IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 202 OF 2015

MARK KASMIRI...APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Arusha)

(Massengi, J.)

Dated the 14th day of August, 2014
In
Criminal Session No. 68 of 2013

JUDGMENT OF THE COURT

9th & 15th October, 2015

MWARIJA, J.A.:

In the High Court of Tanzania sitting at Arusha, the appellant was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. He was sentenced to suffer death by hanging. Aggrieved, the appellant has appealed to this Court.

The facts giving rise to the appeal are simple. Mwamvua D/O Mussa (the deceased) an aunt of the appellant, was until the material time of her

death living in Magugu village within Babati district, Manyara region. Her neighbours included one Amina Omari (PW4).

On 19/11/2011, the children of the deceased's neighbours were playing outside, near the deceased's house. Some of those children were Tabu Amiri (PW2) and Hawa Ismail (PW3). At about 12:00 hrs, PW2 and PW3 heard a noise from the deceased's house, sounding like something had fallen down. They went there and found the deceased lying down in pain. She had injuries on her head which looked swollen at the Centre and sides. They also found a hoe handle besides the deceased. After witnessing the incident, the children (PW2 and PW3) sounded an alarm which was responded to by neighbours including PW4 who arrived at the scene.

They assisted the deceased by taking her to hospital after they had obtained a Police Form No. 3 (P.F.3) from Police. The deceased was unsuccessfully treated at Babati Hospital where after her discharge, her relatives arranged to take her to KCMC. She unfortunately died before she could be taken there.

According to Dr. Cornel Huriha (PW5) who conducted a postmortem examination on the deceased, the cause of her death was head injury. He

described the nature of injuries to be a depressed fracture of the skull and a fracture of the left radial ulna joint.

It was the prosecution's case that the deceased was killed by the appellant. The evidence linking him with the offence was mainly that of PW2, PW3 and PW4. According to PW2 and PW3, after hearing the noise from the deceased's house, they rushed there and when they arrived at the house, they met the appellant running from therein. On her part, PW4 testified that when she heard the alarm raised by PW2 and PW3, she went to the scene. While approaching the deceased's house, she saw the appellant running away from that house. The evidence by all the three witnesses was to the effect that they knew the appellant because he was their neighbour living with the deceased. They said that on the material date when they saw him running from the deceased's house, he had put on a black "baraghashia" hat and a white T-shirt.

In his defence, the appellant denied commission of the offence. He raised the defence of *alibi* that on the material date of the incident, on 19/12/2011 at 12:00 hrs, he was in Gichameda village working in his farm. He denied the allegation that he was at the material time living with the

deceased at Magugu village. It was his defence that although he previously lived with her, he left and went to live in Gichameda village following a quarrel between him and the deceased. He denied having been to the deceased's house on the material date of incident.

During the hearing of the appeal, the appellant was represented by Mr. Severine Lawena, learned counsel while the respondent Republic was represented by Mr. Felix Kwetukia, learned State Attorney assisted by Ms. Tarsila Assenga, learned State Attorney.

In his memorandum of appeal the appellant raised four grounds:-

> *"1. That the trial Judge erred in law and in fact when she failed to conduct a voire dire as required by Section 127 (2) of the Tanzania Evidence Act in particular to P.W.2 and P.W.3 who testified before that Court.*
>
> *2. That the trial Court erred in law and in fact when it convicted the Appellant on contradictory evidence that could not prove the offence against the Appellant as required by law.*

appellant's conviction a nullity. On his part, at first Mr. Kwetukia argued that the learned trial judge summed up the evidence to the assessors, and therefore the omission to direct them on circumstantial evidence was not a fatal irregularity. On a second thought, however, the learned State Attorney argued that the omission to specifically direct the assessors that the prosecution case rested on circumstantial evidence and direct them on the application and condition under which such evidence may found conviction, vitiated the trial. He submitted thus that although the remedy is to order a retrial, he prayed that the case be remitted to the High Court so that the assessors can be directed accordingly.

In her judgment, the learned trial judge analyzed the evidence and found that the prosecution's case rested on circumstantial evidence. Upon being satisfied of its weight, she relied on it to found the appellant's conviction. She was of the view that the same pointed irresistibly to the appellant's guilt. The learned judge observed as follows:-

> *"...from the prosecution evidence, it is clear that no prosecution witnessed the accused person murdering the deceased MWAMVUA MUSA JUMBE*

also known as mama Mrisho. Therefore, what constitutes the case at hand is basically, circumstantial, enshrined through the accused after the murder incident and the state of affairs in existence by item between the accused person and the deceased (if any)."

She went on to state further that:-

"...considering the demeanor of the prosecution witnesses especially that of PW2 and PW3 who testified to have seen the accused person getting outside the deceased's house at a distance of just ten (10) paces, the consistence of the two witnesses as to what transpired on the fateful date and this Court having warned of any possibility of a planned syndicate to fix the accused with the charged offence, this Court is satisfied that the prosecution evidence though circumstantial, is irresistibly watertight."

As state above, the assessors were not directed on the fact that the prosecution case rested wholly on circumstantial evidence so that they could give their opinion as to whether or not the same sufficiently proved the case against the appellant. On that omission, the trial cannot be said to have been with the aid of assessors. In the case of **Said Mshangama @ Sanga v. The Republic,** Criminal Case No. 8 of 2014, an issue arose as to whether the assessors were adequately addressed on the vital point of law that a dying declaration must be corroborated before the court acts on it to ground a conviction. The Court held as follows:-

> *"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 (See **Rashid Ally v. The Republic**, Criminal Appeal No. 279 of 2010 (unreported))."*

Applying the principle in the case at hand, there is no gain saying that since the assessors were not directed on the vital point of law concerning circumstantial evidence as stated above, the omission vitiated the trial. As

a result therefore, we hereby quash the proceedings, set aside the sentence imposed on the appellant and order a re-trial before another judge and a new set of assessors.

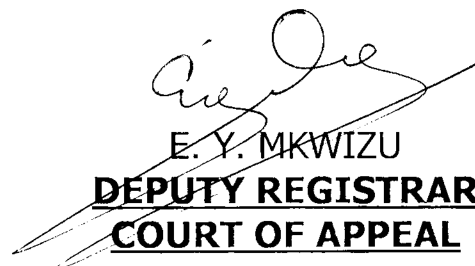
DATED at **ARUSHA** this 15th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL