IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MMILLA , J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CRIMINAL APPEAL NO. 429 OF 2018

SAMITU HARUNA @ MAGEZI ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Mkasimongwa, J.)

dated the 29th day of October, 2018
in
Criminal Sessions Case No. 1 of 2015

.....

JUDGMENT OF THE COURT

4th & 10th December, 2019

MZIRAY, J.A.:

The appellant is aggrieved by the judgment of the High Court of Tanzania sitting at Bukoba in Criminal Sessions Case No. 1 of 2015 in which he was convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E. 2002 and sentenced to suffer the mandatory death sentence. The particulars of the information which was filed on 9/5/2015 alleged that on 19/10/2014 at about night

hours at Kiteyangwa – Rwamishenye area within Bukoba Municipality in Kagera Region the appellant did murder one Ernest s/o Kato, the deceased. He pleaded not guilty.

The facts giving rise to this appeal may briefly be stated as follows; On 20/10/2014 at about 07:00 hours, the deceased was found dead and his body was abandoned at Kiteyangwa area within Kagondo Ward in Bukoba Municipality. The Police investigations linked the appellant with the murder in question and arrested him. Upon being interrogated he confessed to have been hired to murder the deceased for a consideration of Tshs.450,000/= of which he had already received an advance of Tshs.50,000/=.

As indicated earlier, the appellant pleaded not guilty to the information after which a full trial ensured and according to the trial court the offence of murder was fully established against him and he was sentenced to suffer death by hanging. Aggrieved, he filed this appeal.

On 15/2/2019 he filed his memorandum of appeal with four grounds of appeal and sometimes later on 29/11/2019 he added

another ground in the supplementary memorandum of appeal which 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. Remidius Mbekomize, learned advocate, while Ms. Susan Masule, learned State Attorney represented the respondent Republic.

Before the commencement of the hearing of the appeal, Mr. Mbekomize, sought leave of the Court to address us on a point of law to the effect that the trial court did not properly address the assessors in the summing up on the repercussions of the cautioned statement which the trial judge heavily relied upon in arriving at the conviction of the trial Court. Seeing that it was a point of law, the Court unhesistantly granted the learned advocate leave to make the address.

In his submission, Mr. Mbekomize took us straight to page 54 – 55 of the record of appeal and argued that what is reflected in the said referred pages, clearly shows that the trial judge failed to address the assessors on the cautioned statement tendered as exhibit, which

was heavily relied upon to ground the conviction. He further submitted that, it is a principle of law that the assessors have to be properly directed on vital points of law and failure to do so is a fatal procedural irregularity which vitiates the case and obviously will prejudice the accused. It is his contention that since the assessors were not properly addressed on this vital point of law, then the assessors failed to express their opinions on the importance of the cautioned statement which was the basis of the conviction in this case. He therefore submitted that, the way forward to this procedural irregularity is for this Court to order a retrial *denovo.*

In response, Ms. Masule entirely concurred with the learned advocate for the appellant in his submission. She read to us the contents of the summing up notes at page 54-55 line 22 of the record of appeal where the trial judge stated:-

> *"the evidence is silent if there is a direct one and the case against the accused is mainly based on a confessional statement alleged to have been made by the accused. The later did but repudiate the statement. He shows that he did not make the*

statement and the police officer did forcefully want him to sign it which he did from the torture inflicted upon him."

From the above excerpt, it is the view of the learned State Attorney that the trial judge did not adequately address the assessors on the tendered cautioned statement, and possibly that was the reason why in their opinions they did not refer anything to the cautioned statement, she argued. The omission in her view tainted the case. She joined hands with Mr. Mbekomize that the way forward should be to remit the case to the trial Court for retrial *denovo.*

We have given deep consideration to the consensus minds of the two learned counsel in their focused submissions that the trial judge did not adequately sum up to the assessors on the vital points of law on the cautioned statement in which it grounded the conviction. Summing up to assessors is a requirement of the law under section 265 of the Criminal Procedure Act [Cap.20, R.E. 2002] (the CPA) which provides that once the prosecution side and the defence side had closed their cases, the trial judge has to sum up to the assessors before inviting their opinion as provided under section

298(1) of the CPA. The main purpose being 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 Lodaru v. R**, Criminal Appeal No. 70 of 2010; **Charles Lyatii @ Sakala v. R**, Criminal Appeal No. 290 of 2011 and **Selina Yambi and two Others v. R**, Criminal Appeal No. 94 of 2013 (all unreported).

In our view, in any trial before the High Court in which assessors one involved, their full participation cannot be taken as a mere formality of the law, but a necessity. The law is clear that assessors are part and parcel of the trial before the High Court and thus a trial judge must ensure that the assessors participate at every stage of the trial from the beginning to the end. (See **Hilda Innocent v. R**, Criminal Appeal No. 181 of 2017 (unreported)). The only duty of the trial judge when summing up is to explain the law in relation to the relevant facts as to vital points of law (See **Maswola**

Samwel v. R, Criminal Appeal No. 206 of 2014 and **Omari Khalfan v. R**, Criminal Appeal No. 107 of 2015 (both unreported)).

When we refer to the summing up notes of the trial judge at page 54-55 of the record of appeal which we earlier on reproduced, we are increasingly of the settled opinion that the trial judge failed to sum up properly to the assessors on the relevancy of the cautioned statement on which the conviction was anchored. Such failure definitely diminished the value of their opinions as reflected in page 56 of the record of appeal. From the opinions given there is no doubt that the assessors were not enlightened to enable them to arrive at a correct opinion. With the opinions they gave it clearly show that they were not conversant with the applicability of the cautioned statement and that the same could be used to ground a conviction. We think that failure on the part of the trial judge to address the assessors on the applicability of the cautioned statement which led to convict the appellant was a non direction on vital point of law. (See **Republic v. Revelian Naftali and Marick Emmanuel**, Criminal Appeal No. 570 of 2017 (unreported)).

Thus in the scenario of this nature where the trial judge fail to address the vital point of law to the assessors as reflected in the summing up at page 54-55 of the record of appeal, it cannot be said the trial was with the aid of the assessors as provided under section 265 of the CPA. The trial was therefore a nullity. (See **Turubuzya Bituro v. R**, [1982] TLR 204; **Suguta Chacha and two others v. R**, Criminal Appeal No. 101 of 2011; **Mara Mafuge and six others v. R,** Criminal Appeal No. 29 of 2015 (both unreported)).

On the foregoing reasons, we quite agree with the learned counsel that the assessors were not properly directed on the vital points of law, particularly the applicability of the cautioned statement in which it grounded the conviction. The omission in our view tainted the case and obviously prejudiced the appellant.

As a result, in exercise of our revisional powers under section 4(2) of the AJA, we nullify and quash the conviction and all the proceedings of the trial court and set aside the sentence of death. We order for the trial to recommence afresh before another judge with a new set of assessors. We direct a speedy trial.

Meanwhile, the appellant to remain in custody to wait for the new trial.

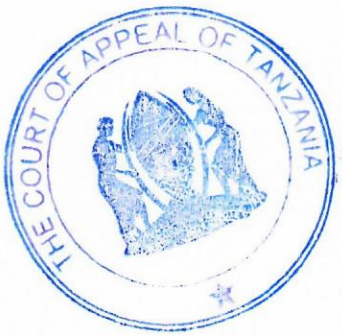
DATED at **BUKOBA** this 10th day of December, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

R. E. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

The Judgment delivered this 10th day of December, 2019 in the presence of Mr. Remidius Mbekomize, learned Counsel for the appellant and Ms. Suzan Masule, 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