IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: KIMARO, J.A., KAIJAGE, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 162 OF 2016

KHALIFA AJIBU MUSEVEN.....APPELLANT

VERSUS

THE REPUPLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mtwara)

(Mwaimu, J.)

dated the 30th November, 2015

in

Criminal Sessions Case No.21 of 2014

JUDGMENT OF THE COURT

18th & 22nd July, 2016

KIMARO, J.A.:

The appellant was convicted for the offence of murder. He was alleged to have intentionally killed Mohamed Rashidi @ Wayaga on 29th March 2013 at Ligalu "A" area in the Municipality and Region of Mtwara.

From the judgment of the learned trial judge the appellant's conviction was based solely on circumstantial evidence. The learned judge pointed out three aspects which he considered were sufficient to amount to

circumstantial evidence for the conviction of the appellant. From the testimonies of Hassan Zuberi Makwela (PW1), and Selemani Hamisi Athumani (PW2), on 29th March 2013 the appellant went to a place known as "Kijiwe cha Nice" tracing for the deceased whom he had earlier on blamed for having stolen a bag of cement from him. There, there is a garage known as Kovu. Although the deceased attempted to run away he was apprehended because the appellant shouted thief, thief,. Upon the deceased being arrested, the appellant left with the deceased saying that he was taking him to the police station. Abdallah Mohamed Mkunjuugu (PW3) testified to have on the same date at 19.00 hours heard shouts. On making a follow up to the place the shoutings were coming from, he found the appellant whom he knew before, beating a person whom he did not know. On asking for the reasons for beating that person, the appellant replied that the person stole his bag of cement. PW3 urged the appellant to stop beating that person. On the next day, 30th March 2013 the deceased was found dead, dumped near Ligula Hospital.

The appellant admitted in his defence to have gone to Kovu garage to look for the deceased. He also admitted having complained to the persons he found with the deceased that he had stolen a bag of cement from him.

He said although he had intended to take the deceased to the police station, his friends advised him not to do so because the deceased had another pending case. He was advised to settle the matter amicably. He left the deceased on agreement that they should go with Mula at the site where he was doing construction on the next day. Mula was not called to testify. On the next day Mula went to the house of the appellant but the deceased was not seen and the report he received later was that he was killed. Subsequently he was charged with the murder of the deceased which he denied to have committed.

The learned trial judge was satisfied that the appellant committed the offence. The conviction was based on the principle that he was the last person to be seen with the deceased alive. The motive for the killing was associated with the appellant's complaint that he had grudges with the deceased that he stole a bag of cement from him. The appellant was seen by PW3 beating a person. The learned trial judge in the evaluation of the evidence by the prosecution and the defence reached a conclusion that:

> *"Certainly I would say that the prosecution witnesses were credible and made a clear explanation on how the accused was involved in the death of Wayanga.*

The accused had a grudge with the deceased, which formed malice aforethought and when he beat the deceased with a piece of wood in the presence of PW3, he had started to execute his ill will motive."

The appellant was then convicted and sentenced to suffer death by hanging.

Aggrieved, the appellant through Mr. Moses Mkapa learned advocate filed one ground of appeal challenging the conviction and the sentence of death by hanging. The ground of appeal is that the Honourable trial Judge erred in law and fact by failure to consider that, the circumstantial evidence was not enough to prove the case beyond reasonable doubt against the appellant.

Before us for the hearing of the appeal, the parties were represented by Mr. Moses Mkapa, learned advocate, and Mr. Ladislaus Komanya, learned Senior State Attorney for the appellant and the respondent respectively. They submitted in length the views they hold in respect of the ground of appeal filed by the appellant. However, because of a procedural irregularity

raised by the Court "*suo moto*" we will not dwell with the ground of appeal. Instead, we will address the procedural irregularity noted in the trial.

Section 265 of the Criminal Procedure Act, [CAP 20 R.E. 2002] provides that trials in the High Court are carried out with aid of assessors. The section reads:-

> "*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.*"

After the hearing of the evidence for the prosecution and the defence is completed, the law requires the learned trial judge to sum up the evidence for the prosecution and the defence and require each of the assessors to give his/her opinion orally, as to the case generally or on specific question of fact addressed by him and record their opinion. The section relevant on this aspect is 298(1) of Cap.20. The section reads:

> "*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 Court required the learned advocate for the appellant and the learned Principal State Attorney for the respondent to address the Court on whether the summing up of the case at page 31 of the record of appeal met the requirement of the law as given in section 298(1) of Cap. 20.

The learned advocate for the appellant was of the opinion that the summing up by the learned judge was too general and it did not lead the assessors well on the principle that was involved in the evidence which was used to convict the appellant. In the summing up to the assessors, the learned judge after giving a summary of the evidence of the prosecution and the defence witnesses directed the assessors as follows:

"You have the right to believe either side and give your opinion. However, before you give your opinion, you have to take into account that there was no eye witness who told the Court that he saw the accused killing the deceased. The prosecution

evidence is based on circumstantial evidence which suggests that the accused was the last person to be seen leaving with the deceased. After he had made threats in the presence of PW1 and PW2 that he would break the legs and hands of the deceased

should he found him after he had stolen his bag of cement. Apart from the prosecution evidence you should also consider the accuse'd defence. You remember that he denied to have left the deceased apprehended by him. You have to consider the weight of the evidence on both sides and give your opinion accordingly. Should you find that the prosecution case is doubtful and has material contradiction you should advice accordingly as always it is the burden of the prosecution to prove a case beyond reasonable doubt"

On his part, the learned Principal State Attorney was of the opinion that the summing up given by the learned trial judge was sufficient. It directed the assessors on the evidence that was given and they gave their

opinion. A further procedural aspect in respect of the assessors which the Court required the learned advocate and the learned Principal State Attorney to address is the type of questions which the assessor put to the witnesses and the appellant. The learned advocate said the questions were that of a cross examination and in that respect the assessors abdicated their role and stepped into the shoes of the defence counsel and the prosecution. The learned Principal State Attorney said the questions sought for clarification only.

The case of **Charles Lyatii @ Sadala V Republic** Criminal Appeal No. 290 of 2011 (unreported) is one of the cases in which the issue of summing up to the assessors arose. In that case the Court formed the opinion that malice aforethought, one of the ingredient of the offence for murder was not well explained to the assessors. That portion of the summing up to the assessors which prompted the Court to raise their concern reads as follows:-

> " 1. *I (sic) you find the accused shot the deceased intentionally, i.e. with malice aforethought, you should advise the court to find the accused guilty of murder as charged.*

2. *If you find the defence of the accused probable, you should advise the court to convict him of manslaughter u/s 195 of the Penal Code."*

In the said case the Court held that:-

> *"...the learned judge did not properly sum up the case, but also did not direct the assessors as to what amounts to malice aforethought as is provided for under section 200 of the Penal Code, Cap. 16 R.E. 2002. We think the assessors were not properly directed as to what is all about. That in our view is a non-direction to the assessors on a vital point on this case."*

Since under section 265 of Cap 20 the High Court is properly constituted when it sits with assessors who are well directed on their role to advise the trial High court on matters of fact only, an omission for a proper direction to them affects the trial. Where the assessors are left to take sides with any of the parties in the trial then the High Court will definitely not be

properly constituted. As stated before the conviction of the appellant was based on circumstantial evidence. The circumstantial evidence was comprised of three aspects. The appellant was the last person to be seen with the deceased alive. The two eye witnesses (PW1 and PW2) at the Kovu garage where the appellant met the deceased said the appellant left with the deceased. All the three prosecution witnesses (PW1, PW2 and PW3) said the appellant blamed the deceased for stealing a bag of cement from him and he was taking him to the police. PW3 said he saw the appellant beating a person. The learned judge considered the three aspects and concluded that the three aspects considered left no doubt that the appellant was the one who committed the offence.

Back to the summing up which the learned trial Judge made to the assessors, it is apparent that the learned trial judge did not bother to let the assessors know what is circumstantial evidence. Assessors are lay men. In his judgment, the learned judge cited the case of **Hamida Mussa V Republic [1993]** T.L.R. 123 which is one of the cases which explains what is circumstantial evidence. The Court held that:

> "*circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the*

innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

This is what the learned trial judge should have told the assessors and not simply to mention it without clarifying what he meant when he talked of circumstantial evidence. Another important matter which the learned trial judge should have clarified to the assessors who sat with him in the summing up, was to explain to them the ingredients of the offence of murder. It was not sufficient to tell them that:

"The accused person has been charged with the offence of murder contrary to section 196 of the Penal Code."

The case of **Washington s/o Odindo V R [1954]** E.A.392 explains the importance of having a thorough summing up of the evidence and the law involved in the case to the assessors. The Court said:

"The opinion of the 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 law. If the law is not explained and the attention not drawn to the salient facts of the case, the value of the assessors opinion is correspondingly reduced."

The reality of the above direction is reflected by the opinion of the assessors which they gave after the summing up. The three assessors who sat with the learned trial judge gave similar opinions. We will reproduce the opinion of one of them to show that they were not properly directed.

"3rd Assessor Dadi Salum: There was a dispute between deceased and accused on a debt. Deceased owned accused T.shs. 20,000/=. Accused did not pay. The accused was required by PW1, PW2 and PW3 to take the deceased to the police station. He took him to his own destination. The accused was last seen leaving with Wayanga. The accused caused the deceased death therefore is guilty of the offence charged."

Obviously such an opinion from an assessor in a murder trial is indicative that there was no proper directions given to the assessor. In the summing up by the learned judge there is no mention of the debt of T shs. 20,000/=. There is not even a mention that the appellant took the deceased to his own destination. Such a gap, causes a miscarriage of justice.

Another concern that was expressed by the Court was the type of questions which the assessors were allowed to put to the witnesses. In his defence the appellant testified that:-

> *" When I arrived at Kovu garage Wayanga ran away. He ran away because before that day he had taken my bag of cement. He ran to the direction of Kisutu."*

When the assessors were allowed to put questions to the appellant, The 1st Assessor Ammy Mchenga asked questions which were responded to by the following answers.

> *"Wayanga ran away before I told him of the work. I shouted thief because he had stolen my bag of cement so I wanted him either to hand me back the*

cement bag or work for me to compensate for the stolen bag."

The questions which the assessor asked were not seeking for clarification as the learned Principal State Attorney said. The witness was very clear in his evidence on how he arrived at the area and what took place there. The questions amount to cross examining the witness; a role which the assessor should not perform.

In **Tulubuzya Bitiro V R** [1982] T.L.R. 264 the Court cited the "*ratio decidendi*" in the case of **Bharat V The Queen** [1959] AC 533 which approved the principle that when the trial is required to be conducted with the aid of assessors and a misdirection occurs on a vital point, the trial judge cannot be said to have been aided by those assessors. The Court said:

"*Since we accept the principle in **Bharat's** case as being sensible and correct it must follow that 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 aid of assessors. The*

position would be the same where there is non-direction to the assessors on a vital point."

The trial in this case suffers from the same shortfall of undetailed directions in the summing up to the assessors on the ingredients of the offence, the evidence that was intended to be relied upon by the prosecution, and the failure to direct the assessors on the type of questions appropriate for them to ask the prosecution witnesses and the accused person. The role of assessors is well explained in the cases of **Abdallah Bazamiye % Another V R** [1990] T.L.R.162 and **Mapuji Mtogwshinge V R.** Criminal Appeal No. 162 of 2015 (unreported). The duty of the learned trial judge is to supervise and control the assessors on the questions they are allowed to put to the witnesses. They are neither allowed to examine or cross-examine witnesses. What the law allows them to do is to seek for clarification where they do not understand the witness. Other relevant cases on this matter are **Makomelo &Two Others V R** Criminal Case No 15 of 2014, **Mathayo Mwalimu and Another V R** Criminal Appeal No. 174 of 2008 and **Godlove Azael @ Mbise V R** Criminal Appeal No 312 of 2007 (all unreported).

All cases mentioned above held that where the learned Judge makes an omission to properly direct the assessors, that irregularity is incurable. Exercising powers of revision under section 4(2) of the Appellate jurisdiction Act, [CAP 141 R.E.2002], we declare the High Court proceedings a nullity. We order a retrial before another judge sitting with different assessors.

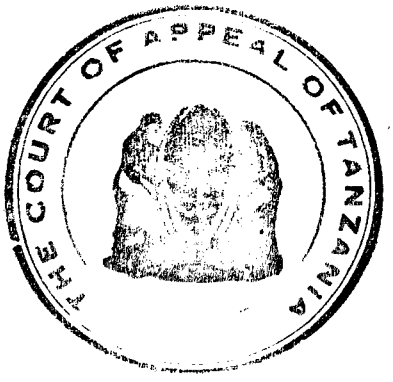
DATED at **MTWARA** this 21st day of July, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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



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