IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: MZIRAY, J.A., MKUYE, J.A., And MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 153 OF 2017

MICHAEL MAIGE.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mambi, J.)

Dated 16th day of May, 2017

in

Criminal Session No. 96 of 2014

JUDGMENT OF THE COURT

28th October & 1st November, 2019

MZIRAY, J.A.

The appellant, Michael Maige, was charged before the High Court of Tanzania at Mbeya with the offence of murder in breach of section 196 and 197 of the Penal Code, Chapter 16 R.E. 2002. The particulars of the offence were that on 25th day of October, 2012 at Karungu hamlet in

Makongorosi village, within Chunya District and Region of Mbeya, the appellant murdered one Mawazo Mwakamele.

The appellant pleaded not guilty to the information after which a full trial was conducted. The brief facts of this case were that, the deceased Mawazo was a businessman who engaged himself in mining activities at Karungu village in Chunya District. On the fateful day, the deceased left home for his usual business by using his motorcycle and had his gold metal detector make GP 3500 for the mining activities. While at Karungu village the deceased left his motorcycle in the care of one Shija Likenejo and headed to Karungu forest for mining. From that day the deceased disappeared until 26/10/2012 when he was found dead at Mambuzi hamlet in Karungu village with cut wounds on his head and several parts of his body. The investigation commenced immediately and on 15/11/2012 the appellant was apprehended selling the deceased gold detector machine to PW4 Sauli Solomon Mwarabila.

Based on the above facts, the appellant was convicted of murder and was sentenced to suffer death by hanging. Aggrieved by the conviction and sentence he filed this appeal raising nine grounds of appeal in his

memorandum of appeal. For reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal, the appellant was represented by Mr. Ladislaus Rwekaza, learned advocate; whereas on the part of the respondent Republic had the services of Mr. Ofmedy Mtenga, learned State Attorney.

Before the commencement of the hearing, Mr. Rwekaza, learned advocate sought leave of the Court to address us on a point of law which according to him was fatal and had tainted the decision of the trial court. He expressed his disappointment on the way the summing up to the assessors was conducted. He submitted that the summing up insufficiently and improperly guided the assessors for failure on the part of the trial judge to properly address the assessors on the issue of circumstantial evidence and the doctrine of recent possession on which the conviction was based upon. He submitted that the summing up was not in conformity with the requirements of section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 (the CPA) and Section 177 of the Tanzania Evidence Act, Cap 6 R.E. 2002 (the Evidence Act). To him, the irregularity was fatal and

rendered the entire proceedings defective. As to the way forwarded he came up with two propositions. The first proposition was to nullify the judgment and sentence and remit the case to the trial Court for purposes of complying with section 265 of CPA and section 177 of the Evidence Act. Alternatively, he suggested to the Court to nullify the proceedings, quash the judgment and conviction, set aside the sentence and release the appellant from prison.

At first the learned advocate opted for the case to be remitted to the trial court for the assessors to be properly addressed on vital points of law. On a second thought, particularly after being prompted by the Court, he thought the second option was more viable due to insufficient evidence. He submitted that on the evidence the detecting machine was not valued, likewise, its ownership was not established and above all there was no evidence to prove that on the fateful date the deceased was in possession of the detecting machine allegedly found with the appellant. In such circumstances, the learned advocate contended that the chain of custody was broken and due to insufficient evidence the appellant should be released instead of being taken back to the trial court.

In response, Mr. Mtenga was at one with the learned advocate that the trial Judge did not properly direct the assessors on vital points like the doctrine of recent possession and circumstantial evidence on which he based to ground the conviction. To strengthen this proposition, he cited **Tulubuzya Bituro v. R.** [1982] TLR 264; **Hassani Ramadhani Mndika and 2 Others v. R.,** Criminal Appeal No. 234 of 2017 (unreported). He therefore prayed for the proceedings in respect of summing up to the stage of judgment and sentence be nullified and the trial court be directed to correct the error. He did not support the proposition made by Mr. Rwekaza to acquit the appellant arguing that the circumstancial evidence based on the doctrine of recent possession was sufficient to sustain a conviction.

On our part, having carefully considered the unanimous submissions by the learned counsel for the parties, on which they consensusly submitted that the trial judge did not adequately sum up to the assessors on the doctrine of recent possession and circumstantial evidence, to which we subscribe, we quite agree that the summing up in the circumstances was problematic.

We begin our discussion with the requirement of section 265 of the CPA which provides:

> *"All trials before the High Court shall be with the aid of the assessors the number of whom shall be two or more as the court thinks fit."*

We think that the above provision should be read in conjunction with section 298(1) of the CPA which states:

> *"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."*

From the above excerpt, the issue of summing up to assessors is a requirement of the law that for the trial judge who sits with the aid of assessors has to sum up to them before inviting their opinion as the main purpose is to enable them to arrive at a correct opinion and the same can be of great value to the trial judge only if they understand the facts of the case in relation to the relevant law. (see **Washington s/o Odindo v. R**

(1954) 21 EACA 392; **Augustino Lodami v. R,** Criminal Appeal No. 70 of 2010; **Charles Lyatii @ Sadala v. R,** Criminal Appeal No. 290 of 2011; **Selina Yambi and two others v. R,** Criminal Appeal No. 94 of 2013 (all unreported).

In order for the assessors to arrive at a correct opinion, the duty of the judge when summing up is to explain to them the law in relation to the relevant facts as to vital points of law and what amount to the vital points of law. (see **Maswola Samwel v. R,** Criminal Appeal No. 206 of 2014 and **Omary Khalifan v. R,** Criminal Appeal No. 107 of 2015 both unreported).

Having in mind the above principles, in the present case, we have taken our ample time to revisit the judgment of the trial court and it is apparent that the appellant was convicted based on the doctrine of recent possession and circumstantial evidence. It is apparent from the said judgment that the trial judge illustrated very well the evidence of the prosecution and defence and reached his conclusion based on the above legal principles. However, the immediate question we pose is; were the assessors conversant with the point of law on which the appellant was convicted with? When we go through the summing up notes by the trial

judge at page 2 thereof, it is clear that there are some basic legal principles listed but to our dismay the doctrine of recent possession and circumstantial evidence were not among the listed points of law. We observed that the trial judge concentrated much on introductory remarks and summary of testimonies of the witnesses but when it comes to points of law we find that they were scantly articulated. The trial judge had a duty to address the assessors on vital points of law on circumstantial evidence and the doctrine of recent possession in relation to the charge of murder facing the appellant. Further to that we note that at page 13 of the summing up notes the trial judge invited the assessors to address him on the issue of *alibi* which he never addressed despite the fact that it was a legal point.

It is our considered view that failure to address the assessors on the above aforementioned vital points of law was a non-direction as observed in the cases of **Suguta Chacha and two others v. R,** Criminal Appeal No. 101 of 2011 and the case of **Mara Mafuge and six others v. R,** Criminal Appeal No. 29 of 2015 (both unreported). In **Mara Mafuge** (supra), we observe that:

"... we are of well considered view that the summing up to assessors in the present case fell short of the minimum threshold required under the law .... [Therefore] the proceedings are as good as if the trial was without the aid of assessors."

To sum up in this subject, we are convinced that in the scenario of this nature, where assessors are not properly addressed on vital points of law, it cannot be said that the trial was with the aid of assessors as envisaged under section 265 of the CPA. The consequences which follow is to render the proceedings from that point a nullity. (See **R v. Grospery Ntagalinda @ Koro,** Criminal Appeal No. 73 of 2014 and **Charles Lyatii @ Sadala** (supra).

For the reasons we have endeavoured to give hereinabove, we exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and nullify the proceedings in respect of the summing up, judgment and sentence imposed by the High Court and order for the trial record to be remitted to the High Court for the same judge with the same set of assessors to conduct the summing up and

compose a new judgment in conformity with the spirit of our judgment. For interest of justice, the compliance is with immediate effect.

The appellant shall in the meantime remain in custody to wait for the judgment.

It is so ordered.

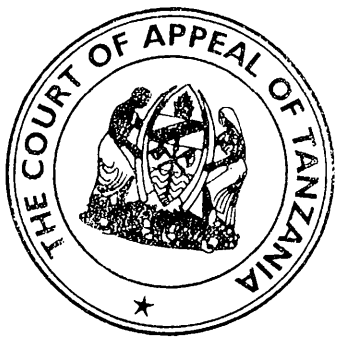
DATED at **MBEYA** this 31st day of October, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

The Judgment delivered on this 1st day of November, 2019 in the presence of Mr. Victor Mkumbe, hold brief for Mr. Ladislaus Rwekaza and Mr. Ofmedy Mtenga, State Attorney, for the respondent is hereby certified as a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL