IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 530 OF 2015

BERNADETA BURA @ LULU .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Opiyo, J.)

Dated 15th day of July, 2015

in

Criminal Session No. 44 of 2014

JUDGMENT OF THE COURT

22nd & 26th February, 2016

LUANDA, J.A.:

BERNADETA BURA @ LULU (henceforth the appellant) was charged and convicted of murder by the High Court of Tanzania at Babati (Arusha Registry). She was sentenced to suffer death by hanging. Aggrieved by the finding of the trial High Court, she has preferred this appeal in this Court.

The evidence on record shows that there is no dispute at all that the deceased one Jumanne s/o Hassan died an unnatural death. According to

the Post Mortem Report, the cause of death was strangulation and compression of private parts resulting to sharp pains. The real issue for determination and decision was who caused the death of the deceased.

The prosecution side called six witnesses to prove its case. The conviction of the appellant was based on circumstantial evidence. The appellant denied to have murdered the deceased. However, before we go to the merits of the appeal, we have come across to one procedural irregularity; it is this. After both sides had made their final submissions, the learned trial Judge briefly adjourned the case so as to enable her summed up the case to the assessors. When the trial resumed, the record indicates thus:-

> ***COURT RESUMES***
>
> ***State Attorney****: Honourable Judge the Coram is as it was in the morning the matter is coming up for summing up to assessors. We are ready.*
>
> ***Counsel for the defence:*** *We are also ready.*
>
> ***SUMMING UP.***

Made accordingly.

Opinion of Assessors.

Then the assessors gave their opinions. Out of three assessors, two returned the verdict of guilty; whereas one found the appellant not guilty. It is the mode of summing up the case to assessors which prompted us to seek the views of the counsel for the parties as to whether the way the summing up was done was proper. In this appeal Mr. Adam Jabir advocated for the appellant. The respondent/Republic was represented by Ms. Elizabeth Swai, learned Senior State Attorney. Mr. Jabir told us that the way the summing up was done was not proper. It offends s. 298 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) as such it vitiates the proceedings. He urged us to quash the proceedings and order a trial.

Basically, Ms Swai joined hands to what had been said by Mr. Jabir. In elaboration she said in terms of s. 265 of the CPA all trials in the High Court are required to be conducted with the aid of assessors. After the close of both cases, prosecution and defence, the trial Judge is required to sum up the case to the assessors so that they help the trial Court through

their opinions to arrive at a just decision. In this case she said it is very difficult to know what was addressed to the assessors. It is questionable whether really section 298 (1) of the CPA was complied with as such it cannot be said the trial was conducted with the aid of assessors. She urged us to quash the proceedings, set aside the sentence and order a retrial.

The starting point is s. 265 of the CPA. It reads:-

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

The wording of the section is couched in mandatory terms. It is clear then that if the High Court conducts a criminal trial without assessors, the trial is a nullity. But how the assessors assist the High Court in criminal trials to arrive at a just decision? The answer is twofold. One, the High Court to avail the assessors with adequate opportunity to put questions to witnesses as provided for under s. 177 of the Evidence Act. Cap. 6 R.E. 2002. Through asking questions to witnesses, the assessors will help the Court to know the truth. Two, which is relevant to our case, is that in terms of

section 298 (1) of the CPA when the case on both sides is closed, the judge is required to sum up the case and then take the opinions of assessors. (See, **Augustino Ladaru v. Republic,** Criminal Appeal No. 70 of 2010 (unreported)). Since the second limb is where the crux of matter lies, we reproduce the section for ease reference. Section 298 (1) of the CPA reads:-

> *298. – (1) When the case on both sides 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 and as to any specific question of fact addressed to him by the judge, and record the opinion.*

The word "may" in its ordinary meaning connotes discretionary. But the Court had the occasion to say that though the word used is discretionary, as a matter of a long established practice, it is prudent for the trial judge to sum up the case. Indeed that augur well with the spirit behind the provisions of section 265 of the CPA reproduced supra. (See **Hatibu**

Gandhi & Others [1996] TLR 12 and **Khamisi Nassoro Shomar v. SMZ** [2005] TLR 228). Probably it is high time the section be amended by deleting the word "may" appearing in section 298 (1) to read "shall" to harmonize with section 265 of the CPA.

Be that as it may, in the instant case we have shown the learned trial judge to have indicated in the record that she summed up the case to the assessors. Since it is not in the record, there is likehood that she did it orally. In case she did that, we are not in a position to say what exactly she had told the assessors. Did the learned trial judge sufficiently summed up the case to the assessors by explaining fully the facts of the case before them in relation to the relevant law? We cannot tell. We would have been in a position to answer that question only if the summing up was in writing. The summing up notes in writing will enable this first appellate Court see whether or not the trial learned judge sufficiently summed up the case to the assessors. Since that was not done, we are of the firm view that section 298 (1) of the CPA was not complied with. The trial cannot be said to have been conducted with the aid of assessors. We entirely agree with both learned counsel.

In the exercise of our revisional powers as provided under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, the proceedings and judgment of the trial High Court are quashed. The sentence is set aside. We order a retrial before another judge and a new set of assessors.

Order accordingly.

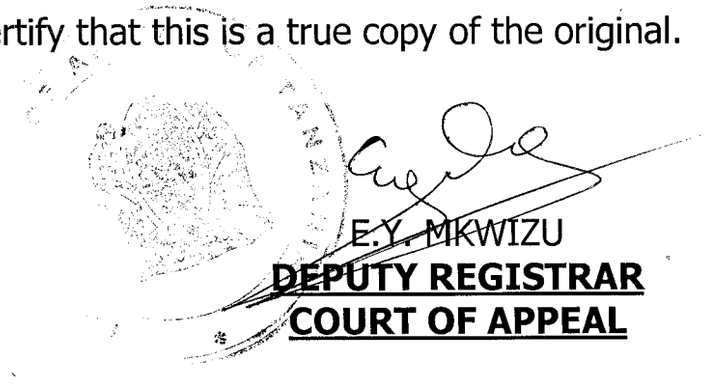
DATED at **ARUSHA** this 25th day of February, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL