IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MBAROUK,J.A.,LUANDA,J.A., And MZIRAY, J.A.,)

CRIMINAL APPEAL NO. 171 OF 2015

KULWA MISANGU .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Mrango, J)

dated 4th day of December, 2014
in
Criminal Session Case No. 17 of 2012

JUDGMENT OF THE COURT

10th & 18th October, 2016

LUANDA, J.A.:

The above named appellant, appeals to this Court against the conviction and sentence of life imprisonment imposed by the High Court of Tanzania (Tabora Registry) for attempted murder. It is the prosecution case that on 12/12/2009 at Bugalama Village within Maswa District in Shinyanga Region, the appellant attempted to murder one Limifrida d/o Kapungu.

The prosecution called two witnesses to establish its case; whereas the appellant in his defence distanced himself from criminal responsibility and called no witness other than himself.

In this appeal Mr. Yussuf Mwangazambili, learned counsel represented the appellant. The respondent/Republic had the services of Mr. Ildephonce Mukandara, learned State Attorney. Mr. Mwangazambili filed a memorandum of appeal consisting of four grounds which we reproduce hereunder as follows:-

1. *That on the evidence on record the case for prosecution was not proved beyond reasonable doubt.*
2. *That the learned Judge's Summing up to Assessors was wrong to have his impression known to assessors.*
3. *That the life imprisonment sentence imposed by the trial Judge to Appellant was excessive one.*
4. *That the trial Judge grossly erred in Law and facts for failure to specify the provision of the Code under which the Appellant was convicted and sentenced.*

Mr. Mwangazambili started to argue the second ground for obvious reason. The first one is a general one and in actual fact it embraces all grounds.

As to ground number two, Mr. Mwangazambili argued with force that the record of appeal shows that the learned trial judge disclosed his own views or remarks which might influence the assessors in one way or another. He made reference to page 27 of the record. *The passage reads:-*

> *"Gentle assessors, then (sic) is no dispute that PW1 Winifrida d/o Kupungu was grievous injured, and she was found in the bush while her body was with Maggot. There is no doubt that she travelled to Mwanza and finally to Maswa for Sardines business. She was attached and injured where she was robbed Tshs 4,050,000/= She mentioned the accused to have been the person whom is responsible for the injuries and robbery".*

He said that was not proper. By so doing it cannot be said, the trial was conducted with the aid of assessors as envisaged by S. 265 of the Criminal Procedure Act, Cap. 20 RE. 2002 (the CPA); he charged. He made reference to our decision in **Hamis Mdushi V R,** Criminal Appeal No. 161 of 2015 (CAT – unreported) where the Court called upon learned trial judges to desist from disclosing their views

or remarks when they sit with assessors, as that might influence the assessors. He went on to say that since the trial is taken to have not conducted with the aid of assessors, which is a fatal irregularity and hence not curable, the proceedings and judgment should be nullified. The appellant, who so far has been in prison for a period of six (6) years, should be released from prison, he concluded.

Apart from the observation made by Mr. Mwangazambili, the Court also pointed out another fatal irregularity pertaining to assessors' participation in that the learned trial judge did not at all address them during the summing up on the issue of *alibi* raised by the appellant though the learned trial judge considered and rejected it. We raised it because if it is shown a trial judge to have not directed assessors on a vital point of law like *alibi* in summing up, the omission vitiates the entire proceedings (See **Tulibuzyo Bituro V R [1982] TLR 264).** Mr. Mukandara joined hands with both observation made by Mr. Mwangazambili and the Court. He submitted that the proceedings and judgment be quashed and sentence set aside. There should be a retrial before another judge and a new set of assessors, he submitted.

In both instances, the bottom line is whether the trial was conducted with the aid of assessors as mandated by s. 265 of the CPA. In terms of s. 265 of the CPA all criminal trials before the High Court are required to be conducted with the aid of assessors. The section reads:-

> *"265. All trials before the High Court should be with the aid of assessors, the number of whom shall be two or more as the Court thinks fit".*

The wording of the above section is couched in mandatory terms. It will be improper if the High court conducts a criminal trial, if the CPA is applicable, without the aid of assessors. But what is the role of assessors? The role of assessors is to assist the trial court to arrive at a just decision. And the assessors assist the court in two ways. One, the trial court to avail the assessors with adequate opportunity to put questions to witnesses as permitted by S. 177 of the Evidence Act, Cap 6-RE 2002. Two, the trial judge to sum up the evidence for the prosecution and the defence and shall then require each of the assessor to state his/her opinion as is provided under S. 298 (1) of the CPA (See **Augustino Lodaru V R,** Criminal Appeal No. 70 of 2010). The phrase "Sum up" means to summarize the

evidence on both sides in order to enable the assessors understand the facts of the case. The section does not permits opinions or views of the presiding judge to form part of summing up as was done in this case reproduced *supra*. Further, the learned trial judge did not address assessors what the defence of *alibi* entails. Indeed opinions of assessors are very useful but only if the assessors understand the facts of the case. In **Washington s/o Odindo** V R, (1954) 21 EACA 392 the then Court of Appeal for Eastern Africa said:-

> *"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 salient facts of the case the value of the assessors' opinion is correspondingly reduced."*

Since the learned trial judge did not summarize the case properly to the assessors it cannot be said the trial was with the aid of assessors. Section 265 of the CPA was not complied with. Improper summing up led to a miscarriage of justice on the part of the appellant. We declare the proceedings a nullity.

Exercising our revisional powers as provided under S. 4(2) of the Appellate Jurisdiction Act, Cap. 141 RE. 2002, we quash all the proceedings and judgment of the trial court and set aside the sentence of life imprisonment. We have carefully given a deep thought as to whether we should order a retrial. The appellant was charged with a serious offence of attempted murder which carries a maximum sentence of life imprisonment. He has been in prison for six years. We think no injustice would be occasioned if we order a retrial. We order the appellant to be tried *de novo* before a different judge and a new set of assessors.

Order accordingly.

DATED at **TABORA** this 14th day of October, 2016

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL