IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LILA, J.A, MKUYE, J.A., And KITUSI, J.A.)

CRIMINAL APPEAL NO. 389 OF 2017

MARIUS S/O SIMWANZA.....1ST APPELLANT
EDWARD S/O CHIKWEMA @ JESHI.....2ND APPELLANT

VERSUS

D.P. P.....RESPONDENT

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

(Mambi, J.)

Dated the 22nd day of September, 2017
in
Criminal Sessions Case No. 13 of 2015
.....

JUDGMENT OF THE COURT

24th & 30th March, 2020.

KITUSI, J.A.:

This is an appeal from a conviction for murder under section 196 of the Penal Code [Cap. 16 R.E. 2002] in which it is alleged that the appellants caused Magreth Lazaro's unnatural death at Kaengesa village in Sumbawanga District on 10th June, 2012. The facts of the case are bizarre. On that day the deceased was found lying wounded with intestines sticking out of her vagina allegedly after the said intestines were pulled out by her assailants. She was taken to hospital where she subsequently died, but not before she had been interrogated by Mary

Mungira (PW2), a police officer, and named the appellants as among those who maimed her.

The Post Mortem Examination Report which was admitted in evidence as Exhibit P1 gave the cause of death as severe hemorrhage resulting from a "*perforated uterus, virginal and intestine.*" The description of the state in which the deceased was found, which is not being contested, and the report on Post Mortem Examination, leave one fact certain, that the acts that led to the death of Magreth Lazaro were cold blooded.

The appellants pleaded, and still maintain, that they had nothing to do with the killing of Magreth Lazaro but, as we have indicated, the deceased's statement before she died implicates them. Therefore, the main issue at the trial was, whether the appellants were the ones who caused her death. The prosecution sought to prove the appellants' guilt mainly on the basis of the deceased's statement, her dying declaration.

So, this is what is alleged to have taken place on the fateful evening; the deceased was at a "pombe" shop of Nikas Lunguya (PW1) enjoying local brew with one Silvanus Chambanenje. According to PW1, the deceased and Silvanus Chambanenje left the bar at around 21:00 hours after which, it seems, he also left. The dying declaration however

is not exactly in harmony with PW1's version of how the deceased left the bar. According to the statement, the deceased, while still at the bar, went for a short call and that while she was out there a group of youths attacked her, causing the injuries that led to her untimely death.

PW1 said he was at home when he heard alarms coming from his bar and hurried there in response, only to find the deceased lying with intestines protruding from her vagina as already described. She told him that Marius Simwanza and Edward Chikwema were the ones who had done to her what he was seeing. PW1 felt that he needed to report the matter to somebody else so he went to the house of Restuta Lazaro (PW3) the deceased's sister, and told her about the incident. PW3 went to the scene and found the deceased in a sad state that made her cry. The deceased told her sister that the perpetrators were Juma, Jeshi (Edward) and Mkolobia.

PW1 and PW3 took the deceased to hospital. The deceased's husband Anania Ng'ongo (PW4) who had been away attending to his shamba visited her at the hospital on 11/6/2012. The deceased told PW4 that she was attacked by Marius, Jeshi (Edward) and Juma. On 12/6/2012 PW2 recorded the deceased's dying declaration in which she made an account of what happened. In that statement she named the

perpetrators as Marius Simwanza, Jeshi Simzungu, Juma Nkumbe and Sele Jelas. According to the dying declaration the people the deceased named were her neighbours whose relationship with her had gone sour on account of allegations of witchcraft they made against her. We are certain that Juma was not prosecuted, but whether the names of Jeshi (Edward), Sele Jelas, Jeshi Simzungu and Mkolobia refer to the appellants, will later form a subject for our deliberations.

On the basis of the foregoing evidence the appellants were jointly charged for murder as stated earlier.

In defence the first appellant made a brief statement denying the allegation. He said that he was named by the deceased for no reason because there existed no conflict between them. He challenged the evidence of visual identification as weak because the incident is said to have taken place at night and there was no light at the scene. The second appellant denied involvement too and said the only reason he was named by the deceased is because of his friendship with the first appellant. Even then he said, he goes by the name of Edward, not Jeshi as mentioned by the deceased and further challenged the evidence of visual identification on the same grounds as the first appellant.

The three gentlemen assessors who sat with the learned trial Judge advised him to acquit the appellants but he took a different view. As we have said earlier the learned Judge convicted and imposed on the appellants the mandatory death sentence.

In this appeal each appellant had initially filed a separate Memorandum of Appeal to challenge the conviction and sentence but at the hearing, Mr. Chingilile, learned advocate, who acted for them, consolidated them and filed a joint supplementary Memorandum of Appeal, containing three grounds. The Director of Public Prosecutions the respondent, was represented by Mr. Saraji Iboru, learned Senior State Attorney, and Mr. John Kabengula, learned State Attorney.

However, before Mr. Chingilile addressed the Court on the grounds of appeal, he sought to submit on one point of law which was not raised in the Memorandum of appeal. The issue counsel wished to address us on was on summing up to the assessors, and since there was no resistance from the responding State Attorneys, we granted leave.

Counsel submitted that the learned trial Judge omitted to direct the assessors on three vital points of law. The first vital point is on dying declaration which the trial court heavily relied on in convicting the appellants. The learned counsel submitted that it was incumbent upon

the trial judge to direct the assessors on the conditions for acting on the dying declaration, but that was not done.

The second vital point which the trial judge is criticized for not directing the minds of the assessors to, is circumstantial evidence. Counsel pointed out that the learned trial Judge acted on circumstantial evidence at page 110 of the record of appeal but nowhere in the summing up, he argued, did the Judge bring the assessors' attention to that evidence and what it takes to act on it. The last point is the defence of *alibi* and it was submitted that the learned Judge considered it in his judgment at page 105 but he had not directed the gentlemen assessors on it during the summing up.

Mr. Chingilile submitted that the trial which was supposed to be by the aid of assessors was vitiated by the omission to direct them on those vital points of law. He prayed that on that ground we should nullify the proceedings, quash the judgment and set aside the sentence. The learned counsel was aware that under the circumstances we would ordinarily order a retrial but took exception and urged us not to order a retrial. We shall at the moment skip that aspect until later.

Mr. Kabengula, who argued the appeal on behalf of the respondent agreed with the appellant's counsel on the impropriety of the summing

up, and cited more instances. The learned State Attorney drew our attention to page 40 of the record of appeal where the learned Judge raised three issues for the assessors to consider, but in the judgment, he raised four issues including two new issues which had not been mentioned earlier. He submitted that the issue of dying declaration was not at all placed before the assessors for their consideration. The learned State Attorney generously referred us to the case of **Tulubuzya Bituru v. Republic,** [1982] TLR 264. In that case the Court took the view that failure by the trial Judge to direct the assessors on the issue of provocation vitiated the entire proceedings. Mr. Kabengula was also of the view that we should nullify the entire proceedings, quash the judgment and set aside the sentence.

On our part we have seen with ease the point raised by both attorneys, and we instantly agree with them that the proceedings are marred by the improper summing up. We have no reason to refer to the countless decisions the Court has made on this point, except for emphasis only. These are, **Shija Sosoma v. DPP,** Criminal Appeal No. 327 of 2017; **Monde Chibonde @ Ndishi v. DPP,** Criminal Appeal No. 328 of 2017 and **Yustine Robert v. Republic**, Criminal Appeal No. 329 of 2017 (all unreported).

In the case of **Shija Sosoma** (*supra*) the Court held at page 11:-

> *"In this case, as the trial judge failed to address the vital point of law regarding circumstantial evidence, then it cannot be said that the trial was with the aid of assessors as envisaged under section 265 of the CPA."*

We appreciate that section 265 of the CPA requires trials of criminal cases before the High Court to be with the aid of assessors, which is now common knowledge. What needs to be underlined is the active role which the assessors must play in a case as we emphasized in **Richard Lucas Muhanza @ Leonard & 3 Others v. Republic,** Criminal Appeal No. 504 of 2016 (unreported). The Court stated: -

> *"According to the section, it is incontrovertible that trials of this nature ought to be conducted with the aid of assessors.* ***Such aid is not limited to assessors to be in court as mere statues. The judge should cause active and effective participation of assessors in the proceedings and at the time of giving opinion"*** *(underlining ours).*

Since it is clear that the assessors were denied active participation by not being directed on three vital points of law, we agree that the trial

was vitiated. As requested, we nullify the proceedings quash the judgment and set aside the sentence that was imposed.

The next and last issue for our consideration is substantive in nature but fortunately Mr. Kabengula once again agrees with the position that has been taken by the appellant's counsel. This is that we should not order a retrial.

Mr. Chingilile cited several reasons why he thinks we should not make an order of retrial. The first is that the trial court relied on the dying declaration in convicting the appellants but he faulted that dying declaration on two fronts. The first one is procedural in that the dying declaration was introduced into evidence without a prior notice in terms of section 298 (1) of the CPA, nor was it mentioned and read over during committal proceedings. The second criticism is that in that dying declaration the deceased did not explain how she identified the appellants. In the circumstance, the learned counsel argued, there is no evidence of visual identification.

Submitting further, Mr. Chingilile cautioned that an order of retrial may provide to the prosecution an opportunity to fill in gaps in their case such as rectifying the defects in the introduction of the dying declaration in evidence or they may use that opportunity to call material witnesses

such as Silvanus Chambanenge who ought to have been called from the beginning.

In supporting the position taken by the appellant's counsel, Mr. Kabengula submitted on the errors that were committed by tendering the dying declaration without notice. He pointed out that the appellant objected to the admissibility of that document but the court overruled the objection even without getting an explanation from the prosecution. The learned State Attorney submitted that what the trial court did was akin to taking, without prior notice, evidence of a witness whose statement was not read over during committal proceedings, and that this offends Section 289 (1) of the CPA. He cited the case of **Daud Jeremiah v. Republic,** Criminal Appeal No. 359 of 2015 (unreported) in which the Court was faced with a similar problem.

When the learned State Attorney was asked to consider if what the deceased told PW2 could not be treated as oral dying declaration, he responded that the said statement is still insufficient and cannot be relied upon because the deceased did not state how she managed to identify the assailants in an unlit surrounding at night.

As for what should be our consequential orders, we take clue from the case of **Fatehali Manji v. Republic** [1966] EA 343 which warns

against ordering retrial in some cases, and ours is one of such cases in our conclusion. We entirely agree with both counsels that there was no evidence of visual identification and that such evidence is unlikely to be forthcoming if a retrial is ordered because it should only come from the dying declaration. Assuming the dying declaration was properly introduced in evidence, which it was not, it does not solve the riddle regarding visual identification.

There are yet other shortcomings which we wish to refer to. To begin with, the evidence for the prosecution is spotty and lacks harmony. For instance, while one of the suspects known as Juma was not prosecuted, there is nothing to show that the other names refer to the appellants. Again, PW1 said that the deceased and Silvanus Chambanenge left, and logically, we think, he left thereafter. But the version given by the deceased in the dying declaration shows that she was still at the bar, but had only gone for a short call at the time she was attacked. And then, where is Silvanus Chambanenge in the picture for he is disturbingly neither an accused nor a witness. The worry by the counsel for the appellant that an order of retrial may present an opportunity for the prosecution to fill in gaps by calling witnesses such as Silvanus Chambanenge, is not at all imaginary in the circumstances.

In the end we find these contradictions as affecting the roots of the case. See the case of **Mohamed Said Matula v. Republic** [1995] TLR 3. Consequently having nullified the proceedings, quashed the judgment and set aside the sentence, we do not order a retrial. Instead, we invoke our revisional powers under section 4(2) of The Appellate Jurisdiction Act, Cap 141, RE 2019, and set the appellants at liberty. They should be released from prison forthwith unless otherwise lawfully held.

DATED at **MBEYA** this 28th day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 30th day of March, 2020 in the presence of the Mr. Issack Chingilile, counsel for the Appellants and Ms. Prosista P. Minja learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL