

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 140 OF 2016

LIMI LIMBU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mgetta, J.)

dated the 28th day of August, 2016

in

Criminal Session Case No. 130 of 2012

JUDGMENT OF THE COURT

16^h & 20th February, 2018

MUGASHA, J.A.:

In Criminal Session Case No. 130 of 2012, the High Court sitting at Tabora, the appellant, **LIMI LIMBU**, was arraigned for the offence of murder. The information laid before the trial court alleged that, on 25th August, 2011 at Mwamabu Village, Bariadi District in Shinyanga region, the appellant did murder one Tabu d/o Maimathi aged one year and eight months.

A brief account of the prosecution case was that, the deceased was the appellant's child before she had separated from her ex-husband. She later fell in love with **KIJIJI S/O NYAMAGU** who proposed to marry her, on condition that they terminate the deceased's life because they would bear another child. They executed the killing by strangling the deceased and hid the body on the hill. The appellant denied to have committed the killing and instead she mentioned **KIJIJI S/O NYAMAGU** to be the one who strangled the deceased to death.

The learned trial judge was satisfied that the prosecution had proved the charge of murder against the appellant beyond reasonable doubt. She was thus found guilty, convicted and sentenced to death by hanging.

Dissatisfied, the appellant seeks to impugn the decision of the trial court. In the memorandum of appeal filed through advocate Mugaya Mtaki on 24th January, 2018, the appellant has raised two grounds of complaint namely:

1. That the trial of the case by the High Court was irregular as it proceeded without the aid of assessors as required by the law.

2. That the learned trial judge erred in law in holding that the prosecution had proved its case against the appellant beyond reasonable doubt.

The appellant was represented by Mr. Mugaya Mtaki learned counsel whereas the respondent Republic was represented by Mr. Ildephonce Mukandara, learned State Attorney.

At the hearing of the appeal, Mr. Mtaki rose to inform the Court that after liaising with the appellant, he will argue only the first ground. He opted to abandon the second ground of appeal.

In addressing the ground of appeal, Mr. Mtaki submitted that, the trial was conducted without the aid of assessors which is contrary to the requirements of section 265 of the Criminal Procedure Act [**CAP 20 RE.2002**]. In this regard, he pointed out that, though they have been availed with the opinion of assessors, the summing up notes of the trial judge are not on record and it is not possible for the Court to ascertain if during the summing up, there were mis-directions or non-directions to the assessors. Thus he argued that, the absence of the summing up notes is a fatal irregularity vitiating the entire trial. The

learned counsel urged us to nullify the entire trial and order a retrial before another judge with a different set of assessors.

On the other hand, the learned State Attorney, supported the submission of the appellant's counsel adding that, the missing summing up notes vitiated the active role of assessors which is a fatal irregularity rendering a need for a retrial.

The issue for our consideration is the propriety or otherwise of the trial in the absence of the record of the summing up notes of the trial judge.

It is on record that, after the close of the trial, both the prosecution and the defence made their respective submissions on 23rd October, 2014. On the same date the trial judge made an order to the effect that he would sum up the case to the assessors on 28th October, 2014. It is also on record that, on 4th November, 2014. The trial judge made a summing up to the assessors and they all gave their opinions. However, what is disturbing is that, on the record of the trial we could not find any summing up notes of the trial judge.

As we always have stated in a number of our decisions, the role of assessors in a criminal trial is articulated under section 265 of the Criminal Procedure Act which provides:

"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".

(See also the case of **ESROM PETRO VS REPUBLIC**, Criminal Appeal No. 167 'A' of 2015 (unreported).

Under the cited provision, it is a mandatory requirement that all criminal trials before the High Court must be conducted with the aid of assessors. In terms of section 298(1) of the CPA, after the case on both sides is closed, the judge is required to sum up the evidence for the prosecution and the defence and call upon 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. Such opinion must be recorded.

To ascertain compliance with section 298 (1) of the CPA, there has to be the written summing up notes by the trial judge in order to establish that, during the summing up, the trial judge properly guided

and directed the assessors to enable them to give rational and informed opinions. Furthermore, it is in the summing up notes where it can be established if there were mis-directions and non-directions to the assessors.

We wish to point out that, the opinion of the assessors can be of great value and assistance to a trial judge but only if they 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 the assessor's opinion is correspondingly reduced or eroded. Therefore, it is only through proper summing up that the assessors can give an invaluable opinion to aid the trial judge in reaching a just decision. (See the case of **WASHINGTON S/O ODINDO VS REPUBLIC**, [1984] 24 EACA).

In view of the foregoing, it is only through the written summing up notes on the record that it can be established if at all the assessors were properly guided and directed on the facts in relation to the relevant law. Moreover, the written summing up notes on the record will ascertain if there were mis-directions or non-directions to the assessors on the evidence and the points of law and facts. In the case

of **MAKUBI KWELI AND NKWABI MASUNGA VS THE REPUBLIC**, Criminal Appeal No.149 of 2015 the Court was confronted with missing summing up notes of the trial judge. The Court stated:

"In the instant case, the learned trial judge has completely failed to record the summing up notes to the assessors, we therefore fully agree with the learned advocate for the 2nd appellant that the trial was conducted without the aid of assessors as we cannot be sure if they were or were not guided properly in giving their opinion."

Thus, for that reason the Court nullified the entire proceedings.

We fully subscribe to the said decision. Therefore, the missing summing up notes of the trial judge is a fatal irregularity which vitiates the trial. This is tantamount to conducting the trial without the aid of assessors as required by section 265 of the CPA, because without the summing up notes the full involvement of the assessors at the trial cannot be safely vouched.

In the case under scrutiny, as pointed out by the learned counsel, the missing summing up notes indeed vitiated the proceedings and the judgment because the Court cannot safely vouch

if the assessors were properly guided into the giving of their opinions in a serious trial of the offence of murder.

In view of the aforesaid, we nullify the judgment and trial proceedings of High Court. We set aside the conviction and the sentence and in the interest of justice, we order expedited retrial of the appellant before another judge with a different set of assessors. Meanwhile the appellant shall remain in custody.

DATED at TABORA this 19th day of February, 2018.

S. MJASIRI
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.


A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL