss this complaint.

Likewise, the complaint that the assessor's opinion was not sought individually has no justification. The record bears out at pp. 103 – 104 that each assessor was sought opinion and individually returned the verdict of guilty. We find no justification in this complaint as well. We dismiss it.

On the complaint that that PW6 was not a witness of truth, we do not agree. Ms. Biko pegged this complaint on the fact that he testified that he interrogated PW4 who said he witnessed the appellant killing the deceased while even PW4 himself did not adduce such evidence. We agree that PW4 did not testify that he saw the appellant killing the deceased, rather, he saw him attack the deceased. But that is not a guarantee that he did tell PW6 so. As such we cannot accuse PW6 for not being a witness of truth. The trial court found him to be a witness of truth and we, as an appellate court reading the script, have no material upon which to fault the trial court which saw him testify. This complaint is also unfounded.

We now turn to consider ground three. It is a complaint on convicting the appellant on circumstantial evidence and the doctrine of the last person

to be seen with the deceased. Ms. Paul conceded that the doctrine of the last person to be seen with the deceased was not applicable in the instant case. We find difficulties in agreeing with her. PW4 testified that he saw the appellant attacking the deceased and felling him down. He did not testify to have seen him stabbing or slaughtering the deceased. He ran away for fear of being attacked as well. The deceased was found dead with severe cut wounds at the place where PW4 saw the appellant attacking him. The body looked slaughtered and its private parts were chopped off. In those circumstances, we think, the doctrine of the last person to be seen with the deceased could be applicable and was correctly applied by the trial court. In **Mathayo Mwalimu and Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported), the court held:

> *"... where a person is alleged to have been the last to be seen with the deceased. in the absence of the plausible examination to explain away the circumstances leading to the death he/she will be presumed to be the killer."*

In the instant case, the appellant stated that he found the deceased and his colleagues PW2 and PW4 grazing and left them there and proceeded to Antesia village to buy sugarcane. The trial court did not believe that tale.

We think the trial court rightly so found. We don't believe it either. On the strength of the cited authority, we think the trial Judge rightly found that the doctrine of the last person to be seen with the deceased incriminated the appellant that he is the one who killed the deceased – see also: **Keneth Jonas v. Republic**, Criminal Appeal No. 156 of 2014 (unreported), **Makungire Matani v. Republic** [1983] T.L.R. 179 and **Armand Guehi v. Republic,** Criminal Appeal No. 22 of 2010 (also Unreported). We thus find and hold that ground three is without merit and dismiss it.

Ground four is a complaint that the trial court did not consider the appellant's defence. Ms. Paul was of the submission that the complaint was without justification. We agree. The record of appeal bears out at p. 141 that the High Court summarized the evidence of the appellant and considered it at p. 142 and eventually dismissed it. The fact that the appellant's evidence was dismissed does not mean it was not considered – see: **John Stephano and 5 Others v. Republic**, Criminal Appeal No. 251 of 2021 (unreported). In that case, we faced a similar complaint and observed at 12 of the typed judgment:

> *"We have gone through the record and satisfied ourselves that, the trial court considered the said*

defence at page 95 of the record of appeal and rejected it. In our view, the mere fact that it was rejected, does not mean that it was not considered."

The above stated, we find no merit in this ground of appeal as well. We dismiss it.

In the upshot, we find and hold that this appeal was filed without an iota of justifiable complaint. We accordingly dismiss it.

DATED at **DAR ES SALAAM** this 17th day of October, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 18th day of October, 2022 in the presence of appellant in person vide video link from Ruanda Prison and Steven Rusibamaila, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL