

IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MBAROUK, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 180 OF 2017

**1. KATO SIMON
2. VICENT CLEMENCE APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Karagwe)**

(Bongole, J.)

Dated the 26th day of May, 2017

in

(HC) Criminal Session Case No. 13 & 33 of 2015

RULING OF THE COURT

27th & 29th August, 2018

MBAROUK, J.A.:

In the High Court of Tanzania at Bukoba, the appellants and two others (not subject to this appeal) were charged with the offence of murder, contrary to section 196 of the Penal Code, [Cap. 16. R.E. 2002]. The appellants were alleged that

on 06th day of December, 2013 at Kabale – Bwena village within Karagwe District in Kagera Region murdered one Exavery s/o Edmund. After full hearing at the trial High Court, the appellants were convicted as charged and both appellants were sentenced to suffer death by hanging. Dissatisfied, the appellants have preferred this appeal.

In this appeal the appellants were represented by Mr. Mathias Rweyemamu, learned advocate, whereas the respondent / Republic was represented by Ms. Chema Maswi, learned State Attorney.

Before we allowed the parties to argue the appeal on merits, we wanted to satisfy ourselves as to the competence of the case before the trial High Court having noted that the learned trial judge has failed to sufficiently direct the assessors in his summing up.

The record of appeal shows that, the learned trial judge convicted the appellants with the offence of murder but the

record is silent in the summing to assessors as to whether the trial judge explained to the assessors the ingredients of the offence of murder and as to how malice aforethought is proved. Also the issue of the difference between co -accused and mob – justice was not explained to the assessors in the summing up made to them by trial judge. In addition to that also the issue of corroboration, common intention was not explained to those assessors. For that reason, we invited both parties to address us on that issue and whether they were properly directed in terms of section 265 of Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA) so that it can be properly seen that the Court was aided with assessors.

On his part, Mr. Rweyemamu readily conceded to the issue raised by the Court. He submitted that, as shown at page 106 of the record, the trial judge mainly directed the assessors to the issue of identification, cautioned statement and credibility.

He further added that, the above noted issues raised by the Court which were not explained to the assessors during the summing up were vital points of law. With that anomaly Mr. Rweyemamu wanted us to find that the High Court acted without jurisdiction. He therefore urged us that, we should consider that the trial court was not properly aided with assessors in terms of the requirement under section 265 of the CPA, hence we should invoke the powers of revision conferred upon us under section 4(2) of the Appellate Jurisdiction Act Cap. 141 R.E. 2002 (the AJA) and nullify the proceedings and judgment of the High Court. He also prayed for the conviction to be quashed and sentence to be set aside. Thereafter order a retrial before another judge and a new set of assessors.

On her part, Ms. Maswi too conceded to the issue raised by the Court *suo motu*. She submitted that, as shown at page 92 of the record of appeal, when the trial judge

explained to the assessors in his summing up, he stated that the prosecution depended on a direct evidence, visual identification, credibility of witnesses and cautioned statements of the accused persons/ appellants. However, she said, as pointed out by the Court, the assessors in the summing up were not explained to some other vital issues like, malice aforethought, common intention and the points of law of co – accused statements. The record shows that some were mentioned in the judgments but did not feature in the summing up. In support of her contention, Ms. Maswi cited to us the decision of this Court in **Mbalushimana Jean – Marie Vianney @ Mtokambali v. Republic**, Criminal Appeal No. 102 of 2016 (unreported), where reference was made to the decision of the erstwhile East African Court of Appeal in **Washington s/o Odindo v. Republic** (1954) 21 EACA 392.

She then urged us to find that the remedy for not directing the assessors properly in the summing up, is to nullify the proceedings and the judgment of the trial High Court and thereafter quash the conviction and set aside the sentence. She further urged us to order for a retrial before another judge and a new set of assessors.

Section 265 of the CPA stipulates in mandatory terms that all trials before the High Court must be conducted with the aid of assessors. The same reads 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."

According to section 298(1) of the CPA, after both sides have closed their case, the judge is required to sufficiently sum up the evidence of both sides in the case to the assessors, who thereafter are required to give their opinion orally. This Court

in its decision in of **Mbalushimana Jean – Marie Vianney** (supra) the case of **Washington Odindo** (supra) was quoted with approval where it was 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 assessors opinion is correspondingly reduced."

See **Andrea and another v. Republic**, (1958) E.A 684 and **Augustino Lodaru v. Republic**, Criminal Appeal No. 70 of 2010 (unreported).

As per the record, the learned trial judge addressed vital points of law in his judgment and made the decision to convict the appellants basing on those points, but those vital points of law were not summed up to assessors with a view to seek their opinions. What the trial judge did when summing up to assessors, as seen at pages 92 – 106 of the record, was to summarize evidence from both sides and later summed up to them on the condition to enable visual identification or not, cautioned statements of all the accused persons against one another and credibility of each of the witnesses. Having so done, the honourable trial judge called upon the assessors to give their opinions.

It is our opinion that, the assessors were not informed properly on the vital points of law to enable them give their opinion as the result the trial cannot be said to have been aided by assessors. See the case of **Fadhili Juma and Another v. Republic**, Criminal Appeal No. 567 of 2015

(unreported) and **Tulibuzya Bituro v. Republic**, [1982] TLR 264, (unreported) where it was held that failure to do so renders the entire proceedings a nullity.

In the case of **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported) just like in this case, the appellant was charged with the offence of murder contrary to section 196 of the Penal Code. In the summing up to assessors, the learned trial judge did not address them on the voluntariness of the confessional statement and defence of *alibi*. That anomaly was held to be fatal and vitiated the trial and its consequent judgment.

In the instant appeal there is no gainsaying that the learned trial judge did not sum up to the assessors on the ingredients of murder and how malice aforethought is proved, the question of co-accused, mob-justice, corroboration, and the conduct of accused before and after the incident. It is our humble opinion that, these were vital points of law in the case

which ought to have been summed up to assessors so that they could give a meaningful verdict. Admittedly, what amounts to a vital point of law cannot be laid by any hard and fast rules. It depends upon the facts of each particular case. As we stated in **Masolwa Samwel** (supra):-

" There is no exhaustive list of 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."

In the instant appeal, it is our opinion that the ingredients of the offence of murder, how malice aforethought is proved, the question of co accused mob-justice, corroboration, and conduct of accused before and after the incident comprise vital points of law which should have been addressed to the assessors so that they could give their

opinions on those issues too. Failure to do that diminished the role of the assessors in assisting the trial court and that leads us to conclude that they were therefore not fully involved in assisting the court in the trial and this made the trial and the final judgment and sentence a nullity.

We also noted at pages 16 – 17 of the record that at the beginning of the prosecution's case, the trial judge failed to explain to assessors their duty, that anomaly made the assessors not to know what their duty was in that case. That anomaly would also help us to determine at what stage the case to begin if we will order the file back to the trial court.

All in all, in exercising the revisional powers bestowed upon us by the provisions of section 4(2) of the AJA, we nullify the proceedings and judgment of the trial court, quash the conviction and set aside the sentence meted out to the appellants. Therefore, considering the gravity of the offence with which the appellants were arraigned upon, and bearing

in mind the fact that they have been in custody since 2013, in the interest of justice we order a retrial to be expedited before another judge and a new set of assessors. The appellants should remain in custody while awaiting for their retrial. It is so ordered.


DATED at **BUKOBA** this 29th day of August, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL

