**IN THE COURT OF APPEAL OF TANZANIA**
**AT MBEYA**

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

**CRIMINAL APPEAL NO. 388 OF 2017**

**AUGUSTINO S/O NANDI........................................................ APPELLANT**

**VERSUS**

**D.P.P ........................................................................... RESPONDENT**

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

**(Mambi, J.)**

**Dated on 18th day of September, 2017 in Criminal Sessions No. 57 of 2015**

................

## JUDGMENT OF THE COURT

23rd & 31st March, 2020.

**MKUYE, JA:**

The appellant, Augustino Nandi, was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code, Cap 16 R.E 2002 and was sentenced to suffer death by hanging. According to the particulars of the information, the appellant on 14th day of April 2015 at Singiwe village within Kalambo District in Rukwa Region did murder one Olivieta d/o Augustino Nandi.

The brief facts leading to this appeal are that, the appellant and his wife Agness Mioto (PW1) lived at Singiwe Kalambo village. They were blessed with three children among them being Olivieta Nandi (the

deceased). On the material date, 14th day of April, 2015, the appellant returned home at night from a local brew shop where he had gone to consume a local brew christened "Sekenke". It would appear that he had consumed much of it to the extent that he was brought home by one, Cherehani. Upon arrival at his home he found PW1 and children. He started requesting for food from PW1 but she told him there was none as she had not prepared it. Thereafter, a quarrel between them ensued as the appellant was very angry and furious.

Fearing for her safety, PW1 left her matrimonial home together with two of her children and sought refuge at the pastors' home one, Leonard Kiseko (PW2). She left behind the deceased asleep.

In the following morning, PW1 returned to her matrimonial home whereupon the appellant gave her money for purchasing some meat. When she came back and inquired the whereabouts of the deceased, the appellant replied that she had followed her behind. PW1 later saw the deceased's clothes while she was not there. She became suspicious and decided to report the matter to the hamlet Chairman. Then, PW1 together with the chairman entered into the house and they came across blood stains in the bedroom while the deceased was not there.

Search was mounted whereupon on 18th day of April 2015, the body of the deceased wrapped in a raffia bag together with a stone, was discovered in a water well which was close to the appellant's home. The appellant was arrested and a murder charge was preferred against him which culminated in his conviction and sentence of death as we have already alluded to.

Dissatisfied with the decision by the High Court, he has now appealed to this Court on four (4) grounds of appeal basically challenging the trial court for convicting him with murder instead of manslaughter which was established.

At the hearing of the appeal the appellant was represented by Mr. Pacience Maumba, learned advocate; whereas Ms. Scholastica A. Lugongo, learned Senior State Attorney together with Ms. Marieta Maguta learned State Attorney, appeared for the respondent/Director of Public Prosecution.

From the outset, Mr. Maumba sought and leave was granted by the Court to raise a legal issue in relation to the summing up to the assessors.

The learned counsel prefaced by submitting that section 298 (1) of the Criminal Procedure Act, Cap 20 R.E 2002, (the CPA) requires the trial judge to summarize the evidence from both sides to the assessors. In

doing so he has to explain the relevant points of law to enable them give an informed opinions. However, he said, the trial judge did not explain to them matters of law relating to the caution statement, intoxication and the defence of *alibi.* He stressed that, had the trial judge directed the assessors on those vital points of law, they would not have given weak opinions as shown at page 61 of the record of appeal.

The learned counsel went on to submit that, even the assessors were not properly selected as the appellant was not accorded an opportunity to state whether or not he objected to any or all of them. This, he said, resulted into unfair hearing which vitiated the proceedings and the judgment thereof.

In this regard, he prayed to the Court to exercise its revisional powers under section 4 (2) of the Appellate Jurisdiction Act, Cap 141 R.E 2002 (the AJA) and quash the proceedings and judgment, set aside the sentence meted out against the appellant and order for a retrial.

On her part, Ms. Lugongo conceded to the irregularities presented by her learned friend concerning improper selection of the assessors and insufficient summing up to assessors. In relation to summing up to assessors, she added that the trial judge included extraneous matters which did not feature in the prosecution. To amplify her argument she

took us to page 99 of the record of appeal where the trial judge added "... *hitting and strangling his innocent child...*" which was not part of evidence.

In relation to the improper selection of assessors, she referred us to the case of **Andrea Bernerdo and Another v. Republic**, Criminal Appeal No 128 of 2015 (unreported) where the Court quoted with approval the case of **Laurent Salu and 5 Others v. Republic**, Criminal Appeal No.176 of 1993 (unreported) which was also followed in the case of **Chacha Matiko @ Magige v. Republic**, Criminal Appeal No.562 of 2015 (unreported).

As to the way forward she also agreed with Mr. Maumba's proposition for the invocation of our revisional powers under section 4(2) of the AJA and nullify the proceedings and judgment thereof and further quash the conviction, set aside the sentence imposed to the appellant and make an order for a trial *de novo*.

We have dispassionately examined and considered the submissions for both sides. We propose to deal first with the issue of selection of assessors. Both parties are at one that the selection of assessors was not properly done as the appellant was denied/not given the opportunity to comment if he had any objection to any of the assessors to sit at the trial

before the trial commenced. They were of the view that this violation rendered the appellant's trial to be unfair.

Looking at the record of appeal, it does not show if the appellant was asked by the trial court if he objected to the appointment of assessors. For easy appreciation of what transpired in the trial court, we have deemed it appropriate to extract part of it as hereunder:

> *"Date:* *19.06.2017*
>
> *Coram:* *Hon. Dr. A. J. Mambi, J.*
>
> *For Republic:* *Happyness Mayunga & Safi,*
> *State Attorneys*
>
> *For Accused's:* *Mr. Kamyalile,*
>
> *Accused:* *Present*
>
> *Interpreter:* *Miss Zuhura Jabir, English into Kiswahili and vice versa*
>
> *Miss Magreth Kannonyele, Judge's Legal Assistant.*
>
> *Information is read over and properly explained to the accused person in Kiswahili language:-*
>
> ***Court Assessors***
>
> 1. *Odilia Katili*
> 2. *Salome Kapele*

***Republic Prosecution:-***

*My Lord, I am Happiness with Ms. Safi, State Attorneys, for the defence we have Peter Kamyalile. The matter is coming for hearing.*

**Court**: *The accused is reminded his charges.*

**Accused**: *Siyo kweli.*

**Court:** *The accused Pleads Not Guilty. The court enters Plea of not Guilty.*

***Sgd: Dr. A. J. Mambi***

***Judge***

***19.06.2017***

***PW1:*** *Agness Mioto*

*Age:* *39 years*

*Work:* *Farmer*

*Place:* *Mpanda*

*Religion:* *Christian*

*PW1 is sworn and states:-*

***Court:***

*PW1 is asked if she volunteers to give evidence against the accused (her husband)*

***PW1***: *I am ready to testify against the accused.*

***Court**: PW1 is read to testify.*

***XD Prosecution - Happy:"***

This Court in the case of **Andrea Bernardo and Another** (*supra*) while adopting with approval the decision in the case of **Laurent Salu and 5 Others** (supra) stated as follows:-

> *"Admittedly, the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which however, is now well established and accepted as part of the procedure in the proper administration of criminal justice in the Country. The rationale of the rule is fairly apparent. The rule is designed to ensure that the accused has a fair hearing."*

Then the Court in the same case went on to hold that, since it was not known whether any of the accused person had any objection to any of the assessors, and to the extent that they were not given the opportunity to exercise their right, it amounted to an irregularity.

Even in this case, given that the trial court did not accord an opportunity to the appellant to express his view if he had any objection to the assessors, it resulted in the denial of his right to a fair hearing. And,

this was a fatal irregularity which vitiated the proceedings and the judgment thereof.

With regard to the issue of improper summing up to assessors, we have equally considered the submissions from either side and perused the notes relating to sum up. Our starting point would be restating that, according to section 265 of the CPA, all trials in the High Court must be conducted with the aid of assessors. After the prosecution and defence side have closed their cases, the trial judge is under obligation to sum up the case to the assessors before inviting them to give their opinion as per section 298 (1) of the CPA. And the said summing up is required to be adequate and proper for a simple reason of ensuring that the assessors understand the facts and the points of the law included in the case. At this juncture it is also noteworthy that section 298(1) of the CPA requiring the trial judge to sum up to assessors may seem to be discretional by the use of the words "*...may sum up to assessors...*", however, in practice the trial judges are bound to comply. This stance was stated in the case of **Jeremia Paskal Gabriel v. The Director of Public Prosecutions,** Criminal Appeal No. 185 of 2012 (unreported), where the Court while construing section 279 (1) of the Criminal Procedure Act, 2004 (Act No. 7

of 2004) of Zanzibar which is in parimateria with section 298 (1) of the CPA, stated as follows:-

> *"...The words "may sum up to assessors" as used in section 279 (1) (supra) may sound discretionary but practice has it that they are binding to a trial judge. The said summing up has to be adequate and proper to make the assessors knowledgeable with issues involved in a particular case."*

The importance of opinion of assessors was stated in the case of **Hamis Basil v. Republic,** Criminal Appeal No. 165 of 2017 (unreported) in which the Court adopted with approval the decision of the defunct Court of Appeal for East Africa in the case of **Washington Odindo v. Republic,** [1954] 12 EACA 239 and stated as follows:-

> *"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 in relation to the relevant law. If the law is not explained and attention is not drawn to the salient facts of the case, the value of the assessors' opinion is correspondingly reduced."*

In this case both counsel have contended that the summing up to the assessors was not properly done as the trial judge did not explain to them vital points of law involved in the case. Pages 47 to 61 of the record of appeal contain the summing up notes in which the trial judge

summarized the evidence of both sides and gave some general guiding principles such as the standard of proof; to whom the burden of proof lies; that conviction is not based on weak evidence but of the strength of evidence; and that doubts are to be resolved in favour of the accused etc.

In the judgment appearing at pages 45 to 100 the trial judge discussed at length legal issues involving confessions, circumstantial evidence, malice aforethought and the defence of intoxication. However, such pertinent issues of law which were involved in the case were not addressed to the assessors. It was expected that he could have explained for example, when the confession be it oral or written could provide a reliable evidence; the threshhold to be met before relying on the circumstantial evidence; the ingredients of the offence of murder such as malice aforethought; and when intoxication can be taken as a defence.

We think, failure by the trial judge to address the assessors on such issues might have culminated in the assessors giving uninformed opinion on the case before them. This can be reflected in the opinions they gave after being invited to do so at page 61 of the record of appeal as hereunder:-

***"ASSESSORS OPINION.***

***1.Salome Kapele:-***

*In my opinion the accused is responsible for causing the death of the deceased. This is due to the fact that they admitted that he was drunk that is why he caused the death and decided to throw the body at the water well.*

***2. Odilia Katili:-***

*In my opinion the accused is responsible for the death of the deceased. This is due to the evidence adduced in this court. The accused also admitted that he slept over the deceased before she died. The accused decided to hide the deceased body at his water well, this shows he knew what he was doing.*

*Court: Assessors opinions are noted and marked."*

Looking critically at the opinions given by the assessors it is clear that they lacked some information on the points of law which were vital to enable them give an informed opinion.

On the summing up to assessors, that was not the only shortcoming. The trial judge also included in it matters not given in evidence. For instance, at page 48 of the record of appeal, the trial judge stated that *"PW1 said, she found blood all over their matrimonial room under*

*mosquito net."* However, in her testimony at page 14 of the record of appeal, PW1 said *"she found some blood stain at the sleeping room."* Further to that, while the trial judge at page 56 of the record of appeal said *"PW1 told the court that a child body had a cut wound on her head and was bleeding",* our perusal on the record of appeal at page 14 revealed that PW1 said the *"body had no wound."*

In the case of **Shija Sosoma v. Republic,** Criminal Appeal No. 327 of 2017 (unreported) when the Court was faced with a similar scenario, after having relied on the case of **Kulwa Misangu v. R.,** Criminal Appeal No. 171 of 2015 (unreported) in which the case of **Washington Odindo** (*supra*) was cited, it stated as follows:-

> *"Summing up the evidence under section 298 (1) of the CPA envisages evidence of witnesses accurately recorded by the trial judge. We think opinion of assessors will only be useful to the trial High Court if those opinions are based on a true and accurate account of what the witnesses actually said in Court."*

Also, in the case of **Yustine Robert v. Republic,** Criminal Appeal No. 329 of 2017 (unreported), when the Court was faced with a similar scenario where extraneous matters were imported in evidence, it adopted

the case of **Okethi Okale and Others v. Republic**, [1965] 1 EA 555 and stated as follows:-

> *"In every criminal trial a conviction can only be based on the weight of actual evidence adduced and it is dangerous and in advisable for the trial judge to put forward a theory not canvassed in evidence or in counsel's speeches."*

In the instant case, since it is evident in the record of appeal and as was rightly argued by the both counsel that the trial judge added extraneous matters which did not feature in evidence adduced by witnesses, we agree with them that it was a fatal irregularity which vitiated the whole proceedings and the judgment thereof.

As to the way forward, we agree with both counsel that since the appellant does not deny killing the deceased, it would be in the interest of justice if an order for a retrial is issued.

In the event, in terms of our revisional powers bestowed on us under section 4 (2) of the AJA, we hereby nullify the proceedings from the stage the assessors were selected, quash the conviction and set aside the sentence meted out against the appellant. For avoidance of doubt, we order that the preliminary hearing which was conducted on the 2nd day of March, 2016 (Nyangarika, J.) is not to be disturbed. Likewise, we order

that the appellant should remain in custody to wait for a retrial before another judge with a new set of assessors and that the retrial should be fast tracked.

It is so ordered.

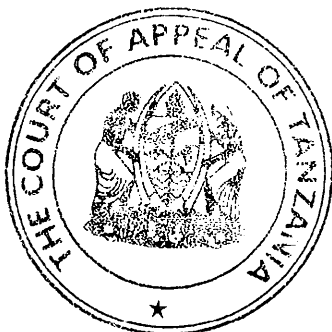
**DATED** at **MBEYA** this 30th day of March, 2020.

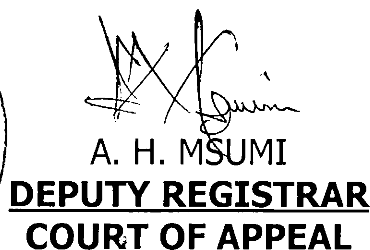
S. A. LILA
**JUSTICE OF APPEAL**

R. K. MKUYE
**JUSTICE OF APPEAL**

W. B. KOROSSO
**JUSTICE OF APPEAL**

The Judgment delivered this 31st day of March, 2020 in the presence of Ms. Irene Orest holding brief for Mr. Pacience Maumba, 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**