IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 172 OF 2012

MARWA JOEL GESABO.....APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

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

(Muruma, J.)

Dated 25th day of June, 2012
in
Criminal Session Case No. 13 of 2002

JUDGMENT OF THE COURT

5th & 8th May, 2014.

KAIJAGE, J.A.:

In the High Court of Tanzania, at Mwanza, the appellant, MARWA JOEL GESABO, was arraigned for the murder of one KIRAMBO s/o BURURE WANYUMBA, the deceased, contrary to section 196 of the Penal Code, Chapter 16 of the Laws. Following a full trial, the appellant was found guilty of manslaughter contrary to section 195 of the Penal Code, for which he was sentenced to life imprisonment. Aggrieved, he preferred the present appeal.

The facts of the case which led to the appellant's arrest, prosecution and his eventual conviction could be stated, briefly, as follows; On 3/5/1998, PW1 Meng'anyi s/o Wengari threw a local brew party at his premises situated at Rong'abure village within the District of Serengeti in Mara Region. The appellant, the deceased, PW2 Mwita Marwa Moraswa and PW3 Chacha Ngile were in attendance. As the party progressed, the appellant approached the deceased demanding an explanation as to why, during an undisclosed occasion, the latter who was the commander of sungusungu arrested him. This developed to a conspicuous misunderstanding involving hurling of words of insult between the appellant and the deceased.

In the course of trial, the trial court was told that the quarrel between the two was quickly noted by their host, PW1, who managed a temporary soothing of their hostilities. However, PW1 could not tolerate what appeared to be continued squabbles between them. In the circumstances, he was forced to ask them to leave his premises, which they did.

It is common ground that the deceased and his friend, PW2, were the first to leave PW1's premises followed by the appellant a little while later. This was at about 4:30 p.m., according to the appellant's testimony in defence. The trial court was further told by PW2 that he parted ways with the deceased somewhere before reaching home, but on the same day at about 6:00 p.m. he heard someone in the neighbourhood yelling for help. The alarm was also heard by other persons including PW3. As both witnesses rushed to and approached the scene from their respective homes, they saw the deceased lying on the ground crying that; "Marwa Gesabo (the appellant) is the one who killed me." This, certainly, qualifies to be a dying declaration.

Further account of the incident in question was given by PW2 and PW3 to the effect that as they came closer to where the deceased was lying in pains, they saw the appellant who was, apparently their village-mate running away carrying a bow, arrows and a sword. The appellant was also seen wearing a red pair of long trousers. In concert with other villagers who had gathered at the scene, they assisted and carried the deceased who died on the way to hospital. Going by the Report on Post-Mortem Examination (Exh. P1), the cause of death was "bleeding" from cut

wounds sustained by the deceased on his head and the back. The incident was reported to the police authorities who consequently arrested the appellant and brought him to court to answer a charge of murder.

In his sworn defence, the appellant flatly denied to have killed the deceased, stating that at the material time of the incident he was at a distant village, Koreri, where he had gone to attend a sick child of his relative. He called two witnesses to strengthen his defence of an *alibi*.

The two assessors who assisted the learned trial judge were unanimous. They both opined that the appellant be acquitted. In his judgment the learned judge rejected appellant's defence of an *alibi* and found the evidence of PW2 and PW3 cogent, impeccable and corroborative of the said deceased's dying declaration. Upon his evaluation of the entire evidence on record, he was satisfied that malice aforethought was not established. Accordingly, he found the appellant guilty of a lesser offence of manslaughter.

The appellant lodged a two point's memorandum of appeal premised on the following grievances:-

1. *That the learned trial judge erred in convicting the appellant on the basis of circumstantial evidence, which did not directly and conclusively point to the guilt of the appellant.*

2. *That the life imprisonment sentence imposed upon the appellant is, in the circumstances of the present case, excessive.*

Before us, the appellant had the services of Mr. Anthony Nasimire, learned advocate. The respondent Republic was represented by Mr. Pascal Marungu, learned State Attorney, who resisted the appeal.

Upon our thorough perusal of the record of proceedings and judgment of the trial High Court, it came to light that in grounding a conviction against the appellant the said trial court heavily relied on the deceased's dying declaration corroborated by the evidence of PW2 and PW3. However, we found nothing on record showing that in the course of summing-up to assessors the latter were directed on the basic evidence of the said deceased's dying declaration and its legal import. Because we were settled in our minds that this shortcoming could easily dispose of the

"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 a trial cannot be construed to be a trial with the aid of assessors****. The position would be the same* ***where there is a non-direction to the assessors on a vital point****."*

[The emphasis is supplied].

In this case, we have already alluded to the fact that in convicting the appellant, the trial court relied on the deceased's dying declaration corroborated by the evidence of PW2 and PW3, but in the course of summing-up to the assessors this vital evidence and its legal import was not fully addressed. Under the circumstances, we are at a loss as to what would have been the assessors opinion had they been properly directed.

Be that as it may, on the authority of the decision in **Tulubuzya's case** (*supra*) and other decisions of this Court in; **HATIBU TENGU v. R.,**

Criminal Appeal No. 62 of 1992, **CHARLES LYATII @ SADALA v. R.,** Criminal Appeal No. 290 of 2011 and **MOSHI MABEJA v. R.,** Criminal Appeal No. 74 of 2014, we are satisfied that appellant's trial by the High Court cannot be construed to be a trial with the aid of assessors on account of them not having been directed on the said vital point of law.

From the foregoing, we hasten to hold that such a non-direction to the assessors constituted a procedural lapse which undermined the conduct of the entire trial. Accordingly, in the exercise of our revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, we nullify the proceedings and the judgment of the trial High Court. The conviction entered and the sentence passed against the appellant are, respectively, quashed and set aside. As to whether or not the appellant who has so far spent over fifteen years in remand and prison custody should be retried, we leave it to the discretion of D.P.P. to decide as he deems appropriate. Should the D.P.P. prefer a retrial, we hereby direct that the appellant be retried with all convenient dispatch before another judge and a different set of assessors. Pending the decision of the D.P.P., we order that the appellant be remanded in custody.

We so order.

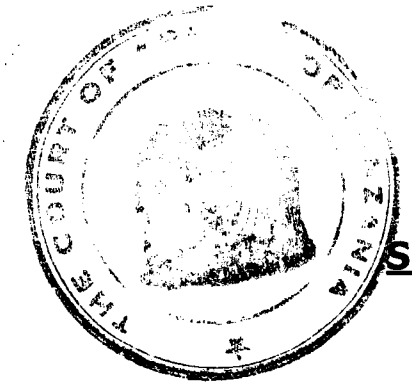
DATED at **MWANZA** this 7th day of May, 2014.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL