IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MASSATI, J.A., MUSSA, J.A. And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 170 OF 2015

MASUNGA ERASTO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwaimu, J.)

Dated the 8th day of December, 2014

In

Criminal Session Case No. 69 of 2012

RULING OF THE COURT

20th & 29th April, 2016

MWARIJA, J.A.:

In the High Court of Tanzania, sitting at Tabora, the appellant and another person, Mashaka Mbeshi were charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 of the Revised Laws. It was alleged that on 23/1/2011 at Mhongolo village within Kahama District, Shinyanga Region, the appellant and that other person, murdered one Bulugu S/O Batholomeo @ Shingi. The said Mashaka Mbeshi was

discharged immediately after the plea taking following a *nolle prosequi* entered by the prosecution.

The following are the brief facts of the case: In the night of the material date of the incident mentioned above, the deceased who was a "bodaboda" (Passenger service motorcycle) operator, was attacked by bandits and robbed of the motorcycle which he was riding. Information about the incident was received by the deceased's father, Manija Shingi Bulugu (PW1) from a certain boy called Godwin. Upon the information, PW1 went to the scene at about 21.00 hours. He found the deceased lying down bleeding from a cut wound on the left of his head. He was already dead. At the time when PW1 arrived there, many people had gathered and fortunately, the police had also arrived. The police took the body to hospital.

As would be expected, the incident was disquieting to other bodaboda operators, particularly at the stand where the deceased used to park his motorcycle. They conducted their own investigation with a view of finding the deceased's assailant. According to Gogo Hezron Madololyo (PW2), one of the bodaboda operators, their investigation revealed that

two of their colleagues at the stand, one of whom being a daladala driver, had disappeared from the stand immediately after the date on which the deceased was murdered. The two persons were the appellant, a daladala driver, and Mashaka Mabeshi. Upon further inquires, PW2 and his colleagues learnt that the said persons were in their home village at Mwakibuga in Baridadi district, each one of them possessing a motorcycle.

PW2 and the owner of the robbed motorcycle, Paulo Mkonge (PW3) in the company of other persons immediately went to the village after that information. They reported the matter to the police who arrested the appellant and Mashaka Mabeshi.

Apart from PW1 – PW3 who facilitated the arrest of the appellant and recovery of the motorcycle, the prosecution relied also on the evidence of other witnesses, PW4 No. D. 96 35 D/CPL Emphraem, PW5 Herumes Byarugaba, who was until the material time a primary Court Magistrate, and PW6, Kayanda Mayanda Manjulumi. Whereas PW4 and PW5 testified that they recorded the appellant's cautioned and extra-judicial statements respectively, PW6 said that he informed PW2 and other bodaboda operators about the presence of the appellant in his home village. On their

part, PW4 and PW5 said that the appellant confessed to them that he murdered the deceased. The statements were admitted in evidence as exhibits P.4 and P.6 respectively.

In his defence, the appellant denied the charge. He said that he was arrested together with Mashaka Mabeshi in Mwakibuga village at bodaboda stand. Following his arrest, he said, he was taken to Kahama police station where he was tortured and later required to sign a document, the contents which he did not understand. He said further that when he was interrogated, he denied having been to Kahama at any time before the date of his arrest. He added that after he had been interrogated, he was taken before the justice of the peace to record his extra-judicial statement. Before he was taken there, he said, he was directed on what he should state to the justice of the peace. He said that he was so instructed by PW4 and another police officer, one Dickson. He said therefore that he gave the statement before the justice of the peace on the instructions of the police.

After a full trial, the learned trial judge found that the prosecution had proved the case against the appellant beyond reasonable doubt. In arriving at its decision, the trial court relied on circumstantial evidence and

the appellant's cautioned and extra-judicial statements. The appellant was convicted and sentence to suffer death by hanging. He was aggrieved hence this appeal.

Through his advocate, the appellant filed a memorandum of appeal raising four grounds as follows:-

> *"1 That, learned trial judge erred in law and in fact to convict the appellant on a retracted and or repudiated cautioned statement which was not recorded in form of question and answers.*
>
> *2.That, the learned trial judge erred in law to conduct trial in violation of fundamental principles of fair trial, to wit.*
>
> *a) That, the cautioned statement of the Appellant Exhibit P.4 was not read in court.*
>
> *b) That, while PW4 No. D. 9635 D/CPL Ephraem wanted to tender only the cautioned statement of the appellant as exhibit then it was an error on the part of the trial judge during trial within trial to inquire the admissibility on the extra-judicial statement which was not the case at that stage.*

c) That, the trial judge allowed assessors to cross examine witness.

3.That, the learned trial judge erred in law in her findings leading to conviction and sentencing the Appellant which findings was reached without assessing, evaluating and considering the Appellant's vital defence evidence in the judgment.

4.That, the learned trial judge erred in law and in fact to convict and sentence the accused on the prosecution evidence which did not prove the offence against the Appellant beyond reasonable doubt."

At the hearing of the appeal, the appellant was represented by Mr. Mussa Kassim, learned counsel while the respondent Republic was represented by Mr. Ildephonce Mukandara, learned State Attorney. The Court heard Mr. Kassim's arguments in support of the grounds of appeal and Mr. Mukandara's reply thereto. In the course of hearing the appeal however, the Court raised ***suo motu***, the point of law concerning the trial court's duty to direct assessors on vital point upon which the case was determined.

As stated above, the appellant's conviction was grounded on circumstantial evidence and the cautioned and extra-judicial statements of the appellant. In his judgment, the learned trial judge stated as follows:-

> *"It is a clear fact that from the evidence led by the prosecution, none of the witnesses saw the accused assaulting the deceased to his death. The prosecution relied on circumstantial evidence and the extra-judicial statements of the accused. Can it be said that it was sufficient enough to sustain a conviction"?*

The learned judge answered that question in the following words:-

> *"I would answer this question in the positive. The four instances pointed out by Mr. Lwenge State Attorney, irresistibly points to the accused being guilty of murder..."*

The four factors which were found to have been established and which have led the court to arrive at an irresistible conclusion that the

appellant was guilty are **firstly,** that the appellant disappeared from his usual place of work immediately after the deceased's death, **secondly**, that the appellant was found in possession of the motorcycle said to have been robbed from the deceased, **thirdly,** that the appellant was found with the said motorcycle within the period of sixteen days from the date on which the property was stolen, thus justifying invocation of the doctrine of recent possession.

When summing up the case to the assessors, the learned trial judge stated as follows on the vital point concerning circumstantial evidence:

> *"You must consider that in this case no single witness testified that he saw the accused assaulting the deceased. But again, the evidence adduced by the prosecution is solely based on circumstantial evidence as exhibit P.4 and P.5 the statements alleged to have made (sic) the accused."*

It was that content of the summing up to the assessors on the point concerning circumstantial evidence that the court raised the issue. Mr. Mukandara agreed that the assessors were not properly directed on that

point. He agreed also that the assessors were influenced by the learned judge's comment that the prosecution relied solely on circumstantial evidence. Mr. Kassim did not have a different view on the issue.

It is clear from the record that the assessors where not directed on the nature and scope of that kind of evidence. It was not enough to inform them that the evidence is solely circumstantial. In the case of **Seif Salum and Anr. v. The Republic**, Criminal Appeal No. 119 of 2015 (unreported), when summing up to the assessors, the learned trial judge merely informed them that circumstantial evidence can prove a case if that evidence points irresistibly to the accused persons as the persons who committed the offence. The court found that, with such a summing up, the assessors were not properly directed because they ought to have been told about the nature of that evidence and explain to them each of the exculpatory facts which, if proved, would found conviction. The court stated as follows:-

> *"We think the learned trial judge ought to have done more than that. She had a duty to inform the assessors that before the accused persons could be*

convicted on circumstantial evidence the prosecution had a burden of proving that the circumstances led to the only reasonable inference that the accused persons took part in the commission of the crime they stood charged with and that circumstantial evidence led to an irresistible conclusion that they committed the crime. The learned judge also ought to have explained to the assessors that each of the inculpatory facts, adduced against the accused considered singly must justify the drawing of the influence that the accused committed the crime in question. Likewise when considered together it must justify the drawing of such inference. (See ***Abdu Muganyizi v. R****, 1990 TLR 263....)."*

It is trite, law that an omission to direct assessors on a vital point vitiates the trial. In **Tulubuzya Bituro v. Republic** [1982] TLR 264, the Court stated as follows:-

"... 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..."

Since therefore, in this case, the assessors were not directed on the vital point concerning circumstantial evidence upon which the appellant's conviction was founded, the infraction vitiated the trial. For this reason, In the exercise of the powers conferred on the Court by Section 4(2) of the Appellate Jurisdiction Act, Cap 141 of the Revised Laws, we hereby nullify the proceedings, quash the appellant's conviction and set aside the sentence. Having done so, we are enjoined to consider whether or not we should order a retrial. The general rule as stated in **Tulubuzya Bituro** (supra) is that where a trial is nullified on the basis that the trial was illegal or defective as it has happened in this case, the remedy is to order a retrial unless there are reasonable grounds for making a different order. (See also **Fatehali Manji v. The Republic,** [1966] 1 EA 343. In this case, we find it

order a retrial before another judge and a new set of assessors.

DATED at **TABORA** this 27th day of April, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL