IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

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

CRIMINAL APPEAL NO. 102 OF 2016

MBALUSHIMANA JEAN-MARIE VIANNEY @ MTOKAMBALI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Conviction and judgment of the High Court of Tanzania at Bukoba)

(Kairo, J.)

dated the 21st day of March, 2016

in

Criminal Sessions Case No. 83 of 2014

JUDGMENT OF THE COURT

5th & 11th December, 2017

MWAMBEGELE, J.A.:

The appellant, Mbalushimana Jean-Marie Vianney @ Mtokambali, was arraigned upon information for murder in the High Court of Tanzania, it being alleged that on 16.07.2013 at Kihinda Village within the Kyerwa District of Kagera Region, with malice aforethought, he killed a certain Theodozia w/o Genzi. After a full trial, on 21.03.2016,

he was found guilty as charged, convicted and awarded the mandatory death sentence. Aggrieved, he has appealed to this Court on a number of grounds of complaint as appearing in the Memorandum of Appeal he lodged in the Court on 29.11.2016 as well as in the Supplementary Memorandum of Appeal lodged on 29.11.2017 by Ms. Aneth Lwiza, learned advocate. However, at the hearing of the appeal before us on 05.12.2017, Ms. Lwiza, the learned counsel who appeared for the appellant, dropped all the grounds in both memoranda of appeal, except for the fourth in the Supplementary Memorandum of Appeal. The sole ground upon which Ms. Lwiza opted to argue the appeal reads:

> *"That the trial Judge grossly erred in law for failure to make a summing up to assessors on vital points of law on essential ingredients of the offence of murder and vitiated the procedure as well as the judgment thereof."*

In order to appreciate some of the points we will canvass in this judgment which form the basis of our verdict, we find it apt to

explore, albeit briefly, the factual background to the present appeal. It is this: the appellant was, some days before the offence was committed, a *shamba* boy of the deceased. They were living at the same home at Kihinda Village, Kyerwa District, Kagera Region. The deceased used to sale local brew at her home. On the fateful day; on 16.07.2013 to be exact, at about 2100 hours, the deceased was at home together with Evarister Tibendekela Nyamamba PW3, Oliver Simeo PW4, a certain Abel; the deceased's grandson and others. The deceased was attending to her customers. The room was illuminated by a wick lamp. The appellant arrived and asked for the brew. He was served and after he was done with the drinking, he asked for a torch from the deceased and left.

The prosecution and defence part ways on what happened thereafter. It is the prosecution's story that the appellant returned after about half an hour wielding a hammer and started to demand money from the proceeds of the harvest they had sold. Subsequently, the deceased demanded her torch back, the appellant attacked the deceased and others who were there and in the process inflicting a

serious head injury on the deceased which caused her death. The appellant's story is that he indeed went there to drink local brew, asked for a torch from the deceased and left as narrated by the prosecution but that he never went back.

Be that as it may, the deceased sustained a fatal head injury from which she died on the same night. The appellant went missing after the incident. He was arrested on 30.07.2013 in Uganda and later charged with the murder of the deceased. So much for the background material facts.

Arguing for the appeal on the remaining sole ground, Ms. Lwiza submitted that in the judgment of the trial court as appearing at pages 103-4 of the record of appeal, the trial judge addressed herself to the issue whether the appellant caused the death of the deceased with malice aforethought. However, she submitted, that question was not addressed to the assessors so that they could give their opinions on. This is a fatal ailment which vitiates the proceedings of the High Court and its consequent judgment, she submitted.

Augmenting on how the learned trial Judge summed up to the assessors on the case, the learned counsel referred us to pages 66-7 of the record. At those pages, she submitted, the learned trial Judge summed up to the assessors on the burden of proof in criminal cases as well as on the law relating to identification after which she called upon the assessors to give their opinions.

Ms. Lwiza did not stop there. She went on to assail the proceedings and judgment of the trial court that at pages 40-1 of the record, the appellant stated that at the time of the killing is said to have occurred, he had already left. That, she argued, was the appellant's defence of alibi which, despite addressing it in her judgment as appearing at pages 93-4 of the record, the learned trial Judge did not address it to the assessors. That was a fatal irregularity as well which vitiates the trial, she stated.

Ms. Lwiza went on to argue that failure by the trial court to sum up to assessors on vital points of law; that is, on the ingredients of the offence with which the appellant was charged and on the law relating to alibi, the trial Judge fell into an error making the trial and its

consequent judgment a nullity. To bolster up her argument, the learned counsel cited to us our unreported decision of **Omari Khalfan v. R.**, Criminal Appeal No. 107 of 2015 in which we held that such failure was a fatal irregularity vitiating a trial. She thus prayed that the proceedings and judgment of the trial court be quashed on account of their being a nullity and that the appellant be tried afresh in the High Court before another Judge and another set of assessors.

Ms. Chema Maswi, the learned State Attorney who appeared for and on behalf of the respondent Republic, assisted by Mr. Nestory Nchiman, also learned State Attorney, was at one with the learned counsel for the appellant. She submitted that the learned trial judge summed up to assessors on only two aspects; that is, the burden of proof and identification. Ms. Maswi added that in her judgment as appearing at page 105 of the record, the learned trial judge stated that there were apparent contradictions in evidence regarding the hammer alleged to have been used in the killing. The trial judge, the learned State Attorney submitted, concluded that PW6's testimony to that effect was "untenable and illusionary".

However, Ms. Maswi went on, that relevant point in evidence was not summed up to assessors.

The learned State Attorney thus joined hands with counsel for the appellant to pray that the appellant be retried before another Judge and another set of assessors.

With the foregoing response from the respondent Republic, Ms. Lwiza had nothing to rejoin.

We have considered the learned arguments brought to the fore by both trained minds. Having so done and juxtaposed them with the applicable law founded upon prudence in our jurisdiction, we find ourselves unable to disagree with them. It is true that the learned trial Judge addressed vital points of law in her judgment and made the decision to convict the appellant basing on those points but, ostensibly, those vital points of law were not summed up to assessors with a view to seeking their opinions on.

What the learned Judge did when summing up to assessors, as seen at pages 66-7 of the record, was to summarize evidence from both sides and later summed up to them on the burden of proof in criminal cases and on the law relating to identification. Having so done, the learned trial Judge called upon the assessors to give their opinions. All the three assessors returned a verdict of not guilty.

As rightly submitted by Ms. Lwiza, the learned trial Judge, in her judgment as appearing at pages 103-4 of the record of appeal, addressed herself to the issue whether the appellant killed the deceased with malice aforethought. In resolving this issue, she addressed herself, correctly in our view, to the weapon employed in the killing and the extent of force used in inflicting the fatal blow, to conclude that the killing was coupled with malice aforethought. However, in her summing up to assessors, the learned trial Judge did not sum up on this very important point. That was a fatal ailment which vitiates the proceedings in the High Court and its subsequent judgment.

Likewise, it is apparent on the record at pages 40-1 that the appellant brought to the fore the defence of alibi; that when the killing is alleged to have occurred, he had already left. The learned trial Judge addressed herself on this point at pages 93-4 of the record and concluded that the alibi was not worth of truth as the appellant was sufficiently identified at the scene of crime during the killing and that he was the assailant. Again, this important fact was not addressed to the assessors so that they could give their opinion on.

As if the above is not enough, there is yet this aspect of discrepancy in the testimony of witnesses. As already stated, at page 105 of the record, the learned trial Judge noted that there were apparent contradictions in evidence regarding the hammer alleged to have been used in the killing. However, having considered the time the incident was committed and the time the witnesses were testifying and given the old age of PW3, she concluded that such discrepancies were to be expected. But that apart, the trial Judge was not exonerated from her duty to the assessors; she ought to have summed up this important aspect to the assessors to solicit their

opinion. That was not done and its spill-over effect is to make the trial and its flanking judgment a nullity.

There is a plethora of authorities in this jurisdiction which insist on the full use of assessors in trials conducted with their aid. Failure to fully use the assessors in cases of that nature, like the present, is tantamount to such trial being conducted without their aid and its legal consequence is to make such a trial and its ultimate judgment a nullity. In **Washington** s/o **Odindo v. R** (1954) 21 EACA 392, the erstwhile Court of Appeal for Eastern Africa, articulated:

> "'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 supplied].

[Referred to in our unreported case of **Augustino Lodaru v.** R., Criminal Appeal No. 70 of 2010 and **Omari Khalfan** (supra); a case referred to by counsel for the appellant].

The duty of the trial Judge to sum up to assessors on vital points of law in a particular case is of paramount importance. In **Omari Khalfan** (supra), we referred to our previous unreported decision of **Masolwa Samwel v. R.,** Criminal Appeal No. 206 of 2014 where, like here, the appellant was charged with the offence of murder contrary to section 196 of the Penal Code. In the summing up to assessors, the learned trial Judge did not address them on the voluntariness of the confessional statement and defence of alibi. That anomaly was held to be fatal and vitiated the trial and its consequent judgment.

In the instant appeal there is no gainsaying that the learned trial judge did not sum up to the assessors on the ingredients of the offence of murder and how malice aforethought is proved, the question of alibi and its applicability in criminal proceedings as well as the discrepancy in the testimony of witnesses and its implication. These, in our view, were vital points of law in the case which ought to have been summed to assessors so that they could give a meaningful verdict. Admittedly, what amounts to a vital point of law cannot be laid by any hard and fast rules. It is dependent upon the facts of each particular case. As we stated in **Masolwa Sawel** (supra) and reiterated in **Omari Khalfan** (supra):

> "There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."

In the instant appeal, we are of the considered view that the ingredients of the offence of murder, the question of alibi and the

discrepancy in the testimonies of witnesses comprise vital points of law which should have been addressed to the assessors so that they could give their opinions on. Failure to do that diminished the role of the assessors in assisting the trial court. The role of assessors in the present matter, to borrow the words in **Washington** s/o **Odindo** (supra), was correspondingly reduced. They were therefore not fully involved in assisting the court in the trial. This, as already alluded to above, made the trial and the final judgment and sentence a nullity. This state of affairs cannot be left to stand.

To recap, we are satisfied that the trial Judge's failure to sum up to assessors on vital points of law in the case so that the latter could give their opinions on was but a fatal ailment which vitiated the trial and the resultant judgment as well as the sentence meted out to the appellant. Exercising the revisional powers bestowed upon us by the provisions of section 4 (2) of the Appellant Jurisdiction Act, Cap. 141 of the Revised Edition, 2002, we quash the proceedings and judgment of the trial court and set aside the sentence meted out to the appellant. Considering the gravity of the offence with which the

appellant was arraigned upon, and bearing in mind the fact that he has been behind bars since 2013 coupled with the fact that the appellant was sentenced just last year, we think, in the interest of justice, a retrial will be apposite.

We thus order that the appellant be tried afresh before another judge and a new set of assessors. For the avoidance of doubt, in the meanwhile, the appellant should remain in custody to await a new trial which we order should be commenced at the earliest opportunity.

Order accordingly.

DATED at **BUKOBA** this 8th day of December, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

THE COURT OF APPEAL OF TANZANIA

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

N. BA

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL