IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A, MWAMBEGELE, J.A And SEHEL, J.A.)

CRIMINAL APPEAL NO. 34 OF 2016

1. CHARLES KARAMJI @ MASANGWA
2. MEDARD MAZIKU @ MACHUNDA } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kaduri, J.)

dated the 31st day of May, 2011
in
Criminal Sessions Case No. 23 of 2009

JUDGMENT OF THE COURT

26th November & 2nd December, 2019

MWAMBEGELE, J. A.:

Charles Karamji @ Masangwa and Medard Maziku @ Machunda; the appellants herein, were convicted by the High Court of Tanzania sitting at Kahama of murder contrary to section 196 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged in the particulars of the offence in the information that on 19.10.2008 at about 02:00 hours, at Shilela Village in Kahama District, Shinyanga Region, they, together with a certain

Masumbuko Madata @ Sumbu who is not party to this appeal, murdered Esther Charles; a child with albinism. After the convictions, the sentence against the said Masumbuko Madata @ Sumbu and the first appellant were deferred for the reason that they were convicts of murder in another case of similar nature. The second appellant was sentenced to suffer death by hanging. Aggrieved, the two appellants lodged this appeal protesting their innocence.

In order to appreciate the decision we are going to make in determination of this appeal, we think it is apt to narrate, albeit briefly, the relevant factual background to this appeal. It is this. Deep in the night of 19.10.2008, Jennifer John (PW1) was fast asleep with her two children including a nine-year old child; Esther Charles, the deceased, when she heard a door being broken into by an uninvited guest. That person wielded a machete on the one hand and a torch on the other. That person went straight to where the deceased slept and hacked her in the arm and shoulder. PW1 tried to protect the deceased to no avail. He grabbed her. The duo struggled over the deceased and, ultimately, PW1 was overpowered and that person threw the deceased in the living room where PW1 heard the deceased being hacked by other persons. In the

meantime, the uninvited stranger took control of PW1 in the room for some time. At a later stage, he, together with others left with the deceased.

PW1 raised an alarm for help. The deceased was nowhere to be seen. The first to respond to the raised alarm was a certain Mzee Waziri Ndubi; one of the neighbours. They searched the compound. The body of the deceased was found in the vicinity with her two legs amputated. She was already dead. More alarm was raised and more people showed up.

The appellants were arrested at different times; first in connection with a similar killing in which we take judicial notice that the first appellant, among others, was convicted by the High Court and this Court confirmed both the conviction and the death sentence by hanging meted out to him. That case is **Masumbuko Matata @ Madata, Emmanuel Masangwa and Charles Karamji @ Charles Masangwa v. Republic**, Criminal Appeals No. 318, 319 and 320 of 2009 (unreported). This detail also appears at p. 321 of the record of appeal. In connection with the death of Esther Charles in this case, as already stated above, both appellants were convicted and the sentence against the first appellant was deferred and the second appellant was sentenced as stated above. Dissatisfied, the duo

appealed to this Court on several grounds filed by themselves and their advocates but which for reasons to become apparent shortly, we will not reproduce.

When the appeal was placed before us for hearing on 26.11.2019, both appellants appeared but were under custody and were represented. While the first appellant was represented by Mr. Kamaliza Kamoga Kayaga, learned advocate, the second appellant had the representation of Mr. Emmanuel Bernard Musyani, also learned advocate. The respondent Republic appeared through Mr. Deusdedit Rwegira, learned Senior State Attorney.

Before we could commence the hearing of the appeal in earnest, we prompted the learned counsel for the parties to address us on the sufficiency of the summing up notes to assessors as we thought they did not touch on essential ingredients of the offence of murder and also failed to give directions on how the assessors should consider facts relating to the application of vital points of law relevant to the case. We wanted the three trained minds for both parties to address us so because we learnt from the summing up notes that the trial Judge made it point-blank that he

would sum up to the assessors on only matters of facts while the ones relating to law would be dealt with by the court in the judgment.

Responding to this prodding by the Court of its own motion, Mr. Kayaga for the first appellant submitted that the trial Judge summed up to the assessors that he would like them to give opinions on only matters of facts and not on matters of law. He went on to submit that there were important matters of law which were relied upon by the trial Judge to convict the appellants but, ostensibly, were not summed up to the assessors. The learned counsel gave examples of those matters of law as the cautioned statement, the question of alibi and the ingredient of malice aforethought in cases of this nature. That irregularity, he charged, was fatal and was tantamount to not involving the assessors on vital points of law and therefore not involving them in the trial. That, he argued, vitiates the whole proceedings. Given the circumstances, the learned counsel implored us to invoke our powers of revision bestowed upon us by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 (hereinafter referred to as the AJA) to nullify the proceedings and judgment of the High Court.

As to the way forward, Mr. Kayaga submitted, there were two options; **one**, to order a retrial before another Judge and new set of assessors, and, **two**, he submitted, would have been to look into the evidence and see if there was enough evidence to order a retrial. But the learned counsel was quick to state that the second option was not feasible in that there was, *prima facie*, evidence against the appellants that would make a retrial a better option. It was his submission that the appeal could be disposed of on this ground alone.

Mr. Musyani for the second appellant was at one with Mr. Kayaga in both the arguments and the way forward. He added that the role of assessors is to assist the Court to arrive at a just decision. Failure to involve them on points of law, he argued, let alone on vital points of law, means the trial was not conducted with the aid of assessors and the misfortune vitiates the whole proceedings. Like Mr. Kayaga, Mr. Musyani prayed that the proceedings be nullified in terms of section 4 (2) of the AJA and a retrial before another judge and another set of assessors be ordered. Prompted on the status of the Preliminary Hearing conducted prior to the selection of the assessors, the learned counsel was of the view that the

same should be saved given that the assessors were not involved at that stage.

Mr. Rwegira for the respondent Republic had the same views. There was a problem with the summing up to assessors as the judge convicted the appellants on the strength of retracted confession, identification in a horrifying situation, alibi, malice aforethought and common intention, he submitted. It was therefore important for the trial Judge to sum up to them on those vital points of law. Prompted on whether or not the unfortunate situation could be saved by section 388 of the CPA or the overriding objective entrenched in our laws in the recent past, the learned counsel was of the view that the ailment goes to the root of the matter and thus neither section 388 of the AJA nor the overriding objective principle could resuscitate the matter. He, like the learned counsel for the appellants, also prayed that the Court should order a retrial before another Judge and another set of assessors.

We have considered the concurring arguments of the learned counsel for both parties. We start our determination by a statement that, in terms of the dictates of the provisions of section 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (hereinafter referred to as the

CPA), all criminal trials before the High Court are mandatorily conducted with the aid of assessors the number of whom shall be two or more as the court may find appropriate. In terms of the provisions of section 298 (1) of the CPA, a trial Judge sitting with assessors is obligated to sum up to them before inviting them to give their opinions. The subsection reads:

> *"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."*

Despite using the words "**the judge may sum up**" in the foregoing subsection, the practice of the courts in this jurisdiction has been to comply with it to the letter. In **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported), grappling with an akin situation, we observed:

> *"... as a matter of long established practice and to give effect to S. 265 of the Act that all trials before the High Court shall be with aid of assessors,* ***trial judges sitting with assessors have invariably***

been summing up the cases to the assessors. *(See* ***Khamis Nassoro Shomar v. S.M.Z*** *[2005] TLR 228 and* ***Hatibu Gandhi v. R.*** *[1996] TLR12)."*

[Emphasis supplied].

Likewise, in **Khamis Nassoro Shomar v. S.M.Z** (supra), the appellant was charged with and convicted of manslaughter and sentenced to serve a prison term of five years. It was not apparent from the record whether at the close of the case for both sides the trial Judge either summed up the case to the assessors or required the assessors to state their opinion in terms of section 256 (1) of the Criminal Procedure Decree, Chapter 14 of the Laws of Zanzibar which is *in pari materia* with section 298 (1) of the CPA. The Court, we quote from the headnote, held:

"As there was no summing up of the case to the assessors and their opinion was not taken, in similar vein, ***the proceedings were in contravention of the clear and long established practice of the court."***

[Emphasis supplied].

Also, in **Andrea s/o Kulinga and others v. Republic**, [1958] 1 EA 684 the Court of Appeal for Eastern Africa sitting at Dar es Salaam, had an

opportunity to discuss the tenor and import of the provisions of section 283 (1) of the Tanganyika Criminal Procedure Code – now section 298 (1) of the CPA. It had this to say at p. 685:

> *"It is true that under s. 283, sub-s. (1) of the Tanganyika Criminal Procedure Code a trial judge is not under a statutory obligation to sum up to assessors. On this point we prefer the decision of this court in* ***Washington s/o Odindo v. R.*** *(1954) 21 E.A.C.A. 392, following as it does the express words of s. 283, to the dictum in* ***Miligwa s/o Mwinje and Another v. R.*** *(1953) 20 E.A.C.A. 255, 256, that s. 283 (1)* ***'requires the judge to sum up the evidence to the assessors'****. Nevertheless we wish to endorse the view expressed by this court in* ***Washington s/o Odindo v. R.*** *that* ***'it is a very sound practice ... to do so except in the very simplest cases'****."*
>
> [Emphasis ours].

In view of the above authorities, it must be trite law that the need to sum up to assessors is of such relevance that as per practice, of course founded upon prudence, a trial Judge cannot pick and choose to do away

with it. That is to say, the above subsection has not been couched in imperative terms but the practice of the courts has made it so important that no court can forbear with its compliance. It is a very sound practice which courts of law in our jurisdiction have been observing it religiously.

The manner in which the summing up to assessors has to be made has also been explained by case law to comprise **sufficient summing up**. This process encompasses summing up adequately on both facts and all vital points of law. Failure to comply with this requirement, so the practice has it, is fatal; it vitiates the whole proceedings.

In **Omari Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported), the Court discussed at some considerable length for the dire need of trial Judges in the High Court to sum up to assessors on all vital points of law. In that appeal, the Court recited the following excerpt from its previous unreported decision in **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014:

> *"... With due respect, the two learned counsel have correctly articulated the settled position of law regarding the trials in the High Court that are aided by the assessors. In the instant appeal*

there was misdirection on the part of the trial judge for failing to direct the assessors on those two vital points of law.

"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."*

In a somewhat akin situation, the Court, in **Jesinala Malamula v. Republic** [1993] TLR 197, grappled with the point. In that case, the appellant was found guilty and convicted of the murder of her husband. The Trial Judge found that the appellant had been provoked by the deceased. Nevertheless the learned trial Judge directed the assessors not to consider this defence. On appeal, the Court considered the propriety of the trial Judge's direction to the assessors and the effect of removing the question of provocation from the assessors. The Court held that to remove

the question of provocation from the assessors when there was such provocation was fatal to the resulting conviction. It held at p. 201:

> *"This Court has held on a number of occasions that to remove the question of provocation from the Assessors when there is such provocation is fatal to the resulting conviction, for it is impossible to know what the Assessors would have said had the question been put to them."*

The same was the position in **Tulubuzya Bituro v. Republic** [1982] TLR 264 in which the Court was faced with an identical situation. In that case the appellant had been convicted of murder. The main question on appeal was whether failure by the trial court to address the assessors on the point of provocation could nullify the proceedings. The Court held:

> *"Failure by a judge to direct assessors on the issue of provocation, where evidence shows so, vitiates the entire proceedings".*
> See also: **Fadhili Juma and Another v. Republic**, Criminal Appeal 567 of 2015 (unreported).

In the case at hand the trial court convicted the appellants basing on the strength of retracted confession, identification in the horrifying situation, alibi, malice aforethought and common intention. These vital points of law featured well in the judgment of the trial High Court and the trial Judge was quite meticulous in their elaboration. However, His Lordship did not sum up to assessors on any of the legal issues. Not even on elementary legal points such as malice aforethought nor summing up to them on the burden of proof in criminal jurisprudence. This, as can be gleaned from the record of appeal, was not by default but, rather, by design, for at the very outset of the four-page summing up at p. 242 of the record of appeal, the trial Judge told the assessors of his stance to require them to give their opinions on only points of facts. We will let the record speak for itself:

> *"Lady and Gentleman assessor, we have come to the end of both the prosecution and defence case.* ***I would therefore invite you to give me your opinion on matters of facts*** *as you heard in the course of the trial.* ***I shall consider the legal issues raised by both parties*** *...."*
> [Bold expression supplied].

Concluding, at p. 245, having summed up to the assessors mainly on how the appellants were arrested and the case for the prosecution and defence until closure, the learned trial Judge stated:

> *"**I will deal with the legal issues myself and what I have given you is in a nutshell**. I hope you will be able to give me your opinion for each of the three accused. I will record your verdict."*
> [Emphasis supplied].

Thereafter, the assessors successfully prayed for a half-hour adjournment and on resumption, they both returned verdicts of not guilty on all the three accused persons.

From the above quotes from the record of appeal, it is no gainsaying that the trial judge allotted the legal issues to himself leaving the factual part of it to the assessors. This, with unfeigned respect to the trial Judge, was plainly wrong. Reducing the role of assessors to advise on only points of facts and living matters of facts within the empire of the trial Judge is strange to our criminal justice. As observed above, the assessors must be summed up on facts and every vital point of the law so as to give the court an informed verdict. That was not done and, on the authorities discussed

above, the ailment vitiates the entire proceedings, for it is impossible to know what the assessors would have said had the vital points of law been put to them.

At this juncture we find it irresistible to quote what the erstwhile Court of Appeal for Eastern Africa held in **Washington s/o Odindo** (supra) 21 EACA 392 and recited in **Andrea s/o Kulinga** (supra) and **Augustino s/o Lodaru v. Republic**, Criminal Appeal No. 70 of 2010 and **Omari Khalfan** (supra) on the importance of sufficient summing up of the case to the assessors on both facts and law. It held:

> *"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 sufficient facts of the case the value of the assessors' opinion is correspondingly reduced*** *..."*
> [Emphasis supplied].

For the avoidance of doubt, we are in agreement with the learned State Attorney that the ailment cannot be salvaged by the provisions of

section 388 of the CPA. Neither can it be so rescued by the principle of overriding objective recently introduced in section 3A and 3B of the AJA. As we observed in **Shija Sosoma v. Republic**, Criminal Appeal No. 327 of 2017 (unreported) as recent as 07.11.2019, much as *expeditiousness* is one of the pillars of the principle of overriding objective now part of our laws, it must not come at the expense of just resolution/just determination of appeals. Put differently, just resolution/just determination of cases take precedence over expeditiousness.

In the end result, we invoke the provisions of section 4 (2) of the AJA to quash all the proceedings of the trial court from the stage the assessors were selected to assist the trial court, quash the judgment thereon and set aside the conviction and the sentence of death by hanging meted out to the second appellant. The order deferring the sentence against the first appellant is also set aside. For the avoidance of doubt, the Preliminary Hearing conducted on 22.06.2009 before Rwakibalila, J., is saved; it shall not be affected by this decision.

As regards the way forward, we agree with the three trained minds; that the justice of this case demands a retrial order before another judge

and a different set of assessors should be made. We order that the file be remitted to the High Court for the appellants to be retried before another judge and a different set of assessors as soon as practicable. In the meanwhile, the appellants shall remain in custody to await their fresh trial on a date to be fixed.

Order accordingly.

DATED at **TABORA** this 29th day of November, 2019.

S. A. LILA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of December, 2019 in the presence of Mr. Emmanuel Musyani who hold brief for Mr. Kamaliza Kayaga, learned counsel for the 1st appellant, Mr. Emmanuel Musyani, learned counsel for the 2nd appellant and Mr. Tumaini Pius, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL