IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MJASIRI, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 27 OF 2016

ZAKARIA JOSEPH @ IJUMAA NANGWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)
(Maghimbi, J.)

Dated 11th day of May, 2015
in
Criminal Session Case No. 92 of 2013

JUDGMENT OF THE COURT

6th & 12th Dec. 2017

MJASIRI, J.A.:

In the High Court of Tanzania sitting at Arusha, the appellant Zakaria Joseph @ Ijumaa Nangwe was charged and convicted of the offence of murder contrary to section 196 of the Penal Code, [Cap. 16, R.E. 2002] and was sentenced to death. Aggrieved by the conviction and sentence, he has appealed to this Court.

It was the prosecution case that on 21st day of December, 2008 at Gisambalang Village within Hanang District in Manyara Region, the

appellant did murder one Jumanne s/o Athuman. It was alleged that the appellant shot the deceased with an arrow. The appellant denied the charge. The prosecution called five (5) witnesses during the trial.

At the hearing of the appeal the appellant was represented by Ms. Neema Mtayangulwa, learned advocate, while the respondent Republic had the services of Ms. Elizabeth Swai, learned Senior State Attorney who was assisted by Ms. Janeth Masonu, learned State Attorney.

Ms. Mtayangulwa presented a two (2) point memorandum of appeal which is reproduced as under:-

1. *The trial Judge erred in law and in fact for making a finding that the prosecution proved both actus reus and mens rea of the appellant beyond reasonable doubt.*
2. *In view of the above ground this Court should allow the appeal by quashing the conviction and setting aside the sentence.*

Before the commencement of hearing, the learned advocate for the appellant rose to inform the Court that the appeal record was incomplete. According to her, the record did not contain the Judge's notes on the summing up to the assessors. Even though the opinions of the assessors

are reflected in the record, no summing up notes were in sight. She submitted that this was a serious anomaly rendering the proceedings a nullity. She asked the Court to order a trial *de novo*. She also submitted that there were other procedural errors on the record, for instance the assessors instead of putting questions to the witnesses, crossed examined them.

Ms. Swai readily agreed with the appellant's counsel. She submitted that the Judge's summing up notes were missing from the record. The said notes were non existent and could not be found in the original file. She spoke on the important role the assessors have to play in the trial, and the requirement for summing up to them before reaching their decision. She also submitted that the assessors cross examined the witnesses instead of putting questions to them. She asked the Court to order a retrial before a different High Court Judge.

We on our part, after a careful scrutiny of the record are inclined to agree with counsel that there are no summing up notes, despite the record

indicating the decision reached by the assessors. This is indeed a serious anomaly which renders the whole proceedings before the High Court a nullity.

Section 265 of the CPA requires that all criminal trials before the High Court be conducted with the aid of assessors. A trial Judge is therefore duty bound to guide them accordingly. In the absence of the Judge's summing up notes in the record of appeal, it leads to the conclusion that no summing up to the assessors was done, despite the fact that assessor's opinions are reflected in the record.

It is settled law that failure to record the summing up notes to assessors vitiates the entire proceedings. See – **Khamis Nassoro Shomar v. SMZ** [2005] TLR 228. The Court held thus:-

> *"As there was no summing up of the case to the assessors and their opinion was not taken, in similar vein, the proceedings were in contravention of the clear and long established practice of the Court".*

In the instant case even though the opinion of the assessors were recorded, the fact that there was no summing up to them would render the proceedings a nullity.

In **Stanley Anthony Mrema v. Republic,** Criminal Appeal No. 6 of 2000 (unreported), this Court reiterated the position of the law regarding summing up of the case to the assessors applicable in Tanzania. In that case, the Principal Resident Magistrate in exercise of extended jurisdiction, did not properly sum up the case and direct the assessors on the applicable law in the circumstances of the case. In view of this anomaly, the Court allowed the appeal and ordered the case to be tried de novo. The Court reaffirmed the views expressed by the Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R** [1954] 21 EACA 392, a decision which was also followed in **Andrea and Others v. R** [1968] EA 684.

The Court stated thus:-

> *"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 **Stanley Anthony Mrema** (supra) where the assessors had not been properly directed, the Court took a serious view. In the instant case the situation is more grave as there was no summing up of the case to the assessors. See – **Othman Issa Mdabe v. DPP**, Criminal Appeal No. 95 of 2013 (unreported).

In **Samsoni Mukono and Another v. Uganda** [1965] EA 491, it was held thus:-

> *"Although section 283 (1) of the Criminal Procedure Code indicates that when the case on both sides is closed, the Judge is not bound to sum up the evidence to the assessors,* ***it is desirable that he should do so; and that when he does so, notes of the summing up should appear on the records of the proceedings."***

The position in Tanzania, is that it is a deep routed practice. The seriousness of the matter can be determined by the findings of the Court where there is an improper guidance to the assessors.

The importance of the role of the assessors in criminal trials is demonstrated in section 265 of the CPA. We need to examine the legal

position in order to establish the role and significance of assessors in criminal trials.

Section 265 of the CPA provides as follows-

> *"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."*

According to various decisions of this Court, failure to conduct a trial without the aid of assessors renders the proceedings a nullity. See – **Charles Lyatii @ Sadala v. Republic**, Criminal Appeal No. 290 of 2011 and **Kulwa Misanga v. Republic**, Criminal Appeal No. 171 of 2015 (both unreported).

Section 298 (1) of the CPA requires a trial Judge to sum up to the assessors the evidence for the prosecution and for the defence. It provides that:-

> *"When the case on both sides is closed, the judge may sum up 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."

In **Khamisi Nassor Shomari** (supra) this Court, observed that even though the trial Judge's summing up of the case to the assessors is discretionary, it is prudent for the Judge to sum up the case. The Court stated thus:-

"It is our view that this view is in accord with logic and the spirit behind the provisions of section 265 of the CPA."

The Court stated further:-

"In our view, to hold otherwise would negate the impact of this very clear and mandatory provision of the section."

The Court made reference to the case of **Hatibu Gandi and Others v. Republic** [1996] TLR 12, where the Court took the view that although the trial Judge's summing up of the case to the assessors is not mandatory it is prudent to do so as a matter of practice.

In fact the Courts of Appeal of Tanzania and Kenya have subscribed to this practice. The importance of the opinion of the assessors has been underscored in the case of **Washington s/o Odundo** (supra).

In **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007 (unreported), the need to sum up the evidence to assessors was emphasized. The Court stated that the purpose of summing up to assessors is to enable them to arrive at a correct opinion.

In **Laurent Salu and Five Others v. Republic**, Criminal Appeal No. 176 of 1993 (unreported), the Court had this to say in respect of summing up to assessors:-

> *"The Court has to sum up to the assessors at the end of the submissions by both sides. The summing up to contain a summary of facts, the evidence adduced, and also explanation of the relevant law, for instance, what is malice aforethought. The Court to point out to the assessors any possible defences."*

In **Charo Katana Kitsao v. Republic,** Criminal Appeal No. 269 of 2006 [2007] eKLR, the trial Judge failed to sum up the evidence to

assessors. The appellant raised this omission in his supplementary ground of appeal, which read as follows:-

> *"The learned trial Judge erred in law by failing to sum up the evidence to the assessors and give them proper directions as required in law before receiving their verdict. The trial was a nullity for failure to comply with the laid down procedure."*

The court of Appeal of Kenya, making reference to section 322 (1) of their Criminal Procedure Code which is similar to our section 298 (1) of the CPA stated thus:-

> *"Although by its use of the word "may" the above provision gives the court the discretion to sum up the evidence to the assessors before requiring the assessors to state their opinions, by usage and case law, summing-up to the assessors is no longer a discretionary matter, for if the court requires the assessors to be of any use to it, the assessors must make informed opinion which they can only do upon the court summing up the entire evidence to them and at the same time directing them on issues of law,* ***that the summing up must not only be***

done but must be seen to be done. *Summing up to the assessors has gained the force of law and is now a must."*
[Emphasis ours.]

The Court of Appeal of Kenya made reference to the case of **Joseph Mwai Kungu v. Republic**, Criminal Appeal No. 68 of 1993 (unreported), where the Court stated as follows:-

"We would, for our part, now emphatically assert that the practice of summing-up to the assessors is a thoroughly sound one and has been followed for so long that it has acquired the force of law. That is what this Court, was saying in ***LELEI's*** *case and we would add that the practice is so well established that if a trial Judge is to depart from it, then there must be some special and compelling reason for doing so."*

This means, there must be on record evidence that summing-up to the assessors was undertaken or that there was some special and compelling reason why that was not done.

In the instant case, the learned Judge after hearing the entire prosecution case and the defence by the appellant stated as follows:-

> *"Evidence is summed up and elaborated to the assessors for the purpose of recording their opinion. On the guilt of the accused (summed up evidence attached)."*

We entirely agree with both learned counsel, that there is no tangible evidence that the learned Judge summed up the evidence to the assessors. There is no such summary in the record. In order to satisfy ourselves that this requirement has been complied with, the summing up notes must form part of the record. In the absence of the summing up notes, we cannot conclude with certainty whether or not the assessors were guided properly before giving their opinion. See – **Makubi Kweli and Another v. Republic,** Criminal Appeal No. 149 of 2015 (unreported).

In view of what we have stated herein above, we are of the considered view that the entire trial was a nullity. In the result we are compelled to invoke the powers conferred upon us under section 4 (2) of the Appellate Jurisdiction Act [Cap. 141, R. E. 2002] by quashing the

proceedings and setting aside the death sentence meted out to the appellant. We therefore order a trial de novo before another High Court Judge with a set of new assessors, as soon as practicable. The appellant to remain in custody pending retrial.

It is so ordered.

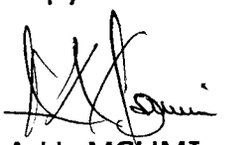
DATED at **ARUSHA** this 7th day of December, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL