IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

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

CRIMINAL APPEAL NO. 107 OF 2015

OMARI KHALFAN ..... APPELLANT

VERSUS

THE REPUBLIC. .....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Msuya J.)

dated 20th day of June 2014

in

Criminal Session No. 9 of 2013

.....

JUDGMENT OF THE COURT

14th & 17th August, 2015

JUMA, J.A.:

The appellant, Omari Khalfan, was charged before the High Court of Tanzania at Tanga with the offence of murder contrary to sections 196 and 197 of the Penal Code, Cap 16. The particulars of the offence were that on the 1st day of October, 2011, at Kwachuma Village in Handeni District of Tanga Region, he murdered Nurdin Rajabu. The prosecution lined up a total of six witnesses who testified against the appellant. The appellant

testified in his own defence and he did not bring any other witness to testify on his behalf.

Before his arrest, the appellant was employed by Rodgers Batwel Mnyili (PW1) as casual manual labourer. He also lived at the latter's farm at Michungwani Kwachuma. The deceased who lived nearby also worked in the farm as a casual labourer. There were two huts and a fenced enclosure designated for preserving maize harvested from the farm. In one of his visits to the farm, PW1 noticed that one casual labourer was absent and the appellant was working alone. When he enquired, the appellant told PW1 that the deceased had been fired from his work after stealing some chicks and eggs. PW1 also noted that the fencing enclosure had been broken, to which he replied that he would make repairs. When PW1 insisted that the appellant should remove what remained of the broken fence to enable the planting of maize. PW1 then ordered the appellant remove the remnants of the demolished fence in order to plant maize the whole area. When the appellant continued to show reluctance to dig up holes in PW1's presence, PW1 decided to dig. That was when the appellant remarked that there was what he described as "personal matter" at the

place PW1 directed him to dig up. When PW1 pressed for elaboration of what those personal matters were, the appellant explained that the missing labourer was dead, and he had killed him.

E 4113 DSGT Emmanuel (PW6) testified how PW1 visited the Michungwani Police Station to report his suspicions over the disappearance of one of his farm labourers. Because it was not then certain whether there was a body buried underneath the enclosure, the police pretended that they were searching farm premises looking for illicit bhang hidden in the farm. The police arrived at the farm taking along one Bakari Simeni (PW5), a member of the local people's militia. At the farm, the appellant flatly denied the allegation that bhang was hidden somewhere in the farm. The two huts were searched before the police asked the appellant about what was underneath the heap at the fenced area of the farm.

A body was found by the police when the appellant was ordered to dig up the ground under the heap of maize stalks. Fatuma Rajabu (PW3) who summoned at the scene to identify the deceased body, testified that she last saw her brother Nurdin Rajabu on 30/9/2011. At the farm PW3

found a body covered under a sheet. It was the body of her brother. The post-mortem examination report (exhibit P1) which was without objection admitted during the preliminary hearing showed the cause of death to be due to: *"hind brain injury which led to cardio pulmonary arrest."*

In his defence the appellant had flatly denied any responsibility in the death of the deceased. He explained how one day he had gone to buy some soft drinks and upon his return, the deceased had gone away.

At the conclusion of the hearing the trial High Court (Msuya, J) convicted him and sentenced him to suffer death by hanging. In convicting the appellant, the learned trial Judge relied on circumstantial evidence by *inter alia* stating:

> *"...As earlier indicated, the evidence against the accused person is purely circumstantial. The law on circumstantial evidence is settled that in a case depending solely on circumstantial evidence, the court must before basing ... conviction on that evidence, it must be satisfied that*

inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other facts incompatible with the reasonable hypothesis, than that of guilty..."

Dissatisfied with the outcome of his trial, the appellant has through Mr. Alfred Akaro, his learned advocate, preferred one main ground of appeal and two other grounds he argued in the alternative. In the main ground it is contended that the trial Judge erred in law for failing to make note of or otherwise recording of the points of her summing up to the Assessors. In the alternative, the appellant complains that the evidence on record did not sufficiently establish his guilt beyond reasonable doubt. In the third ground of appeal the appellant faults the sentence of death by hanging where the trial Judge had acknowledged that punishment to be cruel, inhuman, and degrading and violates the principles of human rights.

At the hearing of the appeal, learned counsel Mr. Alfred Akaro represented the appellant while the learned Senior State Attorney Mr. Saraji Iboru represented the respondent/Republic. On the ground faulting

the summing up to assessors, the learned counsel for the appellant first expressed his dismay over the way the summing up notes to assessors were not included in the record of appeal which was handed to him, only to be brought to his attention a day before the hearing. Further, he submitted that apart from the belated way the notes were handed over to him, the contents of the summing up notes were insufficient to properly guide the assessors.

According to Mr. Akaro, the summing up notes did not touch some essential ingredients of the offence of murder and also failed to give directions on how the assessors should consider facts relating to the application of circumstantial evidence. The learned Counsel submitted that since in terms of section 198 (1) of the Criminal Procedure Act, Cap. 20 (CPA) the informed opinion of assessors is at the centre of all trials conducted with aid of assessors, failure of the trial Judge while summing up to elaborate the ingredients of offence of murder and application of circumstantial evidence, takes away the centrality of the role of assessors.

Mr. Akaro urged the Court to allow the first ground of appeal and order a new trial in the same way this Court did under similar circumstances in **Othman Issa Mdabe vs. Director of Public Prosecutions**, Criminal Appeal No. 95 of 2013 (unreported).

Responding to the appellant's main ground of appeal faulting the summing up notes, Mr. Iboru submitted that initially when he read page 6 of the summing up notes, he was under the impression that the summing up was sufficient to enable the assessors to give their informed opinion. But, when we pointed out to him that on pages 6 and 7 of the summing up notes, the trial Judge was not in fact directing the assessors on ingredients of murder, but was summarizing the submissions of the learned counsel; Mr. Iboru came round to agree with Mr. Akaro that the summing up notes were insufficient. Concerning the effect of the insufficiency of the summing up notes, the learned Senior State Attorney urged us to order a retrial.

From their respective submissions, the two learned counsel are on common ground that the law under section 265 of the CPA, directs trials before the High Court to be conducted with the aid of at least two

assessors. Further, trial Judges sitting with assessors are required by section 298 (1) of the CPA to sum up to the assessors before inviting their opinion. Section 298 (1) provides:

> *298 (1) When the case on both side is closed, the judge **may** sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally as to any specific question of fact adduced to him by the judge and record the opinion.* [Emphasis added]

The trial "**with the aid of assessors**" under section 265 of the CPA has been interpreted by this Court as to require the trial High Court Judge to give the assessors adequate opportunities to put across questions and after the close of evidence from the prosecution and defence, to sum up and to obtain the opinion of the assessors. In **Selina Yambi and Two Others vs. R**, Criminal Appeal No. 94 of 2013 the Court cited **Charles**

Lyatii @ Sadala v. R, Criminal Appeal No. 290 of 2011 (both unreported) where the Court underscored the role of assessors:

> *"...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 cases, 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."*

Again, the phrase- "the judge may sum up" does not mean that the trial Judge can skip the summing up to assessors. This phrase has been expounded by the Court to imply a mandatory duty placed on the shoulders of the trial Judge to sum up. In **Mulokozi Anatory vs. R**, Criminal Appeal No. 124 of 2014 (unreported) the Court said:

> *"...We wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up*

the case to the assessors but as a matter of long established practice and to give effect to S. 265 of the ***Criminal Procedure*** *Act that all trials before the High Court shall be with aid of assessors,* ***trial judges sitting with assessors have invariably been summing up the cases to the assessors****..."*

[Emphasis added]

Decisions of the Court have even gone much further by insisting that summing up is not performed merely as a routine duty imposed on the trial Judge without useful purpose. In **Augustino Lodaru vs. R.**, Criminal Appeal No. 70 of 2010 (unreported) the Court stated that through summing up, the trial Judge assists the assessors to understand the facts in relation to applicable law before the assessors:

"Underscoring the importance of summing up of the case to the assessors, the then Court of Appeal for Eastern Africa in ***Washington s/o Odindo vs. R*** *[1954] 21 EACA 392 stated, inter alia:*

'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 sufficient facts of the case the value of the assessors' opinion*** *is correspondingly reduced...' "*[Emphasis added]

The duty of the trial Judge when summing up to explain the law in relation to the relevant facts has been explained by the Court as involving summing up of ***vital points of law*** which arise from the case concerned. The case of **Masolwa Samwel vs. R.,** Criminal Appeal No. 206 of 2014 (unreported) was an appeal where the appellant was charged with the offence of murder contrary to section 196 of the Penal Code. In the summing up, the learned trial Judge did not in the summing up, address the assessors on voluntariness of the confessional statement and defence of alibi, which learned counsel for the appellant and the respondent Republic agreed to be vital points of law. The Court stated:

"...With due respect, the two learned counsel have correctly articulated the settled position of law regarding the trials in the High Court that are aided by the assessors. In the instant appeal there was misdirection on the part of the trial judge for failing to direct the assessors on those two vital points of law.

There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on ***"all vital points of law"****. There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."*

The Court similarly underscored the duty to address vital points of law in **Said Mshangama @ Senga vs. R.,** Criminal Appeal No. 8 of 2014 (unreported). The Court insisted that an adequate summing up to assessors requires the trial Judge to direct the assessors on vital point of law disclosed in the case concerned. The Court stated:

"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."

From above authorities of the Court, both Mr. Akaro and Mr. Iboru are entitled to express their concerns over the inadequacy of the summing up notes of the trial Judge. The nine pages of the summing up which were included in the record of appeal quite belatedly, did not explain to the assessors all the ***vital points of law*** arising from the trial of the appellant for murder, a trial which was solely based on circumstantial evidence. At the conclusion of the summing up the trial Judge states:

"f) Conclusion:

Honourable lady and gentlemen assessors,

In the light of the evidence and submissions of the parties narrated to you, I require you to give me your opinion considering the following-

(i) Whether the circumstantial evidence adduced lead irresistibly an inference of accused's guilt.

(ii) *Consider the circumstance of surrounding the killing, can you affirmatively say that the accused had malice aforethought."*

It is clear from above conclusion; such vital points of law as the ingredients of the offence of murder (e.g. intention to cause death or to cause grievous bodily harm, unlawful causing of death, possible defences available) were not touched except for the question put out to the assessors as to whether the appellant **"had malice aforethought"**. The application of circumstantial evidence and how this type of indirect evidence can irresistibly link the appellant to the ingredients of murder was another vital point of law which was not addressed to the assessors. There was a non-direction on the part of the trial Judge in not addressing the assessors on those two vital points of law. It cannot be said that the trial

was with the aid of assessors as envisaged under section 265 of the CPA. That irregularity marred the entire proceedings.

From the foregoing finding, the Court is minded to exercise its revisional jurisdiction provided under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 (AJA). We as a result quash and set aside the proceedings and the judgment of the trial High Court. The record shall be returned back to the High Court for a new trial to commence as soon as practicable before another Judge and different set of assessors.

DATED at **TANGA** this 15th day of August, 2015.

B. M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

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

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL