IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CRIMINAL APPEAL NO. 574 OF 2016

1. NKOLOZI SAWA
2. CHONA SEBEYA .....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

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

(Makani, J.)

dated 29th day of July, 2016
in
Criminal Sessions Case No.55 of 2015

JUDGMENT OF THE COURT

30th October & 5th November, 2019

MUGASHA, J.A.:

The appellants were charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. The prosecution alleged that, on 8th May, 2013 at Mwakabeya Village, Maswa District within Simiyu Region, the appellants did murder one Nshoma Kanoni, the deceased. After a full trial, they were both convicted and sentenced to suffer death by hanging. Aggrieved, the appellants have appealed to the Court. In the

Memorandum of Appeal, they have raised four points of grievance as hereunder paraphrased:

1. That, the appellants were denied a fair trial as the documentary Exhibits, the Post mortem examination report and the sketch map of the scene of crime tendered and admitted in the evidence were not read and explained to the appellants.

2. That, the learned trial judge erred to convict the appellants having relied on the caution statements of Jilaba Limbu (PW1) one Nkolozi Sawa (DW1) which were neither tendered in the evidence nor part of the evidence on record.

3. That, the learned trial judge erred in law having misdirected the assessors in the course of summing up on the defence of *Alibi* which occasioned a miscarriage of justice to the 1st appellant.

4. That, the learned trial judge erred to convict the appellants having acted on very shaky and unreliable evidence of recognition from Jilaba Limbu (PW1).

What led to the apprehension, arraignment and conviction of the appellants is briefly as follows:The prosecution case hinged on a total of six witnesses and two documentary Exhibits namely: the Post Mortem Examination report and the sketch map of the scene of crime (Exhibits P1 and P2 respectively). The prosecution case was to the effect that, on 8/5/2013, Jilaba Limbu (PW1) and Nshoma Kanoni were at their homestead. While there, around 10.00 pm a group of people stormed into their house, forcefully dragged the deceased outside the house and she was beaten with sticks and stones and lost consciousness. In an abortive attempt by PW1 to rescue the deceased, he was as well mercilessly beaten by the group pursuant to a direction by the Local Militia (Sungu Sungu) Commander who then ordered PW1 to pay a sum of TZS. 1,000,000/= on the ground that his wife was a witch. After a while, PW1 managed to collect a sum of TZS. 500,000/= and gave it to the Sungu Sungu commander but all the same, he found his wife unconscious and notified the Chairman who called a Medical Doctor. On arrival, the Doctor pronounced that the deceased had succumbed to death. The autopsy established the cause of death to be head injury. PW1 claimed to have been aided by moon light to see and identify the appellants among the

assailants. The incident was reported to the Police which was followed by the arraignment of the appellants. The appellants denied each and every detail of the prosecution account.

On the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt. Thus, as earlier indicated the appellants were convicted and sentenced to suffer death.

At the hearing before us, the appellants were represented by Mr. Kamaliza Kamoga Kayaga, learned counsel whereas the respondent Republic had the services of Mr. Miraji Kajiru, learned Senior State Attorney.

Prior to making his submissions on the appeal, Mr. Kayaga abandoned the 4th ground of appeal. In the first ground of appeal, he faulted the trial court on failure to read out to the appellants the Post Mortem Examination report and the sketch map of the scene of crime, Exhibits P1 and P2 respectively, arguing the same to have occasioned a failure of justice on the part of the appellants who were unaware of the contents of the exhibits in question. He thus urged us to expunge those exhibits.

On the second ground, Mr. Kayaga faulted the trial court to have wrongly acted upon the cautioned statements of PW1 and DW1 to convict the appellants because those statements were not part of the record having not being tendered in the evidence. On this, he argued that, the appellants were thus not fairly tried as their conviction was based on the evidence which was not before the court. As such, the learned counsel urged us to expunge those statements from the record.

As to the 3rd ground of complaint on the propriety of the trial, it was Mr. Kayaga's submission that, at the summing up to the assessors, the trial judge did not properly direct them on the defence of *alibi* intended to be relied upon by the 1st appellant. On this he submitted that, the 1st appellant testified that, though he heard alarm raised, he could not rush to the scene of crime because of the illness which had confined him to bed on the fateful day. However, while summing up to the assessors, the trial judge ruled out that defence *alibi* on ground that, it was not raised in accordance with section 194 (4) of the CPA on the failure by the 1st appellant to initially file the respective notice of intention to rely on such defence. He argued this, to be irregular which vitiated the trial because apart from the trial judge having pre-determined the case, her views were earlier known to the

assessors who were influenced in that regard. Thus, he urged us to nullify the proceedings and judgment and order a retrial before another judge of competent jurisdiction with a new set of assessors. To back up his proposition he referred us to the cases of **CHARLES SAMSON VS REPUBLIC,** [1990] T.L.R 40 AND 41 and **ABDALLA BAZAMIYE AND ANOTHER VS REPUBLIC** [1990] TLR 42 and 45.

On the other hand, the learned Senior State Attorney supported the appeal only on the account of the procedural irregularity at the summing up and conceded that the trial was vitiated. To back up the proposition, he cited to us the case of **MATHIAS BUNDALA VS REPUBLIC,** Criminal Appeal No. 62 of 2004 (unreported).

After a careful consideration of the grounds of complaint, the record before us and submission of the learned counsel for the parties, the issue for determination is the propriety or otherwise of the trial.

At the outset we wish to point out that, we agree with the learned counsel for the parties that, the Post mortem examination report and the sketch map of the scene of crime, the documentary exhibits P1 and P2 which were produced at the trial were not read out to the appellants. This was irregular as emphasized in the case of **ROBINSON MWANJISI AND**

OTHERS VS REPUBLIC, [2003] TLR where the Court stated among other things that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted, before it can be read out...."*

See - also the case of **MBAGA JULIUS VS REPUBLIC,** Criminal Appeal No 131 of 2015 and **JUMANNE MOHAMED AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 534 of 2015 (both unreported).

In our considered view, the essence of reading the respective exhibits is to enable the accused to understand what is contained therein in relation to the charge against them so as to be in a position of making an informed and rational defence. Thus, the failure to read out the documentary exhibits was irregular as it denied the appellants an opportunity of knowing and understanding the contents of the said exhibits.

Regarding the complaint on the trial judge having acted on the evidence which was not before the trial court to convict the appellants, the

High Court judgment at pages 56 -58 of the record of appeal reflects as follows:

> *"In evaluating the evidence by the defence, I find that the defence by the 1st accused that he was sick and not present at the scene of crime wanting. This is so because there is no proof to support this allegation, as reasons given by the 1st accused failing to inform about his sickness were not coherent.* ***And as already said the defence of alibi is rejected for failure to comply with the law. Furthermore, the testimony in court during trial is a complete turnaround of what DW1 recorded at the Police in his Caution Statement. At the Police he said*** *that he was at the scene of crime and he saw the deceased body. I am therefore convinced that* ***the issue that he was not at the scene of crime is an afterthought."***

[Emphasis supplied]

We have gathered that, though the statements of PW1 and DW1 were contained in the information filed at the High Court and a subject of the committal proceedings, they were not tendered as evidence to warrant consideration by the trial court in its judgment. In a nutshell, as the two

statements were not evidence before the court, the trial judge wrongly acted upon them to convict the appellants. In view of the pointed out infractions, though the offensive documents deserve to be expunged, we have opted not to take such stance due to what will be apparent in due course.

As to the propriety or otherwise of the trial, the learned counsel for the parties faulted the trial judge to have influenced the assessors at the summing up.It is a mandatory requirement under section 265 of the CPA that, trials before the High Court must be conducted with the aid of assessors. Thus, after both the prosecution and the defence have closed their respective cases under section 298 (1) of the CPA, the trial judge is required to sum up the evidence for the prosecution and defence and require assessors to state his opinion as to the case generally and on any specific question of fact addressed to them by the trial judge who shall record their opinion. In the case of **WASHINGTON ODINDOVS THE REPUBLIC** [1954] 12 EACA 392 the defunct Court of Appeal for Eastern Africa had this to say:-

> *"The oplnion 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]

As to what are the consequences of the non-direction of the assessors on vital points of law, this position was underscored in the case of **TULIBUZYO BITURO VS REPUBLIC** [1982] TLR 264 where the Court among other things, held:

" ...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 no-direction of the assessors on a point of law."

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. Therefore, it is incumbent on the trial judge at the summing up to adequately address the vital aspects of the case to the

assessors to enable them to make informed opinions which can be achieved, if the assessors have been fully appraised of the antecedent facts before them in relation to the requisite law.

Regarding the trial judge's pre-determination of the case and disclosing her views in the course of summing up to the assessors, the law frowns upon such practice because it is likely to influence the assessors in one way or another in making up their minds about the issues being left with them for consideration. See - **ALLY JUMA MAWEPA VS REPUBLIC**, [1993] TLR 231. In that case, the appellant was convicted of murder and sentenced to death after his defences of drunkenness and provocation were rejected by the Judge sitting with Assessors. The decision of the Court was based entirely on the credibility of the appellant as a witness. On appeal, the appellant's advocate criticised the trial Judge for making certain comments during the summing up to the Assessors about the credibility of the appellant. Thus, the Court held:

> *"When summing up to the 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 another in*

making up their own minds about the issue or issues being left with them for consideration;

The assessors should 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 views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case; where the Court emphasized that the assessors should 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 views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case."

In the matter under scrutiny, we have noted thatat page 35 of the record, in the course of summing up, the trial judge addressed the assessors among other things, as follows:

"On the other hand, one of you might decide to raise the defence of alibi, namely that the accused was elsewhere when the deceased person was beaten to death. ***But this defence cannot be tenable now because the accused (DW1) has***

not complied with section 194 (4) of the Criminal Procedure Act."

The trial judge's view on the undesirability of the defence of *alibi* seems to have influenced the opinion of two assessors who at pages 36 and 37 returned a verdict of guilty having opined as follows:

" ...The defence by the 1st accused that he was sick did not have proof..."

As for the 2nd assessor he opined as follows:

" The 1st accused defence that he was sick has no support because he could have brought a witness to say that he was sick"

In our considered view, we think such misdirection clearly expressed the judge's own findings of fact on the evidence which were aimed at influencing the assessors to agree with her views on the undesirability of the 1st appellant's defence of *alibi* and had nothing to do with wanting to get their opinion. See- the cases of **ALLY JUMA MAWEPA VS REPUBLIC** (supra), **MT. 101296 MWINCHANDE AND 4 OTHERS VS REPUBLIC,** Criminal Appeal No. 71 of 2016and **DAVID LIVINGSTONE SIMKWAI AND 8 OTHERS,** Criminal Appeal No. 146 of 2016 (both unreported).

It was thus with respect, wrong for the trial judge to have made her impressions known to the assessors in the course of summing up. As such, the assessors were not properly guided to aid the trial court as per dictates of section 265 of the CPA and as such, it cannot be safely vouched that, they were properly informed to make rational opinion as to the guilt or otherwise of the 1st appellant. We are thus satisfied that, the trial was vitiated.

Furthermore, the trial judge's pre-determination on the defence of *alibi* at the summing up is reflected in her judgment whereby having rejected that defence, at page 52 of the record she concluded asfollows:

> " *The 1st accused DW1raised the defence of alibi in that he was not at the scene of crime because he was sick. He however failed to furnish any evidence to support his allegation. Even when the lady assessor asked him if he told his neighbour about the sickness he said he did not do that.* ***The defence of alibi is raised where a notice has been provided as required under section 194 (4) of the Criminal Procedure Act. The court is entitled under section 194 (6) of the Criminal Procedure Act to reject such evidence if no***

notice is given. Under the circumstances of this case I reject as I hereby do the defence of alibi as raised by the 1st accused for failure to comply with the mandatory provisions of the law. It was a mere afterthought technically calculated to circumvent the ends of justice."

[Emphasis supplied]

It is also glaring that, the trial court did not take cognizance whatsoever of the defence of alibi which amounted to a mistrial and a consequential miscarriage of justice. See- **CHARLES SIMON VS REPUBLIC** [1990] TLR 39. It is a settled principle that, even if the defence of alibi is brought contrary to the law, the trial court must consider it and may accord it no weight instead of disregarding it at the outset. It is pertinent to consider such defence because if it is sufficiently established that the absence of the accused does not connect him/her with the charged offence, that might raise a shadow of doubt of the prosecution case warranting determination by the trial court. Thus, it is our considered view that, failure to consider the 1st appellant's defence of *alibi* amounted to a mistrial that went to the root of the matter which occasioned a failure of justice.

As to the way forward, we agree with the learned counsel for both parties that, in the interest of justice, a remedy of a re-trial is unavoidable. See -**FATEHALI MANJI VS. THE REPUBLIC** (1966) EA, 341. We thus, allow the appeal and order a re-trial before another judge of competent jurisdiction and a new set of assessors. Meanwhile the appellants shall remain in custody.

DATED at **TABORA** this 5th day of November, 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 5th day of November, 2019 in the presence of Mr. Miraji Kajiru, learned Senior State Attorney for the respondent/Republic and Mr. Kamaliza Kamoga Kayaga, Counsel for the Appellants is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL