IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: MUSA J.A., MUGASHA, J.A. And LILA, J.A.)

CRIMINAL APPEAL NO. 21 OF 2016

THE REPUBLIC ..... APPELLANT
VERSUS

1. PEREUS PIUS @ DOMICIAN
2. JACOB STEPHANO ..... RESPONDENTS

(Appeal from the conviction and judgment of the High Court of Tanzania at Bukoba)

(Kente, J.)

Dated 10th day of December, 2015
In
Criminal Session No. 21 of 2014

JUDGMENT OF THE COURT

28th November & 7th December, 2017

MUSSA, J.A.:

In the High Court of Tanzania, Bukoba registry, the respondents were jointly arraigned for murder, contrary to section 196 of the Penal Code, Chapter 16 of the Revised Laws. The particulars on the information alleged that on the 11th day of November, 2012, at Kasinga – Chabuhora Village, within Karagwe District, the respondent jointly murdered a certain Buruhani William.

The respondents denied the accusation, whereupon the prosecution lined up ten witnesses, a report on post mortem examination and a motorcycle registration No. T937 BZX. The evidence was to the effect that the referred motorcycle belonged to the deceased. In a nutshell, the case for the prosecution was that on the 10th November, 2012 the first respondent approached the deceased and asked him to drive him to a certain locality at a forest with his motorbike on the following day. The deceased obliged and, on the fateful day, around 5.00 a.m. or so, the two of them departed from the deceased's residence destined, as they agreed, to the forest locality. At the time of their departure, the deceased had informed Fadhila Burhani (PW1), his wife, that he will arrive back around 8.00 a.m. Unfortunately, as will shortly become apparent, he never showed up.

Speaking of PW1, the witness informed the trial court that she was able to identify the first respondent on the fateful morning because she knew him quite well as he (first respondent) was a friend of the deceased who used to visit them regularly.

A good deal later, in the evening, the first respondent was seen at the residence of Obed Rutale (PW3) aboard the deceased's Motorcycle. He

arrived there in the company of the second respondent who was riding another motorcycle registration No. T.808 ACV. As it were, the deceased was not in their company. Incidentally, PW3 is the first respondent's uncle and, at the material times, he was the Chairperson of that locality. Upon arrival, the first respondent excitedly informed PW3 that he had purchased the motor bike which he was riding and wanted to leave it there for safe keeping because the police are looking for him. He did not, however, disclose to his uncle as to why the police were on his heels. The uncle (PW3) declined the request as he had no sufficient space at his residence but he, nevertheless, took the first respondent to his (PW3's) son, namely, Mwemezi Obed (PW4) who agreed to take custody of the motorbike at his house.

In the meantime, PW1 and several of the deceased's relatives were increasingly worried about his whereabouts and, at the height of their suspicions, they reported deceaseds' disappearance to the police on that same day. As it turned out, the police promptly arrested the respondents, who, it was said, confessed to killing the deceased and lead them to the recovery of motor cycle as well as the deceased's body. Upon a post-mortem examination which was performed by, Dr. Thadeo Chagaba (PW7),

the deceased's death was attributed to severe bleeding secondary to multiple cut wounds.

In reply to the foregoing prosecution version the respondents' replies were a complete denial to the accusation. More particularly, the first respondent's defence was in the form of an *alibi* in that he claimed that on the fateful day he was throughout at his home till around 9.30 p.m. when he was arrested. On his part, the second respondent claimed that he was arrested on the 12th November, 2012 but he denied involvement in any of the events in which he was implicated by the prosecution witnesses.

At the end of respective cases from either side, the presiding judge (Kente, J.) summed up the case to the three assessors who were sitting with him on a variety of subjects. More precisely, he addressed them on the charge, malice aforethought, burden of proof, standard of proof, standard of proof and, finally, gave a summary of the evidence. In response, the assessors unanimously returned a verdict of "*not guilty*" in favour of both respondents.

On his part, the learned trial Judge shared the conclusion arrived at by the assessors, the more so as he put it:-

"...the evidence against the accused persons in this case is wholly circumstantial because nobody saw them murder and rob the deceased of his motorcycle...."

In the upshot, the judge was not convinced that the adduced circumstances were such as would have supported any other irresistible inference than that of the guilty of the respondents. Likewise, the judge was reluctant to invoke the doctrine of recent possession much as, to him, in the absence of the motorcycle registration card, the deceased's ownership of the motorbike was thrown into doubt. In sum, the judge concluded:-

"Having regard to the totality of the evidence on record which, as I have stated, is wholly circumstancial, like the lady and gentlemen assessors, I am satisfied that the Republic has indeed failed to discharge the onus of proving the charge against the accused person, or any of them, beyond reasonable doubt. They are accordingly, found not guilty and consequently acquitted."

The Republic was aggrieved, and presently it seeks to impugn the decision of the High Court upon a lengthy and verbose memorandum of appeal which is comprised of fourteen grounds of grievance.

At the hearing before us, the appellant was represented by Mr. Athumani Matuma, learned Senior State Attorney, whereas the respondents had the services of Ms Jacqueline Mrema, learned Advocate. It is, perhaps, pertinent to note that the respondents did not enter appearance but, since they were represented by an advocate, we dispensed their attendance and ordered the hearing to proceed. Such a dispensation is permissible under Rule 80(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). What is more, we informed counsel from either side that the appeal turns and is wholly disposable under the second ground of appeal and, accordingly, we directed them to only address us on that ground of appeal which goes thus:-

> *"That, the Hon. Judge erred in law and facts by not addressing the assessors on crucial issues as far as the law is concerned on the doctrine of recent possession, visual identification and circumstancial evidence thereby causing the assessors to fail giving their opinion on the same."*

Addressing us in support of the ground of appeal, the learned Senior State Attorney submitted that, by not directing the assessors on those crucial subjects which were used to ground the acquittal, the learned trial judge materially erred. The error, he argued, was so fundamental to the extent that it vitiated the entire proceedings of High Court. To buttress his contention, Mr. Matuma referred us to the case of **Tulubuzya Bituro v The Republic** [1982] TLR 264. We are mindful that in the case under reference, the Court, indeed, held that the trial proceedings were vitiated by the trial judge's misdirection to the assessors on the issue of provocation. In the premises, the learned counsel for the appellant pressed on us to nullify the trial proceedings with an order for a re-trial.

In reply, Ms Mrema did not quite contest, the complaint about the trial judge non-directing the assessors on vital legal issues. Nonetheless, she was quick to rejoin that we should not order a re-trial particularly on account of insufficient evidence adduced before the trial court. The learned counsel for the respondents had in mind the evidence of visual identification of the first respondent as well as the identification of the motor cycle of which, she said, were insufficient. On this plea against a

retrial, Ms Mrema sought fortification in the unreported Criminal Appeal No. 354 of 2015 – **Chacha Mwita and Another Vs The Republic**.

Addressing the issue regarding the non-direction of the assessors on vital points of law, it is noteworthy that, in his judgment, the trial judge commenced his determination of the case with a lengthy discussion on the quality expected of the evidence of visual identification. At the end of the discussion, he discounted the evidence of PW1 who claimed to have identified the first respondent for not conforming to the benchmarks laid down in the case of **Waziri Amani Vs The Republic** [1980] TLR 250. Yet, in his summing up notes, the learned trial judge had not directed the assessors on the tenents of the evidence of visual identification.

Next, the learned judge clearly expressed in his judgment that the evidence in support of the prosecution case is wholly circumstancial. He correctly related as to what entails circumstancial evidence but, again, the legal explanation was not done to the assessors in the summing up notes. And, finally, in his judgment the trial judge discussed the pre-requisites for the invocation of the doctrine of recent possession which, again, was not put to the assessors.

As to what are the consequences of the non-direction of the assessors on vital points of law, we propose to start by paying homage to the old case of **Washington Odindo Vs The Republic** [1954] 12 EACA 392 where the defunct Court of Appeal for Eastern Africa had this to say:-

> *"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."*

Upon numerous decisions, this Court has insistently emphasized the need for a trial Court to direct the assessors on vital points of law. A non-compliance has been held to be fatal with the result of vitiating the entire trial proceeding. In, for instance, the unreported Criminal Appeal No. 290 of 2011 – **Charles Lyatii @ Sadala Vs The Republic**, the Court vitiated the High Court proceedings on account of the assessors not being directed on what malice aforethought was all about. The Court had cited the *ratio decidendi* in the English case of **Bharat Vs The Queen** (1959) AC 533 and observed:-

> *"Since we accepted the principle in **Bharat's** case as being sensible and correct, it must follow 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 a non-direction to the assessors on a vital point."*

Corresponding remarks had earlier been made in the case of **Tulubuzya Bituro v The Republic** (supra). Thus, in the matter under our consideration, the failure by the learned trial judge to address the assessors on the tenents of the evidence of visual identification, what is entailed in circumstantial evidence and the law governing the doctrine of recent procession, was fatal with the effect of nullifying the entire trial proceedings. We, accordingly, nullify the entire, proceedings of the High Court.

Having done so, we have given deep thought over the question whether or not we should order a re-trial. We are, in that regard, mindful of the guidelines laid down in the case of **Fatehali Manji Vs The Republic** [1966] EA 341 thus:-

"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up 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."

Indeed, each case must depend on its own facts and circumstances and, in that respect, we should observe that the situation at hand is somewhat distinct in that it is not a conviction, rather, an acquittal which is vitiated by the mistake of the trial court. To this end, having nullified the trial proceedings, we think we should leave it open to the Director of Public Prosecutions to either re-institute the information or leave the matter to lie where it is. Just in case he opts for the former course, the resumed trial

should be before another judge and a new set of assessors. Order accordingly.

DATED at BUKOBA this 5th day of December, 2017.

K. M. MUSSA
JUSTICE OF APPEAL

S.A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL