IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 504 OF 2016

1. RICHARD s/o LUCAS MUHANZA @LEONARD.....APPELLANT
2. YUSUPH s/o RAJABU MLETE .....APPELLANT
3. ISSACK s/o ABUU@SWAI .....APPELLANT
4. SAID s/o HAMIS KATIKATI .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Bongole, J.)

dated the 28th day of July, 2016
in
Criminal Session Case No 22 of 2011

JUDGMENT OF THE COURT

04th & 12th October, 2017

MBAROUK, J.A.:

In the High Court of Tanzania at Dar es Salaam, the appellants RICHARD s/o LUCAS MUHANZA @ LEONARD, YUSUPH s/o RAJABU MLETE, ISSACK s/o ABUU @ SWAI and SAID s/o HAMIS KATIKATI (hereinafter the first, second, third and fourth appellants respectively) together with five others

who are not subject to this appeal were charged with two counts of the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R. E. 2002. They were found guilty of the offence, hence convicted and sentenced to death by hanging. Aggrieved by the decision of the High Court, Bongole J. dated 28th day of July 2016 the appellants preferred this appeal.

According to the information before the High Court the appellants were facing the charge of murder where it was allegedly stated that, being in a company of other people who were acquitted, on the 31st day of July 2009 at NMB Temeke Branch in Temeke District in Dar es Salaam Region, the appellants murdered one Seif s/o Athuman Mkwike on the first Count and on the second Count that, at the same time, date and place, the appellants also murdered one E. 329 CPL Joseph P. Milambo.

Briefly put, the facts of this case may be stated that, on the material date the armed bandits invaded NMB Bank at Temeke, with the intention of stealing money there from. Before they could do anything they opened gunfire directed at

the police officers on guard. Consequently an exchange of fire ensued between the police officers and the bandits. It was in the course of that exchange of bullets, that one police officer and one private security guard were shot dead. As the firing continued, the bandit threw three hand grenades into the guard room. The police officers were thus subdued. Thereafter, the bandits entered into the bank and made away with unknown amount of money from NMB and her customers. Prosecution witnesses alleged to have identified three bandits, among them were the second and third appellants. Upon interrogation the first and fourth appellants and others who are not part of this appeal were linked with the commission of the offence. Henceforth they were charged with the offence of murder before the High Court. After trial, the High Court found the appellants guilty of the offence.

For the reason apparent to be shown herein, we found convenient to state at this stage that this background suffices to demonstrate what transpired prior to the conviction of the appellants.

In this appeal, the first and third appellants were represented by Mr. Edward Lisso, and second and fourth appellants were represented by Mr. Leonard Manyama, both learned advocates, whereas the respondent/Republic was represented by Dr. Zainabu Mango and Mr. Tumaini Kweka, both learned Principal State Attorneys.

Mr. Edward Lisso and Mr. Leonard Manyama had lodged their memoranda of appeal containing three and two specific grievances respectively in respect of their clients. The grounds of appeal for the 1st and 3rd appellants which read as follows:-

1. THAT, the Honourable trial Judge erred in law and fact by relying upon a single identifying witness of the 1st and 3rd Appellants respectively, which was not absolutely watertight to justify a conviction for lack of other credible expert evidence to corroborate the evidence of PW1 and PW2.
2. THAT, the Honorable trial Judge grossly erred in law and fact in relying upon the identification of

the 1st Appellant at an identification parade which was flawed in that PW1 had not given a detailed description of the suspect and for want of strict compliance with Section 60(1), (2), (3) and (4) of the Criminal Procedure Act (CAP. 20 R.E. 2002 and the Police Force and Auxiliary Police Force Act (Cap. 322 R.E. 2002).

3. THAT, the Honorable trial Judge further erred in law and fact in convicting the 1st Appellant on the basis of a retracted confession which was vitiated by torture.

Whereas the 2nd and 4th appellants grounds of appeal were:-

1. THAT, the Honorable trial Judge erred in Law and facts by convicting the 2nd and 4th appellants basing and or relying on the evidence of identification with no physical description of the appellants.
2. THAT, the Honorable trial Judge erred in law and facts by convicting the 4th appellant basing on the identification evidence of the prosecution witness

"(PW2)" one Noel Lupembe during the trial with no prior description of the 4th appellant.

Before we let counsel for both sides to canvass these grounds of appeal, we found ourselves constrained to ask them to address us first, on the soundness of the trial of the appellants and their conviction on account of the patent non-involvement of assessors in the conduct of trial and failure by the judge to consider opinion of assessors without assigning any reason(s).

Mr. Manyama was sharp to grasp the issue raised, he quickly submitted that section 265 of the Criminal Procedure Act Cap 20 RE 2002 (hereinafter the CPA) mandates a criminal trial before the High Court to be aided by assessors. According to the record of appeal, ten witnesses testified before trial. Assessors were denied a chance of full involvement when all these ten witnesses were testifying, they were not allowed to put questions to witnesses as required by section 177 of the Evidence Act. To attest, Mr. Manyema provides some instances as it appears on 3rd September, 2013 at pages 82-85 of the

record of appeal, in that day PW1 was testifying; and on 04th September, 2013 at pages 87-91 when PW3 was giving a testimony. He argued that taking part of assessors includes allowing them to put questions to witnesses.

On second aspect, with regard to non-consideration of assessors opinion without assigning any reasons, Mr. Manyama was of the firm view that, that was another fatal irregularity committed by trial judge. He pointed out that, according to section 298(2) of the CPA, judges are not bound by the opinion of assessors but when he or she differs with them, the judge is mandated to give reasons thereof.

He submitted that, such irregularities vitiate the whole proceedings and make the proceedings a nullity. Hence, he prayed for the Court to invoke Section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA) to quash proceedings and the conviction and set aside the sentence and order a re-trial.

Mr. Lisso on his side was at one with the Counsel for first and third appellants' submission, he therefore adopted and associated himself with what Mr. Manyama submitted. Mr. Lisso added that at page 351 of the record of appeal the judge differed with assessors who opined for the appellants to be set free without giving reasons to that effect. He reiterated that, such anomaly taint the whole proceedings and the consequences are for this Court to nullify the proceedings, quash the conviction and set aside the sentences.

Dr. Zainabu was not far apart with the appellants' advocates. She submitted that the assessors were not involved in trial to put questions from PW1 to PW10. He supported her observation by citing to us a reported case of **Abdallah Bazamlye & Others v. R** [1990] TLR 42 at page 45.

With regard to an issue that opinion of assessors were not considered with reasons, she hastily pointed out that was another irregularity. She asked us to revisit a case of **Abdallah Bazamiye & Others** (supra) at page 45.

We are inclined to agree with the counsel for the appellants and the learned state attorneys that non-involvement of assessors and failure to consider opinion of assessors without assigning reasons are serious irregularities which render the whole proceedings a nullity.

Section 265 of the CPA mandatorily requires all criminal trials before the High Court to proceed with aid of assessors. For easy of reference the provision provides as follows:-

> *"265 - 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 the section, it is incontrovertible that trial of this nature ought to be conducted with the aid of assessors. Such aid is not limited to assessors to be in Court as mere statues. The judge should cause active and effective participation of assessors in the proceedings and at the time of giving opinion.

The undoubted invaluable role of the assessors in trials before the High Court does not demand an elaborate exposition from us. It is as respected as it is indispensable. Discharging in good faith this rule, they are the eyes and ears of justice when determining issues of fact in any trial with assessors.

Active and effective participation of assessors is emphasized in cases of **Samson Njarai and Leah Njarai v. Joseph Meseviro**, Civil Appeal No. 92 of 2015 and **The General Manager Kiwengwa Strand Hotel v. Abdallah Said Musa,** Civil Appeal No. 13 of 2012 (both unreported).

For this reason, although, the trial judges are not bound by the assessors opinions but some principles have been developed by this Court and its predecessor to ensure active and effective participation of assessors. Those guidances are found in a case of **Kandi Marwa Maswe v. R,** Criminal Appeal No. 467 of 2015 (unreported) which provides that:-

"(i) Where an assessor who has not heard all the evidence is allowed to give an opinion on the case,

the trial is a nullity: see, for instance, ***Joseph Kabai v. Reg.*** *(1959) 21 EACA 260;*

(ii) A trial which has begun with the prescribed number of assessors and continues with less than two of them is unlawful: see, for instance, ***Clarence Gikuli v. Reg.*** *(1959) 21 EACA 304; Nyehese Cheru v. R. (1988) TLR 140, etc;*

(iii) Where the trial judge does not agree with the opinion of an assessor, or assessors he/she should record his reasons, or else the omission might lead to the vitiation of the conviction: see, for instance, ***Baland Singh v. Reg.*** *(1954) 21 EACA 209;*

(iv) It is a sound practice which has been consistently followed and should be followed, to give an opportunity to an accused person to object to an assessor: see, ***Tongeni Maata v. R,*** *(1991) T.L.R. 59.*

(v) ***Denying the assessors the opportunity to put questions to witnesses means that the assessors were excluded from fully participating in the trials****: see,* ***Abdallah Bazamiye and Others v. R****, (1990) T.L.R. 42;*

(vi) ***Where in a trial with the aid of assessors, there is no summing up of the case to the assessors and as a consequence their opinion not taken, the trial is a nullity****: see,* ***Khamis Nassoro Shoniar v. S.M.Z.*** *(2005) T.L.R.228; and*

(vii) Where there is inadequate summing up, non-direction or misdirection on ... a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity. See, ***Said Mshangama @ Senga v. R.,*** *Criminal Appeal No. 8 of 2014 and* ***Masolwa Samweli v. R.,*** *Criminal Appeal No. 206 of 2014 (both unreported), etc."* [Emphasis added].

One of the principles is effective participation of assessors as outlined herein above is to avail the chance to put questions (if any) to the witnesses. Expectation to put questions to the witnesses by assessors is provided by section 177 of the Evidence Act, we quote:-

> *"In cases tried with assessors the assessors may put any questions to the witness, through or by leave of the court, which court itself might put and which it considers proper".*

In the matter before us, first, assessors were not given chances to put any question to all ten prosecution witnesses as well as all defence witnesses who testified during the trial. We are of the opinion that, the record ought to have clearly stated the participation of each assessor in asking questions. If any member among the assessors does not have a question to ask, the record shows "NIL" after recording his name. What we insist here is that, it should be apparent in the proceedings that

the assessors were given an opportunity to put questions to witnesses.

In the case of **Abdallah Bazamiye and Others** (supra), referred to us by Dr. Zainabu, the appellant Abdallah Bazamiye and five others, were convicted of murder and consequently sentenced to death for assaulting to death one Enock Hinyonza Masharubu allegedly, a train robber. Like in this case it was apparent on the trial judge's record that the gentlemen assessors were not given the opportunity to put questions to witnesses although the learned trial judge agreed with the assessors' opinion. This Court held thus:-

> *"(i) Denying the assessors the opportunity to put questions means that the assessors were excluded from fully participating in the trials;*
>
> *(ii) to the extent that they were denied their statutory right, they were disabled from effectively aiding the trial judge who could only benefit fully*

as he would have if he had taken into judicious account all the views of his assessors;

(iii) assessors' full involvement in the trial is an essential part of the process, its omission is fatal, and renders the trial a nullity."

We subscribe to this finding and approve the same. This puts to rest the first issue which we think suffices to dispose of this matter, but to put the record clear, we feel imperative to say a bit on the second aspect, that is, assessors opinion was disregarded by the trial judge without explanations or reasons given.

It should be borne in mind that in this matter, assessors were in unanimous view that the appellants were not guilty of the offence with which they were charged. The judge was of the contrary view. In such circumstances, it was expected for the judge to assign reasons which caused him to differ with them in order for us to appreciate on whether the judge was

right or wrong to do so. In **Bazamiye Case** (supra), the Court clearly puts this point at page 45 as follows:-

> *"For our purpose in the Court of Appeal, the informed and full views of the assessors become further necessary when we have to rely on what we might call the Segesela principle, that is in the event of the trial judge disagreeing with the unanimous views of his assessors we shall want to determine whether he was entitled to do so. In order to enable us to make that determination meaningfully we must know the judge's reasons for so disagreeing, and to appreciate those reasons we would have to gauge them against the full and informed views of the assessors which they can only express satisfactorily if the trial was with their aid as explained. This need for a judge to give his reasons for disagreeing with the unanimous views of his assessors was enunciated in* ***Charles Segesela v R., E.A.C.A*** *Criminal Appeal No. 13 of*

1973, from a case tried in Tanzania, and we wish to express our approval of it."

Non-involvement of assessors and failure to consider opinion of assessors without assigning reasons are serious irregularities, for whatever reason, distorted the proceedings to the detriment of any party to the proceedings, the trial cannot be said to have been conducted with the aid of assessors. It becomes a nullity.

Coming to the next issue, learned advocates and state attorneys asked us to make an order for retrial. With respect, where the trial court mis-directs itself on an essential step in the course of the proceedings, it does not, in our view, automatically follow that a re-trial should be ordered, even if the prosecution is not to blame for the flaw. Clearly, of course, each case must depend on its particular facts and circumstances.

This Court has consistently subscribed to the holding in the case of **FATEHALI MANJI v. R** [1966] E.A.343 to the effect that:

*"In general, a retrial may 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 purposes of enabling the prosecution to fill in gaps in its evidence at the first trial.....**each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it.**"* [Emphasis added].

On the other hand, we are also aware that the appellants have been in prison for more than seven years. There is no doubt that, that is a long period. Much as we may sympathize with the appellants' predicament, it is our well-considered view that, given the circumstances of the case it would be in the interest of justice to order a retrial. Pursuant to section 4(2) of the AJA, we quash the entire proceedings and conviction and set aside the sentence and order a retrial of the case as

expeditiously as possible by a different judge and different set of assessors.

Order accordingly.

DATED at **DAR ES SALAAM** this 10th day of October, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

S. E. 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