IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 173 OF 2017

RICHARD SIAME MATEO.....APPELLANT

VERSUS

D.P. P.....RESPONDENT

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

(Herbert, SRM – Ext. Jurisdiction)

Dated the 26th day of May, 2017
in
Criminal Sessions Case No. 04 of 2015

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JUDGMENT OF THE COURT

16th March, & 1st April, 2020.

MKUYE, J.A.:

In the High Court of Tanzania sitting at Mbeya, the appellant, Richard Siame Mateo was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E. 2002. It was alleged that the appellant, on the 1st day of August 2011 at Naming'ongo village within Mbozi District in Mbeya Region did murder one, Thobias Simbili. Upon a full trial, he was convicted as charged (Herbert SRM (Extended Jurisdiction)) and was sentenced to suffer death by hanging.

In order to prove the offence, the prosecution marshaled four (4) witnesses while for the defence the appellant was the only witness.

It was the prosecution's case that the deceased, Thobias Simbili, was living at Chomba village but had gone to his daughter Theresia Thobias (PW2) at Naming'ongo village in Sara Ward to pick his grandson to assist him in his works. On the material day, the deceased was walking in company of his other grandson Roid Henerice Simbili (PW1) from Naming'ongo village to Chomba Village. While still on their way, PW1 being some few steps ahead of the deceased heard a sound/loud thud and when he turned back he saw four people emerging. Among the four, PW1 allegedly identified two people one of them being the appellant who was holding a club and the other person who was not arrested, holding a stick. Then the appellant hit the deceased with a club on the back of his head. PW1 inquired why he was attacking the deceased, but he received no reply. Instead the other assailants started to chase him. PW1 ran into the bush where he spent the whole night. On the 2nd day of August, 2011, he reported the incident to his grandmother (the deceased's wife) and the ward chairperson and a search for the deceased was mounted. On 3/8/2011 the body of the deceased was

found lying at the edges of River Momba. The appellant was arrested and arraigned before the court, convicted and sentenced as we have alluded to earlier on.

Aggrieved, the appellant lodged an appeal comprising nine (9) grounds of appeal. However, the learned counsel who were assigned to represent him filed another memorandum of appeal comprising four (4) grounds of appeal as follows:-

1) *The learned trial magistrate with extended jurisdiction erred when convicted the appellant while the evidence of identification adduced at the trial court was not sufficient enough to prove that the appellant was correctly identified at the scene of crime.*
2) *The learned trial magistrate with extended jurisdiction erred in the manner of summing up the case to assessors by failure to direct on vital points of law on circumstantial evidence and identification to convict the appellant.*
3) *The learned trial magistrate with extended jurisdiction erred when convicted the appellant by including extraneous matters which are not*

found on record and did not originate from the witnesses.

4) *The learned trial magistrate with extended jurisdiction erred when convicted the appellant when (sic) failed to analyse and evaluate defence evidence.*

At the hearing of the appeal, the appellant was represented by Ms. Joyce M. Kasebwe assisted by Mr. Baraka H. Mbwilo both learned counsel; whereas Ms. Rosemary Magenyi assisted by Ms. Hannarose Kasambala both learned State Attorneys, represented the respondent/Director of Public Prosecutions. The learned counsel for the appellant had also filed written submission in support of the appeal as per Rule 74 (1) of the Tanzania Court of Appeal Rules which they sought to adopt together with the grounds of appeal.

In the said written submission, the learned counsel argued at length all the grounds of appeal but we found it appropriate to deal with the 2nd ground of appeal alone, in relation to improper summing up the case to the assessors as, we think, it is capable of disposing of the entire appeal without necessarily dealing with the other grounds of appeal.

Thus, we will concentrate with the summary which relates to the said ground of appeal.

The learned counsel have submitted that the summing up of the case to assessors contravened the provisions of section 298 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (the CPA) as the learned trial magistrate with extended jurisdiction failed to direct the assessors on vital points of law on circumstantial and identification evidence. They pointed out that, though the trial magistrate told the assessors that PW1 was an eye witness and gave evidence which is circumstantial, it is difficult to grasp what he intended to obtain from the assessors. The learned counsel submitted further that the ingredients of the offence of murder and the meaning of malice aforethought was not explained to the assessors, they added, as the circumstantial and identification evidence were used to convict the appellant with the offence of murder and the summing up on vital points of law was not done on such evidence, the trial was not done with the aid of assessors as was held in the case of **Michael Maige v. Republic,** Criminal Appeal No. 153 of 2017 (unreported). They went on to submit that, this, led the assessors to give unguided or unclear opinions as they were not abraised with the

aspects of law relevant to the case. To support their argument they referred us to the unreported Criminal Appeal No. 329 of 2017 between **Yustine Robert vs The Republic**.

On that basis, they urged us to find that the trial was irregular and nullify the proceedings and judgment thereof and order a retrial.

In response, Ms. Kasambala, lucidly and to the point readily conceded that the summing up to assessors was not sufficiently done. She pointed out that the trial magistrate with extended jurisdiction did not explain to the assessors on vital points of law relating to the identification evidence and circumstantial evidence though he used such evidence to convict the appellant with the offence of murder. She added that neither did he direct the assessors on the ingredients of malice aforethought. In that regard she contended that, failure to explain to the assessors such vital points of law is equal to conducting the trial without the aid of the assessors as per section 265 of the CPA. While citing the case of **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 (unreported), she urged us to find the proceedings and

judgment a nullity and invoke section 4 (2) of the Appellate Jurisdiction Act, (the AJA) to nullify the same and order a retrial.

However, on reflection, after a short dialogue with the Court on whether the identification evidence was sufficient to prove the case against the appellant, she was of the view that it was not. She thus, abandoned her earlier proposition and urged the Court to quash the conviction, set aside the sentence meted out against the appellant and release him forthwith from custody.

We have anxiously examined and considered the submissions from the learned counsel from either side. We wish to begin by stating the genesis of the High Court to sit with assessors when trying cases.

According to section 265 of the CPA, all criminal trials are mandatorily required to be conducted with the aid of assessors who are to be two or more as the court may deem appropriate. This position was emphasized in the case of **Charles Karamji @ Masangwa and Another v. Republic**, Criminal Appeal No.34 of 2016 (unreported) as hereunder:

"... 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."

A part from that, the trial judge who sits with assessor has a duty to sum up the case to the assessors as provided for under section 298 (1) of the CPA which states:

"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."

Though the above excerpt may not seem to impose a mandatory requirement to the trial judge to sum up the case to assessors by the use of the words "... *the trial judge may sum up...*", it is now a settled practice which the trial court has to comply with. This stance was also

emphasized in the case of **Mulokozi Anatory v. Republic**, Criminal Appeal No.124 of 2014 (unreported). In the said case the Court stated:-

> "... *as a matter of long established practice and to give effect to section 265 of the Act that all trials before the High Court shall be with the aid of assessors,* ***the trial judges sitting with assessors have invariably been summing up the cases to the assessors".***
>
> [Emphasis added].

It is also important to note that, in order for the opinions of the assessors to be of great value to the judge who is being aided in terms of section 265 of the CPA, the said judge has to make sure that the facts of the case are well understandable to them and how they relate to the relevant laws. This means that the summing up to assessors on both facts and all points of law must be sufficiently or adequately made by the trial judge. (See **Fadhili Juma and Another v. Republic**, Criminal Appeal No. 567 of 2015 (unreported); **Charles Karamji** (*supra*), and **Michael Maige** (*supra*). For instance, in the latter case of **Michael Maige** (*supra*) the Court stated:

> "...*the issue of summing up to assessors is a requirement of law that for the trial judge who sits*

with the aid of assessors has to sum up to them before inviting their opinion as the main purpose is 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 Odingo v. R****, 1954 21EACA 392;* ***Augustino Lodami V. R,*** *Criminal Appeal No.70 of 2010;* ***Charles Lyatii @ Sadala v. R****, Criminal Appeal No.290 of 2011, and* ***Selina Yambi and 2 Others v. Republic,*** *Criminal Appeal No.94 of 2013 (all unreported)."*

Likewise, in the case of **John Mlay v. Republic,** Criminal Appeal No. 216 of 2007 (unreported), the Court emphasized in clear terms that the purpose of summing up to assessors is to enable the assessors to arrive at a correct opinion, and it further stated that the summing up to assessors must touch on all essential elements of the offence of murder the accused person is facing and must explain as to what murder entails.

In the case at hand, we have examined the judgment of the trial court and we agree with both counsel that the appellant was convicted with the offence of murder on the basis of circumstantial and visual

identification evidence as shown at pages 43 to 45 and 47 of the record of appeal. However, in the summing up to assessors at pages 32 to 37 of the record of appeal, the trial magistrate with extended jurisdiction just summarized the prosecution and defence evidence. He did not explain to the assessors the vital points of law which featured in evidence such as the visual identification and circumstantial evidence to enable them understand the circumstances under which such evidence can be relied upon. He did not also explain the ingredients of the offence of murder though he concluded in his summing up by posing a question to them that:

> *"The question here as far as the evidence of prosecution case is concerned is whether the accused person is responsible for the* ***alleged offence of murdering the deceased*** *and if that issue is answered affirmatively, then the next issue is* ***whether the accused person had malice at the time of committing the said offence."***
>
> *[Emphasis added].*

In response to the posed question, the assessors gave general opinions as reflected at pages 37 to 38 of the record of appeal as follows:

"ASSESSORS OPINION

1st Assessor Amina Kibumba: *From the evidence by the prosecution side it is my opinion that they have proved their case beyond reasonable doubt because PW2 was the wife of the accused uncle and the distance between the accused village and his uncle village is not far hence they know each other therefore it is the accused person who committed the offence.*

2nd Assessor Plli Mwasakitundu: *The offence has been proved beyond reasonable doubt. As to the evidence of PW1 who was with the deceased narrated that he recognized the accused he asked him why he beat his grandfather and the accused person did not respond because he knew they knew each other hence he is guilty.*

3rd Assessor Amina Khalfani: *In my opinion I find the prosecution side has proved their case beyond reasonable doubt as PW1is the eye witness who saw the accused hit with a club a deceased and there is no dispute as PW4 stated that the death was due to injuries sustain and loss of blood. Also as to the accused he has not brought any witness to state his whereabouts of*

the date of the incidence hence his evidence is not reliable."

Looking at the opinions given by the assessors, it is evident that they were given by persons who were not knowledgeable of the vital elements of the circumstantial and visual identification evidence which was before them and how it could be relied upon to prove the case; and the essential elements/ingredients of the offence of murder. This is vividly reflected from the general and weak opinions they gave that the appellant committed the offence.

We think, the trial magistrate with extended jurisdiction was duty bound to address the assessors on vital points of law relating to visual identification evidence, circumstantial evidence especially in relation to the nature of death of the deceased and the ingredients of murder, in particular, malice aforethought.

Failure to explain to the assessors on such vital points of law was a non-direction on the part of the trial magistrate with extended jurisdiction and, therefore, the trial cannot be said to have been conducted with the aid of assessors as per section 265 of the CPA. (See **Omary Khalifan v. Republic,** Criminal Appeal No. 107 of 2015

(unreported); and **Suguta Chacha and 2 Others v. Republic**, Criminal Appeal No.101 of 2011. In the case of **Mara Mafuge and 6 Others v. Republic,** Criminal Appeals No.29 of 2015 (unreported)), the Court grappled with an akin similar situation and it stated:

> *"...We are of a well considered view that the summing up to assessors in the present case fell short of the minimum threshold required under the law... the proceedings are as good as if the trial was without the aid of assessors."*

Given the circumstances of this case and as we had hinted earlier on, we agree with both counsel that even in this case, the trial cannot be said that it was with the aid of assessors as required by section 265 of the CPA.

As to the way forward, we have taken note of the learned State Attorney's earlier proposition of ordering a retrial. However, on reflection, following a short dialogue with the Court on the reliability of visual identification evidence, she abandoned her earlier stance and conceded that such evidence was not sufficient and opined that the appellant be set free. On our part, we agree with both learned counsel that ordering

retrial in the circumstances of this case may not be a proper course of action.

In the final event, we allow the appeal, quash the conviction, and set aside the sentence of death meted out against the appellant and order for his immediate release from custody unless held for other lawful reason(s).

It is so ordered.

DATED at **MBEYA** this 1st day of April, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 2nd day of April, 2020 in the presence of Mr. James Kyando holding brief for Ms. Joyce Kasebwa, counsel for the Appellant and Mr. Ofmedy Mtenga, 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