IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NSEKELA, J.A., LUANDA, J.A. And MASSATI, J.A.)

CRIMINAL APPEAL NO. 290 OF 2011

CHARLES LYATII @ SADALA ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Moshi)

(Munuo, J.)

dated the 3rd day of July, 2000
in
Criminal Session No. 52 of 1996

JUDGMENT OF THE COURT

11 & 21 May, 2012

LUANDA, J.A.:

The appellant CHARLES LYATII @ SADALA was charged with and convicted of murder by the High Court of Tanzania sitting at Moshi. Upon conviction, he was sentenced to suffer death by hanging. Aggrieved by both conviction and sentence, he has come to this Court on appeal.

Having read the record of appeal, the following facts are not disputed at all. One, EVARISTER ELLAS URIO (henceforth the deceased) is dead and she died a violent and unnatural death caused by a gun shot. Two, the bullet which killed the deceased came from a gun which was under the possession of the appellant and so it was the appellant who killed the deceased. The only issue during the trial was whether the appellant killed the deceased intentionally or it was sheer bad luck. In law if it falls under the former it is murder; it is manslaughter if it is the latter.

The High Court (Munuo, J. as she then was) was satisfied beyond reasonable doubt that the appellant killed the deceased with the requisite *mens rea,* hence the conviction and sentence.

In this appeal Dr. Ronilick Mchami learned counsel represented the appellant; whereas the respondent/Republic had the services of Mr. Victor Kahangwa learned Principal State Attorney, who resisted the appeal.

Dr. Mchami raised two grounds in the memorandum of appeal, namely:-

1. *The trial High Court Judge erred in law when she convicted the appellant on the charge which was not proved beyond reasonable doubt.*

2. *The trial High Court Judge in law and fact when she relied on the evidence of a single witness Vicky Swai without considering the fact that the witness had grudges against the appellant.*

Briefly the prosecution case from a single witness Vicky Swai (PW1) as received by the trial court was to this effect. The deceased, the appellant and PW1 were working in Msoka Mashaka Farm situated at Sanya Juu, in Hai District as Store Keeper, Herdman and Veterinary Officer respectively.

On the fateful day around morning hours when PW1 was entering in the office, she met the deceased and the appellant. The

appellant was leaving the office. When leaving the office, the appellant uttered the following words towards the deceased:

"Haya Bwana"

She did not know the reason as to why the appellant uttered those words. The appellant went away. Not long the appellant returned to the office, this time he had a gun while the deceased was going out to pour water. PW1 heard the appellant when he was asking for a pen from the deceased whereby the deceased asked PW1 to supply him. As PW1 was in the process of taking the pen from a drawer, she heard a gun shot. She was puzzled. The appellant then pointed the gun to her while clinching his teeth, sweating and breathing heavily. The appellant went to the place where the deceased had fallen, looked at the body and left.

In his defence the appellant admitted to have killed the deceased but he said it was bad luck. He explained his relationship with the deceased that they were lovers. He also explained how he gave the deceased money for the purpose of buying land and also for hiring a piece of land about 2 acres to cultivate.

On the fateful day he agreed to have gone to the office where the deceased gave him the gun. He then told the deceased to get labourers after working hours to harvest maize. The deceased answered rudely and that he should not have followed her. After the deceased had spoken those words, PW1 arrived. The appellant asked for a pen from the deceased. The deceased uttered uncivil words towards him and she refused to give him a pen. Instead the deceased requested PW1 to give him a pen. The appellant and the deceased exchange words in connection with maize harvesting and he demanded for return of his money. It was at that juncture the gun accidentally trigged off and killed the deceased.

Dr. Mchami submitted his grounds of appeal he had raised in the memorandum of appeal. Upon completion, we asked him whether the summing up of the case to the assessors in particular the question of malice afore thought as is reflected on page 20 of the record was satisfactorily. We had in mind section 200 of the Penal Code, cap 16. The relevant portion reads.

Direction to Assessors

1. *I (Sic) you find that the accused shot the deceased intentionally, i.e. with malice aforethought, you should advise the court to find the accused guilty of murder as charged.*

2. *If you find the defence of the accused probable, you should advice the court to convict him of manslaughter u/s 195 of the Penal Code.*

Dr. Mchami told us that going by the above extract, it shows that the learned trial Judge did not explain what malice aforethought is all about. Further, the language used is a technical one which is not easy for an ordinary man to understand. And to crown it all, the learned trial judge did not give a summary of the evidence of PW1, the single witness in the prosecution case. In view of the above, he urged us to quash the proceedings, set aside the sentence and order retrial as the trial was a nullity.

Mr. Kahangwa also made submission in respect of the stance he had taken in support of the conviction and sentence. Turning to

the summing up the case to assessors, at first he said the trial Judge summed up the case to the assessors properly. But on reflection he said the learned judge did not address the assessors on the question of malice aforethought as is provided under S. 200 of the Penal Code. In case the Court found that the assessors were not properly directed, then the Court should order a retrial, he submitted.

The starting point is Section 265 of the Criminal Procedure Act Cap. 20 RE. 2002 (the CPA). That all trials before the High Court shall be with the aid of assessors.

The section reads:

> *265. All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the Court thinks fit.*

The above cited Section is couched in mandatory terms. A criminal trial in the High Court therefore is required to be conducted with the aid of assessors. To conduct a trial without assessors will

normally result the proceedings to be a nullity. But how do assessors assist the High Court to arrive at a just decision? The answer to this question is two told. One, the court to avail the assessors with adequate opportunity to put questions to witnesses from both sides and the same should be clearly recorded. Two, which is relevant to our case, is that when the case on both sides is closed, the judge is required to sum up the evidence for the prosecution and the defence and shall then require each of the assessor to state his opinion as to the case generally and as to any specific question of fact addressed to him by the judge and record the opinion. (See Section 298 of the CPA). The importance of the opinion of assessors can be of great value if properly utilized. This was underscored by the then the Court of Appeal for Eastern African in **Washington s/o Odindo v R** [1954] 21 EA CA 392. The Court stated:-

> *"The opinion of assessors can be of great value and assistance to a trial judge but only if they fully understand the facts of the case before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of*

> *the case, the value of the assessors opinion is correspondingly reduced."*

In our case, the learned trial Judge only did she not properly sum up the case, but also did not direct the assessors as to what amounts to malice aforethought as is provided for under Section 200 of the Penal Code, Cap 16 RE. 2002. We think the assessors were not properly directed as to what malice aforethought is all a about. That in our view is a non direction to the assessors on a vital point in this case.

In **Tulubuzya Bituro v R** [1982] TLR 264 the Court cited the ratio decidendi in **Bharat v The Queen** [1959] AC 533 with approval the principle that where a trial is required to be by a judge with the aid of assessors and therefore where assessors are misdirected on a vital point, the trial judge cannot be said to have been aided by those assessors. The Court said:

> *"Since we accept the principle in Bharat's case as being sensible and correct it must follow that in a Criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to*

> *be a trial with the aid of assessors. The position would be the same where there is non direction to the assessors on a vital point."*

It is clear therefore that the failure by the learned trial judge to summarize the facts and address the assessors on the meaning of malice aforethought in this case, which is very crucial, has the effect of vitiating the entire proceedings. We do hereby declare that the High Court proceedings a nullity.

We have given a deep thought over the idea whether or not to order a retrial. We are alive to the principles enumerated in **Fatehali Manji** v R [1966] EA 341. In that case the then Court of Appeal of East Africa stated:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is 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 a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

The appellant was charged with the offence of murder whereby a human life was lost. It is acceptable world wide that human life is sacrosanct, as such, it should not be taken away lightly without the due process of the law.

On the other hand we are also aware that the appellant has been in prison for more than 15 years. There is no doubt that that is a long period. We sympathize with the appellant's predicament.

In view of the foregoing, therefore it is our considered view that it would be in the interest of justice to order a retrial. We quash the entire proceedings, set aside the sentence and order a new trial of the appellant as expeditiously as possible by a different judge and different set of assessors.

Order accordingly.

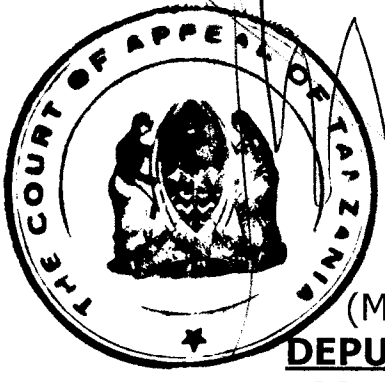
DATED at **ARUSHA** this 19th day of May, 2012.

H. R. NSEKELA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(M.A. MALEWO)
DEPUTY REGISTRAR
COURT OF APPEAL