

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

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

CRIMINAL APPEAL NO. 79 OF 2015

RAMADHANI S/O RANGU.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from decision of the High Court of Tanzania
at Dar es Salaam)**

(Mwakipesile, J.)

Dated 15th day of March, 2013

in

Criminal Session Case No. 96 of 2011.

JUDGEMENT OF THE COURT

2nd & 9th August, 2016

MBAROUK, J.A.:

The appellant, Ramadhani s/o Rangu was charged with the offence of murder contrary to section 196 of the Penal Code [Cap 16 R.E. 2002]. The High Court (Mwakipesile, J)

sitting at Dar es Salaam convicted and sentenced him to suffer death by hanging.

At the trial court, the facts of the case reveals that on 16th day of February, 2010 at about 22:00 hours at Mtangae Village within Mvomero District in Morogoro region, the deceased Athuman Juma Rome met one Ally Mtunya (PW2), a ten cell leader and told him that the appellant injured him. PW2 testified that, thereafter, he went to the appellant's house accompanied with the deceased so as to ask him the reason as to why he injured the deceased. PW2 said, the appellant admitted to have injured the deceased, but it was for the reason that he broke his door. PW2 then advised the deceased and the appellant to go to the Village Executive Officer (VEO) for the purpose of settling the matter. The two agreed and went to the Village Executive Officer in company of PW2, Sami Lazaro (PW3) and one Robert Clemence. PW2 said, while on the way to Village Executive Officer, and for no reason, the appellant picked a knife from his worn clothes and stabbed the deceased on the chest. As a result of that incident, the

deceased could not walk properly. PW2 and those who accompanied him arrested the appellant and took him to Doma Police Station. At the Police Station, it was discovered that the deceased has already passed away, hence sent to hospital. The Post Mortem Report revealed that the deceased death was due to deep penetrated stab wound.

Dissatisfied with the conviction and sentence, the appellant preferred six grounds of appeal and later at the hearing added another ground to the effect that the trial judge failed to comply with the requirement under section 265 of the Criminal Procedure Act as the opinion of one Assessor was not collected. The contents of the initial six grounds of appeal were as follows:-

- 1. The trial judge erred in law and fact by finding the appellant guilty of murder while there was a fight between the latter and the deceased.*

2. *The trial judge erred in law and fact by holding that PW2 and PW3 proved beyond all reasonable doubts that the appellant herein murdered the deceased (Athuman Juma Rome) contrary to Exh. P1 which referred to a different deceased person.*
3. *The trial judge erred in law and fact by holding that the person murdered (Athuman Juma Rome a.k.a. Maximo) is the same as the person who was referred in Exh. P1.*
4. *The trial court decision is incurably defective for contravening S. 291 of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
5. *The trial court decision is invalid for contravening SS. 312(2) and 323 of the Criminal procedure Act, Cap 20 R.E. 2002.*
6. *The trial court erred in law and fact by failing to evaluate and assess the evidence which was adduced before it.*

In this appeal, Mr. Francis Mgare, learned counsel appeared for the appellant, whereas Ms. Anunciatha Leopold, learned Senior State Attorney appeared for the respondent/Republic.

In the course of hearing the appeal, the Court noted a pertinent point and invited the parties to address on it. The said issue is to the effect that whether the trial Judge properly summed up to assessors the facts of the case in relation to the relevant law especially on the issue of malice aforethought as per section 200 of the Penal Code.

In his reaction to the point raised by the Court, Mr. Mgare, conceded that, the trial Judge failed to explain to the assessors on the issue of malice aforethought when she summed up the facts and the relevant law. He therefore said, that vitiate the whole proceedings and hence urged us to quash them all, as the irregularity is fatal and not curable. As to whether, we should order a re-trial or not, he initially prayed for us to set the appellant free as that will not cause any

injustice to the prosecution side. However, he later changed his mind and left it to the Court to decide as to whether there shall be an order for re-trial or not.

On her part, the learned Senior State Attorney concisely submitted that the record is very clear that in her summing up to assessors, the trial Judge failed to explain on an important issue of malice aforethought in this murder case. For that reason, the learned Senior State Attorney urged us to nullify all the proceedings before the trial court and invoke section 4(2) of the Appellate Jurisdiction Act and order a trial de novo before another Judge and another set assessors.

Let us begin by looking at section 298 (1) of the Criminal Procedure Act (the CPA) which reads as follows:-

"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,"

[Emphasis added.]

However, this Court in the case of **Augustino Lodaru v. The Republic**, Criminal Appeal No. 70 of 2010 (unreported) stated as follows on the use of the word "may" in section 298 (1) of the CPA:-

*"The word "may" in its ordinary meaning is discretionary. However, the Court had the occasion to say that **though the word used is discretionary, as a matter of practice, it is prudent for the judge to sum up the case.**"*

[Emphasis added.]

Taking into account the importance of summing up to assessors, the erstwhile Court of Appeal for Eastern Africa in

the case of **Washington s/o Odingo v. R.** (1954) 21 E.A.

C.A. stated as follows:-

"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 sufficient facts of the case the value of assessors' opinion is correspondingly reduced."

[Emphasis added.]

Furthermore, underscoring the point where assessors are misdirected on a vital point at the summing up stage, the case of **Bharat v. The Queen** [1959] AC 533 stated inter alia:-

"..... a trial is required to be by a judge with the aid of assessors and therefore where assessors are misdirected on a vital point, such

as prosecution, the trial judge cannot be said to have been aided by those assessors."

In the instant case, the trial judge failed to explain and direct the assessors on a vital point concerning malice aforethought as required under section 200 of the Penal Code at the stage of summing up. In the **Bharat's** case (supra) the principle touched on a situation where assessors are misdirected on a vital point, when judge sum up the facts of the case in relation to the relevant law, but we are of the view that, that position would be same even where there is non-direction as it has occurred in this case.

For the reason we have alluded earlier, such an omission occasioned by the trial judge for not explaining or directing the assessors on the vital point on malice aforethought at the stage of summing up, we find the entire proceedings nullity. We therefore invoke the powers conferred upon us under section 4(2) of the Appellate Jurisdiction Act and hereby quash the

conviction and set aside the sentence and order a re-trial before another Judge and another set of assessors.

Having quashed the proceedings, and order a re-trial, we are of the view that, that point alone disposes of this appeal without going any further to examine the grounds of appeal.

We consequently order that, the appellant to be tried afresh as expeditiously as possible. It is so ordered.


DATED at **DAR ES SALAAM** this 5th day of August, 2016.

M. S. MBAROUK
JUSTICE OF APPEAL

K.M.MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSITCE OF APPEAL

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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL