

IN THE COURT OF APPEAL OF TANZANIA

AT MOROGORO

(CORAM: MWARIJA, J.A., MASHAKA, J.A. And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 330 OF 2022

LEONARD NGOSO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ngwembe, J.)

dated 18th day of March, 2022

in

Criminal Session No. 32 of 2021

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JUDGMENT OF THE COURT

5th May & 26th October, 2023

MWARIJA, J.A.:

The appellant, Leonard Ngoso and another person, Zabron Benjamin @ John were jointly charged in the High Court of Tanzania at Dar es Salaam with the offence of murder contrary to ss 196 and 197 of the Penal Code, Chapter 16 of the Revised Laws. They were accused of having murdered one Leonard Zidadu on 15/11/2019 at Usangule "B" Village in Mpiluka Division within Malinyi District, Morogoro Region. They

denied the charge and after a full trial, which was conducted in the High Court of Tanzania, Morogoro District Registry, whereas the said Zabron Benjamin @ John was convicted of manslaughter contrary to s.195 of the Penal Code and sentenced to two years imprisonment, the appellant was convicted as charged and sentenced to suffer death by hanging. The appellant was aggrieved hence this appeal.

The facts giving rise to the prosecution and the ultimate conviction and sentence meted out on them may be briefly stated as follows: until the time of his death on 15/11/2019, the deceased was living at Usangule "B" Village within Malinyi District in Morogoro Region. He was staying with his wife, Pili and his step son (the biological son of Pili), Zabron Benjamin who was the 2nd accused person at the trial (DW2). Prior to July, 2019, DW2 was staying at Kahama but in the said month in 2019, her mother went to take him from there and came to stay with him.

Within a short period of time before his death, the deceased person was involved in frequent quarrels between him and his wife

whereby the deceased resorted to use of violence against her. On the fateful day, while the deceased person and his wife were fighting, DW2 intervened, so as to save her from being assaulted by the deceased. He managed to overcome the deceased. It was then that her mother sent him to call a neighbour for help so that the deceased person did not restart the quarrel.

DW2 went to call the appellant who arrived later. On what was understood to be a way of containing him the appellant tied the deceased's hands and legs and thereafter, placed him in a separate room in which he was to stay during that night to allow the deceased's wife to sleep peacefully.

A day after the above stated incident, it transpired that the deceased person's properties were in the process of being auctioned. One of the persons who got that information on 16/11/2019 was Nyenye Machibya (PW4). He was approached by DW2 and informed that, the deceased person's shamba, iron sheets and bricks were being sold by him (DW2) and his mother. PW4 bought 1,000 bricks for TZS 60,000.00

after having been assured by DW2 that, the deceased had gone to look for another farm at the place where he had decided to make his new settlement. PW4 intended also to buy the deceased person's shamba but wanted to confirm from him whether he was selling it. Knowing the impossibility of facilitating communication between PW4 and the deceased, DW2 found an excuse and lured PW4 that the deceased person was unreachable.

Suspecting that the auctioning of the deceased person's properties might have been based on ill-motive, PW4 called the Hamlet Chairman who arrived at the deceased's home. As the information about the auction spread, many other villagers turned out at the deceased's home. When they were questioned about the auction and the whereabouts of the deceased, both the deceased's wife and DW2 disclosed the truth that he had been killed. Whereas DW2 said that the deceased was killed by the appellant, the deceased's wife said that he was killed by both the appellant and DW2. They were, as a result, immediately arrested by the

peoples' militia (sungusungu) and the police was informed about the incident.

Following the information sent to the police about the incident, on 18/11/2019, ASP. John Boscal John Katekela (PW1) went to the deceased's home in the company of D/Cpl. Simon and D/Cpl. Wilson. He found the appellant, and DW2 who had been arrested by the people's militia (sungusungu) and took them together with the deceased's wife to Matibira Police Post. Having interrogated them and after conducting investigation, the appellant and DW2 were charged as shown above.

In his evidence, PW1 told the trial court that, he found the appellant at the scene having been arrested by sungusungu and together with him were the 2nd accused person and the deceased's wife who were also suspected of having killed the deceased. PW1 took them to police station where, according to him, after interrogation, the appellant admitted the offence. The witness went on to state that, on 18/11/2019, he accompanied the OCD and a Doctor to the scene of crime where the appellant, the 2nd accused person and the deceased's

wife showed the pit in which the deceased's body was buried. After having uncovered it, the deceased's legs and hands were found to have been tied with a rope. The neck was also tied with a rope. After having examined the body, Dr. Ernest Mataura (PW3) who went to the scene with PW1, concluded that the cause of the deceased's death was strangulation. He tendered the medical report contained in the PF3 and the same was admitted in evidence as exhibit P1. The evidence of PW1 was supported by G. 2988 D/Cpl. Simon (PW5) who accompanied the former to the scene of crime on 18/11/2019.

On his part, PW4 who suspected the act of the deceased's wife and the 2nd accused person of auctioning the deceased's properties, stated in his evidence that, after being questioned before the Hamlet Chairman and the villagers, the deceased's wife confessed that the deceased was killed by the appellant and the 2nd accused person. The witness said also that when the appellant and the 2nd accused person were questioned before the villagers, they admitted the offence.

The evidence to the effect that the 2nd accused person confessed to have murdered the deceased, was also given by Gloria Godson Marijani, (PW2) who was at the material time the Primary Court Magistrate, Malinyi. She testified that, on 18/11/2019, she recorded an extrajudicial statement of the 2nd accused person. According to her testimony, the 2nd accused person confessed that he killed the deceased. She tendered the 2nd accused person's statement which was admitted in evidence as exhibit P2.

In his defence, the appellant testified that on 17/11/2019, he went to the deceased's home where there was an auction. He had the intention of buying cows. Upon his inquiry as to the whereabouts of the deceased person, he was told that the deceased person had gone to the mountain area to find another place to establish his new settlement. He went on to state that, later at about 6:00 pm; the sungusungu arrived and arrested him in the presence of the Hamlet Chairman allegedly for having been mentioned by the 2nd accused person and the deceased's wife as the person who murdered the deceased person. It was his

evidence further that, thereafter, the police arrived and took him to police station and was later charged in court.

Having considered the prosecution and the defence evidence, the learned trial Judge was satisfied that, whereas the offence of murder had been proved against the appellant, as for the 2nd accused person, the evidence did not prove that he had the intention of killing the deceased. As a result, whereas the appellant was convicted of murder, the 2nd appellant was convicted of the lesser offence of manslaughter contrary to s. 195 of the Penal Code. According to the learned Judge, the evidence of PW1, PW3, PW4 and PW5 as supported by the confession evidence of DW2, who was the appellant's co-accused person, proved the charge against the appellant beyond reasonable doubt. He found further that, the evidence of DW2 which required corroboration, was corroborated by the evidence of PW1, PW3, PW4 and PW5. With regard to the defence of the appellant and the 2nd accused person, the learned trial Judge was of the view that, the same did not raise any reasonable doubt against the prosecution case as far as the

appellant is concerned. On the part of the 2nd accused person, the High Court agreed that, his participation in the incident prior to the killing of the deceased, was without the intention to kill. The learned Judge found that, the acts of 2nd accused person were not intended to cause the death of the deceased.

The appellant was aggrieved by the decision of the High Court and thus preferred this appeal. His memorandum of appeal filed on 13/4/2023 consists of eleven (11) grounds. For reasons which will be apparent in this judgment, except for the 5th ground, we do not intend to state the substance of the other grounds and decide on them. In his 5th ground of appeal, the appellant challenges the decision of the trial court as follows:

"5. That, the learned trial Judge erred in law when he abdicated his duty as a trustee in law by allowing the appellant and his co-accused to be represented at the trial by one defence counsel [while there was a conflict of interest between them]."

At the hearing of the appeal, the appellant was represented by Mr. Daud Clement Mkilya, learned counsel while the respondent Republic was represented by Ms. Chivanenda Luwongo, learned Senior State Attorney assisted by Mr. Emmanuel Kahigi, learned State Attorney.

Submitting in support of the 5th ground of appeal, Mr. Mkilya argued that the learned trial Judge erred in failing to afford the appellant a fair trial because, it was apparent, right from the preliminary hearing stage, that he had a conflict of interest with the 2nd accused person. According to the learned counsel, the court noted that situation and as reflected at page 46 of the record of appeal, it directed that each of the accused persons be provided with an advocate of his own. That was not, however, done and at the trial, they were represented by one advocate. Mr. Mkilya went on to argue that, since the appellant's conviction was founded on the evidence of his co-accused including his confession statement (exhibit P2), which was admitted in evidence at the trial without being opposed by their advocate, their representation by the same advocate rendered the trial unfair on the part of the appellant. He

thus urged us to nullify the proceedings and judgment and set aside the sentence.

On the way forward, Mr. Mkilya argued that a retrial order will not be appropriate because it will occasion injustice to the appellant. According to the learned counsel, the crucial evidence upon which the appellant's conviction was grounded is that of the 2nd accused person. Since that evidence was improperly acted upon because of the above stated anomaly, whereby the appellant was denied the opportunity to dispute it because of being represented by the same advocate with the 2nd accused person, a retrial order will enable the prosecution to rectify that irregularity. The learned counsel prayed therefore, that the appellant be released from prison.

In reply to the submissions of the appellant's counsel on that ground of appeal, Ms. Luwongo readily conceded that the learned trial Judge erred in failing to afford the appellant a fair hearing. The concession was expounded by Mr. Kahigi who admitted that, the appellant and the 2nd accused person had a conflict of interest. That, he

said, is clear because in his evidence, the 2nd accused person incriminated the appellant as the person who killed the deceased. Mr. Kahigi submitted thus that, for that reason, the appellant and the 2nd accused person were each supposed to be assigned his own advocate as ordered by the learned Judge who conducted the preliminary hearing.

On whether or not a retrial should be ordered, Mr. Kahigi argued that, the case should be tried afresh as that will serve the interest of justice. He cited the case of **Jackson William and James Obedi v. Republic**, Criminal Appeal No. 225 of 2019 (unreported) to support his argument. Reinforcing Mr. Kahigi's submission, Ms. Luwongo argued that a retrial order will not occasion injustice to the 2nd accused person because, if convicted of a lesser offence, the sentence served by him, will be considered while if convicted of murder, that will serve the justice of the case.

Having considered the submissions of the learned counsel for the appellant and the learned State Attorneys, we agree that, indeed the appellant was denied a fair trial. It is true that, from the record, the

court had previously, at the preliminary hearing, noted that the appellant and the 2nd accused person had a conflict of interest because, in his cautioned statement which the prosecution intended to rely on and which was later tendered in evidence, the 2nd accused person implicated the appellant with the offence. It therefore, directed that each of them be assigned a different advocate.

That was not done and thus since, as a result, the appellant was not afforded a fair trial, the mistake vitiated the trial. As a consequence we hereby nullify the proceedings, quash the judgment and set aside the sentence meted out against the appellant. For the same reason, we invoke the provisions of s. 4 (2) of the Appellate Jurisdiction Act and also quash the conviction of the 2nd accused person and set aside the sentence which was imposed on him.

With regard to the way forward, the principle to be considered when deciding whether or not to order a retrial was stated in the case of **Fatehali Manji v. Republic** [1966] 1 E.A. 343, that:

"...In general a retrial will be ordered only when the original trial was illegal or defective, it will not be ordered when the conviction was set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial; even where a conviction is vitiated by mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

In the case at hand, admittedly, due to the trial court's mistake, the appellant was denied a fair trial in that, even though he had a conflict of interest with the 2nd accused person, both of them were represented by the same advocate. At the end, the appellant's conviction was basically founded on the confession evidence of a co-accused, the 2nd accused person. If a retrial is ordered and representation issue is rectified, the prosecution will be enabled to use the same evidence of the 2nd accused person which has been found to have occasioned a

mistrial. In that regard, we are of the settled mind that, in such a situation, an order of retrial will not be in the interests of justice.

In the event, we order that the appellant be released from prison forthwith unless he is otherwise lawfully held. In the same vein, the 2nd accused person should be released from prison if he has not finished serving his sentence.

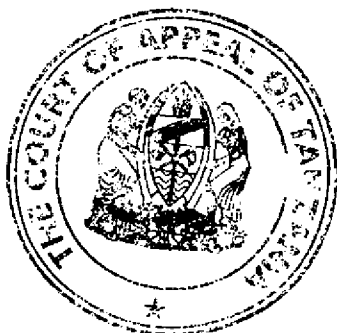
DATED at DAR ES SALAAM this 20th day of October, 2023.


A. G. MWARIJA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of October, 2023 in the presence of appellant in person and Ms. Edina Aloyce, learned State Attorney for the Respondent/Republic via virtual linked from the High Court of Tanzania at Morogoro Registry, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL