IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 216 OF 2016

MAULID HAMIS @ MRISHO.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mgonya, J.)

dated the 11th May, 2016
in
Criminal Session No. 10 of 2014

JUDGMENT OF THE COURT

21st & 29th October, 2019

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE: 2002. It was alleged by the prosecution that on 17th May, 2013 at Ujiji Guest House Mwanga area within the Municipality and Region of Kigoma, the appellant did murder one Saidi Omari @ Vema, the deceased. After a full trial, the appellant was convicted and sentenced to suffer death by hanging. The appellant was aggrieved, and presently seeks to impugn the decision of the High Court

upon a memorandum of appeal which is comprised of four grounds of grievance as hereunder paraphrased:

1. That, the learned trial judge erred in law and fact to convict and sentence the appellant on the bases of the prosecution evidence on visual identification of the appellant which did not prove the charge beyond a reasonable doubt.
2. That, the learned judge of the High Court erred in law and in fact to convict and sentence the Appellant having linked him with the murder of the deceased on the bases of the pistol which was found in the possession of the appellant.
3. That, the learned trial judge erred in law in her findings leading to conviction and sentencing the Appellant without assessing, evaluating and considering the defence evidence.
4. The learned trial judge erred in law to conduct trial in violation of the fundamental principles of fair trial, having failed to guide the assessors in summing up on the crucial issue of circumstantial evidence which is the only evidence used to implicate the appellant.

Before disposing the grounds of complaint, in order to appreciate, what led to the apprehension, arraignment and conviction of the appellant it is crucial to briefly state the background to that effect.

From a total of seven witnesses and six documentary and physical exhibits, the prosecution case against the appellant was to the effect that: on 17/5/2013 around midnight at Ujiji Guest House, the deceased was shot by two bandits. It was the prosecution account that, **RASHID SAIDI** (PW1) and the deceased who were present on the fateful day, both worked respectively as guard and attendant at the said guest house. It was alleged that on the fateful day, the appellant and a colleague went to the said guest house and requested to hire two rooms. While the deceased was lying on the sofa, PW1 went to the store, picked the keys for the respective rooms and saw a gun pointed at him by one of the assailants who ordered and PW1 obliged to kneel down and part with Tshs. 30,000/=. In the wake of such a frightening moment, the deceased tried to escape but was shot and succumbed to death on the spot. PW1 ran to the toilet and managed to make a phone call to his boss one Lumumba and a neighbour one Esther who then notified the police about the incident and ultimately, **WILBARD WIFRED KAIZA** (PW2) the police officer rushed to the scene of

crime and found the lifeless body of the deceased lying down. He then picked two spent cartridges and had the deceased's body taken to Maweni Regional Hospital. PW1 claimed to have been aided by two tube lights to see and identify the appellant. He as well described the appellant's attire and physique. However, the record is silent if such descriptive detail was in the first instance narrated to PW2 or those who were initially informed by PW1 about the killing incident.

More than four months later, a pistol and six rounds of ammunition were found at the ceiling of the appellant's house following a search on 29/9/2013 led and conducted by **EDWARD MASUNGA KATENDELE** (PW3), a member constituting a Task Force to combat crime in Kigoma. The black pistol make Star together with one magazine and six extra bullets were packed together in a plastic bag. Subsequently, PW3 prepared a certificate of seizure (Exhibit P7) wherein the seized items including the pistol were entrusted to the OC-CID Kigoma for further investigation. The incident was reported to the Police. Since the pistol found in the hands of the appellant was suspected to have been used in the murder incident, the cartridges and a brown pistol make MAKROV made in Russia were transmitted to the ballistic expert for examination at the Police Headquarters in Dar-es-

salaam. It was established that, the spent cartridges found at murder scene were actually fired from that pistol.

The appellant, who was the sole defence witness, denied each and every detail of the prosecution account regarding the charge of murder. He admitted to have been arrested on 29/9/13 and charged with the offence of being found in unlawful possession of a gun in Criminal Case No.445 of 2013. Apart from denying to have used that weapon to kill the deceased he claimed to be unaware of the contents found in the plastic bag which was entrusted to him on 22/9/2013 by a friend named Gerald Ntahondi who directed that one Christopher would collect it later.

At the end of respective cases from either side, the presiding judge summed up the case to the three assessors who were sitting with her at the trial. Apart from being given a summary of the evidence, the assessors were addressed on the charge; burden of proof; malice aforethought; burden of proof and standard of proof. In response, the assessors unanimously returned a verdict of guilty against the appellant. Having concurred with the unanimous verdict of the assessors the trial judge convicted the appellant on ground that, he was identified at the scene of

crime; found in possession of a pistol which killed the deceased which according to the trial judge necessitated invoking the doctrine of recent possession. We shall, at a later stage, address the propriety or otherwise of the invoking of the doctrine of recent possession in the case at hand.

At the hearing before us, the appellant was represented by Mr. Kassim Mussa Kassim, learned counsel whereas the respondent had the services of Mr. Juma Masanja, learned Senior State Attorney who was assisted by Mr. Tumaini Pius, learned State Attorney.

In the first and second grounds of appeal, the trial court is faulted to have convicted the appellant acting on: **One**, weak evidence on visual identification; **Two,** the weapon alleged to have killed the deceased is not that was found in the possession of the appellant. **Three**, failure to consider the defence evidence and **Four**, failure by the trial judge to direct and explain to the assessors on vital points of law.

Having abandoned the 3rd ground, Mr. Kassim opted to argue the 1st and 2nd grounds together and the 4th ground separately. In addressing the first two grounds, the learned counsel attacked the propriety of the prosecution's evidence on the weapon which was used to kill the deceased.

On this, he pointed out that, while according to the certificate of search and seizure (Exhibit P7) plus the evidence of PW3 the appellant was found in unlawful possession of a black pistol make star, such account is not compatible with the evidence of PW6 and PW7 who both, respectively testified about the examination of the brown coloured pistol make MAKROV made in Russia and two spent cartridges which were transmitted to the police headquarters established that, the spent cartridges were from the bullets fired from that pistol. As such, it was the learned counsel's argument that, the prosecution account is riddled with uncertainty as to the weapon used to kill the deceased which in effect delinks the appellant from the murder incident rendering the prosecution case not proved.

As to the insufficiency of evidence on visual identification, he submitted that the appellant was not properly identified at the scene of crime because: **One,** he was a stranger to the identifying witness who was not taken to the identification parade to identify the appellant; **Two,** PW1's account at the trial which was **Three** years past the incident, on presence of sufficient light at the scene of crime and the description of the appellant contradicts with PW1's statement (Exhibit D 1) earlier made to the police which is silent on the presence of light at the scene of crime and it lacks

the detailed description of the appellant. In this regard, the learned counsel argued that, in view of the said loopholes prevalent in the prosecution account, the charge of murder was not proved beyond a reasonable doubt.

Submitting on the 4th ground of appeal, Mr. Kassim challenged the manner in which the summing up to assessors was conducted as the trial judge did not direct them on vital points of law such as circumstantial evidence; the doctrine of recent possession; expert evidence and the defence of *alibi* relied on by the appellant. He argued this to have vitiated the trial which was not conducted with the aid of the assessors in violation of section 265 of the Criminal Procedure Act Cap 20 RE: 2002 (the CPA). On the way forward, it was Mr. Kassim's submission that, though the anomalies would have been remedied in a retrial, the same is not worthy on account of weak prosecution evidence and it could be utilised by prosecution to fill in the evidence gaps. To back up all propositions, the learned counsel referred us to cases of **MWITA CHACHA KABAILA VS. REPUBLIC**, Criminal Appeal No. 356 OF 2013, **SAIDI MOHAMED MWANAWATABU@ KAUSHA @HATIBU MOHAMED MWANAWATABU VS. REPUBLIC,** Criminal Appeal No. 161 of 2016 (both unreported).

On the other hand, Mr. Tumaini Pius, learned State Attorney initially supported the appeal only on the account of the procedural irregularities in the summing up to the assessors arguing that, the trial was vitiated and as such, he pressed for a retrial. However, on being probed by the Court, he conceded on account of the weak prosecution account surrounding the visual identification and the uncertainty on the weapon used in the killing incident, that the retrial is not worthy. He thus urged the Court to allow the appeal and set the appellant at liberty.

After a careful consideration of the grounds of grievance, the record before us and submissions of the learned counsel for the parties, the issue for determination is the propriety or otherwise of the trial and whether on record there is strong prosecution evidence. From the circumstances surrounding the record before us, we have opted to initially dispose the 4th ground of appeal, which relates to the procedural irregularity, before determining the remaining two grounds.

We agree with the learned counsel for the parties that, the trial judge did not direct the assessors on the vital points of law including circumstantial evidence; the doctrine of recent possession and the defence of *alibi* which was relied on by the appellant. We have observed that, in her

judgment she relied on those points to ground the conviction of the appellant. As to what are the consequences of the non-direction of the assessors on vital points of law, in the case of **WASHINGTON ODINDO VS THE REPUBLIC** [1954] 12 EACA 392 the defunct Court of Appeal for Eastern Africa had this to say:-

> *"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."***

[Emphasis supplied]

In numerous decisions, this Court has emphasised on the need for a trial court to direct the assessors on vital points of law whereas non-compliance has been held to be fatal with the result of vitiating the entire trial proceeding. For instance, in **CHARLES LYATII @ SADALA VS REPUBLIC,** Criminal Appeal No. 290 of 2011 (the unreported), the Court nullified the High Court proceedings because the assessors were not directed on what

malice aforethought was all about. The Court relied on the *ratio 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 a vital point."*

In view of the settled position of the law, we agree with both learned counsel that failure to direct assessors was a violation of section 265 of the CPA and it cannot be safely vouched that, they were properly informed to make rational opinion as to the guilt or otherwise of the appellant and as such, the trial was vitiated. On account of the irregular summing up to the assessors, ordinarily we would have ordered a retrial. However, both learned counsel submitted against that course due to the weak prosecution evidence on the record. They both faulted the propriety of the identification

of the appellant at the scene of crime and that the evidence on the weapon used to kill the deceased did not link the appellant with the murder. In this regard, it is crucial to revisit the evidence on record.

We commence with celebrated principles relating to visual identification as emphasised by case law. In the case of **RAYMOND FRANCIS VS REPUBLIC,** [1994] TLR 100 the Court among other things, held:

> *"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance".*

Certain guiding factors to be taken into account by courts in establishing whether the identification of an accused/appellant at the scene of crime is watertight were stated by the Court in the case of **WAZIRI AMANI VS REPUBLIC** [1980] TLR 250. The conditions include:

> *"... the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, if it was*

day or night time; whether there was good or poor lighting at the scene whether the witness knew or had seen the accused before or not."

In the case at hand, while PW1 claimed to have identified the appellant at the scene of crime and described his physique and attire aided by the presence of tube light, such details are not in his statement which was recorded at the police a month after the fateful incident. Also, those details do not fare in PW2's account who rushed at the scene of crime on the fateful day and interviewed him. The variation leaves a lot to be desired on the credibility of PW1 and that is why the defence relied on his statement to impeach his account which was a proper course in our view though it went unnoticed by the trial court. In our considered view, PW1's version in the recorded statement was very much closer to the occurrence of the incident as it bears PW1's fresh recollection of what actually transpired on the fateful incident. Therefore what he said later at the trial tainted his credibility and the trial court ought not to have acted on such evidence to convict the appellant. Besides, the inconsistent account on visual identification raises more questions than answers. While at page 57 of the record, he recounted that the incident did not take much time, yet

he said that the culprits did not hide their faces and in another instance at page 59 of the record he recounted that the appellant wore a cap which in our view was an obstacle to a clear visual identification considering that, the appellant was a stranger to the identifying witness. The law on visual identification is settled, before relying on it the Court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely watertight. See- **CHOKERA MWITA VS. REPUBLIC**, Criminal Appeal No. 17 of 2010 (unreported).

In the case at hand, under the circumstances, the possibilities of mistaken identity were not eliminated and the evidence on visual identification of the appellant was not watertight considering that, the appellant was a stranger to the identifying witness. Besides, in the absence of PW1 being taken to the identification parade to identify the appellant, he identified the appellant in the dock which was worthless as it was not preceded by the identification parade. See- **FRANCIS MAJALIWA AND TWO OTHERS VS REPUBLIC,** Criminal Appeal 139 of 2005 (unreported). In a nutshell, the evidence on visual identification was weak and as such, it was wrongly acted upon by the trial court to convict the appellant. Besides,

since it is on record that, PW1 had on the same day notified the owner of the guest house one Lumumba and a neighbor Esther, none of them was paraded as a prosecution witness to tell the trial court if the details on the appellant's description and terms of description were narrated to them by PW1. We are fortified in that account because that was opportune and earliest moment for PW1 to describe the identity of killers in detail to those went at the scene of crime at the first instance. See - **MARWA WANGITI MWITA AND ANOTHER VS REPUBLIC** [2002] TLR 39. Failure by the prosecution to parade those witnesses entitles this court to draw an adverse inference as held in the case of **AZIZI ABDALLAH VS REPUBLIC** [1991] T.L.R 71 among other things, as follows:

> *"the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution".*

Apparently, since none of the two material witnesses, namely, Lumumba the owner of the guest house where the deceased was killed and Esther a neighbour, who were within reach and no explanation was given on not parading them as prosecution witnesses, an adverse inference ought to be drawn against the prosecution case.

As to the weapon which was used at the killing incident, we entirely agree with the learned counsel that, the said evidence is highly suspect. We are fortified in that account by the evidence that, the weapon used to terminate the deceased's life as per the expert evidence of PW7 is a brown colour pistol make MAKROV made in Russia whereas that found in possession of the appellant is black pistol make STAR. This delinks the appellant from the killing incident at Ujiji Guest House. Apparently, the trial judge solely relied on the expert evidence without considering Exhibit P7 and the evidence of PW3 which are to the effect that the appellant was found in possession of a black pistol make STAR as reflected at page 73 of the record.

Furthermore, since the prosecution's linking of the appellant with the killing incident has traces in the sketch map having checked its original on

record, we gathered that, it is highly suspect due to the probability that it was doctored after the pistol was found at the appellant's residence. We say so because the insertion of letter "J" which depicts the location of the cartridges at the scene of crime, seems to have been inscribed by a pen and handwriting different from the rest of the contents in that sketch map. Besides, mark "J" is not connected with any other feature whose distances are described in key A – 1. This fact as well missed the eye of the trial judge though exhibited in Exhibit P3.

We earlier intimated to address the propriety or otherwise of invoking the doctrine of recent possession made by the trial court whereby from pages 244 to 247 and 259 of the record, all along she treated the pistol found in the possession of the appellant as a stolen property which was not the case and she invoked the doctrine of recent possession to ground the conviction of the appellant. In our considered view that was not proper because the doctrine refers to possession of property that has been recently stolen. It is simply part of the principles of circumstantial evidence which applies only to offences of handling stolen goods as is relevant in proving *mens rea*. Circumstances necessitating invoking of the doctrine were stated in the case **JOSEPH MKUMBWA AND ANOTHER VS. REPUBLIC**,

Criminal Appeal No. 94 of 2007 (unreported) which was followed by the case of **ALEX JOSEPH KASHARANKORO VS. REPUBLIC**, Criminal Appeal No. 156 of 2013 (unreported).The Court was of a considered view that:

> *"For the doctrine of recent possession to apply as a basis of conviction it must be positively proved that,* ***First,*** *that the property was found in possession of the suspect.* ***Second,*** *that the property is positively the property of the complainant.* ***Third,*** *that it was recently stolen from the complainant and* ***lastly,*** *that the stolen thing in the possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen or obtained during the commission of the offence charged".*

Though the weapon was a subject of the charge against the appellant, neither was it stolen from the deceased nor was it obtained during the commission of the killing incident to necessitate the invoking the doctrine of recent possession.

In view of what we have endeavoured to discuss, it is on the basis of the aforesaid that, from the beginning we intimated that a retrial is not worthy. We are fortified in that regard in the light of what the Court

said in the case of **FATEHALI MANJI VS REPUBLIC,** [1966] E.A 341 having propounded the principles governing a retrial that:

> " *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 the insufficiency of evidence of for the purposes of enabling the prosecution to fill up the gaps in its evidence at the trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution's not to blame it does not necessary 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 interest of justice require".

[Emphasis supplied]

In the light of the bolded expression, it is not in the interest of justice to order a retrial in the matter at hand for that could be utilised by the prosecution as an opportunity to fill in the stated evidential gaps which is against the intents and purposes of a retrial. All said and done, we find that the charge of murder was not proved against the appellant beyond a

shadow of doubt. As a result we allow the appeal and order the immediate release of the appellant unless he is held for any other lawful cause.

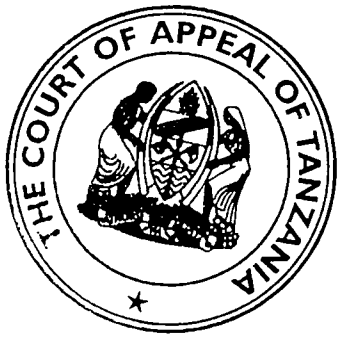
DATED at **TABORA** this 28th day of October, 2019.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 29th day of October, 2019 in the presence of Mr. John Mkony, learned State Attorney for the respondent/Republic and Ms. Edina Aloyce, holding brief of Mr. Mussa Kassim for the Appellant is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL