IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

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

CRIMINAL APPEAL NO. 92 OF 2016

THE REPUBLIC..... APPELLANT

VERSUS

1. BYAMTOZI JOHN @ BUYOYA
2. ISAYA VENANT@ KAKURU ..... RESPONDENTS

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

(Kairo, J.)

dated the 21st March, 2016

in

Criminal Session No. 71 of 2014

JUDGMENT OF THE COURT

4th & 8th December, 2017

MUGASHA, J.A.:

The two respondents were charged with murder contrary to section 196 of the Penal Code, **CAP 16 R.E. 2002**. In a judgment dated, 4th March, 2016, they were convicted of a lesser offence of manslaughter contrary to section 195 of the Penal Code and sentenced to imprisonment for eight years. The appellant has filed an appeal to impugn the whole of the said judgment.

It was alleged that, on the 6th August, 2011, at Kishayo village, within Karagwe District in Kagera Region the respondents did murder one Apollo Elias. The respondents did not plead guilty subsequent to which to establish its case, the prosecution paraded eight (8) witnesses and tendered in the evidence two documentary exhibits namely: the Postmortem Examination Report (Exhibit P1) and the sketch map of the scene of crime (Exhibit P2).

It was the prosecution's case that on the fateful day, the deceased and the respondents were among the attendees in a send-off party of the daughter of **YULIANA MSHEKANABO** who testified as PW3. Around 05.00 a.m. when PW3 was collecting her daughter's items, she heard people shouting outside, went out and found three youths lying down bleeding. She notified the chairperson **JOANITHA D/O ISAYA** (PW2), they came together at the scene of crime and found the deceased already dead. According to **JOHANNES MWEMEZI FILBERT** who testified as PW7, while heading to their respective homes from the send-off party, the respondents attacked them using a knife whereby the deceased was stabbed around the chest and died instantly. The post mortem examination report revealed the cause of death to be:

"Excessive bleeding internally and damage of internal organs such as heart and lungs."

PW2 recounted that after the said fatal incident the respondents remained at large. Having resurfaced after a week they were arrested and charged with murder. The respondents, in their respective sworn accounts told the trial court that, they were present at the send off celebrations but disembarked between 10.00 p.m. and 11.00 p.m. before the fateful incident. The 1st respondent claimed to have been arrested on 5th April, 2013 around 8.00 a.m. in connection with the incident of stealing chicken of one Stanslaus Gervas. However, two days later he was informed to be facing the charge of murder. The 2nd respondent was arrested on 15th April, 2013 and found the 1st respondent already in custody. Thus in a nutshell, they totally denied any involvement in the killing incident.

After summing up to the assessors and analyzing the prosecution and defence cases, the trial court was satisfied that, the respondents killed the deceased with no malice aforethought and as earlier stated convicted them with a lesser offence of manslaughter contrary to section 195 of the Penal Code.

Aggrieved, the appellant filed a notice of appeal on 22nd March, 2016 to challenge the trial court's decision. In the memorandum of appeal, the appellant raised one ground of complaint namely:-

> ***THAT**, the Hon. Judge erred in law and facts for findings that the killing of the deceased done by respondents was without malice aforethought.*

At the hearing Ms. Chema Maswi, learned State Attorney represented the appellant. The respondents were present in person and represented by Ms. Aneth Lwiza, learned counsel.

The hearing of the appeal was preceded by a preliminary point of objection on the propriety of the notice of appeal which indicates to be appealing against Criminal Session No. 71 of 2014 while the impugned judgment is titled Criminal Session No. 71 of 2015. The learned State Attorney stated that the erroneous year in the judgment is a typographical error or a slip of the pen which does not vitiate the notice of appeal.

On the other hand, Ms. Lwiza viewed the notice of appeal defective since it is at variance with the Judgment in respect of Criminal Case No. 71 of 2015.

Having combed through the information of murder and the record of trial proceedings which are part of the record of appeal, they all bear Criminal Session No. 71 of 2014 and relate to such case. However, it is only the judgment which bears the erroneous Criminal Session No. 71 of 2015. We are in agreement with the learned State Attorney that, the Criminal Session Case No. 71 of 2015 borne in the trial court's judgment though erroneous, is a slip of the pen not at all vitiating the notice of appeal. We are thus satisfied that, this appeal emanates from Criminal Session No. 71 of 2014 which is correctly reflected in the notice of appeal which did institute the appeal in terms of Rule 68, the Rules. Therefore, the present appeal is properly before the Court.

Having determined the competence of the appeal we required parties to address us on the propriety of non-direction of the assessors on vital points of law at the summing up. The learned State Attorney conceded that the assessors were not directed on malice aforethought; the legal principles on reliance on defences of intoxication; provocation and alibi. On prompting by the Court, Ms. Maswi added that, it was not proper for the trial judge during the summing up to express her own views on the deficient prosecution evidence relating to the identification of the

respondents. He argued this to have influenced the assessors which amounted to a judgment. She argued that, the cumulative effect of the said shortfalls rendered the trial not impartial. Thus, she prayed that in the exercise of revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, the Court quashes the trial proceedings and order a retrial.

On the other hand, Ms. Aneth Lwiza supported the learned State Attorney's submission and as well prayed for a retrial before another judge and different set of assessors.

The crucial issue for our determination is whether the trial was faulty and if so, whether the fault fundamentally undermined the root and the essence of the trial itself. As earlier indicated, both counsel have faulted the manner in which the assessors played their part in the trial.

From the outset, we wish to make it clear that, section 265 of the Criminal Procedure Act, (CAP 20 R.E. 2002) mandatorily require all criminal trials in the High Court to be with aid of assessors. In that regard, in terms of section 298 (1) of the CPA, at the close of the prosecution and defence cases, the judge or a resident magistrate exercising extended jurisdiction is required to sum up the evidence and require assessors to give their opinion

as to the case on the whole. The importance of the opinion of assessors is of great value if properly utilised as underscored in the case of **WASHINGTON S/O ODINDO VS REPUBLIC (1954) 21 EACA 392** where the Court stated:

> *"The opinion of assessors can be of great value and assistance to the 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 to them and attention is not drawn to the salient facts of the case, the value of assessors opinion is correspondingly reduced."*

It is as well imperative that, during summing up the trial judge should refrain from disclosing his/her own views or making remarks or comments which might influence the assessor one way or another in making up their minds about the issue or issues being left with them for consideration. (See **ALLY JUMA MAWERA vs. REPUBLIC** [1993] TLR 231. On a similar encounter in the case of **CHRISANTUS MSINGI VS REPUBLIC,** Criminal Appeal No. 97 of 2015 (unreported) we emphasized that:-

"The trial judge clearly expressed his own findings of fact on the evidence and had nothing to with the opinions of the assessors but to influence them to agree with him. It was improper for the judge to make his impression known to the assessors because the trial judge should as far as possible desist from disclosing his own views or making remarks or comments which might influence assessors in one way or another in making up their minds about issues being left with them for consideration."

In **HAMISI MDUSHI VS REPUBLIC,** Criminal Appeal No 161 of 2015, the Court relied on the case of **LUSABANYA SIYATENI VS REPUBLIC** (1980) TLR 275 to address the adverse effects on the aforesaid situation having said that:

" We think these directions were clearly expressing the judge's own findings of fact on the evidence, and had nothing to do with wanting to get the assessors' opinions, but to influence them, to agree with him. It was wrong for the judge to have made his impression known to the assessors."

In the present case we have noted that, at the summing up the trial judge disclosed her own views on findings of fact on the evidence as we shall demonstrate in due course.

Moreover, it is settled law that where the assessors are not directed on a vital point of law, the trial judge cannot be said to have been aided by the assessors (See **TULUBUZYA BIJURO VS REPUBLIC (1982)** TLR 264) where the Court had the occasion to consider the issue of involvement of assessors in a criminal trial. The Court approved the *ratio decidendi* in **BHARAT vs. THE QUEEN** [1959] AC 533 as follows:-

> *" Since we accept 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 of law, 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 assessors on a vital point.*** *"*

[Emphasis supplied]

The emphasis on the proper direction of assessors on vital points of law is pertinent and nourishes the active involvement of the assessors in a criminal trial as spelt out under sections 265 and 298 of the Criminal Procedure Act.

In the unreported cases of **CHARLES LYATI @ SADALA V REPUBLIC,** Criminal Appeal No. 290 of 2011 and **REPUBLIC VS NTAGALINDA @ KORO,** Criminal Appeal No. 73 of 2014, this Court, categorically stated that, failure to address and direct assessors on the vital points of law renders the proceedings a nullity.

We shall be guided by the stated principles to determine the matter under scrutiny.

In the present matter, during the summing up, the trial judge addressed the two present assessors on the summary of the prosecution and the defence evidence, the principles of visual identification, the standard of proof and the cause of death in terms of the postmortem examination report. Ultimately she invited them to give their opinions. One of the assessors returned the verdict of not guilty because death occurred at the celebration and the assailants were other people who ran away. The

other assessor as well returned a verdict of not guilty on ground that, the offence was committed at the celebration when people were drunk. Subsequently, as earlier indicated the trial judge found the respondents guilty of a lesser offence of manslaughter.

As earlier stated, in the matter under scrutiny, at the summing up, the trial judge disclosed her own views on the discrepant prosecution evidence relating to the identification of the respondents as reflected at pg. 101 of the record of appeal in that:-

> *"Gentlemen assessors and lady assessors, you will recall that when key witnesses (those who witnessed the commission of the offence) testified, PW6 swapped identify of the 1st accused with that of 2nd accused and vice versa, the action which has the effect of destroying the prosecution case...."*

Upon the said directions, one of the assessors after the summing up opined in line with the views of the trial judge reflected at page 104 of the record:

> *"PW6 (Anod shows that he doesn't know the accused as be swapped their identities. This, I have*

doubts having in mind he is the one who identified the accused at the identification parade."

In our considered view, the direction was a clear expression of the trial judge's finding of fact on the evidence. It had nothing to do with wanting to get the assessors opinion but to influence them to agree with him. It was wrong for the trial judge to have made her impression known to assessors. What is more disturbing is that, such impression is reflected in the trial court's judgment at pg 115 of the record as follows:

"when the testifying, PW6 failed to make proper identification of the 1st and 2nd accused by swapping their identities. It should be remembered that PW6 was the one who identified the accused person during identification parade.PW6 also stated in examination in chief that he knew both of the accused person since year 2007. ... it is strange and infact unconceivable that PW6 was able to identify their assailants at the night of the incident where there was only to be light, yet he failed to identify them in court on a day light where also there also several tube lights..."

We are thus in agreement with the learned State Attorney that, by letting her impressions known to the assessors at the summing up, the trial judge influenced them to agree with her on the deficient prosecution evidence on identification of the respondents. This was fatal.

Pertaining to the non-direction of assessors, we have noted that in her judgment the trial judge discussed vital points of law and concluded that, the respondents are not guilty of the offence of murder but rather the lesser offence of manslaughter. However, the learned trial judge had not directed the assessors on the vital points at the summing up. We say so because in the trial court's judgment the following discussion is evident from pages 123 to 126 of the record: **One,** the occurrence of the offence being surrounded by circumstances whereby the respondents killed deceased after having consumed alcohol without directing the assessors on the legal aspects of intoxication in terms of section 14 of the Penal Code. **Two,** the conclusion on the killing incident being preceded by a quarrel and a fight between the respondents and deceased which brings to scene the possibility of the respondents having been provoked. However, the trial judge did not earlier explain to the assessors, the meaning and legal context of the defence of provocation available under section 202 of the

Penal Code. **Three,** the rejection of the respondents' defence of alibi without initially, explaining to assessors its legal meaning as ascribed under section 194 of the Criminal Procedure Code and the related consequences. **Four,** the conclusion that the killing was not intended in the absence of malice aforethought on the part of the respondents without earlier on directing the assessors the meaning and what amounts to malice aforethought and related consequences as specified under section 200 of the Penal Code.

In view of the aforesaid, we think that the effect of the trial judge making her impressions known to the assessors and not directing assessors on vital points adversely impacted on the summing up because the assessors were incapacitated to make informed and rational opinions. In this regard, it cannot be safely vouched that the trial was conducted with the aid of assessors as per the mandatory requirements of section 265 of the CPA as we said in the cases of **ALPHONCE ALBERT VS REPUBLIC,** Criminal Appeal No. 27 of 1979 and **BENJAMINI KAPUL @ ZENGO V REPUBLIC,** Criminal Appeal No. 283 of 2006, and **HAMIS MBUSHI VS REPUBLIC,** Criminal Appeal No. 161 of 2015 (all unreported). Therefore,

the trial was fundamentally faulty and occasioned a miscarriage of justice and it cannot be spared.

As to the way forward, we invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act. We revise and quash all the proceedings and judgment of the trial Court. We quash the conviction and set aside the sentence. We further order expedited retrial of the respondents before another Judge with a different set of assessors.

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

K. M. MUSSA
JUSTICE OF APPEAL

S. E. 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