IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: LUANDA, J.A, LILA, J.A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 484 OF 2016

G. 2573 PC PACIFICUS
CLEOPHANCE SIMON .....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT
(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kihwelo, J.)

dated the 27th day of July, 2016
in
Criminal Session No. 45 of 2013

JUDGMENT OF THE COURT

1st & 5th June, 2018
LUANDA, J.A.:

In the High Court of Tanzania sitting at Iringa, the above named appellant was charged with murder. It was alleged in the charge sheet that on 2nd day of September, 2012 at Nyololo Village within Mufindi District, in Iringa Region, the appellant murdered one Daudi s/o Mwangosi. The appellant pleaded not guilty to the charge and so the case went on full trial. At the end of the trial, the appellant was convicted with manslaughter, a lesser offence to murder. He was sentenced to 15 years imprisonment.

Aggrieved by the finding of the trial High Court and sentence, the appellant has preferred this appeal.

In this appeal Mr. Rwezaula Kaijage, learned counsel represented the appellant; whereas Mr. Abel Mwandalama, learned Senior State Attorney appeared for the respondent/Republic. Mr. Kaijage filed a memorandum of appeal consisting of five grounds.

Before we proceeded to hearing the appeal, the Court spotted a procedural irregularity which is not a ground of appeal and so wished to satisfy itself first. The irregularity spotted out is that the record, does not show the learned judge to have summed up the case to the assessors as required by law. We posed that question because the record does not contain summing up notes to assessors. Page 141 of the record shows that after the defence had closed its case on 23/6/2016, the case was adjourned to 27/6/2016 for the parties to make their final submissions to be filed by 24/6/2016 and for summing up to the assessors.

Indeed, the parties dutifully complied with the order of the trial High Court. They lodged their submissions on 24/6/2016. As to the summing up notes, the record reads as follows, we reproduce:-

"Date: 27/6/2016

Coram: Hon P.F. Kihwelo, Judge

For the Republic: Mr. Adolf Maganda, State Attorney

For the Accused: Mr. Rwezaura Kaijage, Advocate

Law Assistant: Moses Ambindwile

Accused person: Present under custody

Assessors:

1st Assessor – Khadija Hussein

2nd Assessor - Said Mbaga

3rd Assessor – Sofia Nanguli

Interpreter: Mr. Charles Mwasumbwi – English into Swahili and vice versa.

Mr. Adolf Maganda, State Attorney:

My Lord the matter is coming for summing up to assessors

Mr. Rwezaura, Advocate:

We are ready My Lord.

***Court**: Summing up to assessors dully (sic) done.*

Sgd: P.F. Kihwelo
Judge
27/6/2016.

Then the assessors prayed for a short adjournment to enable them consult which was granted. They then gave their opinions. So, it is clear that the record does not contain summing up notes, hence the question posed. We invited the counsel of both parties to express their views on the matter.

Mr. Kaijage who also defended the appellant during the trial told us that the learned trial judge summed up the case to the assessors. When asked whether it was proper if at all the summing up was done without the same to have been in writing as reflected in the record, he said the same ought to be reflected in the record. And when asked whether the omission vitiates the proceedings, Mr. Kaijage was hesitant. Finally, when he was asked what was the way forward, Mr. Kaijage said we should nullify the proceedings dated 27/6/2016 onwards, quash both the conviction and sentence and order the trial learned judge to sum up the case.

On the other hand Mr. Mwandalama who was focused, brief and to the point. He said that since the trial learned judge sat with assessors as provided

under s. 265 of the Criminal Procedure Act, Cap 20 RE 2002 (the CPA), then he ought to have summed up the case as provided under S. 298 (1) of the CPA and the same must be reflected in the record,. He cited a Kenyan case **Kitsao VR** [2007] 2 EA 252 where the Court of Appeal of Kenya said, *inter alia*, that the summing up must not be done but must be seen to be done. He went on to say that since the omission is fatal, the entire proceedings and judgment should be declared a nullity. The same should be quashed and order a retrial.

Before we proceed further, we wish to point out as to the proprietness of this move taken by the Court in raising the issue of non compliance of S. 298(1) of the CPA. There is nothing improper about this. This is because the duty of the courts is to apply and interpret the laws of the country. The superior Courts, like ours, have an additional duty of ensuring proper application of the laws by the courts below. (See **Marwa Mahende VR** [1998] TLR 248). Having said that, we now proceed to discuss the point raised.

In terms of S. 265 of the CPA it is a legal requirement that when the High Court conducts a criminal trial it must sit with at least two assessors. The section reads as follows:-

*265. 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.* [Emphasis supplied]

The importance of assessors in a trial was underscored in **Washington s/o Odindo VR** [1954] 21 EA CA 394 where the Court of Appeal for Eastern Africa, *inter alia*, 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 salient facts of the case, the value of the assessors' opinion is correspondingly reduced."

It is clear therefore that when the High Court conducts a criminal trial without assessors, the trial is a nullity. But how the assessors assist the High Court in criminal trial to arrive at a just decision?

In **Bernadeta Bura @ Lulu VR,** Criminal Appeal No. 530 of 2015 (unreported) where the facts of that case are almost similar to this case, the Court said as follows:

"One, the High Court to avail the assessors with adequate opportunity to put questions to witnesses as provided for under S. 177 of the Evidence Act, Cap 6 R.E. 2002. Through asking questions to witnesses, the assessors will help the Court to know the truth. Two, which is relevant to our case, is that in terms of Section 298 (1) of the CPA when the case on both sides is closed, the judge is required to sum up the case and then take the opinions of assessors. (See also ***Augustino Ladaru v. Republic, Criminal Appeal No. 70 of 2010*** (unreported))."

In our case our concern is about the second limb namely whether S. 298 (1) of the CPA was complied with. The section provides as follows:

298. – (1) 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.

The word "may" in its ordinary meaning connotes discretionary. However, in order to effectively give meaning of s. 265 of the CPA, summing up to assessors

is not discretionary. Rather it is a necessary requirement for the trial Court to arrive at a just decision. To hold otherwise would water down the role of assessors (See also **Hatib Gandhi & Others VR.** [1996] TLR 12 and **Khamis Nassoro Shomar V SMZ** [2005] TLR 228).

In **Kitsao** case cited supra, the Court of Appeal of Kenya made the following pertinent observation at page 254 – 255 in relation to SS. 262 and 322(1) of the Kenyan Criminal Procedure Code which is *pari materia* with our ss. 265 and 298(1) of the CPA.

> *"Although by its use of the word "may" the above provision gives the court the discretion to sum-up the evidence to the assessors before requiring the assessors to state their opinions, by usage and case law, summing-up to the assessors is no longer a discretionary matter, for if the court requires the assessors to be of any use to it, the assessors must make informed opinions which they can only do upon the court summing-up the entire evidence to them and at the same time directing them on issues of law; that the summing-up must not only be done but must be seen to be done. Summing-up to the assessors has gained the force of law and is now a must."*

In our case it would appear the summing up was done orally. If done orally how are we going to know whether the learned trial judge sufficiently summed up the case to the assessors? In **Bernadeta** case cited supra, the facts were that after the parties had made their final submissions, the record shows thus:-

> *"COURT RESUMES*
>
> ***State Attorney:*** *Honourable Judge the Coram is as it was in the morning the matter is coming up for summing up to assessors. We are ready.*
>
> ***SUMMING UP:*** *Made accordingly.*
>
> ***Opinion of Assessors"***

The Court made the following observation:

> *"... in the instant case, we have shown the learned trial judge to have indicated in the record that she summed up the case to the assessors. Since it is not in the record, there is like hood that she did it orally. In case she did that, we are not in a position to say what exactly she had told the assessors. Did the learned trial judge sufficiently summed up the case to the assessors by explaining fully the facts of the case before them*

in relation to the relevant law? We cannot tell. We would have been in a position to answer that question only if the summing up was in writing. ***The summing up notes in writing will enable this first appellate Court see whether or not the trial learned judge sufficiently summed up the case to the assessors.*** *Since that was not done, we are of the firm view that section 298 (1) of the CPA was not complied with. The trial cannot be said to have been conducted with the aid of assessors."* [Emphasis Ours]

It is clear that in that case the Court insisted the summing up notes must be in writing so as to enable the Court satisfy itself whether the trial court sufficiently summed up the case to the assessors. It is only when the summing up notes are in writing will enable to see whether for instance the assessors were addressed the ingridients of the offence of murder, who has the burden of proof and its standard etc. Failure to show the summing up of the case to assessors to have been done in writing vitiates the entire proceedings. It is taken S. 298(1) of the CPA to have not been complied with.

Like in **Bernadeta** case, since the record does not contain a written summing up notes, it is taken S. 298 (1) of the CPA to have not been complied with.

Exercising revisional powers of this Court as provided under S. 4(2) of the AJA, we declare the entire proceedings and judgment a nullity. The conviction is quashed and sentence set aside. We order the appellant to be tried afresh before another judge and a new set of assessors.

Order accordingly.

DATED at **IRINGA** this 4th day of June, 2018.

B.M. LUANDA
JUSTICE OF APPEAL

S.A. LILA
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL