IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 275 OF 2015

1. SAMWELI GITAU SAITOTI @ SAIMOO @ JOSE
2. MICHAEL KIMANI PETER @ KIM @ MIKE ..... **APPELLANTS**
3. CALIST JOSEPH KAMILI KISAMBU KANJE

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Sambo, J.)

Dated the 11th day of June, 2014
In
Criminal Session Case No. 6 of 2011
.....

JUDGMENT OF THE COURT

29th February, & 1str March, 2016

LUANDA, J.A.

The appellants in this appeal namely, SAMWELI GITAU SAITOTI @ SAIMOO @ JOSEE, MICHAEL KIMANI PETER @ KIM @ MIKE and CALIST JOSEPH KAMILI KISAMBU KANJE (hereinafter referred to as the 1st, 2nd and 3rd appellants respectively) and nine others were charged with murder c/s 196 of the Penal Code, Cap 16 R.E. 2002. The 1st and 2nd appellants were convicted as charged and each was sentenced to suffer death by

hanging. The 3rd appellant was convicted with a minor offence of accessory after the fact to murder and sentenced to 5 years imprisonment. The other nine were acquitted at the close of the prosecution case.

On 12/2/2016 before the date of hearing of the appeal, the 3rd appellant wrote a letter while in prison which was endorsed by The Officer Incharge of Prison, Arusha to the Registrar of the High Court that he no longer wish to prosecute his appeal. He accordingly prayed to withdraw the appeal. Since the application to withdraw the appeal was made when the case had already been cause listed, we invoked Rule 4 (2) (a) of the Court of Appeal Rules, 2009 (the Rules) and dismissed the appeal. So, we remain with the 1st and 2nd appellants.

Initially the appellants had raised eighteen grounds of appeal in their joint memorandum of appeal. Some few days before the hearing i.e. 24/2/2016 the advocate for the appellant one Mr. Edmund Ngemela who was assigned to defend the appellants added two more grounds. On 26/2/2016 Mr. Ngemela's Chambers informed the Court that, Mr. Ngemela would not be available as he was bereaved by his mother and has

travelled to Mwanza to attend burial. The case was assigned to Mr. John Materu, learned Advocate. On the same day, Mr. Materu filed "a fresh" Memorandum of Appeal consisting of two grounds. The grounds raised are:-

1. *That, the gentlemen assessors were not fully involved in the trial making the purported trial a nullity.*
2. *That, the learned trial judge failed to properly direct the gentlemen assessors on the issues involved in the case against the appellants during summing up to assessors.*

When the appeal was called on for hearing, Mr. Materu who was assisted by Mr. Fidel Peter abandoned the grounds raised by the appellants and those filed by Mr. Ngemela. Mr. Materu strongly believed and rightly so, as we shall demonstrate in this judgment, the appeal will be disposed of on procedural irregularity which went to the root of the trial.

In this appeal Ms. Stella Majaliwa and Mr. Hassan Nkya, both learned Senior State Attorneys represented the respondent/Republic. The respondent did not resist the appeal on those two grounds.

Submitting on the first ground, Mr. Materu took us to the record and showed in some instances the assessors were not given opportunity at all to put questions to the witnesses. In some instances the trial learned judge gave one assessor alone to do so. Further, he went on to say some pages show all the assessors were given opportunity but lumped together. That, he said goes against s. 177 of the Evidence Act, Cap. 6 R.E. 2002 read together with s. 265 of the CPA. Section 177 of the Evidence Act, reads:-

> *177. In cases tried with assessors, the assessors may put any questions to the witnesses, through or by leave of the judge, which the judge himself put and which he consider proper.*

S. 265 of CPA requires any Criminal trial in the High Court to be conducted with the aid of assessors. Since that was not done, the omission vitiates the entire proceedings.

Turning to the second ground, Mr. Materu said the learned trial judge did not at all summed up the case. He merely summarized the prosecution and the defence cases and invited the assessors to give their opinions.

All the assessors returned the verdict of not guilty. For instance, he did not explain to the assessors what kind of confessional statements is admissible in court; he did not touch the evidence of **alibi** of the appellant at all. Mr. Materu said in view of the above shortcoming, it cannot be said the trial was with the aid of assessors.

Mr. Nkya joined hands with Mr. Materu. He added that the trial learned judge did not also explain to the assessors what the evidence of recent possession was all about. Both prayed the Court to invoke its revisional powers under s. 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 quash the proceedings, set aside the sentence and order a retrial.

We have carefully read the record of appeal. As regards to assessors to put questions to the witnesses, we discovered as correctly observed by

Mr. Materu that some pages show the assessors to have not been given opportunity to put questions to witnesses. Other pages show one assessor alone was given opportunity to put questions to witnesses and some pages show all the assessors to have been given opportunity but they were lumped together and indicated that they had no questions. We discovered the following as correctly observed by Mr. Materu:-

(i) Assessors were not given opportunity to put questions in respect of the following witnesses-

PW6 - page 105
PW7 - page 100
PW8 - page 111
PW12 - page 149
PW13 - page 152
PW15 - page 170

(ii) one assessor only was given opportunity to put questions to witnesses-

PW11 – Page 142
PW14 – Page 158

(iii) Assessors lumped together and shown they had no questions-

PW16 – page 162

PW17 – page 180

(iv) One assessor was not given opportunity to put questions – PW10."

As regard, to summing up to the assessors, the record show that the learned trial judge merely summarized the cases for the prosecution and defence. He did not explain for example what constitutes the offence of murder; the burden of proof; what is circumstantial evidence and its legal implication; likewise the doctrine of recent possession. He also did not address the assessors if one is raising a defence of **alibi**, as in this case, what they were required to consider. The assessors were not addressed on vital points of the case.

In terms of section 265 of the CPA when the High Court conducts a criminal trial, it is required to sit with assessors to arrive at a just decision. The section is couched in mandatory terms. It is clear then that if the High Court conducts a criminal trial without the aid of assessors, the trial is a nullity.

But how the assessors assist the High Court to arrive at a just decision? In its recent decision, in **Bernadeta Bura @ Lulu v. R.**, Criminal Appeal No. 530 of 2015 (unreported) this Court said:-

> *"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)).*"

And the importance of summing up of the cases to the assessors was underscored in the then decision of the Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R.,** [1954] 21 EACA 392. It 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."

In the instant case, the learned trial judge did not at all or insufficiently give the assessors opportunity to put questions to the witnesses. He did not also sum up the case properly by drawing their attention in a number of vital points to the assessors. The omissions infringes section 177 of the Evidence Act and section 298 (1) of the CPA. The trial cannot be said to have been conducted with the aid of assessors as envisaged under section 265 of the CPA. We entirely agree with both learned counsel that the omissions explained above are fatal and went to the root of trial. We declare the proceedings a nullity.

We have given a deep thought as to whether we should order a retrial. Given the fact that a human life was lost, the interests of justice

demand that we should order a retrial. (See, **Fatehali Manji v. R.,** [1966] E.A. 343). We order the appellants and the one who withdrew his appeal be tried afresh as expeditiously as possible before another judge and a new set of assessors.

Order accordingly.

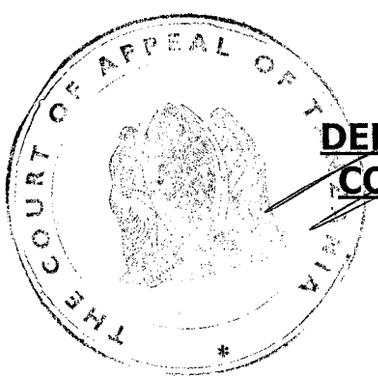
DATED at **ARUSHA** this 29th day of February, 2016.

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