IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 241 OF 2016

CHRISTIAN JONATHAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

dated the 1st day of March, 2016
in
Criminal Session No. 29 of 2014

JUDGMENT OF THE COURT

5th & 14th December, 2017

LILA, J.A.:

The High Court of Tanzania (Bukoba registry) sentenced Christian Jonathan, the appellant, to suffer death by hanging upon finding him guilty of the offence of murder contrary to section 196 of the Penal Code Cap 16 R.E. 2002. He was, together with one Leonidas Petro, accused of murdering one Hamza on 11th day of January, 2013 at Lyengoma Village within Missenyi District in Kagera Region. As it were, Leonidas Petro (then

1st Accused) was acquitted for lack of evidence. Aggrieved, the appellant has preferred the present appeal.

During trial, the prosecution marshalled seven witnesses and, in defence, only Leonidas Petro and the appellant gave evidence. As reflected in both the assessors' opinions during summing up and the trial court judgment, the appellant's conviction relied much on evidence by Editha Petro (PW1) who witnessed the incidence right from the time Leonidas Petro and the appellant arrived at the Pombe shop to the time the deceased passed away.

Briefly, the prosecution evidence was to the following effect. On 10/01/2013 at night time (09:00pm) PW1 was at her residence at Lyangoma Village. There went Leonidas Petro, Ndaise Lyemegi and Hamza at the nearby pombe shop. Leonidas Petro had a bicycle which had a bag in its carrier. He left it outside the club and asked PW1 to keep watching. After a while PW1 saw Hamza pushing the bicycle along the road leading to Mtukula. Later, Leonidas Petro and Ndaise went out only to find the bicycle missing and asked PW1 the whereabout of it. PW1 replied that Hamza (the deceased) had taken it. The two traced the deceased, arrested him and took him to PW1. The deceased denied taking the

bicycle. They tied him up and together with PW1 left to the village chairman. As they were heading to the village chairman the appellant joined them and asked the deceased to bring back the bicycle. The deceased maintained that he had no such bicycle. The appellant then beat the deceased with a stick known as "mlalo" on the shoulders. As they passed over the appellant's house the appellant told his wife to give him two other sticks and was given with which he continued beating the deceased. Soon thereafter, Kiwanuka and Akiza joined and told the appellant to stop beating the deceased. Later on the deceased succumbed and asked to be untied so that he could show where he had hidden the bicycle. The deceased retrieved the bicycle in the appellant's banana farm but had no bag on its carrier. The appellant told the deceased to carry it as they headed to Kitongoji chairman. When asked about the bag, the deceased said he did not know where it was. Then the appellant continued beating the deceased while saying "*mimi kamanda hakuna mtu mwingine kumshika ila mimi kamanda nimemshika.*" Then PW1 was with Leonidas, Ndaise, Kiwanuka, appellant and deceased. That appellant prevented others from beating the deceased while boasting himself that "*mimi kamanda nimemshika.*" Upon arrival at the Kitongoji chairman one

Gozibert Jeremia's (PW3), the deceased who was tired and exhausted fell down after being severely beaten with the two sticks till they broke into pieces. The appellant said the deceased was pretending and forced him to get up but the deceased could not do so. The deceased was put on the bicycle and Leonidas pushed it to Kitongoji chairman (PW1) who then called militiamen to assist Leonidas and the appellant in taking the deceased to the police station. PW1 then left at 07.30 on 11/01/2013. PW3 testified that Leonidas Petro and the appellant took the deceased to him while in worst condition at about 06.00 on 11/01/2017. The deceased had a wound on his right leg and his hand was swollen. PW3 informed the village chairman one John Mbuga (PW5) who reported the matter to police and was told to look for transport for taking the deceased to hospital but while arranging for transport the deceased passed away. He said the appellant admitted beating the deceased so that he (deceased) could show where he had kept the bicycle. Godwin Martin Kamuzora (PW4), a militiaman, responded to the call by PW3 and on arrival thereat he found the deceased helplessly lying on his stomach and no sooner had they secured transport to take him (deceased) to hospital, than the deceased passed away. John Mbuga (PW5), the village Executive Officer of Bubale

Village said he was informed by PW4 the arrest of the deceased who was severely beaten and directed that he (deceased) be taken to hospital but before that could be done he was informed that the deceased had died. Then he went to the scene where he saw the dead body and found Leonidas and the appellant under arrest. Rwebusiga Benedict Barongo (PW6), a Medical Officer conducted the autopsy and found that the cause of death was both internal and external haemorrhage and filled a postmortem report (exh. P1). E5518 D/Cpl Laus went to the scene and drew a sketch map (exh. P2).

In their respective defences, Leonidas Petro and the appellant vehemently denied their involvement in the commission of the offence. Leonidas Petro had it that on 11/01/2013 while on his way back home from the open market (gulio) he passed over a pombe shop and parked his bicycle having a bag on it outside. He asked PW1 to keep an eye on it. Later, he did not find it and was told by PW1 that the deceased had taken it. Having not permitted the deceased to take it, he told those in the club who went to trace the appellant. He, meanwhile, went to report the matter to the ten cell leader.That, the following day (11/01/2013) he was informed by the Kitongoji chairman that his bicycle was found along

Mtukula road and he went to collect it where he found the deceased lying while in bad condition. He said it was then when he was arrested and connected with the offence. He said neither of the prosecution witnesses gave incriminating evidence against him.

On his part, the appellant stated that on the fateful night he was guarding his maize in his farm against wild pigs at his farm located at Kamwena at the Uganda border. He said he was arrested by militiamen along Mtukula road on 11/01/2013 going to buy medicine for his sick child. He discounted the evidence by PW1 on account of the prevalent grudges between them caused by a Shamba dispute.

Basing on the above evidence, the trial court found Leonidas Petro not liable and acquitted him. The appellant was held responsible, convicted and was sentenced as above.

The appellant raised six grounds of appeal in his memorandum of appeal he filed on 29/11/2016. For a reason soon following, we see no reason to reproduce them.

The appellant appeared at the hearing of the appeal and was represented by Ms. Jacquiline Evaristus Mrema, learned advocate. The

respondent Republic had the services of Mr. Nestory Paschal Nchiman and Ms. Chema Maswi, learned State Attorneys.

Ms. Mrema urged the Court to disregard the appellant's memorandum of appeal and instead, she was ready to argue on the grounds of appeal raised in the supplementary memorandum of appeal filed in Court on 27/12/2016. Moreover, in the course of arguing the appeal, she dropped grounds 2 of appeal. In the circumstances only two grounds remained. To discern the grounds that remained in the memorandum of appeal we take pain to reproduce it as hereunder:-

> *"1. That, the Trial Judge erred by considering PW1 as a credible witness while her testimony left much to be desired.*
>
> *2. That, the prosecution case left much to be desired hence failing to prove the case to the required standard."*

We heard Ms. Mrema elaborating on the grounds of appeal. But, for a reason soon to follow, we will not reproduce her submissions in that respect.

Amidst Ms. Mrema's submissions, we raised, *suo motu*, the point of law whether, in view of the summing up done to assessors as reflected from pages 66 to 78, the assessors respective opinions at pages 79 to 81 and the trial judge's judgment at pages 89 to 105 of the record, the assessors were properly directed on vital points of law upon which the case was determined. We drew to her attention to the following points:

First; the import of the defense of *alibi* available under section 194(4) of the CPA as raised by the appellant during his defense at page 55 of the record where he stated that on the fateful night he was at Kamwema at the Ugandan boarder guarding his maize against wild pigs.

Second; the appellant's right of defense to property available under section 18 of the Penal Code. Reference here being that couldn't the appellant's acts be translated to have been geared towards enabling the recovery of the stolen bicycle and bag belonging to Leonidas Petrol and the deceased having been linked with the theft?

Third, the appellant having been charged with murder, whether the elements establishing *malice aforethought* were elaborated to the

assessors and particularly what constituted *malice aforethought* in terms of section 200 of the Penal Code,

Fourth, the effect of failure by the prosecution to call crucial witnesses and how and when the Court can draw an adverse inference. We referred the counsel to pages 97 and 98 of the record where the trial judge, in her judgment stated that Ndaise and Kiwanuka who were mentioned by PW1 to have had witnessed the incident were not called by the prosecution to testify without any reason and the trial judge stated that the Court may draw an adverse inference to the prosecution evidence as such act denied the trial court important information which would assist it in its finding.

Fifth, the credibility of a witness particularly how the same could be determined as reflected during the summing up to assessors at page 68.

Ms. Mrema was quick to state that the assessors were not properly directed by the trial judge on those crucial points of law on which the decision was based. She pointed out that the remedy is that the omission vitiated the trial court's proceedings and judgment hence an order of retrial should be made.

Mr. Nchiman joined hands with Ms. Mrema that the above legal points on which the decision based were not addressed and sufficiently elaborated to the assessors as a result they did not offer useful and meaningful opinions. Like Ms. Mrema, he was of the view that those deficiencies vitiated the proceedings and judgment and for the interest of justice urged the Court to order a retrial before another judge and a new set of assessors.

We have given due consideration to the submissions by counsels of both sides. The issue which need be resolved here, as was raised by the Court above, is whether in the present case the assessors were properly directed by the trial judge before they gave their respective opinions.

We are alive to the mandatory legal requirement that all trials before the High court must be with the aid of assessors whose number is supposed to be not less than two (see section 265 of the Criminal Procedure Act, Cap 20 R.E. 2002 (The CPA). There are three ways through which assessors can assist the court during trial. These are by putting questions to witnesses for clarification of what they had told the court when giving their testimony in terms of section 177 of the Evidence Act, Cap 6 R.E.2002 and giving opinion regarding the verdict of the case

generally and on any specific question of fact addressed to them during the summing up as mandated under section 298(1) of the CPA. (Also see **Selina Yambi and TWO Others Vs R**, Criminal Appeal No. 94 of 2013 and **Charles Lyatii @ Sadala vs R**, Criminal Appeal No.290 of 2011 (both unreported).

In respect of the summing up, the provisions of section 298(1) of the CPA requires the trial judge to, upon conclusion of evidence by both sides, sum up the evidence and then invite the assessors to give their respective opinions. That section states:

> *"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."*

Although the provisions of section 298(1) of the CPA use the phrase *"the judge **may** sum up the evidence"* it does not imply that it is at the court's discretion to do the sum up. When that section is read together with section 265 of the CPA one would realize that not to be the case. The

impression we get is that it is mandatory to summing up the evidence to assessors. Such was the Court's position in the unreported case of **Mulokozi Anatory vs. R,** Criminal Appeal No. 124 of 2014 where it was stated that:

> *"...we wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to S. 265 of the* ***Criminal Procedure*** *Act that all trials before the High Court shall be with aid of assessors,* ***trial judges sitting with assessors have invariably been summing up the cases to the assessors****..."*
>
> [Emphasis added]

The importance of summing up the evidence to assessors was well elaborated by the Court in the case of **Augustino Lodaru vs. R**, Criminal Appeal No. 70 of 2010 (unreported) wherein it quoted the decision of the defunct Court of appeal for East Africa in the case of **Washington s/o Odindo vs R** [1954] 21 EACA 392 to be;

> *"Underscoring the importance of summing up of the case to the assessors, the then Court of Appeal for*

Eastern Africa in ***Washington s/o Odingo vs. R****, [1954] 21 EACA 392 stated, inter alia:*

> *'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 the assessors' opinion*** *is correspondingly reduced...'* "
>
> [Emphasis added]

It is evident that the trial judge is duty bound to adequately direct the assessors to what is now famously known as **all vital points of law** disclosed in the case upon which the decision will be based on so as to enable assessors to give meaningful opinions. (See **Masolwa Salum vs R**. Criminal Appeal No. 206 of 2014 and **Said Mshangama @ Senga vs. R**. Criminal Appeal No. 8 of 2014 (both unreported)).

Having laid down the legal foundation on the issue of sum up to assessors, we now proceed to consider the sufficiency or otherwise of the summing up in the present case.

We, indeed, considering the summing up done to assessors and the judgment of the trial judge, entirety agree with the learned counsel of both sides that the assessors were not properly and sufficiently directed by the trial judge on vital points of law. We will point out the shortcomings.

We will start with the defense of *alibi.* As indicated above the appellant, in his defense stated that during the night when Hamza is said to have stolen the bicycle and beaten to death he was at Kamwema near Ugandan boarder guarding his maize. In his sum up to assessors the trial judge apart from stating so went on to state at page74 that:

> *"Gentle assessors, the learned State Attorney asked the 2nd accused if he told his advocate the defense he intended to give which is the defense of alibi. He replied saying he informed his advocate on such defense which is defense of alibi but they did not file notice in court under s. 194(4) of the CPA that the accused will rely on the defence of alibi."*

But, in his judgment at page 98 of the record the trial judge, while considering the defense of *alibi*, stated:

> *"First the 2nd accused has raised the defence of alibi although he did not file notice of his intention to*

rely on the defence of alibi as required under section 194(4) of the Criminal Procedure Act, nor did he furnish the particulars of the alibi to the prosecution before they close their case as required under subsection 5 of the above mentioned section. There is no reason advanced by the 2nd accused even by his advocate for their failure to do so. I therefore accord no weight to such a defence."

It is apparent that the trial judge was more elaborate in his judgment on the import of the defence of *alibi* and consequences of failure to file notice or furnish particulars of the *alibi* than he did in the sum up. As a result of that shortfall neither of the assessors gave opinion on that aspect.

In respect of the right to defend properties, the prosecution evidence read as a whole brings an impression that the appellant might have beaten the deceased in the process of forcing him (Deceased) show Leonidas's bicycle which went missing and the deceased being named by PW1 as the one who stole it. Such a possible defence was not completely brought to the assessors' attention before giving their opinion.

Again, in the summing up to assessors at page 76 and 77 of the record the trial judge outlined the factors from which malice aforethought

can be inferred to be the type and size of the weapon used, amount of force used and the number of blows inflicted upon the deceased and part of the body where inflicted, the conduct of the accused before during and after the killing and the utterances made by the accused, before, during and after the killing. No elaborations on those factors were given by the trial judge to the assessors as he did in his judgment at page 101 whereat not only the law but also relevant evidence was narrated.

In his summing up to assessors at page 68 the trial judge informed the assessors that it was only PW1 who witnessed the incident as a whole hence the only eye witness and that one Akiza and Kiwanuka joined them at the Kitongoji chairman. He did not inform them the consequences of the prosecution failure to call and testify the two crucial witnesses. Instead, such a legal point was thoroughly considered by the judge at page 97 to the extent of citing the case of **Tumaini Mtayomba vs R**, Criminal Appeal No.217 of 2012 CA (unreported) where the Court stated that where important witnesses are left out the court may draw an adverse inference on the prosecution evidence. Such direction is missing in the sum up and only one assessor (2nd Assessor one Felician Kayombo) spoke of the matter but made no conclusion.

Lastly, read as a whole, it is crystal clear that the appellant's conviction depended on PW1's evidence. Determination of her credence was vital before her evidence could be acted and relied on to found a conviction. Aware of that need the trial judge considered her credibility in details at pages 100 and 101 and came to a conclusion that he had no reason to disbelieve her. Conversely, such analysis was not done to the assessors. The trial judge, apart from stating that PW1 was the only eyewitness at page 68 and 75 nothing was said on the need to consider and determine her credibility. Consequently, neither of the assessors opined on the issue of PW1's credibility.

The deficiencies we have endeavored to demonstrate above have the effect of either the assessors not completely being directed or insufficiently being directed on certain vital points of law on which the case was decided.

There is a chain of authorities by the Court that underscored the duty of the trial judge to not only address assessors on vital points of law but sufficiently do so. And, in either situation the trial is said not to be with the aid of assessors. In the case of **Said Mshangama vs R,** (supra) the Court stated:

"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."

In yet another case of **Tulubuzwa Bituro vs R** (supra) the Court categorically stated 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 the aid of assessors. The position would be the same where there is non-direction to the assessors on a vital point..."

Given the deficiencies in the summing up to the assessors which obtained in the present case and the import of the relevant law and Court decisions, we are satisfied that the trial cannot be said to have been with aid of assessors and the infraction vitiated the trial. We accordingly invoke our powers of revision under section 4(2) of the appellate Jurisdiction Act,

Cap.141 R. E. 2002 and hereby quash all the proceedings and judgment of the trial court and set aside the sentence meted out to the appellant.

Regarding whether we should order a retrial or not, we are mindful of the fact that the appellant was charged with a serious offence of murder and has been behind the bars for just less than two years. We, as were the learned counsel, do not think that he will be prejudiced if an order of retrial is made. We order the appellant be tried *de novo* as soon as practicable before a different judge and a new set of assessors.

DATED at **BUKOBA** this 12th day of December, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OR APPEAL