IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MWARIJA, J.A., WAMBALI, J.A., And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 163 OF 2018

HASSAN JUMA.....1ST APPELLANT
ZAMOYONI EDESI.....2ND APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Khamis, J.)

Dated the 22nd day of December, 2016
in
Criminal Session No. 18 of 2014

.....

RULING OF THE COURT

18th & 30th September, 2019.

MWARIJA, J. A.:

The appellants, Hassan Juma and Zamoyoni Edesi (the 1st and 2nd appellants respectively) and another person, Mohamed Omary (hereinafter to be referred to by his first name of Mohamed) were jointly charged in the High Court of Tanzania at Tanga with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 20/11/2013 at Pumula village within Kilindi district in Tanga region, the trio murdered one Ramadhani Shabani. They all denied the charge and as a result, the prosecution called a total of eight witnesses to testify. The prosecution also relied on seven documentary

exhibits. On their part, the appellants and Mohamed relied on their own evidence in defence.

After a full trial, the trial court found the appellants guilty as charged and consequently sentenced them to the mandatory sentence of death by hanging. Mohamed was found not guilty and was thus acquitted.

Before we proceed to consider the appeal, it is instructive to start with a brief statement of the facts giving rise to the appeal. The deceased person, Ramadhani Shabani was, until the material time of his death, operating a passenger service motorcycle ("bodaboda") in Mbogo Village, Pumula area. On 20/11/2013 at about 2:00 pm. while on duty having parked his motorcycle Reg. No. T. 998 CCL make Sanlag, he was approached by a person who wanted to be transported to a place known as Mamboleo. After negotiation, the deceased rode away with that passenger. He did not however, return from that trip. On 24/11/2013 his body was found at Pumula forest reserve having been badly burnt. Upon medical examination which was conducted by a clinical officer of Kilindi Health Centre, one Edward Boniface Lyimo (PW6), it transpired that the deceased's death occurred as result of

burning of the body by petrol fuel fire. According to the postmortem report, the death was due to:-

> *"...FIRE FROM PETROL FUEL BURNING HIS BODY AS WHOLE FROM HEAD TO TOES."*

Coincidentally, before the body was discovered, on 21/11/2013 while on a motorcycle, the appellants and Mohamed were involved in a traffic accident at Kwakandege area in Kibirashi village, Kilindi district. The motorcycle, which was being rode by the 1st appellant, knocked down to death a three years old boy after the rider had lost control and knocked down a donkey. Following the accident which was witnessed by one of the villagers, Bakari Mohamed Fau (PW5), the trio were arrested and handed over to the Kibirashi Village Executive Officer (the VEO). The motorcycle was also taken to the office of the VEO and later to the police after the accident had been reported to the police by the Kibirashi village Chairman, Ally Gwede (PW3).

Meanwhile, the deceased's relatives who went to the police station in connection with matters relating to the death of the deceased, identified the motorcycle which was involved in the accident to be the property of the deceased. Those who identified it included the deceased's mother, Asha Salim Fredu (PW1). This witness had in her

possession the relevant documents evidencing ownership by the deceased, of the motorcycle. After police investigation, the appellants and Mohamed were charged as stated above.

At the trial, among the eight witnesses who were called by the prosecution, PW1, PW2 and PW3 testified on *inter alia*, undisputable facts stated above. On his part, apart from testifying to the effect that he last saw the deceased on 20/11/2013 leaving Pumula area at 2:00 pm after being hired by a passenger, he averred that he identified the 1st appellant as the person who hired the deceased to transport him to Mamboleo village. He averred that he had known the 1st appellant before the date of incident.

It was the evidence of PW2 and PW3 further that they recognized the motorcycle Reg. No. T. 998 CCL (exhibit P.5) which was involved in the accident at Kibirashi Village, Kwakandege area to be the property of the deceased. On his part, Charles Nyagige (PW7), a Primary Court Magistrate who recorded the 1st and 2nd appellants' cautioned statements (exhibits P.6 and P.7 respectively), testified that the appellants gave their statements voluntarily, admitting that they committed the offence.

In their defence, the appellants refuted the prosecution evidence that they were involved in the murder of the deceased. In his evidence, the 1st appellant, who was mistakenly referred to as DW2 at the trial instead of DW1 and shown as the person who was acquitted instead of Mohamed (the second accused person), testified that on 21/11/2013, on the request of his aunt, he assisted the 2nd appellant to ride him from Tomatoma area to Songe bus stand. He said that his aunt instructed him to use a motorcycle which was parked at her premises. He rode the motorcycle and on the way, by consent of the 2nd appellant, they offered a lift to Mohamed. According to his evidence, Mohamed was the owner of the motorcycle on which they were travelling. At Kibirashi, he was involved in the accident which caused him to be arrested and later charged in this case.

On the part of the 2nd appellant (DW3), his defence evidence was to the effect that on 21/11/2013, he intended to travel from Tomatoma to Songe Village. He secured a motorcycle from his mother in-law who also assisted him to get a person to ride it, that is; the 1st appellant. Like the 1st appellant, DW3 recounted that, before they reached their destination, they were involved in an accident, the result of which they were arrested and later charged in this case on account that the

motorcycle which was found in their possession belonged to the deceased person.

Both appellants refuted the evidence that the motorcycle found in their possession belonged to the deceased. They also retracted the extra judicial statements recorded by PW7 contending that they did not give such statements voluntarily.

In its judgment the High Court convicted the appellants relying firstly, on the evidence that they were found in possession of the motorcycle which was proved to be the property of the deceased person and secondly, the evidence of the appellants' extra-judicial statements. In his judgment at page 299 of the record of appeal, the learned trial Judge observed as follows as regards the appellants' possession of the motorcycle:-

> *"PW1, PW2, PW3 and PW7 sufficiently proved that Exhibit P.5 was bought and owned by the deceased and was robbed from him at the time of killing. This evidence is corroborated with Exhibit P.3, a registration certificate of a motorcycle T. 998 CCL..."*

On the extra-judicial statements, he stated as follows:-

"The above finding is further cemented by Exhibits P.6 and P.7 which contains the confessions by the first and third accused [the appellants]."

The appellants were aggrieved by the decision of the High Court, hence this appeal. Each of the appellants lodged his memorandum of appeal containing two grounds each. The grounds are however identical. They fault the trial court's judgment as follows:-

"1. That, the trial Judge erred in law and fact after failing to consider that the prosecution failed to prove the case beyond reasonable doubt.

2. That, the trial Judge erred in law and fact by convicting the [appellants] applying the doctrine of recent possession while the prosecution failed to prove chain of custody of the said exhibit P.5 motorcycle from the time of seizing, receiving, handling, storing and eventually tendering it in court."

At the hearing of the appeal, the 1st appellant was represented by Mr. Ramadhani Rutengwe while the 2nd appellant was represented by Mr. John Magoti, learned advocates. On its part, the respondent

Republic was represented by Mr. Peter Mauggo, learned Principal State Attorney assisted by Ms. Elizabeth Muhangwa, learned State Attorney.

Before we could proceed to hear the learned counsel for the appellants and the learned Principal State Attorney on the grounds of appeal raised by the appellants, we wanted to satisfy ourselves on three main issues; firstly, whether or not the trial court conducted a preliminary hearing in terms of section 192(1) of the Criminal Procedure Act [Cap. 20 R.E. 2002] (the CPA), secondly, whether or not after the close of the prosecution case section 293(2) of the CPA was complied with and thirdly, whether or not summing up of the case to the assessors who sat with the learned trial Judge was sufficiently made as per the requirements of section 298(1) of the CPA.

The 1st issue arose because the record of appeal does not contain any proceedings evidencing compliance with section 192 of the Criminal Procedure Act [Cap. 20 R.E. 2002]. However, upon our perusal of the original record of the trial court, we found that the High Court duly held a hearing to that effect on 18/2/2016. We find therefore, that there was no omission as regards the mandatory requirement of conducting a preliminary hearing before the trial had commenced.

With regard to the 3rd issue, in summing up the case to the assessors, the learned trial Judge summed up the prosecution and the defence evidence as well as the final submissions made by the learned counsel for the parties at the close of the hearing. It is trite principle however that, in summing up a case to the assessors, apart from the evidence and final submissions, a trial Judge is required to direct the assessors on the vital points of law involved in the case. On this aspect, the only direction made to the assessors in this case was on the burden of proof. On that point the learned trial Judge directed the assessors as follows at page 273 of the record of appeal:-

> *"The standard of proof is beyond reasonable doubts. The prosecution is bound to prove the accused's guilt to the required standard and the accused are not bound to prove their innocence. The duty of the accused is only to raise reasonable doubt(s)."*

That is the only vital point of law which was explained to the assessors. The ingredients of the offence of murder and other vital points of law which arose in the case were not summed up to the assessors.

The requirement of directing assessors sufficiently on vital points of law involved in a case was emphasized in among others, the case of

Said Mshangama @ Senga v. Republic, Criminal Appeal No. 8 of 2014 (unreported). In that case, the Court had this to say:-

> *"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge* ***must adequately sum up*** *to the said assessors before recording their opinions."*
>
> [Emphasis added].

See also the case of **Washington s/o Odindo v. Republic,** [1954] 21 ECA 392 in which the erstwhile Court of Appeal for East Africa observed as follows:-

> *"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."*

In the case at hand, as stated above, in convicting the appellants the High Court relied *inter alia* on the doctrine of recent possession. Yet, with respect, the learned trial Judge did not only fail to direct them on the ingredients of the offence of murder, but also on the application of that doctrine. They were not, as well, directed on the effect of retracted confessions which were also used by the trial court to found the appellants' conviction.

There is a plethora of authorities to the effect that such an omission renders the trial a nullity. In the case of **Said Mshangama @ Senga** (*supra*) the Court had this to say on that position:-

> *"Where there is inadequate summing up, non-direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

Similarly, in the case of **Haruna Ismail @ Dudu v. The Republic,** Criminal Appeal No. 64 of 2017 (unreported) in which the Court considered the effect of a failure by the trial Judge to direct the assessor on the ingredients of the offence of murder and application of the doctrine of recent possession, it was held as follows:-

> *"...we entirely agree with the submissions of the learned counsel from either side to the effect that the learned Judge did not put to the assessors the ingredients of the offence of murder with which the appellant was charged. What is more, since the prosecution largely depended on the appellant's possession of the four heads of cattle, the learned trial Judge also ought to have put to the assessors the pre-*

requisites for the invocation of the doctrine of recent possession."

After considering several decisions on the subject matter at issue including the cases of **Bharat v. The Queen** [1959] A.C. 533 and **Tulubuzya Bituro v. The Republic** [1982] TLR 264 the Court observed that:-

> *"... the failure by the learned trial Judge to address the assessors on the tenents of the offence of murder as well as the law governing the doctrine of recent possession, was fatal with the effect of nullifying the entire trial proceedings."*

Having found that in this case, there was an omission to adequately sum up the case to the assessors, there is no gainsaying that the omission rendered the trial a nullity. In the circumstances, the need for considering the 2nd issue does not arise as the finding on the 3rd issue suffices to dispose of the appeal. We are thus constrained to exercise the powers of revision vested in the Court by section 4(2) of the Appellate Jurisdiction Act [Cap. 141 R.E. 2002] and hereby nullify the proceedings of the trial court. As a result, the appellants' convictions are quashed and the sentences are set aside. We consequently order a

retrial of the appellants before another Judge and a different set of assessors. The retrial order applies also to Mohamed because he was acquitted in the trial which was a nullity. While awaiting their retrial, which we hereby order to be expedited, the appellants shall remain in custody.

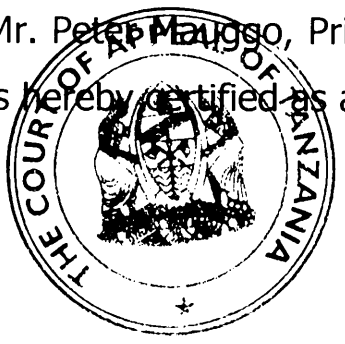
DATED at **TANGA** this 27th day of September, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Ruling delivered this 30th day of September, 2019 in the presence of the Mr. Ramadhani Rutengwe, learned Advocate for the 1st appellant, Mr. George Magoti, learned Advocate of the 2nd appellant and Mr. Peter Maugo, Principal State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL