IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MUGASHA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 332 OF 2016

JAPHET KALANGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mbeya)
(Mambi, J.)

dated the 31st day of May, 2016
in
Criminal Sessions Case No. 7 of 2014

.....

JUDGMENT OF THE COURT

16th & 20th August, 2019

NDIKA, J.A.:

The appellant, Japhet Kalanga, was condemned to death on 31st May, 2016 by the High Court of Tanzania at Mbeya (Mambi, J.) and he is now appealing to this Court against conviction and sentence.

It was alleged by the prosecution that on 7th September, 2012 at Nkunga Village within Rungwe District in Mbeya Region the appellant murdered Shukrani s/o Machelele Mbembela, who we shall henceforth refer to as the "deceased." The appellant having denied the aforesaid allegation, a full trial ensued in the course of which the prosecution lined up an array of seven

witnesses and tendered a postmortem examination report on the deceased (Exhibit P.1). Conversely, the appellant testified on oath and produced three witnesses to support his defence.

It was undoubted that the deceased's lifeless body was found at Lupale Primary School in Nkunga Village on 8th September, 2012 in the morning. According to PW1 Hebron Mwaitulo Mbembela, the deceased's paternal uncle, who was one of the persons who rushed to the scene that morning, the deceased's body lay between the classrooms and trees at the school and that it revealed a wound on the neck. Another person to have visited the scene that morning and identified the deceased's body was PW2 Godwin Mwakasege, a resident of Kikota Village where the deceased also resided.

Dr. Martin Mwandete (PW6), an Assistant Medical Officer at Rungwe District Hospital, Tukuyu who conducted a postmortem examination on the deceased's body, adduced that the deceased died of haemorrhagic shock due to multiple severe cut wounds on the neck. The postmortem examination report (Exhibit P.1) that he tendered states that much. Given that the incident and the cause of the deceased's death were undisputed, the question at the trial was whether the appellant was responsible for the said death.

There was clearly no direct evidence linking the appellant to the death. But it was the prosecution's case that the appellant was the last person seen alive with the deceased around 19:00 hours on 7th September, 2012 at a parking bay for motorcycle taxis known as *bodaboda* at Mabandani area in Kikota Village. This area is depicted in the evidence on record as a bustling and brightly illuminated part of Kikota Village with stalls and outlets selling, among others, alcoholic beverages and grilled meat.

According to PW2, the deceased, whom he knew as a *bodaboda* rider, was at the parking bay at Mabandani at the material time. The deceased was looking for a passenger he was due to take to the nearby Nkungi Village. The said passenger happened to be the appellant. Shortly thereafter, the deceased found the appellant with whom he rode off towards Nkunga Village. On the following day at 06:00 hours, PW2 received a call which drew his attention to the scene of the crime where he visited only to find the deceased's dead body there. He further averred that the appellant disappeared thereafter but was arrested three months later at Tukuyu.

There was further evidence from PW3 Lusajo Ngonile Mgegwa, an owner of a kiosk at Mabandani, who recalled to have served the appellant three bottles of beer that fateful evening. He knew the appellant quite well and allowed him to leave without paying his bill after he had promised that he

would settle it the following day, a promise that he never honoured. He was insistent that the appellant left the place on the deceased's motorcycle as a passenger but was shocked to learn on the following morning of the deceased's violent death. That evidence also tallied with that of PW4 Joshua Anyikile Kasalile who, while at a nearby kiosk in the fateful evening, saw the deceased riding away with the appellant on a *bodaboda*.

Two police officers – D.7929 D/Sgt Mwambingu (PW5) and E.997 D/Corporal David Amon (PW7) – carried out the investigations on the deceased's death. Despite PW5 adducing that PW2 named the appellant as the culprit when he visited the scene of the crime in the morning after the deceased's body was discovered, neither PW5 nor PW7 gave any detail on how the appellant was apprehended in connection with the charge of murder.

In his sworn defence evidence, the appellant vigorously denied responsibility for the death of the deceased, raising an alibi to the effect that he stayed at his home in Nkunga Village that fateful evening and that he never visited the Mabandani area in Kikota Village. He also denied knowing the deceased.

The appellant's alibi was supported by his sister, Sauda Ndekile Kalanga (DW2), who swore that her brother came back home and stayed there from

18:00 hours after having spent the day working on his farm. Further defence evidence was given by DW3 Joel Mwakyusa, DW4 Geoffrey Kabankunga, and DW4 Adama Kalanga to negate the claim that the appellant disappeared from his home in the aftermath of the deceased's death.

At the conclusion of the cases for the prosecution and defence, the learned trial Judge summed up the case for the assessors who then returned a unanimous verdict of guilty against the appellant. He sided with the assessors and convicted the appellant of murder and condemned him to death. Briefly, in his decision, the learned trial Judge, at first, found that the appellant was positively recognised by PW2, PW3 and PW4 as the person last seen with the deceased alive at Mabandani in the fateful evening as they rode away on the deceased's motorcycle. Secondly, he took the view that the appellant's alibi was full of contradictions and accorded it no weight. In the end, having reviewed applicable case law on circumstantial evidence he held that:

> *"The sequence of events on record does, in my opinion, connect the accused person and the death of the deceased. The chain is not broken and it leads to an inference that the deceased was killed by the accused person. The accused person was the last person to be seen with the deceased while he was alive. The accused disappeared after the death of the deceased.*

The sequence of events, until the body of the deceased was discovered gives no other reasonable hypothesis than that it was the accused person who maliciously caused the deceased to die."

Resenting the outcome of his trial, the appellant lodged an eight-point Memorandum of Appeal raising four main complaints: one, that visual identification evidence was not watertight. Two, that the assessors irregularly cross-examined witnesses rendering the trial a nullity. Three, that the defence of alibi was not considered. And four, that the prosecution case was not established beyond peradventure.

At the hearing of the appeal before us, Mr. Pacience Maumba, learned counsel, appeared for the appellant whereas Ms. Rhoda Ngole, learned Senior State Attorney, teamed up with Mr. Baraka Mgaya, learned State Attorney, to the respondent Republic.

Mr. Maumba began his oral argument by indicating that the appellant had abandoned the complaint alleging irregular cross-examination of witnesses by the assessors. He then adopted and highlighted the contents of the written submissions in support of the appeal. Relying on the decisions of the Court in **Waziri Amani v. Republic** [1980] TLR 250 and **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported), the learned counsel

faulted the High Court for acting on shaky visual identification. Arguing that there was a three months' delay in arresting the appellant, the learned counsel wondered why the appellant was not mentioned to the police for him to be arrested promptly if he was recognised as the last person seen with the deceased at Mabandani. It was also his submission that the High Court failed to consider the appellant's alibi. In particular, he faulted the High Court for misapprehending the evidence of DW2 that the appellant stayed at his home only up to 18:00 hours on the fateful day and wrongly took the view that he could have left his home thereafter. Overall, it was his submission that the circumstantial evidence on which the conviction was founded against did not lead to an irresistible inference of guilt. On this point, he cited the case of **Ally Bakari & Pili Bakari v. Republic** [1992] TLR 10.

Replying, Mr. Mgaya took a different tack. With remarkable forthrightness, the learned State Attorney brought to the attention of the Court a disturbing irregularity concerning the manner the learned trial Judge summed up the case to the assessors. At the forefront, Mr. Mgaya referred to page 3 of the annexed summing up notes and argued that the learned trial Judge wrongly sought to influence the assessors with his own assessment and appreciation of the evidence on record. The first passage complained of reads thus:

> *"As you may recall from the evidence,* ***the deceased was brutally slashed, wounded and killed by the accused person*** *who has appeared before this court. The evidence from the scene of crime indicates that* ***the deceased fought for his life but he was not able to survive.*** *The deceased died after* ***heavy internal bleeding.*** *"*[Emphasis added]

Another passage at issue appears at the same page of the notes. It is as follows:

> *"As you may recall from the prosecution facts, that on the night of the death of the deceased, the accused person requested the deceased to ferry him with his motorcycle to Nkunga Village* ***but on their way the accused killed him and took his motorcycle.*** *Using various weapons that were* ***sharp like a knife the accused killed the deceased before arriving at the agreed destination.*** *"*[Emphasis added]

Citing our decision in **MT. 101296 Omary Mwinchande & Three Others v. Republic**, Criminal Appeal No. 71 of 2016 (unreported), Mr. Mgaya contended that the irregularity at hand rendered the appellant's trial unfair and hence a nullity.

Secondly, the learned State Attorney argued that the summing up notes revealed two non-directions committed by the learned presiding Judge by

failing to sum up on vital points of law arising from the case: first, that there was no guidance to the assessors on the nature and cogency of circumstantial evidence even though the learned Judge was aware that the prosecution case was purely based on such evidence. Secondly, there was no direction on the nature and cogency of the defence of alibi relied upon the appellant. Citing our decision in **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported), Mr. Mgaya submitted that the two non-directions, singly or collectively, vitiated the trial.

In view of the irregular summing up, Mr. Mgaya urged us to invoke our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 RE 2002 (the AJA) to nullify the trial proceedings and the decision thereon. However, he cautioned us against ordering a retrial as he viewed that course as improper and injudicious in the circumstances of the case. In particular, he reasoned that the circumstantial evidence on record would not lead to an irresistible inference of guilt against the appellant even though the visual identification evidence might have placed him at the *bodaboda* parking bay with the deceased in the fateful evening. He also conceded, quite candidly, that the appellant's defence of alibi, having not been challenged in cross-examination at the trial, was uncontroverted. If anything, a fresh trial would give the respondent an unfair advantage to tie up the loose ends.

In a brief rejoinder, Mr. Maumba was of the same mind that the trial was unfair and that there was no sufficient evidence to warrant a retrial.

Having heard the learned submissions of the counsel, we find convergence of opinion that the learned trial Judge's summing up was irregular and that it rendered the trial unfair, hence a nullity. It thus behooves the Court to interrogate and determine this crucial issue.

To begin with, it is a peremptory requirement under section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) that criminal trials before the High Court must be conducted with the aid of at least two assessors. In addition, a trial Judge sitting with assessors is required by section 298 (1) of the CPA to sum up the case to the assessors before inviting their opinion. Section 298 (1) of the CPA provides that:

> *"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."* [Emphasis added]

We have emboldened the above phrase "the judge may sum up the evidence" to underscore the settled position that although the word "may"

ordinarily connotes discretion, that phrase has been interpreted as imposing a mandatory duty on the trial Judge to sum up the evidence. Indeed, the Court reaffirmed that position in **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported):

> *"We wish first to say in passing that though the word 'may' is used implying that it is not mandatory for the trial judge to sum up the case to the assessors* ***but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act*** *that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors.***" [Emphasis added]

When summing up, it is the duty of the trial Judge to explain all the vital points of law in relation to the relevant facts of the case – see **Omari Khalfan** (supra) and **Said Mshangama @ Senga v. Republic**, Criminal Appeal No. 8 of 2014 (unreported). In the case of **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported), the Court, having noted that the learned trial Judge omitted to address the assessors in a murder trial on the voluntariness of a confessional statement and the defence of alibi, held that:

> *"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.'*** *There is no exhaustive list of 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."*

Moreover, when summing up the trial Judge must desist from influencing the assessors by giving his opinion on the case. To illustrate this point, we feel obliged to extract a passage, at full length, from the decision of the Court in **Ally Juma Mawepa v. Republic** [1993] TLR 231 which we also referred to in **MT. 101296 Omary Mwinchande & Three Others** (supra). That passage reads thus:

"... when summing up to assessors ***the Trial Judge should as far as possible desist from disclosing his own views, or making remarks or comments*** *which might influence the assessors one way or the other in making up their own minds about the issue or issues being left with them for consideration.* ***The summing up should be unbiased and impartial such that it leaves the assessors to make up their own minds independently.*** *For instance where, as in this case, the accused had given conflicting accounts of the circumstances surrounding the killing, the Trial Judge should sum up and explain*

> *the conflicting accounts to the assessors without showing his own opinion or inclination one way or other;* ***to make known his own views, as he did, as this stage would be going too far****. He should then ask the assessors to decide whether or not in the light of the conflicting accounts, and considering all the circumstances the accused could be believed and if so which account was or was likely to be true.* ***The assessors shouid be made to give their opinions independently, based on their own perception and understanding of the case after the summing up****. The Judge makes his own views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case."*
> [Emphasis added]

In the instant case, we subscribe to the common submissions of the learned counsel that the learned trial Judge's summing up to the assessors was clearly irregular. First and foremost, the learned trial Judge wrongly impressed his own opinion on the evidence and, in doing so, he influenced the assessors. For instance, by stating that *"the deceased was brutally slashed, wounded and killed by the accused person who has appeared before this court",* the learned trial Judge gave his own opinion of the matter, which was obviously mistaken because there was no such direct evidence of the killing. By the same token, his direction that "*the evidence from the scene of crime*

indicates that the deceased fought for his life but he was not able to survive. The deceased died after heavy internal bleeding" was a perilous misapprehension of the evidence that ought to have not been put to the assessors. The prescription that *"the accused killed"* the deceased on the way and then *"took his motorcycle"* is as objectionable as is the detail that *"using various weapons that were sharp like a knife the accused killed the deceased before arriving at the agreed destination."* These details were plainly exaggerated, if not invented. They, too, were unfit to be put to the assessors.

We also go along with both learned counsel in their submission that the learned trial Judge omitted giving guidance to the assessors on the nature and cogency of circumstantial evidence and the defence of alibi relied upon the appellant, which were vital points of law in the case. In our view, the learned Judge ought to have explained the application of circumstantial evidence as indirect evidence on how it could irresistibly link the appellant to the murder of the deceased. As regards the defence of alibi, he should have explained to the assessors that the appellant had no burden of proving the alibi and that conviction could not be entered without considering that defence.

In view of the misdirection and non-directions committed in the summing up as canvassed above, we are constrained by the law to hold that the appellant's trial was unfair; for, it cannot be said to be one conducted with the

aid of assessors as envisaged under section 265 of the CPA. The trial was a nullity. We, as a result, are minded to invoke our revisional jurisdiction under section 4 (2) of the AJA to nullify the entire proceedings of the High Court and the judgment thereon.

On the way forward, both learned counsel urged us in unison to refrain from ordering a retrial mainly on the ground that the evidence in support of the charge against the appellant was too weak to link him to the deceased's death. We agree. Indeed, while the testimonial accounts of PW2, PW3 and PW4 on events that occurred in the fateful evening at Mabandani would suggest that the appellant was positively identified as the last person to be seen with the deceased alive and that PW2 named him as a suspect to a police investigator (PW5), there was an alarming unexplained delay of three months in apprehending the appellant. If he was accurately identified as alleged, why was he not pursued and arrested without undue delay considering that the allegation against him concerned a very serious offence? Neither PW5 nor his co-investigator (PW7) explained the circumstances in which the appellant was arrested. This sorry state of affairs shakes the credibility of the claim that the appellant was the last person seen with the deceased alive.

Even if it were assumed for the sake of argument that the appellant was indeed the last person seen with the deceased alive as they rode off from

Mabandani, we do not think the facts of the case sufficiently triggered the invocation of "the last seen doctrine." We note that in his judgment, the learned trial Judge invoked that doctrine on the authority of the decision of the Court in **Mathayo Mwalimu & Another v. Republic**, Criminal Appeal No. 147 of 2008 (unreported). In that case, the Court held that:

> *"... if an accused person is alleged to have been the last person to be seen with the deceased, in the absence of a plausible explanation to explain away the circumstances leading to the death, he or she will be presumed to be the killer."*

It is noteworthy that the above case is distinguishable from the instant case. The appellants therein were not only presumed to be the killers of the deceased with whom they were last seen after failing to give any plausible explanation but also they confessed to the killing through their respective cautioned and extra-judicial statements that were admitted in evidence.

At any rate, we think that the last seen doctrine must be applied with circumspection as revealed by a chain of the decisions of the Court in **Juma Zuberi v. Republic** [1984] TLR 51; **Katabe Katachoba v. Republic** [1986] TLR 170; **Protas John Kitogole & Another v. Republic** [1992] TLR 51; **Hamidu Mussa Timotheo & Another v. Republic** [1993] TLR 125; **Twaha Elias Mwandungu v. Republic** [2000] TLR 277; and **Nathanael Alphonce**

Mapunda & Another v. Republic [2006] TLR 395. We also find it instructive to quote, with approval, from a decision of the Supreme Court of India in **Ramreddy Rajeshkhanna Reddy & Anr. v. State of Andhra Pradesh, JT** 2006 (4) SC 16:

> *"that even in the cases where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small that possibility of any person other than the accused being the author of the crime becomes impossible,* ***the courts should look for some corroboration.*** *"*[Emphasis added]

In the instant case, the claim that the appellant was last seen with the deceased alive was not backed up by any credible evidence apart from PW2's unembellished accusation that he vanished into thin air soon after the killing. That apart, we think, as we did in **Samwel Marwa @ Ogonga v. Republic**, Criminal Appeal No. 74 of 2013 (unreported) cited to us by Mr. Maumba, that there was the possibility of the break of the chain of events. For example, it was possible that the deceased had dropped off the appellant at Nkungi and taken other passengers before he met his death.

Finally, we find it significant, as conceded by Mr. Mgaya, that the appellant's defence of alibi, having not been assailed in cross-examination at

the trial, was uncontroverted. That fact alone ought to have not only debunked the theory that he was the last person seen with the deceased alive but also it should have negated any link between him and the death of the deceased.

The upshot of the matter, therefore, is that we refrain from ordering a fresh trial, and, instead, we order that the appellant be released forthwith from prison unless he is detained there for some other lawful cause.

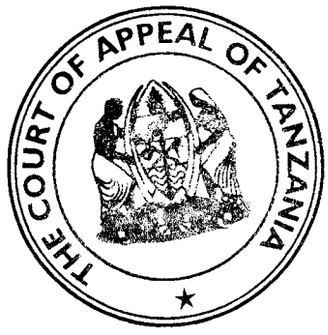
DATED at **MBEYA** this 19th day of August, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 20th day of August, 2019 in the presence of the appellant and his advocate Mr. Pacience Maumba as well as Mr. Ofmedy Mtenga, learned State Attorney for the respondent /Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL