IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 150 OF 2015

NKWABI S/O MASUNGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania Tabora)

(Mgetta, J.)

Dated the 4th day of November, 2014
in
Criminal Sessions Case No. 55 of 2012

JUDGMENT OF THE COURT

25th & 29th September, 2017

MWAMBEGELE, J.A.:

The appellant Nkwabi Masunga together with one Masunga Malenzi who was acquitted, were arraigned upon two counts of murder. It was alleged in the first count that on the 7th day of May, 2011 at about 22:00 hours at Nyawa Village in the Bariadi District of Shinyanga Region, they

murdered one Mwamba d/o Maboyo. In the second count, it was alleged that on the same date and place at about 22:01 hours, they murdered one Minza d/o Mainganya. They denied the allegations levelled against them and upon a full trial in which the prosecution fielded two witnesses and the defence fielded two; the accused themselves, the appellant was convicted as charged and sentenced to suffer death by hanging; a mandatory sentence provided by the law. As already stated above, the second accused was acquitted, it being stated that the prosecution did not prove the allegations levelled against him to the required standard; that is, beyond reasonable doubt.

The conviction and sentence, naturally, did not amuse the appellant, hence the present appeal.

Through a memorandum of appeal filed by his advocate, Mr. Musa Kassim, learned counsel, the appellant lodged three grounds of grievance:

1. That, the learned trial judge erred in l w and in fact to convict and sentence the appellant on the bases 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 the conviction and the sentence against the appellant without recording the summing up to assessors.

At the hearing of the appeal on 25.09.2017 the appellant was present and was represented by Mr. Musa Kassim. Mr Juma Masanja, Senior State Attorney, represented the respondent/Republic.

When Mr. Kassim, was allowed to start arguing the appeal, he started by abandoning the grounds of appeal earlier filed by the appellant himself. He opted to remain with the above grounds of appeal he filed on behalf of his client; the appellant.

In his arguments, Mr. Kassim consolidated the first and second grounds. That course of action was done after leave of the Court was sought and obtained as the second ground was filed in the alternative to the first one. The learned counsel started his onslaught by stating that what implicated the appellant to the offence he was charged with and convicted of was documentary evidence; the cautioned and the extrajudicial statements. As for the extrajudicial statement, he charged, there is nothing in it to connect the appellant with the offence. He stated that while in the extrajudicial statement the appellant is alleged to have stated that they killed one woman at Ng'wanadobana Village, the information levelled against him refers to Nyawa Village and refers to two women deceased. On this premise, he stated, the prosecution case is tainted with a serious doubt which the law requires to be resolved in favour of the appellant.

Regarding the cautioned statement, Mr. Kassim submitted that the same was taken outside the time prescribed by the law; four hours. He stated that the provisions of section 50 (1) (a) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA) stipulate that an

accused person is required to make a statement within four hours of his arrest. Any statement made after that limitation, he submitted will be taken that it has been made under torture as held in **Janta Joseph Komba v. R.**, Criminal Appeal No. 95 of 2006 (unreported).

Mr. Kassim added that the cautioned statement had another shortcoming which is that the same had no appropriate certificate. He stated that the purported certificate at page 78 of the record of appeal is not a certificate recognized by the law. On what a certificate should contain, the learned counsel cited to us the case of **Ibrahim Issa & 2 others v. R.**, Criminal Appeal No. 159 of 2006 (unreported).

With the ailments referred to above, the learned counsel urged us to expunge the two documents; the extrajudicial statement and the cautioned statement which were used to implicate the appellant.

If the two documents are expunged, he submitted, there will be nothing upon which to found a conviction on the accused person and thus beckoned upon us to set the appellant free.

On the third ground, the learned counsel for the appellant submitted that the record of appeal does not contain the summing up notes to the assessors. At page 106A, he submitted, there is an affidavit deposed by Ms. Sharmillah Said Sarwatt; the Deputy Registrar of the High Court of Tanzania at Tabora Sub-Registry to the effect that the summing up notes to assessors are missing and efforts to trace them have been an exercise in futility.

With the absence of the summing notes to assessors, the learned counsel argued, it cannot be ascertained if the assessors were properly guided. He added that the appellant has a right to access the summing up notes so as to sieve grounds of appeal therefrom, if any. For lack of the summing up notes, he submitted, the remedy would ordinarily have been to remit the matter to the trial court for a retrial. But the learned counsel was quick to state that taking that course in the present case will occasion injustice on the part of the appellant as the respondent/Republic will be availed with the opportunity to rectify the ailments in the proceedings. He thus prayed for the appellant to be released from custody unless otherwise held for some other offence.

On his part, Mr. Masanja for the respondent/Republic, did not only support the appeal but also refrained from praying for a retrial. Like Mr. Kassim, the learned Senior State Attorney submitted that the appellant was convicted on the strength of the two statements; the cautioned statement and the extrajudicial statement. Read between the lines, he submitted, the statements have no confessions therein that would suggest that the appellant committed the offence upon which he was arraigned. Had the trial judge considered the two statements closely, he submitted, he would not have convicted the appellant as he did. Relying on the **Janta** case (supra) at page 10, the learned counsel submitted that a conviction of an accused must be based on good grounds; speculation has no room.

Regarding the provisions of section 50 of the CPA, Mr. Masanja stated that they were not flouted as the appellant was arrested in Magu District which is a different District from the one in which the offence was committed. He added that the police were still investigating and therefore such time must be excluded in the computation of the four hours referred to in section 50 (1) of the CPA.

Regarding section 57 of the CPA, the learned Senior State Attorney stated that it was not defied as there was a signature of the appellant immediately before the certificate and that the **Ibrahim Issa** case (supra) is therefore distinguishable from the present case.

Regarding the missing summing up notes to assessors, Mr. Masanja conceded to what has been submitted by Mr. Kassim for the appellant. He submitted that under Rule 71 (2) (g) of the Tanzania Court of Appeal Rules, 2009 (the Rules), summing up record to assessors, if any, or the judge's notes to that effect are among the relevant documents to be part of the record of appeal.

The above said, Mr. Masanja submitted, the whole proceedings of the trial court were vitiated and must be nullified and at the end of the day, the appellant set free. On the premise of the above submissions, Mr. Masanja was of the view that, in the circumstances of the present case, a retrial will not be in the interest of justice.

In a short rejoinder, Mr. Kassim stated that the **Ibrahim Issa** case (supra) falls in all fours with the present case; it is therefore not

distinguishable from the facts of the present case as Mr. Masanja would want this Court to believe. The learned counsel reiterated his prayer to have the appellant set free.

We have considered the learned arguments of the parties. Indeed, the learned counsel for both parties are at one that the missing summing up notes are very relevant to the extent that lack of it in the record of appeal vitiated the proceedings of the trial court. The learned counsel for the parties are also at one that the evidence at the trial was shaky to warrant a retrial. We shall start our determination by addressing the third ground of grievance first.

We have subjected the learned arguments of both trained minds for both parties to serious scrutiny. Having so done, we find it apt to start our determination with expounding, albeit briefly, the law pertaining to criminal trials in the High Court.

The law under section 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA), stipulates that criminal trials before the High Court should be conducted with the aid of at least two

assessors. For easy reference, we take the liberty to reproduce the section. It reads:

> *"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."*

The term "**with the aid of assessors**" under section 265 of the CPA has been interpreted by this Court as to require the trial High Court Judge to give the assessors adequate opportunities to put across questions and after the close of evidence from the prosecution and defence, to sum up and to obtain the opinion of the assessors. Citing our earlier decision in **Charles Lyatii @ Sadala v. R.,** Criminal Appeal No. 290 of 2011 (unreported), in **Selina Yambi and 2 Others v. R.,** Criminal Appeal No. 94 of 2013 (also unreported), we underlined the role of assessors in the following terms:

> *"... to avail the assessors with adequate opportunity to put questions to witnesses from both sides and the same should be clearly*

recorded. Two, which is relevant to our cases, is that when the case on both sides is closed, the judge is required to sum up the evidence for the prosecution and the defence and shall then require each of the assessor to state his opinion as to the case generally and as to any specific question of fact addressed to him by the judge and record the opinion."

Further, the law under section 298 (1) of the CPA requires trial Judges sitting with assessors to sum up to the assessors before inviting them to give their opinions. The subsection provides:

"When the case on both sides is closed, the judge may sum up the evidence for the prosecution and the defence and shall then require each of the assessors to state his opinion orally as to the case generally and as

to any specific question of fact addressed to him by the judge, and record the opinion."

It may not be irrelevant to underscore at this juncture that the phrase "**the judge may sum up**" appearing in subsection (1) of section 298 of the CPA does not mean that the trial Judge can skip the summing up to assessors. As we stated in **Mulokozi Anatory v. R.**, Criminal Appeal No. 124 of 2014 (unreported), the phrase imposes a mandatory duty on the trial judge to sum up the evidence for the prosecution and the defence to the assessors. Let our exact words in that case paint the picture:

"We wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to S. 265 of the Criminal Procedure Act that all trials before the High Court shall be with aid of assessors, trial

judges sitting with assessors have invariably been summing up the cases to the assessors ..."

We underline that the need for the trial Judge to sum up the evidence for the prosecution and the defence to assessors is not performed merely as a routine duty but with a purposes. We are fortified in this stance by the following excerpt from the decision of the erstwhile Court of Appeal for East Africa in the case of **Washington s/o Odindo v. R.** (1954) 21 EACA 392 in which it was stated:

"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 ..."

[Quoted in **Augustino Lodaru v. R.**, Criminal Appeal No. 70 of 2010 and ***Omari Khalfan Vs R.***, Criminal Appeal No. 107 of 2015 (both unreported)].

As we accentuated in **Omari Khalfan** (supra), there is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on "all vital points of law". 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 will depend on important points of law disclosed in each particular case – see: **Said Mshangama @ Senga vs. R.**, Criminal Appeal NO.8 of 2014 (unreported) and **Omari Khalfan** (supra).

In the case at hand, the record has it that the learned trial High Court Judge summed up to assessors as stipulated by the law but the summing up notes are not on record. To appreciate what transpired in

Court on the material date, let us reproduce the record of appeal at pages 56, 59 and 60:

"**Date**: 31/10/2014 -

Coram: Before Hon. J.S. Mgetta – Judge

Mr. Vicent Haule; Senior State Attorney for the Republic

Accused: (Names) 1. Nkwabi Masunga

2. Masunga Malenzi

- represented by Stella Thobias Nyakyi for the second accused.

CC: Lucas Kulwa

Court Assessors:

1. Elias Maganga
2. Tatu Mkaima
3. Eva George

Haule: My Lord, the case is coming for summing up. We on the prosecution side are ready for summing up and ready to receive the opinions of the court assessors.

Stella: My Lord, I do hold a brief of Mr. John Ngw'igulila for the first accused person and I am for the second accused person. We are

ready for summing up as well ready to hear and receive the opinions from the court assessors.

Court: Prayer is granted. I now proceed to sum up to court assessors in any typed version.

J.S. MGETTA
JUDGE
31.10.2014

Court: I now invite the court assessors to give their respective opinions.

J.S. MGETTA
JUDGE
31.10.2014

Assessor 1:

My opinion is that in respect of the 1st accused and as far as the cautioned and extra judicial statement are concerned is guilty of the offences he stand charged. He should be found guilty. In respect of the

second accused, there is no prosecution evidence connecting him to the offence he stand charged.

Assessor 2:

In respect of the evidence given, especially the extra judicial statement and cautioned statement the 1st accused person is guilty of the offence that he stand charge. There is sufficient evidence against the 1st accused in respect of the 2nd accused there is nothing to connect the 2nd accused person to the offences he stand charged.

Assessor 3:

In respect of the death of the two deceased passed away from unnatural death. I do concur with the opinion m de by my fellow court assessors. I humbly submit.

ORDER: Judgment 3/11/2014

AFRIC

J.S. MGETTA
JUDGE
31.10.2014"

What is missing on the record of appeal is the "typed version" referred to by the learned trial Judge. The situation is exacerbated by the fact that such "typed version" has not been found and all efforts to trace it have not born any fruits.

A million dollar question we have posed to ourselves is what should be the way forwards in the circumstances? We must confess that the question has exercised our minds greatly. Having injected a lot of common sense to the problem, we have come to the conclusion that lack of summing up notes to the assessors in the record of appeal renders the proceedings of the trial court a nullity and, consequently, the present appeal incompetent. We shall demonstrate.

Flowing from the cases cited above, it is therefore important to know what and how the summing up to assessors was made. Again, and as already alluded to above, all the vital points of law must be addressed. In the summing up, the trial judge is not required to disclose his views to

the assessors – see: **Sinja Luyeko v. R.** [2004] TLR 254. What an ordinary person of the community of the appellant would or would not do is the province of the assessors. So, facts of the case allowing, the question, if obtains in the case, has to be put to the assessors for a specific determination – see: **Kevin Haule v. R** [2005] TLR 53. Thus, if there are any mis-directions or non-directions in the summing up, the same will be unveiled by the presence of the summing up record to assessors, if any, or the judge's notes to that effect.

The above stated, we are of the considered view that the summing up record of the prosecution and defence evidence to the assessors, if any, or the judge's notes to that effect is very vital in a criminal trial. Such record or the judge's notes thereof must appear on record, short of which the proceedings and consequent judgment of the High Court will be but a nullity. This said, we find merit in the third ground of appeal. Consequently, we quash the proceedings and judgment of the High Court and set aside the sentence of death by hanging meted out to the appellant.

Ordinarily, we should have ordered a retrial before another judge and another set of assessors. However, as will be apparent shortly, we refrain from making such an order.

It is the law in this jurisdiction, of course founded upon prudence, that a retrial order will not be given if it will not be in the interest of justice to do so. There is a long line of cases fortifying this position. In **Fatehali Manji v. R.**, [1966] 1 EA 343, the Court of Appeal for East Africa held at page 344:

> *"... 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 should be ordered; each case must depend on its particular facts and circumstances and an order for retrial should only be made where the interests of justice require it and should not be ordered where it is likely to cause an injustice to the accused person."

[See also: **Shija Masawe v. R.**, Criminal Appeal No. 158 of 2007 (unreported); a case cited by Counsel for the appellant].

In the case at hand the appellant was convicted on the strength of the cautioned and the extrajudicial statements. Both statements had ailments: the cautioned statement had a certificate which the maker (of the statement) did not sign and was taken outside four hours; the time prescribed by the law and the extrajudicial statement does not have anything to sufficiently incriminate the appellant with the charges levelled against him.

In the light of the above discussion, we are of the considered view that ordering a retrial will leave justice crying as the evidence upon which the appellant was convicted is shaky to mount a conviction. It is on this premise we order that the appellant should be released from custody unless otherwise lawfully held for some other offence.

Order accordingly.

DATED at **TABORA** this 29th 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