IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 161 OF 2015

HAMISI MDUSHI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Rumanyika, J.)

dated the 6th day of November, 2014
in
Criminal Session No. 56 of 2012

JUDGMENT OF THE COURT

7th & 8th December, 2015

MASSATI, J.A.:

Following his conviction and sentence of death for the offence of murder contrary to section 196 of the Penal Code, in a judgment dated 6th November, 2014, the appellant has filed an appeal in this Court to impugn the whole of the said decision.

It was alleged at the trial court that, on the 19th February 2009, at Uyogo village, within Kahama District, Shinyanga Region the appellant did murder one ZAWADI d/o STEPHANO. The appellant pleaded not guilty.

The prosecution case was that, the appellant was the manfriend of one SOPHIA d/o LUTONJA, the mother of ZAWADI (the victim). He used to frequent his friend's home, and even spent nights there. On the material day and time the appellant visited the household. The family was taking their dinner. He was invited but refused to partake in the meal. After dinner, he was asked to retire, but the appellant smelt a rat. He started a commotion, and in the course, the deceased was assaulted by an axe on the neck and other parts of her body. He also assaulted other members of the family including his concubine. Then the appellant disappeared.

The deceased was taken to hospital where she pronounced dead the following day, and the cause of death was described as acute blood loss.

On 11th May, 2009, the appellant was arrested, interrogated, and finally arraigned as said above.

In order to impress the trial court, the prosecution brought three prosecution witnesses, and one documentary exhibit, the postmortem examination report (Exhibit P1).

PW1, **LETICIA STEPHANO**, a sister of the deceased, who was present during the incident, testified as an eye-witness. She explained how, as they were taking their dinner, suddenly the appellant began to attack their mother with a panga, outside, which made her (the mother) run away; and how he continued to attack other members, including the deceased, on the neck and head. PW2 **CLEMENT GEME** the street Chairman testified that, on that night, he was at home when he heard alarms to which he responded by rushing there where he found Zawadi still lying. He also heard PW1, mention the appellant as the assailant. He also explained that after that, the appellant went missing. PW3 **F 1666 S/SGT PETER** was assigned to investigate the case. He went to the scene of the crime, drew the sketch map, and assisted in identifying the deceased during the post mortem examination. He was also the one who interrogated the appellant, but did not seek to produce the appellant's cautioned statement.

In his sworn evidence, the appellant told the trial court that he was present at the scene of the crime at the material time but that he was involved in a brawl, and assaulted the deceased in its course. So, according to the appellant, he killed accidentally, and that in fact he didn't

even know who, he had killed. To assist in his defence, he produced his own cautioned statement as Exhibit D1.

After summing up to the assessors, and analyzing the prosecution and the defence cases, the trial court was satisfied that the offence of murder had been committed and by the appellant, hence the conviction. But in their opinions the assessors had advised the trial judge to find that the killing was accidental, and so enter a conviction for the lesser offence of manslaughter. The learned trial judge did not heed to that advice.

Through the services of Mr. Mussa Kassim, learned counsel, the appellant has filed and argued only one ground of appeal, which he sought and was granted leave to amend to read that the trial judge should not have convicted the appellant of the offence of murder and sentenced him to death.

After consulting Ms. Upendo Malulu, learned State Attorney, who appeared for the respondent/Republic and after reframing his ground of appeal, Mr. Kassim submitted that the deceased's death was a result of mutual fight, which could only result in manslaughter. He referred us to the decision of **JAMES KABOYE v R**, Criminal Appeal No. 435 "B" of 2013

(Tabora0 (unreported). He therefore prayed that the appellant's appeal be allowed.

On the other hand, Ms. Upendo Malulu learned counsel for the respondent declined to support the conviction. She submitted that since in summing up the case to the assessors, the learned judge expressed his own views on the pertinent issues in the case in order to influence the assessors, the trial judge's summing up amounted to a judgment. So there was no impartial trial. So, she prayed that in exercise of its revisional powers under section 4(2) of the Appellate Jurisdiction Act, the Court quashes the trial proceedings and order a retrial.

However, while agreeing with Ms. Malulu's observations on the learned judge's style of summing up to the assessors, Mr. Kassim would not hear any suggestion about a retrial. In his opinion, on the evidence on record, the defence of self-defence, was open to the appellant and so it is open for this Court not to order a retrial, and instead, set him free.

After hearing the parties, we asked the learned counsel to address us on the effect of improper summing up to the assessors, and the trial judge's failure to give reasons for differing with assessors.

Mr. Kassim, submitted that the effect was to render the trial as one without the aid of assessors. However, he did not cite any authority to support this contention. Ms. Upendo Malulu concentrated on the contents of the summing up and labelled it as a form of a judgment. She did not add anything other than her earlier assertion that the trial was impartial and thus a nullity.

We think that the most decisive issue in this appeal that we have to determine first, is whether the trial of the appellant was faulty. If so, whether the fault undermined the root and essence of the trial itself? Both counsel have submitted that the fault was in the manner in which the assessors played their part in the trial.

First, we wish to make certain points which are pertinent in the determination of this appeal, regarding the issue at hand.

First, it is provided by statute (section 265) of the Criminal Procedure Act (Cap. 20 RE. 2002) (the CPA) that all criminal trials in the High Court has to be with the aid of assessors. **Secondly**, it is also trite law that section 298(1) of the CPA requires the judge or a resident magistrate exercising extended jurisdiction, at the close of the prosecution and the defence cases, to sum up the evidence, and require the assessors

to give their opinions orally as to the case on the whole, and the judge is to record such opinion. **Thirdly**, in so doing a trial judge should as far as possible desist from disclosing his own views or making remarks or comments which might influence the assessors one way or another in making up their minds about the issue or issues being left with them for consideration. (See **ALLY JUMA MAWERA v R**, (1993) TLR 231. **Fourthly**, it is only through a proper summing up that the assessors may give an invaluable opinion to aid the judge in reaching a just decision. (See **WASHINGTON s/o ODINDO v R.** (1954) 21 EACA 392. **Fifthly**, where assessors are misdirected on a vital point, the trial judge cannot be said to have been aided by the assessors. (See **TULUBUZYA BIJURO v R** (1982) TLR 264; which was followed in **CHARLES LYATI @ SADALA v R**, Criminal Appeal No. 290 of 2011 (unreported)). Finally, although a trial judge is not bound by the opinions of the assessors, this Court has repeatedly held that where a judge differs with the unanimous views of his assessors, it is good practice for the judge to state in his judgment reasons for his disagreement, particularly if the assessors have given grounds for their opinions. (See **BALAND SINGH v R** (1954) 21 EACA 209, although this in itself is not necessarily fatal. (See **TULISANGEYEKO**

ALFRED AND TWO OTHERS v R, Criminal Appeal No. 282 of 2006 (unreported). See also **ABDALLAH BAZAMIYE AND OTHERS v R** (1990) TLR 42, which approved the practice.

In the present case, we note that after the summing up, the assessors opined that the appellant was not guilty of murder as charged, but the learned trial judge, came to a different conclusion. He found that the appellant was guilty as charged of murder and so proceeded to sentence him to death. What is disturbing is that he did not give any reasons for differing with his assessors. He did not even acknowledge that they even gave any opinion. We must say that this was contrary to the salutary rule of practice of giving reasons for differing with the assessors. However, if this was the only irregularity, we would have found it harmless. (See **TULISANGEYEKO ALFRED AND TWO OTHERS v R** (supra).

But the seeds of suspicion may be traced in the learned judge's summing up to the assessors. The said summing up can be found from page 26 to 29 of the record of appeal. After summarizing the prosecution and the defence cases, the learned judge thought it was necessary to address the assessors on some vital issues arising from the evidence. The

first was on visual identification. The second was the appellant's defence of self defence.

On visual identification, the learned judge directed the assessors thus:

> *"The issue now is whether PW1 saw the accused attacking the deceased. ... **The issue whether or not was identified is neither here nor there** (underlining provides)."*

Then as if that was not enough he went on to direct that: -

> *"...even when the issue was of visual identification at night ...yet still as you may recall PW1 and the accused are at one. There was so sufficient light that none of them could have mistaken identity of each other. Leave alone the distance between her and the accused (5-6 paces) in a whitish walled room. It is common knowledge that white colour reflects light."*

It is upon these directions that he then left it to the assessors "to opine if the surrounding circumstances were favourable for PW1 to identify the assailants."

We think these directions were clearly expressing the judge's own findings of fact on the evidence, and had nothing to do with wanting to get the assessors opinions, but to influence them, to agree with him. It was wrong for the judge to have made his impression known to the assessors. (See **LUSABANYA SIYANTENI v R** (1980) TLR. 275.

Finally in his summing up, the learned judge addressed the assessors on the defence of self-defence. First, he said, that it was proposed during final submissions by the appellant's counsel. Then he went on to confuse it with "accidental killing". In our view, these two are different defences. "Accidental Killing" happens if a person does or omits to do an act under an honest and reasonable but mistaken belief in the existence of any state of affairs. This is provided under section 11 of the Penal Code. But the defence of self defence is available under section 18 to 18c of the Penal Code, if such defence results in death.

It was upon the learned judge to direct the assessors on which of the two defences, the appellant had raised, especially considering also the contents of his cautioned statement Exhibit D1. This, in our view, was a vital point that the assessors ought to have been properly directed. In **ALPHONCE ALBERT v R**, Criminal Appeal No. 27 of 1979, and

BENJAMIN KAPULA @ ZENGO v R, Criminal Appeal No. 283 of 2006 (both unreported), it was held that where a judge misdirects the assessors on a vital point, such judge cannot be said to have been aided by the assessors because by such misdirection he will have disabled the assessors from giving him the aid which they should have given him, and thus disabled himself from taking their opinions into account.

It is not therefore surprising that the learned judge did not take the assessors' opinion into account at all or give reasons why he differed with them. Any reasonable person might think that he did not do so because they did not agree with him despite his attempts to influence them.

We think that the effect of improper summing up, and misdirecting the assessors on vital points concerning the appellant's defence, led to a miscarriage of justice on the part of the appellant because it is as if the trial judge tried the appellant without the aid of assessors. We shall therefore declare the proceedings a nullity. As this is dispositive of the matter we find no need to deal with the ground of appeal raised by Mr. Kassim.

In exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, we revise and quash all the proceedings and

judgment of the trial court. We quash the conviction and set aside the sentence. Considering the fact that the appellant was charged with a serious offence and was sentenced only one year ago, and has been in remand since 2009, no injustice would be occasioned by a retrial. So we order that the appellant be retried with immediate dispatch, by a different judge and a different set of assessors.

It is so ordered.

DATED at **TABORA** this 8th day of December, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL