IN THE COURT OF APPEL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 161 OF 2016

SAID MOHAMED MWANAWATABU@ KAUSHA
@ HATIBU MOHAMED MWANAWATABU.....APPELLANT
VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal against decisions of the High Court of Tanzania

at Mtwara)

(Mwaimu, J.)

dated the 25th day of November, 2015

in

Criminal Session No. 45 of 2014

JUDGMENT OF THE COURT

20th & 26th July, 2016

LILA, J.A.:

The appellant, said Mohamed Mwanawatabu@ Kausha @ Hatibu Mohamed Maulidi Mwanawatabu, together with one Hamisi Kassim@ Ding'ombe, were arraigned before the High Court sitting at Mtwara on an indictment of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002. It was alleged that the two, on 24/10/2012, murdered one Ally Chibwana Sanula at Chikongola village within Tandahimba District in Mtwara

Region. They denied committing the offence. Trial ensued. The prosecution marshalled three witnesses to prove the charge against them. At the closure of the prosecution case, Hamisi Kassim @Ding'ombe who then featured as the first accused was acquitted on no case to answer. The appellant was found to have a case to answer. He was the only defence witness. At the end, the appellant was found guilty as charged and was sentenced to suffer death by hanging. Dissatisfied, he filed this appeal. He is represented by Mr. Mosses Mkapa, learned advocate while the Respondent Republic is represented by Ms. Nunu Mangu, learned State Attorney.

Briefly, the material facts emanating from the trial Court record is as follows. Ally Chibwana Sanula, the deceased, worked as a night watchman guarding the shops belonging to Haji Sefu Mamu (PW1) and Fadhili Abdillah Mawazo (PW3) who owned shops at Mahuta township. In the night of 23/10/2012 PW1 was awakened by noise coming from outside. He got outside and saw two people at PW3's shop who he allegedly identified to be the appellant and Hamisi Kassim. PW1 phoned Salim Halifa Bilali (PW2) who quickly rushed to the scene. The two (PW1 and PW2) went to the scene where they found Ally Chibwana, the deceased, bleeding due to head injury. They took the deceased to Mahuta Health Centre where he instantly died.

Both PW1 and PW2 alleged to have had identified the appellant and Hamisi Kassim using moonlight, electricity light as well as a torch. PW1 also said he identified the appellant by voice.

In his sworn defence, the appellant vehemently denied committing the offence. He raised the defence of *alibi* alleging to have been at Mwananyamala kwa Manjunju area within Dar es Salaam City at the time the offence was committed (on 23 and 24/10/2012).

All the same, the trial judge sitting with three assessors namely Adina Kaisi, Rashidi Faida and Mwanahamisi Kasembe, was satisfied that the charge against the appellant was established. He proceeded to convict him as charged and sentenced him as indicated above.

In his judgment, the trial judge was satisfied that the offence was committed at night and that neither of the three prosecution witnesses eye-witnessed the appellant inflicting fatal wound on the deceased. He accordingly, and rightly so, came to a conclusion that the evidence relied upon by the prosecution was purely circumstantial. After analyzing the evidence he further came to a finding that the appellant was properly identified at the scene of crime and that the evidence on record was of such

a nature that there was unbroken chain of events which led to no other conclusion other than the appellant's responsibility on the death of deceased.

Regarding the defence of *alibi* raised by the appellant, the trial judge rejected it on the basis that the appellant was identified at the scene of crime and ruled it to be an unbelievable story.

In his memorandum of appeal, the appellant raised six grounds of appeal. These are:-

1. That, the learned trial Judge erred in law and fact by convicting the appellant and thereby sentencing him without the case being proved against him beyond all reasonable doubts.
2. That, the learned trial judge erred in law and fact by basing conviction on evidence of identification while the appellant was not properly identified at the crime scene because circumstances were not favourable and as a results (sic) none of the witnesses stated any fact in relation to his descriptions, how he looked not even the clothes he was wearing something which raises doubts as to such identification.

3. That all the evidence in record is fundamentally to the extent that the appellant was seen at the seen but given the circumstances of the case here (sic) is a possibility of a mistaken identity, a doubt which should have been resolved in favour of the appellant.
4. That, the learned judge fatally erred in law and fact by disbelieving thereby not giving enough weight to the defence of *alibi* raised by the appellant simply because he was not convinced while it is a canon that the appellant doses (sic) not have a burden to prove his alibi only raising a reasonable doubt which be resolved in his favour.
5. That the learned Judge fatally erred failed to consider the material contradiction and inconsistencies in the witnesses between their testimonies and their statements which the (sic) made at the police station particularly regarding the number of persons seen at the scene source something which renders whole of their testimonies an afterthought and mainly a fabricated version.
6. That, the learned trial Judge materially prejudiced the accused by failing to consider that all the evidence on

record is about seeing the appellant at and around the crime scene and therefore a mere presence at the scene is not sufficient proof that he committed the charged offence.

In addition, before hearing, Mr. Mkapa, learned Advocate representing the appellant, lodged a supplementary memorandum of appeal with only three grounds of complaints coached thus:-

1. That the Honourable trial Court erred in law and fact by failure to consider that the appellant was not identified thus evidence by prosecution on visual identification was insufficient to amount to conviction.
2. That the Honourable trial Court erred in law and fact by failure to consider the appellant's defence of *alibi* and shifted the burden of proof to the appellant.
3. That the Honourable trial Court erred in law and fact by relying in exhibit P2 without considering that the said exhibit is / was doubtful and not detailed.

Before us, and before submitting on the merits of appeal, the learned counsel were invited to address the Court on the issue "***whether or not***

summing up to assessors was adequate on the facts of the case in relation to the law applicable."

Mr. Mkapa, learned advocate for the appellant, informed this Court that trial was conducted in the presence of three assessors. He, however, said they were not properly directed on crucial issues and legal positions relevant to the case before giving their opinions on visual identification evidence, circumstantial evidence, the defence of *alibi* raised by the appellant and on the issue of malice aforethought. He also said the questions asked by the assessors contravened the provisions of section 177 of the Tanzania Evidence Act (TEA). He said the trial Judge did not guide the assessors on the kind of questions to ask. He, further, said during summing up the trial Judge did not address the assessors on the issue of malice aforethought.

On her part, Ms. Mangu, learned State Attorney, was at first inclined to the view that the trial Court was properly constituted arguing that the assessors were properly directed on the various legal issues like that the offence of murder was committed at night, source of light and that they should consider such issues when giving their opinions. But when asked by the Court to consider if the defence of alibi was adequately elaborated to the assessors, she conceded that it was not sufficiently elaborated. She further

conceded that the trial Judge did not explain to the assessors how the offence of murder was committed particularly the issue of malice aforethought. She ultimately concluded that the assessors were not properly directed and addressed by the trial Judge before they gave their opinion. She urged this Court, considering that they have enough evidence against the appellant, to order a retrial.

In his short reply, Mr. Mkapa, learned Advocate, joined hands with the learned State Attorney that in view of such fatal procedural flaws this Court should order a retrial.

Having carefully studied the trial Court record we, on our part, are inclined to associate ourselves with the views of counsel for both sides.

Trials before the High Court are governed by law. The provisions of section 265 of the Criminal Procedure Act, Cap 20, categorically states that all trials before the High Court shall be with the aid of assessors. That section provides:-

> "· *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."*

It is a common ground that in the case under consideration the trial Court sat with three assessors hence complying fully with the above quoted provisions of the law. There is a chain of authorities showing the role of assessors to mention but few are **Chrisantus Msinga v. Republic, Criminal Appeal No. 97 of 2015** cited with approval in **Geogray Kisha v. Republic, Criminal Appeal No. 69 of 2015**, **Mathayo Mwalimu & Another v. Republic, Criminal Appeal No. 147 of 2008** (unreported) and **Charles Lyatuu @ Sadal v. Republic, Criminal Appeal No. 290 of 2011** (unreported) cited in **Kamonogwe Singiri V. Republic, Criminal Appeal No. 235 of 2015** as being to aid / assist the Court in a fair dispensation of justice.

As to how and when the assessors come to aid / assist the Court, section 298(1) is very clear. It provides:

> *"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 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."

It can therefore affirmatively be said that in trials before the High Court, the High Court is properly constituted when sitting with assessors who are properly directed and whose opinions are properly recorded.

It is the assessors legal obligation in trials before the High Court to state their respective opinions on the case generally and on any specific question of fact addressed to them by the trial judge. Elaborating on the purpose of summing up, this Court, in **John Mlay v. Republic, Criminal Appeal No. 216 of 2007** (unreported) stated in very clear terms that the purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion, it must touch on all essential elements of the offence of murder in that the notice must make reference to the charge of murder facing the accused person and must explain what murder is. The Court further stated that the summing up must make reference to the burden of proof, that it is the duty of the prosecution to prove the offence charged beyond all reasonable doubts, elaborate the cause of death, main issues and the issue of credibility of witnesses.

On the above authority, the opinion of assessors would be focused and hence of value only if they are properly directed by the judge. Insisting on this, in **Washington s/o Odimbo v. Republic** [1954] E.A. 392 it was held that:

> *"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."* [emphasis is ours]

The issue in the instant appeal, is whether or not, the trial judge did properly sum up the case to assessors.

As indicated above, the appellant was not seen murdering the deceased. The evidence relied on by the prosecution was that the appellant was seen and identified, actually recognized it being alleged that he was known long before by PW1, PW2, and PW3, at the crime scene. This was purely circumstantial evidence. The trial judge heavily relied on this to convict the appellant. Surprisingly, in the summing up the trial judge did not completely mention let alone elaborating on how such principle operates.

Connected to the above is that the appellants conviction was based on visual identification and at night time. In the summing up to assessors the trial judge not only failed to caution the assessors on the principles governing visual identification evidence as stated in **Waziri Amani v. Republic [1980] TLR 252** but also did not caution them on its unreliability and the dangers of there being a mistaken identify which are crucial matters to take into account before giving their opinion.

Further to the above there was no indication however slight in the summing up that the trial judge addressed the assessors on how the offence of murder is committed particularly the need for the prosecution to prove malice aforethought. He, instead, left it aside and alone delt with it in his judgment where he stated that:

> *"Under section 200 (c) of the Penal Code malice aforethought may be inferred where death occurs in the course of coming an offence punishable by more than three years imprisonment."*

The above legal position was not put open to the assessors during summing up. In **Jesinala Malamula v Republic [1993] TLR 197** at page 200-201 cited in John Mlay's case (supra) the trial judge who had found that

there was provocation removed the question of provocation from the assessors and decided it on his own. The Court held that to be fatal to the resulting conviction for it was impossible to know what the assessors would have said had the question been put to them.

Lastly there was the issue of the defence of *alibi* raised by the appellant. In the summing up to assessors this is what the trial judge stated;

> *"Finally you have heard the accused's defence that he was not at Mahuta at the date Ally Chibwana was assaulted and later died. His evidence is that he was in Dar es Salaam."*

Apart from informing the assessors the above assertion, the trial judge ought to have had explained to the assessors the implication of such defence and the legal position pertaining to its application. That, in the summing up, was not done.

Fortunately, learned State Attorney and defence counsel readily conceded to the above predicaments apparent on the trial Court record.

The cumulative effect of not properly summing up the case to assessors is that the assessors were denied their right to give a proper opinion. Consequences of such failure were discussed in details in the case of **R. v Grospery Ntagalinda @ Koro, Criminal Appeal No. 73 of 2014**

and that of **Charles Lyatuu @ Sadal v. R, Criminal Appeal No. 290 of 2011** (both unreported) that it renders the proceedings a nullity. This exposition is based on sound reason that such trial cannot be construed to be with the aid of assessors as was held in the case of **Tulubuzya Bituro v. R, [1982] TLR 264** which quoted a ratio decidendi in **Bharat v The Queen** [1959] AC 533 which stated that;

> *"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 said to be a trial with the aid of assessors. The position would be the same where there is non direction to assessors on a vital point."***

All said, we are inclined to hold, as we hereby do, that the summing up to assessors was not properly done. This irregularity is fatal. In the exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 we accordingly declare the appellant's trial a nullity.

Having nullified the appellant's trial for reasons above stated and for which the prosecution is not to blame, we have now to consider which appropriate order to give in the circumstances of this case. Both counsel are of the view that a retrial order be given.

In the present appeal the appellant was facing a serious charge of murder. Upon conviction he was sentenced to suffer death by hanging which is the only statutory sentence. He has stayed in prison for just above one and a half years. The interest of justice in such a serious charge demands both sides to be given opportunity to be heard so as to ensure justice is done to both sides. This finding is in line with the guidelines promulgated in **Fatehali Manji v R, [1966] EA 341** that:

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will be not ordered where the conviction is set aside because of* insufficiency *of evidence or for purposes of enabling the prosecution to fill up the gaps in its evidence at the trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not necessarily follow that a retrial shall be ordered; each case must depend on*

its own facts and circumstances and an order of retrial should only be made where the interest of justice require."

The circumstances of this case as demonstrated above leads us to a conclusion that this is a fit case to order retrial. We accordingly enjoin the views by both counsel and we hereby order a retrial before another judge of competent jurisdiction with a new set of assessors. We so order.

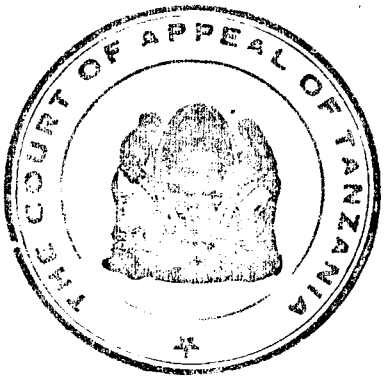
DATED at **MTWARA** this 25th day of July, 2016.

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.



E.Y. MKWIZU
DEPUTY REGISTRAR
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