IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., FIKIRINI, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 600 OF 2020

SHILANGA BUNZALI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgement of the High Court of Tanzania at Bukoba)

(Rumanyika, J.)

dated the 13th day of August, 2020

in

Criminal Session case No. 79 of 2016

JUDGMENT OF THE COURT

28th November & 1st December, 2022

MUGASHA, J.A.:

This appeal arises from the Judgment of the High Court of Tanzania at Bukoba, S.M Rumanyika, J. (as he then was) in which the appellant was charged and convicted of the offence of murder contrary to section 196 of the Penal Code Cap 16 RE 2016 (now RE 2022). It was alleged by the prosecution that, on 31/1/2016 during night hours at Kagulamo village within Muleba District in Kagera Region, the appellant murdered one Sylvester S/O Mriga Faustine.

The appellant denied the charge prompting a trial whereby in order to establish its case, the prosecution lined up six (6) witnesses and tendered three documentary exhibits namely the cautioned and extra judicial statements of the appellant exhibits P3 and P4 respectively and a forensic DNA profiling report test, exhibit P9. The appellant was the sole witness for the defence and tendered the PF3 (exhibit D1).

A brief account underlying the conviction of the appellant is briefly as follows: The deceased was a Councilor at Kimwani Ward and on the material date, he was at his home watching television. While seated, the bandits stormed into his house, attacked him cutting the head and different parts of the body. Apparently, this happened in the presence of the deceased's wife one Magdalena Slyvester who was however not lined up as a prosecution witness as shall be addressed at a later stage. According to PW6 who had rushed to the scene of crime heeding to an alarm raised, he found the deceased seriously injured and arrangements were made to take him to Kagondo hospital where he was pronounced dead. PW1 Ernest Lukumba a senior medical officer, who conducted the autopsy established that the deceased body had multiple cut wounds on the head and the back and that the cause of the deceased death was a head injury. According to the investigation conducted by the Police, the appellant was apprehended by the

villagers at 02.00 and was found with blood stained trousers and a panga suspected to have been used to hack the deceased. It was also alleged by G 792D/C Isack PW4 and Adolph Rutagwerela PW3, that in both the cautioned and extra judicial statements tendered as exhibits P3 and P4 respectively, the appellant confessed to have been involved in the killing incident together with other two persons who were however, discharged after the Director of Prosecution discontinued charges against them. Furthermore, PW4 recounted to have on 1/2/2016 drawn blood specimen from a pool of blood on the floor which was together with the blood stained panga and trousers transmitted to the Chief Government Chemist for examination. According to the Government Chemist one Phideiis Segumba (PW6) and the respective report tendered as exhibit P9, it was established that the specimen was human blood of the deceased and that the DNA profile revealed resemblance with the blood stains found in the appellant's trousers and the panga.

On the other hand, the appellant denied the accusations levelled by the prosecution. He claimed that on the material day at 15.00 hrs. he was at Kyota together with his girlfriend but on his way back home at about 23:00 hours at Kigoga bridge he encountered a mob of people who stopped and interrogated him accusing him of killing the deceased and took him to Kyota

village where he was locked inside. In the morning he was taken to the Muleba police station where besides the interrogation, his left ear was chopped off and he was forced to sign the cautioned statement. Subsequently, he was issued with a PF3, taken to Kaigara hospital and upon examination it was established that he had lost blood which was caused by a cut wound on the left ear as reflected in exhibit D1.

At the conclusion of the trial, the learned trial Judge summed up the evidence to the assessors who returned a unanimous verdict of guilty. Having analysed the trial evidence believing the prosecution account to be true, the learned trial Judge convicted the appellant relying on the appellant's repudiated caution statement, the extra-judicial statement, the circumstantial evidence comprising of the blood-stained panga and the pair of trousers which were not disowned by the appellant as corroborated by the DNA profile examination report. Eventually as earlier stated, the appellant was sentenced to suffer death by hanging.

It is against the said backdrop; the appellant has preferred the present appeal seeking to demonstrate his innocence. In the Memorandum of Appeal filed on 19/10/2020, the appellant had fronted eight grounds of complaint as hereunder:

1. *That the trial High Court erred in relying on custodial investigation and the cautioned statement marked as exhibit P3 which contravened the requirement of section 50(1) of the CPA.*
2. *That the conviction of the appellant was based on exhibits P3 and P4 without independent evidence linking the appellant with the crime.*
3. *That the appellant's evidence (defence) was not summarized no evaluated which inevitably led to wrong and biased conclusion.*
4. *The circumstances that led to the appellant's conviction did not irresistibly point the appellant's guilty with the crime to as the law requirement.*
5. *That the appellant was convicted on evidence which still required corroboration.*
6. *The case against the appellant was not proved beyond reasonable doubt.*

On 17/1/2022 the appellant lodged in Court a supplementary memorandum of appeal, containing the five grounds of appeal which are as follows;

1. *That, the Trial Court contravened section 210 (1) (a) of the CPA by convicting the appellant in a case the mandatory provision of the section was not complied with and rendered the whole trial to be irregular and nullity. And that*

the whole prosecution evidence was not appended the Hon. Trial Judge's signature.

2. *That, the trial Court grossly contravened sections 231 (1) (a) (b) and 3 of the CPA*
3. *That, exhibit P3 was defective under section 57(2) (2) (e) of the CPA for lack of completed time and that exhibit P4 was defective as the statement was not signed by the appellant.*
4. *That, the trial Court contravened section 266(1) of the CPA and section 234 (2) (a) of the CPA Cap 20 RE 2002 about date and month.*
5. *That, exhibit P2 deceased age was not known or written at all.*

Yet on 21/11/2022, the appellant through his advocate filed another supplementary ground of appeal with a complaint that, after a ruling of the case to answer, he was not addressed on the manner of giving his defence.

At the hearing, the appellant had the services of Mr. Joseph Bitakwate, learned counsel whereas the respondent Republic had the services of Messrs. Robert Kidando and Nestory Nchiman, both learned Senior State Attorneys.

At the commencement of the hearing, the appellant's counsel abandoned all grounds of appeal raised in the supplementary memoranda of

appeal and opted to argue the grounds in the memorandum of appeal. Thus, in a nutshell, the appellant is faulting the impugned decision on ground that **one,** it was flawed with procedural irregularities which vitiated the trial; **two,** failure to consider the defence evidence; and **three,** that the charge was not proved at the required standard to warrant the conviction.

In addressing the procedural irregularities which is the gist of the 1st and 2nd grounds, it was Mr. Bitakwate's submission that, the trial was flawed with procedural irregularities occasioned by trial court's reliance on the cautioned and extra judicial statements (exhibits P3 and P4) and the DNA report (exhibit P9) which were improperly introduced in the evidence by the witnesses who were not listed in the committal proceedings. On this, he argued that, in the absence of any notice by the prosecution to parade additional evidence as required under section 289 (1) of the Criminal Procedure Act [CAP 20 R.E. 2021], PW3, PW4 and PW9 were not competent to adduce both oral and documentary evidence at the trial. He thus urged us, to expunge exhibits P3, P4 and P9 and the corresponding oral account. Ultimately, it was Mr. Bitakwate's argument that, if exhibits P3, P4 and P9 are expunged, there is no other evidence to implicate the appellant with the charged offence and as such, the charge was not proved against the

appellant. He thus urged us to allow the appeal and set the appellant at liberty.

On the other hand, the appeal was supported by the respondent Republic on account of **one,** the delayed recording of the appellant's cautioned statement contrary to the provisions of section 50 (1) of the CPA; **two,** the recording of the extra judicial statement by the Village Executive Officer was not assigned in the court house as per dictates of section 52 of the Magistrates' Courts Act; and **three,** the collection of blood sample for the purposes of DNA profiling was illegal because the collector namely, PW4 was not legally mandated to perform the task .That apart, it was further argued that, the unclear or rather unknown circumstances surrounding the collection and preservation of the blood sample before onward transmission to the Chief Government Chemist did compromise the chain of custody which was muzzled if not broken. With this submission, the learned Senior State Attorney urged us to expunge the three exhibits and allow the appeal because the remaining evidence does not connect the appellant with the killing incident.

Having carefully considered the grounds of appeal, submission made by learned counsel and the record before us, the issues for determination

are whether the trial was flawed by the procedural irregularities and if the charge was proved to the hilt against the appellant.

We begin with the appellant's complaint faulting the trial court's reliance on the delayed recorded cautioned statement. Section 50 (1) (a) of the CPA prescribes specific period available for interviewing a person which is four hours after being restrained. That section stipulates: -

> *"(1) For the purpose of this Act the period available for interviewing a person who is in restrain in respect of an offence is*
>
> *"(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence."*

According to section 51 (a) and (b) of the CPA, in case custodial investigation cannot be completed within four hours, the law permits extension of interviewing period beyond the prescribed four hours under certain circumstances for a reasonable cause, by the police officer in charge of investigating the offence, or upon making an application to a magistrate for a further extension. See: **JANTA JOSEPH KOMBA & 3 OTHERS VERSUS REPUBLIC**, Criminal Appeal No 95 of 2006.

In the matter under scrutiny, although exhibit P3 shows that the statement was recorded on 1/2/2016, the evidence of PW5 expounds that the appellant was arrested on 1/2/2016 at about 02.00hrs and locked at the village office. However, PW2 who recorded the appellant's cautioned statement did not disclose the time when the appellant was arrested. On his part, the appellant stated that he was arrested on 31/1/2016 2016 at about 23.00 hours while on his way from meeting his girlfriend. Apparently, neither was the assertion contested by the prosecution nor considered by the learned trial Judge in his judgment considering that it poked holes on the uncertain prosecution account as to when the appellant's arrest was effected. This adversely impacted on the cautioned statement and we agree with the learned counsel that it was recorded beyond the prescribed four hours and thus it was illegally obtained.

Next is the extra judicial statement of the appellant which was recorded by the Ward Executive Officer (the WEO). Although the learned counsel were at one that, the statement was illegally adduced in the evidence, they parted ways on the underlying cause or omission. While Mr. Bitakwate argued that the statement was tendered by a person who was not listed at the committal stage, Mr. Kidando held the view that, it was

irregularly recorded by WEO in his offices as he was not assigned a court house. We have gathered that, although the extra judicial statement was at the committal stage listed as among the documentary account to be relied upon by the prosecution at the trial, it was not read out to the appellant which was irregular. We are fortified in that regard because apart from the appellant deserving a fair trial as he was unaware of the nature and substance of the prosecution evidence to be marshalled by prosecution at the trial, the omission offended the dictates of section 246 (2) of the CPA which categorically stipulates that:

> *"246 (2) Upon appearance of the accused person before it, the subordinate court shall read and explain or cause to be read to the accused person the information brought against him as well as the statements or documents containing the substance of the evidence of witnesses whom the Director of Public Prosecutions intends to call at the trial."*

We have noted that although the prosecution attempted to lodge a notice to call additional witness under section 289(1) of the CPA, yet there was no vigilance in pursuing the notice so as to enable PW3 to properly adduce evidence at the trial. That said, determining the propriety of the place of recording the statement raised by Mr. Kidando is an exercise in futility and

we say no more. Thus, equally we discard the extra judicial statement from the record.

As for the DNA report, we agree with the learned Senior State Attorney that it failed the validity test because the examined sample of blood specimen was collected by PW4 who was not qualified to collect the blood samples for the purposes of DNA profiling. We are fortified in that regard because according to the provisions of sections 3 of the Human DNA Regulation Act of 2009, a sampling officer mandated to collect sample for DNA profiling under section 14 is the officer appointed and gazetted and includes a police officer above the rank of an officer in charge of a police station. In case of absence, a police officer above the rank of assistant inspector or any police officer as directed by the Minister responsible for Home Affairs can collect the blood sample. However, in the case at hand, PW4 was a Detective Police Constable and there is no evidence that he was directed by the responsible Minister to collect the blood sample from the deceased supposedly blood for the purposes of DNA profiling. Therefore, the irregular collection of the blood sample vitiated the Government Chemist DNA profiling report which cannot be spared and we accordingly discard it from the record. Having discarded the DNA report, we think it is not worthy to address the appellant's complaint on the compromised chain of custody

surrounding the collection and preservation of the blood sample transmitted to the CGC a week after collection.

Having discarded exhibits P3, P4 and P9, the follow up question is whether the oral account can be acted upon. We are aware that, it is a settled position of the law that, the credible oral account shall not fail the validity test merely because there is no corresponding documentary account. See: **EMMANUEL MWALUKO NYALUSI AND FOUR OTHERS VS REPUBLIC,** Criminal Appeal No. 110 of 2019; **ZHENG ZHI CHAO VS DIRECTOR OF PUBLIC PROSECUTIONS,** Criminal Appeal No. 506 of 2019 and **DANIEL MALOGO MAKASI AND TWO OTHERS VS REPUBLIC,** Criminal Appeals No. 574 and 476 (all unreported).

However, in the case at hand, since the account of PW3, PW4 and PW6 did not feature in the record of committal, the trial court should not have permitted them to adduce evidence as that contravened the dictates of section 289 (1) of the CPA. For similar reasons, the oral account of PW3, PW4 and PW6 cannot be utilised at this stage to remedy the expunged documentary account and as such we discard the respective account from the record. Therefore, the first and second grounds of appeal are merited.

Having discarded the three exhibits and the oral account of PW3, PW4 and PW6, the issue for consideration is whether the remaining evidence can sustain the prosecution case. The answer is in the negative. We are fortified in that regard because none of the prosecution witnesses testified to have seen the appellant killing the deceased and this is what made the learned trial Judge to convict the appellant believing the blood stained trousers and panga constituted circumstantial evidence which was corroborated by the DNA report. We disagree and shall give our reasons in due course. We are aware about the settled position of the law that, **one,** the circumstantial evidence under consideration must be that of surrounding circumstances which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics. See: **LUCIA ANTHONY @ BISHENGWE VS THE REPUBLIC,** Criminal Appeal No. 96 of 2016 (unreported); **two,** that each link in the chain must be carefully tested and, if in the end, it does not lead to irresistible conclusion of the accused's guilt, the whole chain must be rejected. See: **SAMSON DANIEL VS REPUBLIC,** (1934) E.A.C.A.154]; **three,** that the evidence must irresistibly point to the guilt of the accused to the exclusion of any other person. See: **SHABAN MPUNZU @ ELISHA MPUNZU VS REPUBLIC,** Criminal Appeal No 12 of 2002(unreported); **four,** that the facts from which an inference adverse to accused is sought

must be proved beyond reasonable doubt and must be connected with the facts which inference is to be inferred. See **ALLY BAKARI VS REPUBLIC** (1992) TLR, 10 and **ANETH KAPAZYA VS REPUBLIC**, Criminal Appeal No. 69 of 2012 (both unreported); and **five,** the circumstances must be such as to provide moral certainty to the exclusion of every reasonable doubt- see **SIMON MSOKE VS REPUBLIC** (1958) EA 715.

Applying the said principles to the current factual situation, it is glaring that there are circumstances which have weakened the inference to the appellant thus breaking the chain link. This is so because, **one,** the testimony of PW1 who claimed to have seen the appellant away from the scene of crime with blood stained trousers and panga, is a stand-alone evidence which solely does not incriminate the appellant with the charged offence. **Two,** it is highly probable that the blood stains found on the appellant's trousers and panga were from his chopped ear because it is on record that he bled and lost blood after he was injured. In the premises, the available evidence does not with certainty point to the guilt of the appellant.

Moreover, it is glaring on record that when the bandits stormed at the homestead of the deceased and assaulted him, his wife Magdalena Sylvester happened to be at the scene of crime and witnessed the ordeal of the deceased in the hands of the attackers. However, as earlier pointed out she

was not paraded as a witness despite being listed as one of the intended prosecution witnesses both at the committal and the preliminary hearing. Yet, no reason was given by the prosecution as to why the wife was not paraded. This entitles us to draw an inference adverse to the prosecution because being present when the deceased was attacked, she was in a position to testify on the material facts on the person who hacked the deceased and caused his death. See: **AZIZI ABDALAH v REPUBLIC** [1991] TLR 71 where it was held:

> *"the general and well known rules are that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."*

In the premises we find grounds 3, 4, 5 and 6 merited.

In view of what we have endeavoured to discuss, we agree with the learned counsel for either side that the charge against the appellant was not proved to the hilt. Thus, the appeal is merited and it is hereby allowed.

Consequently, we quash the conviction set aside the sentence and order the immediate release of the appellant unless he is held for another lawful cause.

DATED at **BUKOBA** this 30th day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2022 in the presence Mr. James Kabakama holding brief for Mr. Joseph Bitakwate, learned counsel for the Appellant and the appellant present in person. Ms. Evaresta Kimaro, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL