IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

CRIMINAL APPEAL NO. 149 OF 2015

(CORAM: MBAROUK, J.A., MUGASHA, J.A. And MWAMBEGELE, J.A.)

1. MAKUBI KWELI
2. NKWABI MASUNGA ..... APPELLANTS
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Tabora)

(Mgetta, J.)

dated the 14th day of November, 2015
in
Criminal Session No. 9 of 2012

JUDGMENT OF THE COURT

25th & 29th September, 2017
MBAROUK, J.A.:

In the High Court of Tanzania at Tabora, the appellants Makubi s/o Kweli and Nkwabi s/o Masunga were arraigned for murder of Minza d/o Maiku on 4th day of June, 2011 at Nkindwabiye village within Bariadi District in Shinyanga Region. Both appellants pleaded not guilty, but having evaluated the evidence, the trial High Court (Mgetta,J.) found both the appellants guilty and accordingly convicted and sentenced

them to suffer death by hanging. Aggrieved, they have preferred this appeal.

Briefly stated, at the trial court the prosecution case relied on three witnesses to prove its case against the appellants, namely Shiwa s/o Bomani, Nkindwabiye Village Executive Officer (PW1), WP No. 3272 D.Cpl. Bahati (PW2) and Liberatha w/o Mhagama, the Nyakabindi Primary Court Magistrate (PW3) who testified as a justice of the peace. The facts reveal that while PW1 was at his home on 5/6/2011, he received a telephone call from Somanda sub-village Chairman called Kwabi Lupigila that a woman called Minza d/o Maiku (the deceased) a resident of Somanda hamlet in Nkindwabiye village was hacked to death. He therefore, rushed to the deceased's home where he found many people who responded to a call for help. PW1 then entered the house of the deceased and noticed the cut wounds on the head, neck and hands. At the scene of crime PW1 also met three deceased's children but recalled the names of only two, namely Kwandu d/o Misalaba (23yrs) and Masunga s/o Maduhu (18yrs). According to PW1, Masunga s/o Maduhu told him that during mid-day before their mother

was killed, two men by the names of Makubi Kweli and Nkwabi Masunga approached him and asked the whereabouts of their mother. He then replied to them that, their mother had gone to fetch water.

On her part, the second child of the deceased, Kwandu d/o Misalaba told PW1 that at about 21:00 hrs. at night, two men holding a torch forced the door of their house open and straight away entered the house and went to the deceased's room where she was sleeping. While in their mother's room Kwandu d/o Misalaba told PW1 that the two men hacked their mother with a machete and she saw and identified them while she was in another room. She further told PW1 that she managed to identify them as she recalled to have seen them at their home during day time. Kwandu d/o Misalaba just like his brother named to PW1, Makubi Kweli and Nkwabi Masunga (the appellants) as the ones who killed their mother.

On her part, PW2 testified that on 7/6/2011, she was informed by her boss OC-CID about the incident of death which occurred at Nkindwabiye village. Under the leadership of the OC-CID and in the company of Cpl. Noella, CPl. Vedastus and Dr. John Assey they rushed

to Nkindwabiye village, where they were received by PW1 and Nkindwabiye village Chairman. At the deceased's home, they found her body with cut wounds on her head, neck, right shoulder and at her both hands which were completely chopped off. PW2 also found the deceased's children Kwandu d/o Misalaba and Masangu s/o Maduhu whom they interviewed and recorded their statements. PW2 also testified to have interviewed the village leaders and recorded their statements. As to the Doctor, PW2 said that he conducted a post-mortem examination and prepared his report.

On her part, PW3 testified to the effect that on 24/8/2011, a policer called Ainea from Bariadi Police Station brought before her the 1st and 2nd appellants and left them alone with PW3 for an interview. PW3 then testified to have introduced herself to each of the appellants separately while in an interview room as being a Primary Court Magistrate as well as a justice of the peace. PW3 further testified that she was told by the appellants separately they had come before her on their own volition. After PW3 finished to record the appellants' extra judicial statements, she read over to them separately and each signed.

PW3 then returned the appellants to the policeman who had brought them before her. During the main trial, PW3 t ndered the two extra judicial statements made by the 1st and 2nd appellants and admitted as exhibits P3 and P4 respectively.

In their defence, both, the 1st and the 2nd appellants categorically denied to have committed the offence of murder charged against them. The 1st appellant asserted that on 19/8/2011, policemen arrested him while he was at his aunt's house. The house was ransacked and several items were found and seized. While still at his aunt's house, he heard two policemen discussing as to what kind of an offence they should charge him with, but one of them answered that they would decide after reaching at the police station.

On his part, the 2nd appellant asserted that while he was at his grandfather's house on the morning of 19/8/2011, just before starting to continue with his journey, policemen came t. arrest him and hand cuffed him. His grandfather's house was the searched and several items were seized, thereafter he was handcuffed too. They were then sent to

Magu Police Station and later on 22/8/2011 they were transported to Bariadi Police Station and charged with the offence of murder.

In this appeal, Mr. Kamaliza Kamoga Kayaga, learned advocate represented the 1st appellant and Mr. Musa Kassim represented the 2nd appellant. The respondent/Republic was represented by Mr. Juma Masanja, learned Senior State Attorney.

The grounds raised by Mr. Kayaga were as follows:

1. *That, the appellant was denied a fair trial as Exh. P.1, Report of Post mortem and Exh. P.2 sketch map of the scene his statutory right to call the person who made the report for cross-examination.*
2. *That, the appellant was found guilty and convicted for murder on unreasonably shaky evidence and the alleged confession in the extrajudicial statement Exh. P.3 is a group of meaningless words in law.*

On his part, Mr. Musa Kassim preferred th following grounds:-

1. *"That, the learned trial judge erred in law and in fact to convict and sentence the appellant on the vases of the cautioned statement and extra judicial statement which did not prove the offence against the appellant beyond reasonable doubt.*
2. *That, in the alternative, the learned trial judge erred in law to admit the cautioned statement and extra judicial statement which were taken in violation of the laws and the rules.*
3. *That, the learned trial judge erred in law and fact to ground conviction and sentence against the appellant without recording the summi9ng up to assessors.*

At the hearing, Mr. Kayaga, argued his two grounds of appeal *seriatim* and prayed to abandon those filed by the 1st appellant. As for the 1st ground, he concisely submitted that the appellant was denied a fair trial as exhibit P.1 – the post mortem examination report and exhibit P.2 – the sketch map of the scene of crime were not read and explained

to the appellant and exhibit P.1 was tendered without informing him of his statutory right to call the person who made the report. He said, this was contrary to the requirement of the provisions of section 291 (3) of the Criminal Procedure Act Cap. 20 RE 2002 (the CPA). He said, the effect of such non-compliance with section 291(3) of the CPA is fatal and renders the report produced to be invalid and leads such a report liable to be expunged. In support of his argument, he cited to us the decision of this Court in **Ramadhani Mashaka v. Republic,** Criminal Appeal No. 311 of 2015 (unreported).

Arguing in support of the 2nd ground of appeal, Mr. Kayaga submitted that the trial judge erred when he found the 1st appellant guilty and convicted him relying on a shaky evidence and the confession in the extra judicial statement Exhibit P.3. Mr. Kayaga submitted that some material witnesses were not called to testify, and at page 142 of the record of appeal, the trial judge admitted to that effect when he remarked that "it is unfortunate that they were not called to testify as witnesses. They could be much useful on prosecution case if they could be brought to testify as witnesses before this Court." Mr. Kayaga added

that those material witnesses were the deceased's children who were at the scene of crime when the offence was committed. He said, instead of calling those deceased's children who witnessed the commission of the crime, the prosecution relied on the evidence of PW1 which was purely a hearsay evidence.

As to statement found in the extra judicial statement of the 1st appellant, Mr. Kayaga submitted that, the alleged confession may look like incriminating but not purely a confession in relation to this case. He then related that statement as a group of meaningless words in law. In substantiating his argument, Mr. Kayaga quoted the alleged words of the 1st appellant which was alleged to have implicated him in the extra judicial statement (Exh. P.3) found at page 11 of the record of appeal which reads as follows:-

> *"NKINDWABIYE*
>
> *Tuliua mwanamke 1 na tulilipwa shilingi 350,000/=, tukiwa mimi Nkwabi s/o Masunga na Lwasa s/o Puzu, tulikuwa tunawauwa walikuwa ni wachawi".*

Mr. Kayaga further submitted that, looking at those words in the alleged confession they do not specifically name the deceased as the one that she was killed. Also he said, the alleged confession failed to mention a date when the offence was committed. For that reason, Mr. Kayaga urged us not to rely on the confession made in the extra judicial statement before PW3.

Finally, Mr. Kayaga prayed for his client to be set free after quashing the conviction and setting aside the sentence.

On his part, Mr. Kassim who initially preferred three grounds of appeal, opted to abandon the first two grounds and remain only with the last of the three grounds. This was to the effect that the judge failed to record the summing up to assessors. However, the learned advocate for the 2nd appellant started his submissions by joining hands with the submissions made by Mr. Kayaga, as they also touch his client too. **Firstly,** the requirements under section 291(3) of the CPA were not complied to his client too, because the trial court failed to inform him of his statutory right to call the doctor who made the post mortem examination report Exhibit P.1 for cross-examination. **Secondly,** the

confession in the extra judicial statement, exhibit P.4, the name of the deceased and the date when the incident occurred was not stated therein. He said, that creates doubts as to whether the confession implicated the 2nd appellant against the offence preferred against him.

Reverting to argue his sole ground of appeal, Mr. Kassim proceeded by pointing out that the record of appeal does not show that the trial judge made the summing up notes to assessors. He submitted that, according to section 265 of the CPA, all trials before the High Court are to be conducted with the aid of assessors. He said, that means assessors are part and parcel of criminal trials, hence a trial judge is duty bound to properly guide them. He then urged us to nullify the proceedings in this instant case, because of the failure of the trial judge not to have written summing up notes which would have properly guided the assessors in reaching to a just decision.

Finally, Mr. Kassim contended that, ordinarily for such a defect the Court may have ordered a retrial, but due to the fact that earlier on, the post mortem examination report was tendered without complying with section 291(3) of the CPA, hence liable to be expunged. Also the

two extra judicial statements, exhibits P.3 and P.4 were noted to miss the name of the deceased and the date upon which the offence of murder was committed, that leads not to have a proper confession to be relied on to convict the appellants.

For that reason, Mr. Kassim prayed for the appeal to be allowed, quash the conviction and set aside the sentences in respect of both appellants. Consequently he prayed for the appellants to be released from prison, unless otherwise they are lawfully held.

On his part, from the outset, the learned Senior State Attorney indicated to support the appeal, but with an option of a retrial. Basically, on the issue of the trial judge's failure to record the summing up notes to the assessors, Mr. Masanja submitted that, its effect is to vitiate the entire proceedings and nullify them. In support of his argument he cited to us the decision of this Court in the case of **Khamis Nassoro Shomar v. SMZ** [2005] TLR 228 and **Ntobangi Kelya and Another v. Republic,** Criminal Appeal No. 239 of 2015 (unreported). The learned Senior State Attorney then urged us to invoke our revisional powers

under section 4(2) of the Appellate Jurisdiction Act and nullify all the proceedings and order a retrial.

He then proceeded by giving his response to the two grounds of appeal preferred by the learned advocate for the 1st appellant. He basically pointed out that, the proper provision to have been used was not section 291(3) of the CPA but section 192(4) of the CPA, because the post mortem examination report, exhibit P.1 was tendered at the time when the preliminary hearing was conducted and not at the hearing of the evidence in the appeal. However, Mr. Masanja, just like the learned advocates for the appellants agreed that the effect of not reading and explaining to the appellants the contents of exhibits P.1 and P.2 and informing them their statutory right to call the makers of those exhibits led the appellants to have been denied a fair trial. The result of such an anomaly, he said is to expunge those exhibits from the record.

In his reply to the 2nd ground of appeal, Mr. Masanja submitted that exhibit P.4 was not tendered by the one who took an oath as a witness, instead it was tendered by a learned state Attorney Margreth

Ndaweka, who was not a competent witness to tender it, which is contrary to section 198 of the CPA. He further said, this can be seen at page 77 of the record of appeal. Mr. Masanja therefore urged us to expunge exhibit P.4, the extra judicial statement of the 2nd appellant.

For the reasons he gave and in the interests of justice, Mr. Masanja prayed for the proceedings to be nullified and order a retrial, because the defects were caused by a fault made by the Court. In support of his contention, he cited to us the case of **Lazaro Daudi @ Emanuel v. Republic,** Criminal Appeal No. 376 of 2015 (unreported).

In their rejoinder submissions both Mr. Kayaga and Mr. Kassim had nothing to add, but remained with their earlier stance that the correct provision on account of the failure to inform the appellants of their statutory rights to call a doctor who made the post mortem examination report, exhibit P.1 was section 291 (3) of the CPA and not section 192 of the CPA.

As on the prayer for retrial, both Mr. Kayaga and Mr. Kassim said that it will not be proper to order a retrial, because, that will allow the

prosecution to go and fill in the gaps of the evidence in the case. They therefore reiterated their earlier prayer that we should nullify all the proceedings, quash the conviction and set aside the sentences matted out to both appellants and thereafter set them free unless otherwise lawfully held in prison.

Having heard the rival submissions from both sides in this appeal, we have found it prudent to begin with the ground concerning failure of the trial judge not to record the summing up notes to assessor in the proceedings of the case. Thereafter, we will examine the other grounds.

To start with, we have opted to reproduce section 265 of the CPA, to show the importance of the role of assessors in all criminal trials before the High Court. The said provision 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".*

In terms of the above cited provision, all trials before the High Court are mandatorily required to be conducted with the aid of

assessors. It is now settled in various decisions of this Court that to conduct a trial without the aid of assessors is a fatal defect which renders the proceedings a nullity. See, **Charles Lyatii @ Sadala v. The Republic,** Criminal Appeal No. 290 of 2011, **Kulwa Misangu v. The Republic,** Criminal Appeal No. 171 of 2015, (both unreported) **Ntobangi Kelya** (supra).

In most of the decisions of this Court on the issue of summing up to assessors, they are mainly based on the anomalies of mis-direction or non-direction found in the summing up notes to assessors. But in the instant case, the trial judge has completely failed to record the summing up notes to assessors, which we think is much worse.

As pointed out in section 265 of the CPA, every trial before the High Court has to be tried with the aid of assessors. In arriving at a just decision, the trial judge has to provide the assessors with proper guidance in the summing up exercise and the place where such guidance is to be found is in the record of summing up notes. Section 298 (1) of the CPA requires a trial judge to sum up to the assessors the evidence for the prosecution and the defence. But how can we establish

that such a requirement has been complied with? We are of the view that, there has to be the written summing up notes written by a trial judge. We are further of the view that the record in the summing up notes to assessor will show the guidance and direction of the trial judge which he gave to the assessors in arriving at a just decision when they give their opinions. Misdirection or non-direction of a trial judge will be seen in his summing up notes to assessors, hence failure to record the summing up notes in a trial is a fatal anomaly w. ich renders the entire proceedings a nullity. The erstwhile East African Court of Appeal in the case of **Washington s/o Odindo v. The Republic,** [1984] 24 EACA 392, underscored the importance of the opinion of assessors and 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 salient facts of the case*

the value of the assessors' opinion is correspondingly reduced."

Also see **Kulwa Misangu** (supra).

As pointed out above, in order for the assessors to give their informed or rational opinion properly they have to understand fully the facts of the case before them in relation to the relevant law. That can only be gathered in the summing up notes to assessors recorded by a trial judge.

In the instant case, the learned trial judge has completely failed to record the summing up notes to the assessors, we therefore fully agree with the learned advocate for the 2nd appellant that the trial was conducted without the aid of assessors as we cannot be sure if they were or they were not guided properly in giving their opinion. For that reason, we find the proceedings a nullity.

Ordinarily, having found the proceedings a nullity, we should have reverted to exercise our revisional powers under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and order a

retrial. As to whether the order of retrial is to be issued or not, the decision of the erstwhile East African Court of Appeal in the case of **Fatehali Manji v. R,** [1966] EACA 341 has lucidly stated as follows:-

> *"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 purpose of enabling the prosecution to fill up the gaps in its evidence at the first 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 interests of justice require."*

In the instant case, as pointed out above by Mr. Kayaga and supported by Mr. Kassim that there are serious defects and if a retrial is to be allowed that will enable the prosecution to go and fill in the gaps

in its evidence at the trial. The pointed out defects were as follows, **one,** exhibit P.1, the post mortem examination report and exhibit P.2, the sketch map of the scene of crime were tendered and admitted in Court without its contents being read and explained to the appellants. In addition to that, the post mortem examination report was admitted without informing the appellants of their statutory right to call the doctor who made that report contrary to section 291(3) of the CPA. **Two,** both extra judicial statements were admitted as evidence while both of them (exhibit P.3 and P.4) did not mention the name of the deceased as the one killed by the appellants. Also no dates were mentioned in those alleged confessions as the date upon which the offence was committed.

Apart from those two defects, it is also worth to note that in the course of hearing the appeal, the evidence of PW.1 is purely hearsay evidence as the prosecution have failed to call the two deceased children namely Kwandu s/o Misalaba and Masunga s/o Maduhu who actually witnessed what transpired at the scene of crime so as to testify and give their evidence. Hence the evidence of PW1 was nothing but a hearsay.

The children were material witnesses at the initial trial and failure to parade them entitles the Court to draw adverse inference.

As we held in **Aziz Abdallah v. Republic,** [1991] TLR 71 that:

> "the general and well known rules is that the prosecutor is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

In the case at hand, Masunga Maduhu, Kwandu Misalaba and another whose name could not be recalled are alleged to have eye witnessed the killing. They were not called to testify and the prosecution has not offered any explanation why. In the circumstances, the Court is entitled to draw an adverse inference that had they been called, they might have testified against the interest of the prosecution case.

We are increasingly of the view that, the interests of justice require not to order a retrial. As by doing that, it will enable the prosecution to fill in the gaps in its evidence at the trial.

All said and done, for the reasons stated herein above, we find merit in the grounds of appeal, hence we allow the appeal, quash the conviction and set aside the sentence. We further order an immediate release of both appellants unless otherwise they are lawfully held for any other lawful reason.

It is so ordered.

DATED at **TABORA** this 28th day of September, 2017.

M.S. MBAROUK
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL