IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CRIMINAL APPEAL NO. 64 OF 2017

(CORAM: MUSSA, J.A., MWARIJA, J.A., And MZIRAY, J.A.)

HARUNA ISMAIL @ DUDU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

Dated of 14th day of December, 2016
in
Criminal Session No. 37 of 2014

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JUDGMENT OF THE COURT

16th & 20th July, 2018

MUSSA, J.A.:

In the High Court of Tanzania, at the Dodoma Registry, the appellant was arraigned for murder, contrary to sections 196 and 197 of the Penal Code, chapter 16 of the Revised Edition 2009 of the Laws (the Penal Code). The particulars of the offence alleged that on the 25th day of February 2012, at Unyambwa Village, within the District and Region of Singida, the appellant murdered a certain Clement Rajabu @ Wawa whom we shall henceforth refer to him as "the deceased."

The appellant denied the accusation, whereupon the prosecution featured five witnesses and four documentary exhibits. In a nutshell, the prosecution case was to the effect that the deceased was a herdsman of Jumanne Shabani (PW1). On the mentioned date, the deceased in the company of (PW1) visited Mtamaa Village stock market where the latter bought four heads of cattle. Evidence was to the effect that PW1 obtained a receipt for the purchase. PW1 then entrusted the beasts as well as the purchase receipt to the deceased with instructions to drive the heads of cattle to his Mkenge Village residence.

On the morrow of the incident, the deceased did not show up as expected, just as he was no show on the following day. Worried by the deceased's disappearance, PW1 reported the matter to Ikungi Police Station. No sooner, upon being tipped by a whistle blower, the police raided the house of the appellant where the missing heads of cattle were retrieved. When asked to justify his possession of the beasts, the appellant produced a purchase receipt No. 00068560 issued on the 25th February, 2012 and which, incidentally, bore the name of PW1. Upon seeing the receipt, PW1 confirmed that it was the very one which he was

issued against the purchase of the four heads of cattle and which he, in turn, gave to the deceased.

In the wake of a search of the surroundings of the appellant's premises, the deceased's body was retrieved from a newly dug grave within the appellant's farm. Upon exhumation, a post-mortem examination was conducted, according to which the deceased's death was attributed to asphyxia secondary to fracture of the neck.

There was further prosecution evidence in the nature of a Police statement made by a certain Jailani Haruna, apparently, the appellant's son and which was adduced into evidence by No. E.9500 detective corporal Charlie (PW5). That concludes the prosecution's version of the case. At the close of the case for the prosecution, Mr. Matimbwi, learned Advocate, who was representing the appellant during the trial, pronounced thus:-

"Hon. Judge, we do not wish to address the court."

In response, the presiding Judge simply remarked:-

Court: *Section 293 (2)(a) and (b) complied with.*

Thereafter, the case for defence was opened following which the appellant gave affirmed testimony. In his account, the appellant completely disassociated himself from the prosecution accusation. His testimony was to the effect that the four heads of cattle which were found in his possession were brought to his premises on the 25th February, 2012 by his brother–in- law, namely, Ramso who was in the company of another person, not known to him. Ramso also gave him the referred receipt for the purchase of the heads of cattle. On the 28th February, 2012 the appellant along with the four heads of cattle were apprehended and taken to Singida Police Station. Speaking of the deceased, the appellant denied any knowledge of him and claimed that he heard his name, for the first time, at the police station.

At the end of the respective cases from either side, the learned Judge summed up the case to the three assessors who sat with him. As it turned out, the three assessors unanimously returned a verdict of "guilty as charged." In the upshot, the High Court (Mohamed, J.) was satisfied that the prosecution had proved its case to the hilt and, accordingly, the appellant was found guilty, convicted and handed down the mandatory

death sentence. The appellant is aggrieved and seeks to impugn the decision of the High Court upon four grounds, namely:-

> *" 1. That, the Honorable Learned Trial Judge erred in fact and law in admitting as evidence the statement of* ***JAILAN HARUNA*** *(Exhibit P4) in lieu of the oral evidence of the said* ***JAILAN HARUNA*** *purportedly acting under the powers conferred to him by Section 34B (1) and (2) of the Evidence Act, [Cap. 6 R.E.2002] contrary to the dictates of the law.*
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> *2. That, the Honorable Learned Trial Judge erred in fact and law in convicting the Appellant relying wholly on the evidence of JAILAN's statement tendered and admitted as* ***Exhibit P4*** *in Court by virtue of the provisions of Section 34 B (1) and (2) of the Evidence Act, [Cap.6 R.E. 2002] and the evidence that the body of the Deceased was exhumed from the accused person's* ***Shamba*** *while such evidence was weak, disjointed and unreliable to safely secure a conviction.*
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> *3. That, the Honorable Learned Trial Judge erred in fact and law in treating the Appellant's evidence in defence as a mere afterthought while the same managed to create reasonable doubts as to his guilty thus wrongly reached the conclusion in the impugned decision.*

4. *That, the Learned Honorable Trial Judge erred both in fact and law in holding that the charge of Murder was proved against the Appellant beyond all reasonable doubts."*

At the hearing before us, the appellant was represented by Mr. Cheapson Kidumage, learned Advocate, whereas the respondent Republic had the services of Ms. Chivanenda Luwongo, learned State Attorney.

At the very outset, we invited learned counsel from either side to address us on two issues which we raised *suo motu:* **First,** whether or not the mere remark by the presiding Judge that *"section 293(2)(a) and (b) complied with"* was sufficient to call upon the appellant to make his defence; and **second,** whether or not the trial Judge adequately summed up the case to the assessors who sat with him.

As regards the first issue, both Mr. Kidumage and Ms. Luwongo were of the view that the mere remark by the trial Judge that section 293 has been complied with was inadequate inasmuch as, by it, it was not patently clear that the appellant was informed of his rights as is imperatively required by the provision. In the face of what they conceived as a fatal

impropriety, the learned counsel advised us to nullify the proceedings of the High Court from that stage onwards. Addressing us on the second issue, again, both Mr. Kidumage and Ms. Luwongo similarly took the position that the learned trial Judge did not put to assessors the ingredients of the offence of murder with which the appellant was charged.

On our part we propose to first confront the first issue with respect to section 293 of the Criminal Procedure Act (CPA) which we find easily disposable. We think, in that regard, it is pertinent to pay homage to the unreported Criminal Appeal No. 118 of 2006 between **Bahati Makeja vs. The Republic.** In that case, it was not upon record that the presiding trial Judge had addressed the accused in the manner prescribed by section 293(2) of the CPA. All what was reflected in the record was the choice made by the accused's Advocate to the effect that his client will testify on oath and that he has one witness to call. On appeal, a full bench of the Court took the following positions:-

> *(i) That, it was palpably clear that the learned Judge must have addressed the accused in terms of section 293 of the CPA which is why the learned Advocate stood up to make a choice of his client's manner of defence;*

(ii) That, even if the learned Judge had omitted to do so, in a case where the accused person is represented, the paramount factor is whether or not injustice has been occasioned; and

(iii) That, the word "shall" as used in the CPA is not imperative as provided by section 53(2) of chapter 1 but is relative and is subjected to section 388 of the CPA.

And, so it is our decided opinion that in the scenario at hand, where the learned Judge clearly expressed that section 293(2)(a) and (b) has been complied with, the requirement was fully met.

Addressing now the second issue, we entirely agree with the submissions of the learned counsel from either side to the effect that the learned trial Judge did not put to the assessors the ingredients of the offence of murder with which the appellant was charged. What is more, since the prosecution largely depended on the appellant's possession of the four heads of cattle, the learned trial Judge also ought to have put to the assessors the pre-requisites for the invocation of the doctrine of recent possession.

As to what are the consequences of the no-direction of the assessors on vital points of law, we propose to start by paying homage to the old case of **Washington Odindo vs. The Republic** [1954] 12 EACA 392 where the defunct Court of Appeal for Eastern Africa had this to say:-

> *"The opinion of assessors can be of great value and assistance to 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 the assessors opinion is correspondingly reduced."*

Upon numerous decisions, this Court has insistently emphasized the need for a trial Court to direct the assessors on vital points of law. A non-compliance has been held to be fatal with the result of vitiating the entire trial proceeding. In, for instance, the unreported Criminal Appeal No. 290 of 2011 – **Charles Lyatii @ Sadala vs. The Republic,** the Court vitiated the High Court proceedings on account of the assessors not being directed on what malice aforethought was all about. The Court had cited the ration

decidendi in the English case of **Bharat vs. The Queen** (1959) AC 533 and observed:-

> *"Since we accepted the principle in **Bharat's** case as being sensible and correct, it must follow that in a Criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to the assessors on vital point."*

Corresponding remarks had earlier been made in the case of **Tulubuzya Bituro vs. The Republic** [1982] T.L.R. 264. Thus, in the matter under our consideration, the failure by the learned trial Judge to address the assessors on the tenents of the offence of murder as well as the law governing the doctrine of recent procession, was fatal with the effect of nullifying the entire trial proceedings.

As the non-compliance is not raised in any of the grounds of appeal, we, accordingly, invoke our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Revised Laws 2002 and

nullify the entire proceedings of the High Court. The resultant conviction and sentence are, respectively, quashed and set aside. It is further ordered that the appellant should be tried afresh as expediously as possible before another Judge and a different set of assessors. In the meantime, the appellant should remain in custody as he awaits the resumption of the trial.

Order accordingly.

DATED at **DODOMA** this 19th day of July, 2018.

K. M. MUSSA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

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

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL