IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUSSA, J.A, MWAMBEGELE, J.A And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 64 OF 2019

ALIASGAR MOHAMED BHIMJI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam.)

(Luvanda, J.)

dated the 20th day of March, 2019.
In
Criminal Sessions Case. No. 156 of 2015.

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JUDGMENT OF THE COURT

10th June, & 4th & July, 2019

MUSSA, J.A.:

This appeal originates from committal proceedings which were instituted in the District Court of Tameke on the 2nd day of November, 2015. In those proceedings, the appellant along with a certain Hussein Jeta @ Alnasir were jointly arraigned for murder, contrary to section 196 of the Penal Code, chapter 16 of the Laws (the Code). A little later, on the 7th day of December, 2015 the Republic entered a *nolle prosequi* in favour of Hussein Jeta @ Alnasir

and so, at the height of the committal proceedings, it was the appellant alone who was committed for the trial to be held in the High Court.

In the information that was eventually laid at his door in the High Court of Tanzania at Dar es Salaam, the appellant was formally arraigned for murder, contrary to the referred provision of the Code. The particulars on the information alleged that on the 19th day of October 2015, at Triple A Mbagala mission area, within the district of Temeke in Dar es salaam Region, the appellant murdered one David, Mwalolo @ Kalangula (henceforth called "the deceased").

The appellant refuted the accusation whereupon, at the preliminary hearing stage, the prosecution expressed its intention of featuring twelve (12) witnesses including Hussein Jeta @ Alnasir. But when, eventually, the case for the prosecution was presented only seven (7) witnesses were featured as well as a fire arms and ammunition licence; a Forensic Bureau Report; a pistol, make, Beretta, Serial No. PY 153456; two (2) empty cartridges which were retrieved at the scene; two (2) empty cartridges which were fired by the ballistic expert; four (4) live pistol bullets; and a post moterm

examination report. The enlisted items were adduced into evidence as exhibits P1 to P7, respectively. It is, perhaps, noteworthy that the referred Hussein Jeta @ Alnasir was, after all, not featured by the prosecution as a witness.

From the prosecution witnesses' account, it comes to light that up until his tragic demise, the deceased was employed as a driver by the Triple A holdings company which had a workshop and offices at Mbagala mission area. The company was involved in transporting cargo outside the country and its owner-cum-director, was the already named Hussein Jeta @ Alnasir. The appellant was, at the material time, a workshop manager responsible for the purchase of motor vehicles' spare parts when required.

The case for the prosecution commenced with the testimony of Jamil Remtula (PW1) who was an assistant employment manager at the Triple A company. His account was to the effect that on the fateful day, around 7:00 p.m. or so, the deceased arrived at the company's premises from Lubumbashi, the Democratic Republic of Congo, from where he had travelled on duty. The deceased had a shortage of 400 litres of fuel and, pursuant to the company's

practice, a shortage sheet to that effect was prepared to which PW1 instructed the deceased to append his signature. The deceased, it was said, refused to sign the shortage sheet and, in response, PW1 took him to an office where the Director was. According to PW1, four persons gathered in that office, that is, himself, the Director, the deceased and the head driver, namely, Edwin Martin Madafa (PW4). Whilst there, in the course of a heated argument between PW1 and the deceased, the latter grabbed the former by his shirt and physically assaulted him in his face. In the result, PW1 fell down and, just then, the deceased picked an iron rod from thereabouts, ostensibly, to further attack PW1 with it but, soon after, PW1 heard the sound of a gunshot. In the immediate aftermath, the deceased was seen falling down. Speaking of the appellant, PW1 told the trial court thus:-

> *" I don't recall when Ally came in, I saw him after the event. Ally was holding the weapon as we were going to the police station."*

PW1's narrative with respect to his encounter with the deceased dovetailed with the testimony of PW4, save for the scene

of the exchange and the whereabouts of which PW 4 testified as follows:-

> *" We met Ally in his office, five of us were inside the office. There was Ally Banji, myself, Jamili, the deceased and Hussein Jetta. Hussein came after hearing that there was a driver who had refused a charge sheet. He got the report from Jamili. Ally Bamji is this guy (witness touches the accused). Jamili fell down after being beaten. The deceased (David) picked on iron bar but I heard the sound of a bullet before he could finish his act. I saw David Malolo felling (sic) down. Ally Bamji was holding his gun on the hand. It appears that the sound came from his gun."*

Thereafter, it was said, the Director, PW1 and the appellant reported the incident at Chang'ombe police station. In the wake of the police report, a senior superintendent of the police, namely, Ramadhani Kingai (PW2) visited the scene where he found the deceased already dead. At the scene, he collected two empty cartridges of a pistol. He then, went to the police station where he found and questioned both the appellant and Hussein Jeta @

Alnasir. According to him (PW2), the appellant told him that he was the one who fired the bullet. PW2 directed police officer No. E 3411 detective sergeant Lwanga (PW3) to record a cautioned statement of the appellant and to also take him before a justice of the peace. In this regard, it is noticeable that, during the trial, both the cautioned statement and the extra judicial statement were ruled in admissible.

On the 21st day of October 2015, the deceased's body was examined by a medical specialist, namely, Dr. Hedry Adamson Mwakyoma (PW7). Upon his examination, PW7 found two bullet wounds on the deceased's body. The first wound penetrated through the upper end of the bladder and moved to the back side of the buttocks. The second wound penetrated through the rear side of the head (occipital region) and moved out through the pariental region at the upper right hand side of the head. In the resultant report on post-mortem examination, the medical officer was of the view that death resulted from haemorrhagic shock secondary to the bullet injuries.

On the 30th day of October 2015, an assistant superintendent of police, namely, John Mayunga Sandija (PW5) received several items from the Temeke Regional Crimes officer (the RCO). These were a pistol, make, Barreta of caliber 4.0 inches with serial No. PY 153456; six live caliber 4.0 bullets; and two empty cartridges of a caliber 4.0 pistol. PW5 is an expert working with the ballistic unit of the Forensic bureau and the items were delivered to him by hand by No. E5334 detective corporal John. The RCO requested PW5 to opine as to whether or not the spent cartridges were fired from the availed pistol.

The expert then loaded and fired two bullets out of the availed six live bullets and, upon comparison with the spent empty cartridges retrieved from the scene, he was of the opinion that the same were fired, from the availed pistol. The expert's opinion was posted in the Forensic Bureau Report which was, as we have already intimated, adduced into evidence as exhibit P2. With this detail, so much for the prosecution version of the case which was unveiled during the trial.

In his affirmed evidence, the appellant completely disassociated himself from the prosecution's accusation. On the fateful day, he said, he was at the workshop and he actually saw the deceased arriving from the safari and parking the motor vehicle around 7.30 or 8:30 p.m. Soon after, the deceased left the workshop but he (the appellant) did not know where he headed to. A little later, he heard the sound of a gunshot which came from the right hand side of the workshop. The appellant then walked towards that direction and upon arriving and entering a certain office, he immediately saw the Director, PW1 and PW4 who were standing therein. The deceased was also in sight but he was lying there motionless and bleeding. A moment later, the Director commanded PW1 and the appellant to board into his car and they all proceeded to the police station, Chang'ombe. It was at the police station where he was told by PW2 that the deceased has passed away, whereupon he and the director were put under restraint and instructed to surrender their belongings.

The appellant told the trial court that he handed over to the police his pistol (barreta) which was loaded with 8 unused bullets. He also surrendered his mobile phone and a wallet. On his part, the

director also surrendered his pistol (barreta) amongst other belongings. Both were then detained in police custody up until when they were formally arraigned on the 2nd day of November, 2015.

Speaking of the pistol, the appellant told the trial court that he always carried it for security purposes but he, however, insistedly said that he did not fire the fatal shot that killed the deceased. Having protested his innocence, the appellant rested his case.

When the respective cases on both sides were closed, the presiding learned Judge (Luvanda, J.) summed up the case to the two lady assessors who sat with him. Both assessors were of the unanimous opinion that the case for the prosecution fell short and, accordingly, they both returned a verdict of not guilty in favour of the appellant.

On the whole of the evidence, the learned trial Judge observed that the evidence presented by the prosecution was wholly circumstancial much as no witness testified to have seen the appellant shoot the deceased with his pistol. He was, nevertheless, satisfied that, on the strength of the evidence of PW1 and PW4, the

inculpatory facts pointed to no other reasonable hypothesis than that the appellant is the one who pulled the trigger. Having so found, the Judge respectfully expressed his dissent with the opinion of the assessors and, as it were, he found the appellant guilty and convicted him. Upon conviction the appellant was handed down the mandatory death sentence.

The appellant is presently aggrieved upon a lengthy memorandum of appeal which goes thus:-

1. *That the Honourable judge erred in law and in fact in holding that there was circumstantial evidence sufficient to convict the Appellant.*
2. *The Honourable Judge misdirected himself on the credibility of the prosecution witnesses particularly PW2 and PW4.*
3. *The Honourable Judge misdirected himself on the credibility of PW1 and PW4 who were in fact accomplices in the crime.*
4. *The Honourable Judge erred in law and in fact in failing to draw adverse inference against the*

prosecution on its failure to call as a witness Hussein Jetha who was the main actor in the summoning the deceased into the workshop and his interrogation and who initially was charged together with the Appellant for the offence of the murder of the deceased.

5. *The Honourable Judge erred in law and in fact in holding that it was the Appellant's pistol that shot the deceased on the basis of the contradictory evidence on the number of spent cartridges found at the scene of the murder and in the absence of proper record of what was found at the scene by PW2 and the number of explosions heard.*
6. *The Honourable Judge erred in law in holding that it was the Appellant who shot the deceased while there was no direct evidence on his shooting.*
7. *The Honourable Judge erred in law and in fact in failing to take not of the fact that in the*

absence of any handing over of the exhibits from the accused to the police and later from the police to the Forensic Bureau.

8. *The Honourable Judge failed to appreciate the fact that there was no forensic evidence that the pistol Exhibit P3 had been fired before the alleged test firing by PW5.*
9. *The Honourable Judge erred in law and in fact in failing to draw adverse inference on the fact that PW5 used cartridges that were surrendered by the Appellant to test fire Exhibit P3.*
10. *The Honourable Judge erred in law in shifting the burden of proof onto the Appellant.*
11. *The Honourable Judge misdirected himself on the burden and standard of proof in criminal cases where the only evidence available was circumstantial evidence.*
12. *The Honourable Judge engaged himself in conjecture on the number of spent cartridges."*

When the appeal was placed before us for hearing, the appellant was represented by Dr. Masumbuko Lamwai, learned advocate, who was being assisted by Messrs Augustine Shio and Kung'e Wabeya, also learned Advocates. The respondent Republic had the services of two learned Senior State Attorneys, namely, Ms. Mkunde Mshanga and Mwasiti Ally who were being assisted by Ms. Lilian Rwetabura, learned State Attorney.

Dr. Lamwai who took the floor to argue the appeal, consolidated grounds Nos. 1, 5, 6, 7, 8 and 9 of which he proposed to put a single argument in their support and then he promised to proceed to argue the remaining grounds of appeal. We are, however, obliged to point out at once that, for reasons that will shortly become apparent, we need not fully recite the arguments taken by the learned counsel from both sides either in support or to resist the appeal. It will suffice if we simply paraphrase in a nutshell the respective arguments from both sides.

The thrust of the appellant's grievances as submitted by Dr. Lamwai were that the learned judge failed to properly resolve the material contradictions inherent in the testimonies of PW1 and PW4,

particularly, with respect to the whereabouts of the appellant at the time of the killing; that the learned judge did not resolve the contradictions for the prosecution witnesses with respect to the empty cartridges which were retrived at the scene; that there was no forensic evidence to show that the pistol (exhibit P3) was fired before the test firing by PW5; that in the absence of any handing over documentation over the exhibits from the appellant to the police and later from the police to the forensic bureau, the chain of custody was devastatingly broken; and that the trial Judge erred in failing to draw an adverse inference against the prosecution for its failure to call as a witness the referred Hussein Jeta @ Alnasir who was at the scene at the time of the killing. In the premises, the learned counsel for the appellant urged us to allow the appeal.

In reply, Ms. Ally who stood to resist the appeal, countered that the apparent contradictions between the testimonies of PW1, PW2 and PW4 were minor and rightly disregarded by the trial Judge; that it is not a rule of the thumb that each time when the chain of custody is broken then the evidence of the involved item is discounted. In cases such as the present, she said relating to items which cannot change hands easily and therefore, not easy to tamper

with, the principle of chain of custody would be relaxed; and that it was not quite necessary to feature Hussein Jeta as a witness the more so as what he was expected to testify was told by PW1 and PW4. In sum Ms. Ally submitted that the appeal lacks merits and should be dismissed in its entirely.

But, as we have hinted upon, aside from the grounds of appeal, we noted that there was a disquieting factor of the case which pertains to in sufficient summing up notes. In this regard, we should point out at once that the learned Judge rightly, in our view, impressed on the assessors that the evidence in support of the case for the prosecution is wholly circumstancial, there being no eye witness who testified to have seen the appellant pulling the trigger to fire the fatal shot. Yet, the learned Judge did not go so far as to elaborate what entails circumstancial evidence and how this indirect evidence can irresistibly link an accused person to a charged offence.

What is more, on the adduced evidence, there was a detail about PW1 being physically assailed by the deceased and that he went so far as to pick an iron rod with intent to further perpetrate

the assault. One would have expected, as indeed it was incumbent upon the trial Judge to put to the assessors a direction as to whether or not the course of action taken by the appellant, if at all, was necessary for the preservation of the life or limb of the person under attack.

We raised the foregoing concerns *suo motu* but when we invited the learned counsel to express their comments, Dr. Lamwai grudgingly conceded that the summing up was inadequate but, to him, the non-directions were inconsequential much as the assessors were seemingly not prejudiced. He otherwise advised the Court to refrain from nullifying the proceedings and ordering a new trial as that would only afford the prosecution an opportunity to fill in the missing gaps.

On their part, Ms. Mshanga and Ms. Ally took the position that the non-directions vitiated the trial and called for the nullification of the trial proceedings with an order for retrial.

We have anxiously weighed the learned rival submissions on this raised issue of inadequate summing up notes. There is, in this regard, a long and unbroken chain of decisions of the Court which

underscore the duty imposed on trial judges, who sit with the aid of assessors, to sum up adequately to those assessors on the salient facts as well as all the vital points of law. In, for instance, the case of **Washington Odindo V. Republic** (1954) 21 EACA 392 the then Court of Appeal for Eastern Africa held:-

> *"The opinion of assessors can be of great value and assistance ot 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 sufficient facts of the case, the value of the assessors' opinion is correspondingly reduced."*** [Emphasis supplied.]

In a more recent unreported Criminal Appeal No. 107 of 2015 – **Omari Khalifan V. The Republic**, the Court had to grapple with inadequate summing up notes in relation to such vital points of law as the ingredients of the offence of murder and the application of circumstancial evidence and how that type of indirect evidence can irresistibly linked the appellant to the ingredients of murder. In the upshot, the Court observed:-

"There was a non-direction on the part of the trial Judge in not addressing the assessors on those two vital points of law. It cannot be said that the trial was with the aid of assessors under section 265 of the CPA. That irregularity marred the entire proceedings"

We take the same position in the case at hand in which the trial Judge also non-directed the assessors on a possible defence which may have been open to the appellant. With respect to Dr. Lamwai, we are not persuaded by the contention that the assessors were not prejudiced by the non-directions. On the contrary, we are unable to say with certainty that the assessors would have given the same opinion had they been properly directed on these vital points.

From this finding, we are minded to exercise the Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Chapter 141 of the Laws and, in the result, we quash and set aside the entire proceedings of the High Court.

We have, finally, anxiously given thought to the question whether or not we should order a new trial. The position of the law on this point was laid down with succinctness by the defunct Court

of Appeal for Eastern Africa in the case of **Fatehali Manji V. The Republic** [1966] EA 341:-

> *"In general a retrial will be ordered only when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame; it does not necessarily follow that a retrial shall be ordered; each case must depend on its own facts and circumstances and an order of retrial should only be made where the interests of justice require."*

We are keenly alive to the fact that the appellant has been in police and prison custody ever since the 19th day of October, 2015 when the killing of the deceased occurred. But, on the other hand, we take into account the reality that a human life was lost in the matter under our consideration and, to that extent, the interests of justice cry for the holding of a new trial. Thus, having nullified the

entire proceedings of the High Court, we order that a new trial be commenced as expeditiously as possible before another Judge and a new set of assessors. In the meantime, the appellant should remain in custody to await the resumption of the trial. Order accordingly.

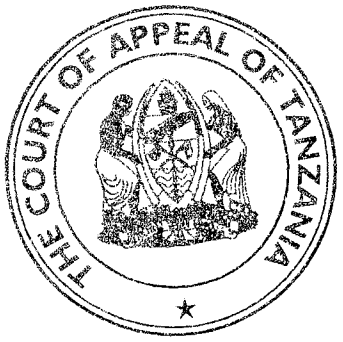
DATED at **DAR ES SALAAM** this 1st day of July, 2019

K. M. MUSSA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

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



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL