IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 436 OF 2016

1. APOLINARY MATHEO
2. BARNABA ALCADO @ SIWINGWA } **..... APPELLANTS**
3. MICHAEL CLAUD @ JOLO

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Mambi, J.)

Dated the 12th day of February, 2016
in
Criminal Sessions Case No. 7 of 2015

.....

JUDGMENT OF THE COURT

30th November & 11th December, 2018

MWAMBEGELE, J.A.:

The three appellants – Apolinary Matheo, Barnabas Alcado @ Siwingwa and Michael Claud @ Jolo – were arraigned before the High Court of Tanzania sitting at Mbeya for three counts of murder. According to the information filed against them, the trio, on 01.09.2012, at Mbata Village in Chunya District, Mbeya Region murdered Julius s/o Katoto @ Mwamasonga, Sabela d/o Boniface and Maongezi s/o Mkusi the subject of, respectively, the first, second and third counts. The appellants denied the charges levelled against them, hence a full trial

after which they were convicted as charged and sentenced to suffer the mandatory death sentence. Aggrieved, they have come to this Court on first appeal with seven grounds of grievance filed by their advocates in lieu of theirs they earlier separately filed which they sought to abandon at the hearing. For easy reference, we take the liberty to reproduce the seven grounds of complaint as under:

1. The learned trial Judge erred in the manner of summing up the case to assessors;

2. The High Court erred on convicting Appellants on basis of evidence which is not at all found on record on proceedings;

3. The High Court gravely erred on holding the Appellants were properly identified by PW3 David Pascal and PW8 Herman Simon given a totality of the evidence on record;

4. The learned trial Judge made a grave mistake when taking evidence of PW8 Herman Simon after prayer by the prosecution for the witness to be declared a hostile witness;

5. The learned trial Judge erred in his assessment of the evidence on record;

6. The learned trial Judge erred in the manner of written Judgment whereby he convicted the Appellants with the offences charged well before making analysis of the evidence brought against them; and

7. The learned trial Judge erred on his failure to identify actual number of accused persons, saying they were nine, three and ended up convicting four.

When the appeal was placed before us for hearing on 30.11.2018, the appellants, who all entered appearance, had the able representation of Mr. Mika Mbise and Ms. Joyce Kasebwa, learned advocates. The respondent Republic appeared through Ms. Catherine Paul, learned State Attorney. In support of the appeal, the learned counsel for the appellants had earlier filed written submissions which they sought to adopt along with the grounds of appeal as forming part of their oral submissions. The written submissions of the appellants are rather detailed and lengthy covering all the grounds of appeal running through ten pages. However, for reasons that will become apparent in due course, we will address the first ground of appeal only.

On the first ground of appeal, the appellants complained that the learned trial Judge erred in the manner of summing up the case to assessors. They submitted that the learned Judge went against the dictates of sections 265 and 298 (1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the CPA) because, instead of summing up evidence for the prosecution and defence, he lured the assessors with his own opinion and imported

extraneous facts which were not at all on record. The learned counsel made reference to p. 58 from line 15 through to line 17 of p. 59. The appellants also submitted that at p. 58 the accused persons; the appellants herein are referred to as Apolinary Matheo, Barnaba Alcado and Adam Patrick while there was no accused going by the name Adam Patrick. The learned counsel for the appellants referred us to our unreported decision in **Chrisantus Msingi v. Republic**, Criminal Appeal No. 97 of 2015 wherein we observed that it was improper for a trial Judge to express his opinion in summing up to assessors.

Having stated as above, the learned advocates for the appellants submitted that because of the above shortfalls, the trial was not conducted with the aid of assessors and, therefore, urged us to invoke the powers of revision bestowed upon us by section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter simply referred to as the AJA) to nullify the entire proceedings of the High Court like we did in **Sikujua Hosea v. Republic** [2016] TLS LR 264 and **Tulubuzya Bituro v. Republic** [1982] TLR 264. The learned advocates prayed that bearing in mind the paucity of evidence on record and on the authority of **Fatehali Manji v. Republic** [1966] EA 341 and **Selina Yambi & others v. Republic**,

Criminal Appeal No. 94 of 2013 and **Salum Salum & another v. Republic**, Criminal Appeal No. 119 of 2013 (both unreported) cited with approval in **Athanas Julius v. Republic** Criminal Appeal No. 498 of 2015 (unreported), the appellants should be set free.

As alluded to earlier, in their written submissions, the appellants' advocates submitted on other grounds as well but we think the first ground disposes the appeal and, therefore, we think we should not burn any fuel in respect of them. We now turn to consider the respondent's rebuttal or acceptance, as the case may be.

Responding, Ms. Paul, was very quick to express her stance in respect of the appeal at the very outset. She was in agreement with the appellants that the proceedings was marred with irregularities regarding summing up to assessors which vitiated the whole trial. Supporting the submissions of the advocates for the appellants in respect of the first ground of complaint, she submitted that the summing up to assessors was inappropriate. The learned State Attorney referred us to p. 61 of the record of appeal where, she stated, the learned Judge influenced the assessors by giving his opinion and importing extraneous matters which did not crop up in evidence. Much worse, she went on, the assessors were not told of their role at the beginning of the trial. Neither were

they asked if they had any objection to any of them. That was inappropriate and an incurable procedural defect.

As regards the way forward, the learned State Attorney parted ways with the appellants' advocates. Having prayed that the proceedings and judgment of the High Court should be quashed and the sentences set aside, she proposed a fresh trial before another Judge and new set of assessors. The learned State Attorney ascribed the reason for taking that course of action to the availability of enough evidence to prove the case against the appellants beyond reasonable doubt in respect of the second count; the murder of Sabela Boniface.

Rejoining, Mr. Mbise came up with some force against the way forward suggested by the respondent's counsel. He charged that the only evidence against the appellants in respect of the murder of Sabela Boniface; the subject of the second count, was that of DP (a child whose name we withhold hence the pseudonym) who testified as PW3. He submitted that PW3 could not have easily identified the assailants who were in a group of about forty people in commotion and who came suddenly at sunset. If PW3 identified the appellants he would have told people on the very day or the following day, he argued. Had he done so, it would not have taken the appellants who lived in the same village

to be apprehended after a month. Thus he reiterated that ordering a fresh trial of the appellants would not do justice to them as the respondent will go back and fill in the gaps of the prosecution case.

Basing on the above arguments and conclusions, Mr. Mbise reiterated his prayer to have the appellants set free.

We have anxiously considered the submissions of the learned advocates for the appellants on the one hand and that of the learned State Attorney on the other. We are profoundly grateful for the industry expended in their respective submissions. The learned counsel for either side argued the appeal with tenacity and zeal and we commend them for the good work well done. The ball is now in our court.

We start our determination by stating that in terms of section 265 of the CPA, all criminal trials before the High Court are mandatorily conducted with the aid of assessors. For easy reference, that section 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."*

In accomplishing the duty under the section, case law has it, inter alia, that the assessors must be selected and told of their duty and the accused person accorded an opportunity to comment on whether or not they have any objection to any of the assessors. That stance of the Court has been stated in a number of decisions including **Tongeni Naata v. Republic** [1991] TLR 54 and our unreported decisions in **Yohana Mussa Makubi and Another v. Republic**, Criminal Appeal No. 556 of 2015, **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017, **Chacha Matiko @ Magige v. Republic**, Criminal Appeal No. 562 of 2015 and **Fadhil Yussuf Hamid v. Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016. In **Tongeni Naata,** the Court observed:

> *"As for the last ground of appeal it was held in Ndiragu Nyagu v R. [1959] E.A.75 that it is a sound practice which has been followed and should be followed to give an opportunity to an accused to object to any assessor. That was followed by this Court in the appeal of Samwel Ndonya v R. Criminal Appeal No. 76/1988 (unreported). However, we added that the result of such omission cannot be the same in each case."*

Likewise, in **Yohana Mussa Makubi**, **Hilda Innocent** and **Chacha Matiko @ Magige** (supra) we reproduced the following excerpt from the case of **Laurent Salu and five others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported) which we think merits recitation here:

> *""Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in this country. The rationale for the rule is fairly apparent. The rule is designed to ensure that the accused person has a fair hearing. For instance/ the accused person in a given case may have a good reason for thinking that a certain assessor may not deal with this case fairly and justly because of, say, a grudge, misunderstanding, dispute or other personal differences that exist between him and the assessor. In such circumstances in order to ensure impartiality and fair play it is imperative that the particular assessor does not proceed to hear the case; if he does then, in the eyes of the accused*

person at least, justice will not be seen to be done. But the accused person, being a layman in the majority of cases, may not know of his right to object to an assessor. Thus in order to ensure a fair trial and to make the accused person have confidence that he is having a fair trial, it is of vital importance that he is informed of the existence of this right. The duty to so inform him is on the trial judge, but if the judge overlooks this, counsel who are the officers of the court have equally a duty to remind him of it.

In the instant case, it is not known if any of the accused persons had any objection to any of the assessors, and to the extent that they were not given the opportunity to exercise that right, that clearly amounts to an irregularity."

In **Fadhil Yussuf Hamid** (supra) we meticulously summarized the above excerpt as follows:

*"The case of **Laurent Salu and five others v. R,** Criminal Appeal No. 176 of 1993 (unreported) is elaborative on all the steps which must be complied with in a trial with aid of assessors.*

1) The Court must select assessors and give an accused person an opportunity to object to any of them.

2) The Court has to number the assessors, that is, to indicate who is number one, number two and number three, as the case may be.

3) The Court must carefully explain to the assessors the role they have to play in the trial and what the judge expects from them at the conclusion of the evidence.

4) The Court to avail the assessors with adequate opportunity to put questions to the witnesses and to record clearly the answers given to each one. If an assessor does not question any witness, that too, has to be clearly indicated as: "Assessor 2: Nil or no question.

5) The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts, the evidence adduced, and also the explanation of the relevant law, for instance, what is malice aforethought. The court has to point out

to the assessors any possible defences and explain to them the law regarding those defenses.

6) The court to require the individual opinion of each assessor and to record the same."

[See also: **Bashiru Rashid Omar v. SMZ,** Criminal Appeal No. 83 of 2009 (unreported)]

Adverting to the instant case, it is apparent on the proceedings of the High Court that the learned trial judge did not select the assessors on the first day of hearing. Let the proceedings of 02.03.2013; the day on which the first prosecution witness started to testify, speak for itself:

"Date: 02.03.2016

Coram: Hon. Dr. A. J. Mambi, J.

For the Republic: Mr. Rodges/Miss

For the Accused: Mr. Mwakolo/Mr. Omary – D/Counsel

1st Accused:

2nd Accused:

3rd Accused:

Interpreter: *Mrs. Flora Mponzi – English into Kiswahili and Vice Versa.*

Notice of trial on information for murder c/s 196 and 197 of the Penal Code was duly served on the accused persons now before this Court.

Prosecution:

My Lord I am Rogers with Ms Zena for the Republic.

Defence:

We have Mwakolo for the 2nd & 3rd accused. Mr. Omary for the accused. The matter is for trial and we have (7) seven witnesses.

Charge is read to the accused persons.

1st Accused: Not true

2nd Accused: Not true

3rd Accused: Not true

Court:

Enters a plea of not guilty to all accused persons.

Sgd: Dr. A. J. MAMBI

JUDGE

02.03.2016

PW1:

Name: Dr. Pastory T. Buhele

Place: Mkwajuni Chunya

Word: Doctor

Religion: Cristian

PW1 is sworn.

I started my work as a clinical officer in 1984..."

After that, PW1 went on to testify as shown above without the assessors being shown in the proceedings that they were selected. Neither was it shown that the appellants were accorded opportunity to object or not to object to any of the assessors. That course offended the principles in **Laurent Salu** (supra) summarized as the first and second principles in **Bashiru Rashid Omar** (supra) to the effect that the Court must select assessors and give an accused person an opportunity to object or not to object to any of them, and that the Court has to number the assessors, that is, to indicate who is number one, number two and number three, as the case may be.

However, as regards the first omission, we think, it is not incurable, for, despite being not indicated that the assessors were selected, we see them at p. 16 of the record of appeal being given opportunity to ask the witness questions. At p. 16 the record shows:

"***Assessors:***

Assessor No. 1:

Police officer come at round 11.00 a.m. They come on the 2.09.2012.

Assessor No. 2:

On the material date I was with other staff in the office.

Assessor No. 3:

I don't know the source of fire.

Sgd: Dr. A. J. MAMBI

JUDGE

02.03.2016"

In view of the fact that the record shows that assessors asked questions, we take it that they were selected. We find fortification in this stance in the maxim of equity which says equity considers as done that which ought to have been done. In **Musa Mohamed v. Republic**, criminal appeal no. 216 of 2005 (unreported), we had this to say on the maxim:

> *"This Court being the final court of justice of the land, apart from rendering justice according to law also administer justice according to equity. We are of the considered opinion that we have to resort to equity to*

render justice, but at the same time making sure that the Court records are in order.

One of the Maxims of Equity is that 'Equity treats as done that which ought to have been done'. Here as already said, the learned Resident Magistrate for all intents and purposes convicted the appellant and that is why he sentenced him. So, this Court should treat as done that which ought to have been done. That is, we take it that the Resident Magistrate convicted the appellant."

Applying the above observation in respect of the application of the maxim, to the present situation, we are of the considered view that the learned Judge, for all intents and purposes, selected the assessors and that is the reasons why he accorded them the opportunity to put questions to the witness. We however, reiterate that in a case triable with the help of assessors, it is desirable that the selection of assessors is reflected in the proceedings. It is also important that they should be reminded of their duty as pointed out in item 3 in **Fadhil Yussuf Hamid** (supra). Failure to do that makes the trial unfair prone to be nullified.

Both learned counsel for the parties have also complained that the assessors were influenced. For clarity we wish to reproduce the portion which the parties allege that the judge influenced the assessors. At pp. 58 - 59, the learned Judge summed up to the assessors as follows:

> *"The Accused Persons APOLINARY MATHEO, BARNABA ALKADO ADAM PATRICK and other villagers upon reaching the house of GIBERT CHIKUNDI they did beat and cut severally the deceased one SABELA BONIFACE the wife of GILBERT CHIKUNDI, the accused persons herein also burned the deceased kitchen and burnt the deceased body to death by using grasses her to be witch. At all this time the deceased grandson one [DP] who was at the scene witnessed the incident and managed to identify the accused persons accordingly.*
>
> *On the similar vein the accused persons APOLINARY MATHEO, BARNABA ALCADO, ADAM PATRIC in association with NESTORY CHRISTOPHER and GEOFREY MUSOLOLO went to the house of the deceased one JULIUS KATOTO burned the house while the deceased was inside the house.*
>
> *The accused persons completed their evil acts by going to the house of the deceased one*

MAONGEZI MKUSI burning the said house while the deceased was inside the house and the deceased died forthwith because of the said act of the accused persons to burn the deceased house while he was inside."

Likewise, at p. 61 of the record of appeal summed up to them in the following terms:

"As you may recall from the evidence, all the deceased were beaten, stoned and burnt to death by the three accused persons and other unknown person. The accused persons alleged all the deceased as witchcrafts who caused the deathbed of the girl known as NELLY D/O ALEX. Their houses and properties were also destroyed and burnt to ashes."

We agree with both trained minds for the parties that, indeed, the learned trial Judge, in summing up to assessors, expressed his opinion and influenced them as well as importing extraneous matters which did not crop up in evidence. That had an adverse effect on the appellants and made the trial against them unfair. In **Chrisantus Misingi** (supra) the case referred to us by the learned advocates for the appellants, we grappled with a similar situation and made the following observation:

"The trial judge clearly expressed his own findings of fact on the evidence and had nothing to do with the opinions of assessor but to influence them to agree with him. It was improper for the judge to make his impression known to the assessor because a 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. (SEE ***ALLY JUMA MAWERA VS REPUBLIC*** *[1993] TLR 231). Moreover, it is only through a proper summing up that the assessors may give an invaluable opinion to aid the judge in reaching a just decision. (SEE* ***WASHINGTON SIO ODINDO VS REPUBLIC*** *(1954) 21 EACA 392). Where assessors are misdirected on a vital point, the trial judge cannot be said to have been aided by assessors. (SEE* ***TULUBUZYA BITURO VS REPUBLIC*** *(1982) TLR 264)."*

Likewise, in **Okethi Okale and others v. Republic** [1965] 1 EA 555, the erstwhile Court of Appeal for East Africa, underlined the importance of not importing extraneous matters into evidence. It was held, (I quote from the first holding in the headnote):

"In every criminal trial a conviction can only be based on the weight of the actual evidence adduced and it is dangerous and inadvisable for a trial judge to put forward a theory not canvassed in evidence or in counsels' speeches".

We also see another shortfall; that the learned trial Judge did not sum up to assessors on a very important aspect of the offence. He did not sum up on the aspect of malice aforethought and what it entails. That amounted to a nondirection on a vital point of law which also adds salt to the wound. As we articulated in **Omari Khalfan Vs Republic**, Criminal Appeal No. 107 of 2015 (both unreported), 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).

The above ailments, on the authorities cited, vitiated the trial.

Regarding the way forward, with due respect to the learned State Attorney, we are not prepared to buy the argument that we should order a retrial as, according to her, there was sufficient evidence to mount a conviction against the appellants in respect of the second count. She added that the prosecution is not to blame for the ailments. With equal due respect, we are in agreement with the learned advocates for the appellants that this case is not one befitting a retrial. We are of such a stance because the only eye witness in respect of the second count was DP (a child of young age hence the pseudonym). As rightly argued by the appellants' advocates, PW3 could not have easily identified the assailants in the conditions obtaining at the scene of crime because; one, it was late in the evening immediately before 20:00 hours – see the testimony of Erick Matheo Chitende (PW2), two, the encounter was sudden and of a mob of about forty people who were not face to face with PW3, and three, PW3 went to sleep to a certain Mama Raeli who was not called to testify and it does not appear the appellants were mentioned to her as they were arrested one month after the incident. Had the witness mentioned the assailants at the earliest opportune moment, we see no plausible reason why the appellants should not have been arrested immediately. This waters down the testimony of PW3, for, the ability of a witness to name a suspect at the

earliest opportunity is an important assurance of his reliability. And, in the same way, an unexplained delay to name the assailants must put a prudent court to inquiry – see: **Marwa Wangiti and Another v. Republic** [2002] TLR 39. In the circumstances, we find and hold that the identification of the appellants by PW3 was not watertight to sustain a conviction against the appellants in respect of the second count. In the premises, we are of the considered view that a retrial will not be apposite in the circumstances.

We also wish to point out that the sentence meted out to the appellants was omnibus. In sentencing the appellants, the following is apparent in the judgment:

> *"The accused persons are convicted of murder and there is only one sentence for this offence that is death by hanging. In terms of section 26 (1) of the Penal Code, Cap. 16 [R.E. 2002] the accused persons are sentenced to suffer death by hanging".*

This sentence was certainly omnibus. We wish to reiterate what the Court stated in **Agnes Doris Liundi v. Republic** [1980] TLR 46 that once an accused person is convicted of murder on more than one counts, a sentence should be inflicted on only one count. There, like

here, the High Court convicted the appellant on three counts of murder and sentenced her to death on each of the three counts. The Court held at p. 50:

> *"The appellant was convicted on three counts of murder. Sentence of death should only have been passed on one count. The convictions on the other two counts being allowed to remain in the record. We accordingly amend the sentence to refer to the conviction on the first count only".*

Adverting to the case at hand, on the authority of **Agnes Doris Liundi** (supra), we hold that the learned trial judge should have convicted the appellants on all three counts but should have sentenced them in respect of only one count; the first count. The logic encapsulated in this position is not far to seek; once a sentence in respect of the first count is executed, there will be no person against whom to execute the sentences in respect of the other counts.

For the avoidance of doubt, we have refrained from engaging section 4 (2) of the AJA as implored by the learned advocates for the appellants because the complaint over improper summing up to assessors was one of the grounds of appeal.

For the reasons we have endeavoured to give, we find merit in this appeal and allow it. We quash the respective convictions of the appellants, and set aside the sentences meted out to them. We order the immediate release of the appellants Apolinary Matheo, Barnabas Alcado @ Siwingwa and Michael Claud @ Jolo unless held there for some other offence.

Order accordingly.

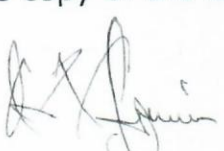
DATED at **MBEYA** this 10th day of December, 2018.

B. M. MMILLA
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