IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: MUSSA, J.A., LILA, J.A., and KOROSSO, J.A.)

CRIMINAL APPEAL NO. 19 OF 2016

DEOGRATIAS MLOWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kalombola, J.)

Dated the 21st day of June 2012

In Criminal Session No. 1 of 2008

JUDGMENT OF THE COURT

30th April, & 9th May, 2019.

KOROSSO, J.A

Deogratias Mlowe, the appellant herein, and Mashine Dickson Mashine were charged with the offence of murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition of 2002 before the High Court sitting at Songea. On the information, the appellant was arraigned as the first accused, whereas Mashine Dickson was the second accused. That, on the 23rd of October 2006 at or about

19.00hrs at Mpandangindo village, within Songea District in Ruvuma Region, the appellant and the second accused murdered one Frank Komba (the deceased).

Upon the information being read over and explained, the appellant and the second accused pleaded not guilty to the charges facing them, and the case proceeded to preliminary hearing. During the preliminary hearing, the postmortem report, sketch map of the place of incident, motorbike documents were tendered by the prosecution side without objection from the defence.

The trial commenced thereafter, and on the first day of trial, the prosecution proceeded to withdraw charges against the second accused person Mashine Dickson Mashine, leading the Court to discharge him under section 91(1) of the Criminal Procedure Act, Cap 20 Revised Edition of 2002. Thereafter, the trial proceeded with the appellant being the only accused person facing charges before the Court.

After the testimony of four (4) witnesses, that is, Cecilia Ngunga (PW1), Bernada Komba (PW2), Hamisi Issa (PW3), Mashine Dickson

Mashine (PW4), a Justice of the Peace, Baltazar Ndunguru (PW5) gave his testimony. Midway the testimony of PW5, The trial Court conducted a trial within trial to determine the voluntariness of and therefore admissibility of the retracted Extrajudicial Statement said to have been written by the appellant. The mini trial involved prosecution witnesses and one defence witness, and at the end of the trial, the extrajudicial statement of the appellant was admitted and marked as Exh. P4.

When the main trial resumed, the prosecution called three more witnesses, that is, Furaha Kifike (PW6), E 8888 Detective Noah (PW7) against the sole defence witness, the appellant himself. At the end of the trial, the three assessors who sat with the trial Judge (Hon. Kalombola), unanimously returned a guilty verdict against the appellant. The learned trial judge concurred with the assessors' verdict against the appellant and accordingly convicted the appellant and condemned him to suffer death by hanging. Aggrieved, the appellant has lodged this appeal.

The appellant expounds in total five grievances exposed in a memorandum of appeal, where four grounds are enlisted, and one

ground is found in a supplementary memorandum of appeal. These are:

> *"(1) The identification of the Appellant as a person who is alleged to have been at all material time in possession of the motorcycle was not water tight.*
>
> *(2) The identification of the motorcycle as property of the deceased was also not water tight*
>
> *(3) The trial judge did not adequately, or at all, address the assessors on all pertinent facts and/or law surrounding the case.*
>
> *(4) The defence case was note adequately considered, and*
>
> *(5) The trial judge erred at law to let her assessors cross examine all witnesses".*

At the hearing of the appeal, the appellant was represented by Mr. Justinian Mushokorwa, Learned Advocate and on the part of the respondent, they enjoyed the services of Mr. Emmanuel Medalakini, Learned State Attorney. The respondent did not resist the appeal.

We find at this juncture before venturing into and reflecting on the submissions before the Court from the counsels for the appellant and respondent respectively, it is imperative that albeit briefly, we unfold the background to the case.

The facts of the case as unveiled by the prosecution witnesses and found by trial court, are that, the deceased was a student, who resided at Lizaboni area within the Municipality of Songea. On the 23rd of October 2006, he came back from school and requested to borrow a motorbike belonging to his brother in law (PW3), so as to visit his friend somewhere in town. PW3 obliged the request and handed to the deceased his motorbike which was admitted as exhibit P5 during trial. In a separate incident that happened in the evening hours of the same day, the appellant was seen by PW1 and PW2 at Mpangido village as a passenger on a motorbike which was being driven by a person whose identity was not known to the two witnesses. A little later, the two witnesses, again, saw the appellant driving back but without a passenger. In the meantime, the deceased never returned home that day and his disappearance was reported to the Police. The deceased body was found a few days later on the 31st of October 2006 at Mkuzo

village, and identified by relatives on the 1st of October 2006. It was alleged by PW3 that the appellant was seen around 6:30 p.m removing the motorbike from the place he resides.

The appellant was arrested on the 8th November 2006 upon suspicions that the person who took him as a passenger was the deceased. It was alleged that upon the arrest of the appellant, he was taken to a Justice of Peace, PW5, where he confessed to have attacked and killed the deceased and taken the motorbike. That the appellant met the deceased at Bombambili area and hired the deceased to drive him to Mpangangido village for fare payment of Tshs. 8,000/-. That the appellant hit the deceased with a panga on his head and thereafter, he had then left the deceased and later taken the motorbike to Dar es Salaam and sold it. The motorbike was later traced in Dar es Salaam by the police officers assisted by the appellant as narrated by PW7 and tendered as Exh. P5. A postmortem report Exh. P1 revealed that the death of Frank Komba (deceased) was caused by multiple skull cut wounds and haemorrhage.

The appellant gave sworn evidence in his defence, without calling any witness, stating that he was arrested on 8/11/2006 while at

home in Bombambili and taken to Police Station Songea where he stayed up to 14/11/2006, when he appeared in Court. He generally denied killing the deceased and claimed that he was harassed and tortured while under police custody and being in fear of his life, he was forced to sign a document which he was unaware of the contents therein but never wrote any statement.

In the Judgment, the learned trial Judge, concurred with the verdict of guilty of the three assessors against the appellant, convicted the appellant of murder, finding that the Prosecution proved their case beyond reasonable doubt. The trial Judge relied on the evidence of PW1 and PW2 of having identified the appellant to be the one seen with the deceased in a motorcycle prior to his disappearance and death. The trial judge relied on the evidence of PW3, PW6 and PW7 together with Exh. P4, P5, P6 and P7 to find that the motorbike tendered in Court as Exh P5, was properly identified to be the one that belonged to PW3, and had been handed to the deceased on the fateful day of his disappearance and death. The trial Court also relied on the evidence of PW4 and Exh.P4, the extra judicial statement, that the appellant did confess to committing the murder of the deceased and

stealing the motorbike which was in the hands of the deceased at the time.

Moving to reflect and determine the grounds of appeal in the memorandum of appeal, we will follow suit the manner which the learned counsel for the appellant submitted, by first addressing the ground in the supplementary memorandum of appeal, which we have listed as ground number 5. The said ground states that the trial judge erred in law to let assessors cross examine the witnesses.

The learned counsel contended that when you look at the proceedings of the trial court, the learned trial judge allowed assessors to cross examine the witnesses and that this can be discerned from the fact she recorded "**XXD**" for questions from assessors to witnesses. The learned counsel made reference to various decisions of this Court, which have addressed such situation and stated that allowing assessors to cross examine was erroneous. The learned counsel argued that while considering this ground, the Court should also consider ground number 3, where their grievances are that the trial judge did not adequately, or at all, in the summing up, address the assessors on all pertinent facts and/or laws surrounding the case.

The case cited by the appellant counsel to cement their contention, included, **Charles Kulingi vs Republic**, CAT at Mbeya, Criminal Appeal No. 96 of 2015 (unreported). Another case referred is **Crisantus Msingi vs. Republic**, CAT at Mbeya, Criminal Appeal No. 97 of 2015 (unreported). On the ground related to improper or non-direction to assessors on pertinent facts and law embracing the case, the counsel contended that the concluding remarks to assessors at pg. 158 of the typed proceedings, did not include a summary or directions on applicable and relevant law and procedure. That this omission is erroneous, and stated that the Court of Appeal has had occasion previously to address such incidents in various decisions and provided directions.

The learned counsel also cited the case of **Mashimba Dotto @Luku Baruja vs. Republic**, (2016) TLR 388 to strengthen his position. When asked by the Court, what are the consequences thereto, if their grievances are found to reflect the true position of what transpired in the trial court. The counsel stated that, where the Court find this to be the position in this case, the said anomalies by the

trial court should lead this Court to find the proceedings a nullity, and thereafter proceed to order a retrial.

On the part of the respondent, in response to the two grounds of appeal under scrutiny, the learned State Attorney supported the appellant's counsel contention. Reflecting on the position of the law on this, the learned State Attorney stated that there is no doubt that the proceedings reveal that the assessors did cross examine the witnesses and that the position of law is clear from the various decisions including those cited by the learned counsel for the appellant.

On the concern raised regarding gaps in the summing up to assessors by the trial judge, the learned State Attorney, supported the learned counsel for appellant assertion and stated that there was no proper direction by the trial Judge to assessors, on law and procedure related to the case. Arguing further that, the trial judge failed for instance, to direct assessors on essential elements of the offence of murder, the burden of proof, weight to be accorded to a retracted confession. That this anomaly vitiates the proceedings and the Court should find them a nullity and quash them and then order a retrial, being the best remedy available under the circumstances.

Having heard the submissions from the counsel for the appellant and the respondent on the first two grounds of appeal, we proceed to consider and determine the said grounds one by one before proceeding any further.

With regard to the contention that the assessors were left to cross examine the witnesses, after examining the records of proceedings of the trial, we are satisfied that, they reveal that during the testimony of all the prosecution and defence witnesses, the assessors, when provided with an opportunity to question the witnesses, the court recorded: "***XXD"*** *by 1st Assessor*", "**XXD**" by 2nd Assessor and "**XXD**" by 3rd assessor respectively. This can be seen at pg. 22 of the trial Court Judgment typed version for PW1, pg. 27 for PW2, and pg. 36 for PW3, pgs. 41 and 42 for PW4, and at pg. 84 for PW5, at pg. 88 for PW6 and at pg. 101 for PW7. This is also reflected on the part of the defence witness, DWI at pgs. 128 and 129.

As observed by this Court in **Sudy Mashawa @Kasala and Gerald Kikamba vs Republic**, Criminal Appeal No. 497 of 2015, CAT at Sumbawanga (unreported), a position which we also subscribe to, that; "*the notorious practice of presiding officers to precede the*

*examination by a party who called him with the abbreviation "**XD**", that is, in lieu of "examined- in -chief". The examination of a witness by the adverse party is abbreviated: "**XXD**", for "cross-examined"; and finally the examination of a witness, by the calling party, subsequent to the cross-examination is abbreviated: "**RXD**", for "re-examined".*

The task of assessors during trial in a criminal case is expounded under the provisions of section 177 of the Tanzania Evidence Act, Cap 6 Revised Edition 2002 (**TEA**) which states:

> *"In cases tried with assessors, the assessors may put any question to the witnesses, through or by leave of the Court, which the Court itself might put and of which it considers proper".*

This provision has to be read with Section 155 of TEA which expounds on questions that fall under the category of cross examination, are those that are aimed at:

(a) Testing the veracity of the witness;

(b) Discovering who he is and what is his position in life;

or

(c) *To shake his credit by injuring his character.*

The necessary implication from the two provisions of the law, that is, section 155 and 177 of the TEA, is that, assessors should not put questions to witnesses that are for the purpose of cross examining the witness. Thus, in this case, the fact that, records of proceedings as shown hereinbefore, reveals that the assessors were allowed to cross examine the witnesses, is a fatal error. This position has been restated in various decisions of the Court of Appeal, such as the one cited by the appellant's counsel, that is, **Chrisantus Msingi vs. Republic** (supra), **Mapuji Mtogwashinge vs. Republic,** Criminal Appeal No. 162 of 2015 (unreported), **Kulwa Makomelo and Two Others vs. Republic**, Criminal Appeal No. 15 of 2014 (unreported).

The position of the law on this issue is very clear as stated above. Thus the question for determination by this Court, is the legality of the trial judge to allow assessors to cross examine witnesses, and if found in contravention of the law, whether the trial was not vitiated by the said anomaly. In **Chrisantus Msingi vs. Republic** (supra) it was held that:

> *"Since the role of assessor is to assist the judge in a fair trial, it was incumbent on those*

assessors to exercise impartiality throughout the trial. However, by cross-examining witnesses, the assessors acted beyond the purpose of the legislature which is to assist the judge in a fair trial".

Understanding that the provision discussed by the Court in the above case, was section 165 of the Criminal Procedure Act, Cap 6 Revised Edition 2002 (CPA). Where the Court imported and reiterated the holding in **Kulwa Maromelo and Two Others vs. Republic**, Criminal Appeal No. 15 of 2014 (unreported), that:

"where assessors cross-examine witnesses, they necessarily identify themselves with the interests of the adverse party and demonstrate bias which is a breach of one of the rules of natural justice, the rule against bias which is the cornerstone of the principles of fair trial now entrenched in article 13(6)(a) of the Constitution of the United Republic of Tanzania 1977".

Thus in that case, the Court, upon making a finding that the assessors did in fact cross examine the witnesses, proceeded to find that the trial was flawed by incurable irregularity. Thus taking in consideration the stated position and applying them to current appeal,

there is no question that, in this case, the trial court by putting the abbreviation: **"XXD"** instead of **"XD"**, in effect, the trial court allowed the assessors to cross examine the witnesses. Thus having made a finding that the assessors in the trial subject of this appeal did cross examine the witnesses, we find that this was a fatal and incurable irregularity.

Before we venture into what is the available remedy therefore with the above finding, we find it prudent to also move to consider the third ground of appeal, on whether or not the trial judge adequately addressed the assessors on all pertinent facts and/or the law surrounding the case. In effect, the counsel for both the appellant and respondent contended that there was non-direction of the assessors on vital points of law and facts of the case in the summing up. Having heard the submissions by the counsel for the applicant and the learned State Attorney, who faulted the manner in which the assessors were guided at the end of the trial by the learned trial judge, we find the issue for determination is whether or not the trial was faulty and if so, whether the said anomaly if any fundamentally weakened the root and the epitome of the trial itself.

When section 265 of the Criminal Procedure Act, is applied, it is clear that it is a mandatory provision that requires that all criminal trials in the High Court to be with the aid of assessors. This being the position, in terms of section 298(1) of the CPA, it is expected that, at the close of the prosecution and defence cases, the trial judge or magistrate exercising extended jurisdiction, to provide a summary of the evidence and the applicable law and procedure related to the issues before the Court and then require the assessors to give their opinion as regards the case before them.

It has been held that the opinion of assessors is of great value, as underscored in the case of **Washington s/o Odindo vs Republic** (1954) 21 EACA 392, where it was held:

> *"The opinion of assessors can be of great value and assistance to the 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 to them and attention is not drawn to the salient facts of the case, the value of assessors' opinion is correspondingly reduced".*

This position has been further restated in **Tulubuzya Bijuro vs Republic** [1982] TLR 264 and **Crisantus Msingi vs Republic** (supra). What is thus revealed is that, it is imperative during summing up, for the trial judge to also direct assessors on vital points of law. Otherwise, if this is not done, the trial judge will not be seen to have been aided by the assessors. **In Republic vs. Byamozi John @Buyoya and Isaya Venant @ Kakuru,** Criminal Appeal No. 92 of 2016, CAT at Bukoba (unreported) held that:

> "*The emphasis on the proper direction of assessors on vital points of law is pertinent and nourishes the active involvement of the assessors in a criminal trial as spelt out under sections 265 and 298 of the Criminal Procedure Act*".

We subscribe to all the above stated positions held by this Court, on the importance of the trial judge properly directing the assessors. In the present case, in the summing up to assessors, the trial judge presented a summary of evidence for all the testimonies of the witnesses from the prosecution and the defence, and then at pg 153, thereafter, stated:

> *"Dear assessors, having heard the summary of the case, it is now high time for you to give out your opinions on whether the adduced evidence by the prosecution proved the offence the accused facing beyond reasonable doubts. However, it should be in our mind that as per section 298 (2) of the Criminal Procedure Act, the trial judge is not bound by your opinions and that the law requires the prosecution to prove their case beyond reasonable doubt. In the premises, I kindly welcome you".*

From this excerpt, the trial judge in fact, acknowledges to have only provided a summary of evidence from both the prosecution and defence and proceeds to seek the assessors opinion, by just reminding the assessors the fact that, as a trial judge, the opinion of assessors do not bind the court and that the burden of proof is for the prosecution and should be beyond reasonable doubt. As expounded by the counsel for the appellant and supported by the Learned State Attorney, there was nothing presented on the salient points of pertinent law related to the case, nor explanation of what was meant in the prosecution being required to prove beyond reasonable doubt, or how a murder charges is proved, that is ingredients of the offence of murder.

In the present case for instance, during the trial, the extrajudicial statement which had been retracted by the appellant was admitted. Despite this, it is clear that, the trial judge failed to guide the assessors on how to address such a situation nor the weight to be accorded to a retracted confession after it has been admitted by the Court. There was also no explanation or guidance on the available defence for the appellant and implications thereto. While in the Judgment the learned trial judge discussed some vital points of law which were considered to lead to the guilty verdict on the murder charges against the accused person, all the said salient legal points were not presented in the summing up to assessors.

This omission is evident when you examine at pg 8 of the judgment, the issue of weight to be accorded to a retracted and repudiated confession is discussed. At pg. 9 of the judgment matters related to contradictions and discrepancies in the testimonies/ evidence of witnesses is discussed and also the weight to be accorded to a witness who was a co-accused is also discussed with regard to PW4. At pgs. 10 and 11 of the Judgment, the trial judge discussed what is circumstantial evidence and the standard of proof required

where the prosecution relies on circumstantial evidence. These are some of the salient matters for the case which though examined in the Judgment, the trial judge did not give any directions to the assessors. From this, there is no doubt that there was a non-direction of assessors by the trial judge.

Taking all the relevant factors into considerations, we find that this omission adversely impacted and vitiated the summing up to assessors, since they were in effect incapacitated and denied to make informed and balanced opinions. As so held in various cited cases, this situation is not one that shows that the trial was conducted with the aid of assessors within the requirement of the mandatory provisions of section 265 of the CPA. This position has been held by this Court in **Sikujua Hosea vs Republic,** Criminal Appeal No. 364 of 2014, CAT Bukoba (unreported). Where the Court observed that the learned trial judge did not at all direct the assessors when he was summing up the case on salient issues for the case and legal implication of the charge of murder and held:

> "*It is settled that where the trial judge failed to direct assessors on vital points, as in this case,*

the trial cannot be said to have been aided by assessors"

It is now clear that in this case, there was cross examination of witnesses by assessors contrary to the law which vitiated the impartiality of the assessors and also non-direction on the law and vital points important in the case to assessors by the trial judge. This being the position, thus the 5th and 3rd grounds of appeal, we find have merit.

Before we proceed further, at this juncture we find it is imperative to determine what are the consequences in such a case like the one on hand, where a Court determines as above, that is, that the assessors did cross-examine witnesses and that there was a non-direction to assessors by the trial judge. The counsel for the appellant and the respondent when asked by this Court, submitted that, the two anomalies vitiate proceedings and that the Court should quash the proceedings and order a retrial.

For a Court to order a new trial, it is important to consider the guidelines set, on when a Court can order a retrial. In the case of

Fatehali Manji vs. Republic (1966) EA 341, the Court of Appeal for East Africa, held as follows:

> *"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 insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial: even where a conviction is vitiated by a mistake of the trial court for which the prosecution is to blame, it does not necessarily follow that a retrial should be ordered; each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it".*

It is also pertinent to remember, that while considering this, we are also mindful of the holding of this Court in **Richard Lucas Muhanza @ Leonard and Three Others vs Republic**, Criminal Appeal No. 504 of 2016, that:

> *"where the trial court misdirects itself on an essential step in the course of proceedings, it*

does not, in our view, automatically follow that a retrial should be ordered".

In that case, the assessors were denied involvement in the conduct of the case and the trial judge proceeded not to consider the opinion of the assessors without assigning reasons, which was held to be a serious irregularity. We find that, the circumstances are distinguishable, in that, in the present case, what is before the Court, is not that the trial court merely misdirected itself on essential steps but that the trial Court failed to comply with legal provisions, such as Section 165 and 177 of the Criminal Procedure Act, pronouncing on the role of assessors in trial proceedings.

As stated earlier, these anomalies by the assessors cross examining witnesses, and the trial judge failing to properly direct the assessors and provide them with an opportunity to give informed opinions on the case in effect, faults the fairness of the trial. With the restated position above, we find that the two grounds are enough to deal with the current appeal and there is no need to proceed to consider and determine the other grounds of appeal.

Whilst we are aware that the appellant has been in prison since 2012, which is almost seven years and there is no doubt it is a long period. In line with the holding in **Fatehali Manji case** (supra) that each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it. That much as we sympathize with the quandary the appellant faces, given the circumstances of the case, it would be in the interest of justice to order a retrial.

This position is fortified by the holding in **Constantino Kagonja vs. Republic**, Criminal Appeal No. 41 of 2011, CAT at Dar es Salaam,

> *"This Court has repeatedly held that the sanctity of the impartiality of the courts generally must be respected and protected. People litigating upon their rights must get assurance that justice will always prevail whenever the courts determine on any person's rights. This includes guiding the assessors properly and not letting them to interfere with roles played by the parties or their advocates in the litigation... Non- compliance with the procedure prescribed as was done in this case*

results in fatal irregularities which cannot be cured. The proceedings were a nullity"

In the premises, pursuant to section 4(2) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2002 (AJA), we quash the entire proceedings and conviction against the appellant, and set aside the sentence and order a retrial of the case. The retrial should be done expeditiously before a different judge and different set of assessors. Order accordingly

DATED at **IRINGA** this 8th day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

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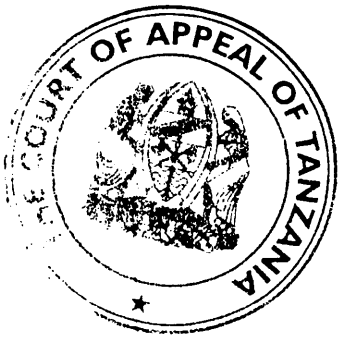

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