**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

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

**CRIMINAL APPEAL NO. 390 OF 2017**

**FREDNAND S/O KAMANDE**
**PETER S/O MPANDASHALO**
**EDES S/O KAMANDE** ..... **APPELLANTS**
**STEPHANO S/O SIKANDA**
**HENERICK S/O NGUVUMALI**
**ANATORY S/O KAMANDE**

**VERSUS**

**THE DPP..... RESPONDENT**

**(Appeal from the decision of High Court of Tanzania**

**at Sumbawanga)**

**(Mambi, J.)**

**Dated 31st August, 2017**

**in**

**Criminal Sessions No. 14 of 2015**

.....

## JUDGMENT OF THE COURT

24th & 31ST March, 2020.

**MKUYE, JA:**

The appellants, Frednand Kamande, Peter Mpandashalo, Edes Kamande, Stephano Sikanda, Henerick Nguvumali and Anatory Kamande together with two others who are not subject to this appeal (Alistid

Kamande and Wilbroad Kamande) were charged with and convicted of murder contrary to section 196 of the Penal Code Cap.16 R.E 2002 and were each condemned to death by the High Court of Tanzania sitting at Sumbawanga. It was alleged that the appellants on 27th day of September, 2012 at Mkowe village within Sumbawanga District in Rukwa Region did murder one, Raymond Kamande.

The facts leading to the appellants' arrest and arraignment can be stated as follows:

The deceased, Raymond Kamande and the appellants were villagers of Mkowe village. On the material date, 27th September, 2012, the deceased together with his wife Specioza Kishia (PW1) and their son Gaudence Kamande (PW3) were sleeping in their house. At about 22:00 hrs, PW1 heard some people knocking at their house. No sooner as she could answer the knock, their house was set ablaze. They tried to escape but her husband (the deceased) got caught up by the assailants who started assaulting and cutting him by using various crude weapons such as "jembe", "shoka", "fyekeo" and "panga". They inflicted assaults on various parts of his body. As if that was not enough, those people set the deceased ablaze burning him to death. PW1 allegedly identified by recognition some of the appellants being among the assailants by the help

of the light from the burning house thatched with grass and moonlight. Likewise, Daudi Kamande (PW2) who was at the neighbouring house and watching what was happening through the window, identified some appellants and Gaudence Kamande (PW3) who had hidden himself near the scene of crime allegedly identified some of the appellants as well. The matter was reported at the Village Executive Officer one, Edwin Mbugwa (PW4) and then to the Police who visited the scene of crime on 28/9/2012. On the same date, an autopsy was conducted and it was revealed through Postmortem Examination Report (Exh P1) that the cause of death was due to brain damage and severe bleeding.

The prosecution marshalled seven (7) witnesses to prove its case while for the defence, eight (8) witnesses testified. At the end of the trial the six appellants herein were convicted and sentenced as we have alluded to earlier on, while the 3rd and 4th accused were acquitted.

Aggrieved, the appellants have come to this Court on appeal. The 1st, 2nd and 4th appellants filed a joint memorandum of appeal comprising seven (7) grounds of appeal while the 3rd, 5th and 6th appellants each lodged a separate memorandum of appeal each comprising four (4) grounds of appeal. Nevertheless, the learned counsel for the appellants

filed another memorandum of appeal fronting seven (7) grounds of appeal.

At the hearing of the appeal, the learned counsel for the appellants sought and leave was granted to abandon the memorandum of appeals initially filed by the appellants with an exception of ground number 5 of the joint memorandum of appeal filed by the 1st 2nd and 4th appellants. They also abandoned grounds number 4, 5 and 6 of the memorandum of appeal they had filed later on. Thus the remaining grounds of appeal are as follows:

1) *That the trial judge erred in law point (sic) and fact when he failed to ask the appellants before the trial if they have any objection to the selected assessors or they agree to the aid assessors as directed by law.*

2) *That the learned trial judge grossly erred in law for basing his conviction on evidence of mistaken and weak identification.*

3) *The learned trial judge erred in law for basing his decision on contradicting testimony.*

4) *That the trial judge erred in law for convicting the appellants for the offence of murder without there being any proof required under the law.*

*5) There was no summing up to the assessors as required under the law.*

The learned counsel for the appellants also filed written submission in support of the appeal.

When the appeal was called on for hearing, the appellants were represented by Ms. Mary Mgaya assisted by Dr. Tasco Lwambano, both learned counsel; whereas the respondent/DPP had the services of Mr. Saraji Iboru, learned Senior State Attorney assisted by Mr. John Kabengula, learned State Attorney.

The learned counsel for the appellants opted to submit first on the grounds touching points of law relating to the selection of assessors and summing up to assessors.

On the issue relating to the selection of assessors, Dr. Lwambano argued that, the trial judge failed to comply with section 285 (1) of the Criminal Procedure Act, Cap.20 R.E 2002 (the CPA) as he did not ask the appellants if they objected or not to the selected assessors. To support his argument, he referred us to the case of **Hilda Innocent v. Republic,** Criminal Appeal No.181 of 2017 (unreported) in which the Court held that the involvement of the assessors begins with their selection followed by asking the accused whether he objects or not to the participation of any of

the assessors before the trial commences. For failure to give the appellants such an opportunity, the learned counsel argued that it rendered the trial to be unfair and thus a nullity as the trial was conducted without the aid of assessors.

As regards the issue of summing up to assessors, the learned counsel for the appellants, in the first place, argued that in terms of section 298 (1) of the CPA the trial judge was required at the closure of the evidence from both sides to sum up the case to the assessors. However, he argued, the trial judge did not direct them on the vital points of law involved in the case. While relying on the case of **Mande Chibunde @ Ndishi v Republic**, Criminal Appeal No.328 of 2017 (unreported), he said, directing the assessors on vital points of law was crucial as per section 298(1) of the CPA.

In elaboration, he referred us to pages 72 to 74 of the record of appeal where he said, the trial judge summarized the evidence for prosecution and for defence. However, though in the decision, the evidence of visual identification by recognition was relied upon, such kind of evidence was not addressed to the assessors. Moreover, Dr. Lwambano took us to page 94 of the record of appeal where the defence of *alibi* was raised as an issue and was discussed at pages 127 to 136 of the record of

appeal but it was not directed to the assessors. In addition, he referred to page 136 of the record of appeal where malice aforethought was also discussed but the learned trial judge failed to address the assessors on the ingredients of murder. In his view, failure to address the assessors on such vital points of law was a fatal irregularity which rendered the appellants' trial to be unfair. He also argued that, this led to the assessors to give uninformed opinions.

As to the way forward, he was of the view that, ordinarily they would have urged the Court to order a retrial, however, this was not such a case. Chipping in from where Dr. Lwambano ended, Ms. Mgaya submitted that, a retrial could not be the best option in this case because **one,** the visual identification evidence that was relied upon in the decision is not sufficient to sustain the conviction. She referred us to cases of **Masolwa Samwel v. Republic,** Criminal Appeal No.348 of 2016; and **Geofrey Isidory Nyasio v. Republic**, Criminal Appeal No.270 of 2017 (both unreported) where the Court stated that knowing a person in identification is an added advantage more so after eliminating all the possibilities of mistaken identity.

The learned counsel also argued that, the evidence of PW1, PW2 and PW3 especially on the manner they identified the appellants is

contradictory as they mentioned different persons whom they saw assaulting the deceased at the scene of crime.

Further to that, the learned counsel challenged the trial judge in basing his decision on extraneous matters which did not feature in evidence. She took us at page 113 of the record of appeal where the trial judge raised an issue "*whether the act of accused persons being found recently in possession of the victim's piece of hand soon after the victim was cut his hand links them with the offence they are charged with*" which, she said, was not part of evidence in this case.

For these reasons, Ms. Mgaya urged the Court not to order a retrial and instead allow the appeal and make an order for the immediate release of the appellants.

In response, Mr. Iboru, basically conceded to what was stated by both learned counsel for appellants. He agreed that the appellants were not involved in the selection of assessors. While citing the case of **Yustine Robert v. Republic**, Criminal Appeal No.329 of 2017 (unreported), he argued that, failure to do so vitiated the proceedings from the date of noncompliance, which is on 27/2/2017.

As regards the issue of summing up to assessors, he equally conceded contending that such irregularity vitiated the entire proceedings and judgment of the High Court.

As to the way forward, he also agreed with his learned friend's proposition that an order for retrial was not a viable course of action to take due to insufficient evidence for the prosecution.

In elaboration, he in the first place, wondered why if the appellants were identified on the date of incident, it took nine months to be arrested while there is no evidence that they had ran away from the village. Secondly, PW1, PW2 and PW3 did not explain the intensity of light from the burning house and moonlight. At any rate, he argued that two sources of lights cannot coexist. Thirdly, the evidence of PW2 that he was at a distance of five meters from the place of incident contradicted with the distance of 18 meters shown in the sketch map (Exh P2) and yet, these contradictions were not resolved by the trial court. He referred us to the case of **Mohamed Said Matula v. Republic**, [1995] TLR 3.

It was his view that, with these deficiencies, a retrial cannot be ordered.

We have considered the submissions from either side. There is no gain saying that under section 265 of the CPA, all criminal trials before the High Court are required in mandatory terms to be conducted with the aid of assessors. The selection of assessors is made under section 285 (1) of the CPA which states as follows:

> *"When a trial is to be held with the aid of assessors. The assessors shall be selected by the court."*

However, the selection of assessors is not complete until the accused person is accorded an opportunity to state whether or not he objects to any of the assessors selected. This position was stated in the case of **Hilda Innocent** (*supra*) which was rightly cited by Dr. Lwambano, where it was stated as follows:

> *"It is instructive to note that involvement of the assessors as per section 285(1) of the CPA begins with their selection. The trial judge therefore must indicate in the record that the assessors were selected, followed by asking the accused person if he objects to the participation of any of the assessors before the commencement of a trial. This must usually be followed by the usual practice that the trial judge must inform and explain to the assessors the role and responsibility during the trial*

*up to the end where they are required to give their opinions after summing up of the trial judge."*

*[Emphasis added]*

See also **Yohana Mussa Makubi and Another v. Republic,** Criminal Appeal No.556 of 2015; **Fadhil Yusuf Hamad v. Director of Public Prosecutions,** Criminal Appeal No.129 of 2016 (both unreported; and **Tongeni Naata v. Republic**, [1991] TLR 54. For instance, in the last case of **Tongeni** (*supra*) the Court emphasized that it is a sound practice which is to be followed, to give an opportunity to the accused to object to any of the assessors.

We wish also to state here that, though the requirement to accord an opportunity to accused to comment on whether he objects or not to any of the assessor is not a rule of law, it is now a well-established practice which must be observed. (See **Laurent Salu & 8 Others v. Republic,** Criminal Appeal No. 176 of 1993 (unreported).

In this case, in order to appreciate how the assessors were selected, we have found it appropriate to let the record of appeal speak for itself as hereunder:

*"...Information is read over and explained to the accused persons in Kiswahili language who plead:*

***Accused persons:***

*1st accused – Not true*

*2nd accused – Not true*

*3rd accused – Not true*

*4th accused – Not true*

*5th accused – Not true*

*7th accused – Not true*

*8th accused – Not true*

*9th accused – Not true*

***Court:-***

*Enters plea of rest Guilty for all 9 accused persons.*

***Court Assessors:-***

*1. Juliana Mshahara*
*2. Thobias Mponuwa*
*3. Blandina Walinguza*

***Republic:***

*I am Scholastica with Lema from the Republic. We have defence counsel Mr. Mathias. We have eight witnesses we are ready.*

*Court: The charges against the accused persons are read.*

***PW1:***

*Name: Specioza Kishia*

*Age: 50 years.*

*Residence: Mkowe, Kalambo*

*Works: Farmer.*

*Religion: Christian*

*PW1 is sworn and states:*

***XD: Prosecution Scholastica State Attorney."***

From the above quotation, it is clear that the trial court proceeded to take evidence from PW1 and the other witnesses without having asked the accused persons (appellants) to comment on whether or not they objected to any of the assessors from participating on their case. It is obvious that since the appellants' case was tried by the trial judge with assessors whose selection did not involve the appellants, such trial was vitiated. (See **Yustine Robert** (*supra*). It rendered the trial unfair with the effect of being a nullity.

As regards the issue of summing up to assessors, section 298 (1) of the CPA is the governing provision. It requires the trial judge after the case on both sides is closed, to sum up the evidence for the prosecution and defence before inviting them to give their opinions. Though the said provision may not seem to be mandatorily couched, such requirement is now well established that the trial court has to comply with in order to give effect to section 265 of the CPA. This position was emphasized by this Court in the case of **Mulokozi Anatory v. Republic,** Criminal Appeal No. 124 of 2014 (unreported) that:-

*"...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."*

It is also worth noting that, in order for the opinion from the assessors to be of significant value, the judge who is being aided by the assessors in compliance with section 265 should ensure that the facts of the case are well understood by the assessors and how they relate to the relevant laws. And, the facts as well as all points of law involved in the case have to be sufficiently and adequately made by the trial judge. In emphasis, this requirement was restated in the case of **Monde Chibunde @ Ndishi** (*supra*) in which the Court adopted with approval the case of **Washington s/o Odindo v. R.,** [1954] 21 EACA 392 and stated as follows:-

*"The opinion of the 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."*

In this case, the record bears out that in convicting the appellants the trial court relied heavily on the evidence of identification/recognition by PW1, PW2 and PW3 that they identified the appellants because they

had known them before. The trial judge at page 94 also raised the issue of defence of *alibi* and discussed it on pages 127 to 136 without having explained it to the assessors during summing. He also dwelt at length on the issue of malice aforethought though the same was not explained to the assessors. In our considered view, since the vital points of law such as the evidence on identification/recognition, defence of *alibi* and malice aforethought were involved in this case, the trial judge ought to have explained or directed the assessors on such points. Failure by the trial judge to do so might have culminated in the assessors giving opinions which did not touch the elements relating to such evidence. As it is evident that he failed to do so, then it cannot be said that the trial of this case was with the aid of assessors in terms of the provisions of section 265 of the CPA. This was a fatal irregularity which rendered the appellants' trial a nullity.

As to the way forward, we have considered the proposition made by both counsel that an order for a retrial would not be the best option to take and we agree with them. Having examined the entire case, we have found that there is no sufficient evidence to sustain conviction. As we have alluded to earlier on, the conviction of the appellants was based on the identification evidence adduced by PW1, PW2 and PW3. As was rightly

pointed out by both counsel, the identification evidence fell short of explanation of the intensity of light which enabled identification; explanation by the witnesses on how each identified the appellants and who identified who among the appellants even if the trial court believed that the witnesses had known the appellants before (see **Geofrey Isidory Nyasio** (*supra*); and no explanation was offered why the appellants were arrested 9 months after the incident. Apart from that, the identification evidence was marred with contradictions as the witnesses identified different persons who were alleged to be assaulting the deceased; and also the distance of the place where PW2 was standing while watching the incident contradicted with the measurement shown in the sketch map (Exh. P2). Worse enough, these contradictions were not resolved by the trial court whether they were minor or they went to the root of the matter as was held in the case of **Mohamed Said Matula** (*supra*).

In addition, there are extraneous matters which were included in the judgment. At page 113 of the record of appeal, the trial judge added in the form of an issue *"whether the act of appellants being found recently in possession of the victim's hand soon after the victim was cut his hand links with the offence which they were charged with."* But the record of

appeal generally depicts a different scenario under which the offence of murder was committed. We think that this was not proper.

Ordinarily, after having found that there were irregularities which rendered the proceedings and judgment a nullity, we would have invoked our revisional powers under section 4 (2) of the AJA and nullify such proceedings and order a retrial. However, with the deficiencies in evidence we have endeavored to show, we think, that would not be a viable course of action having in mind that the order for retrial is not intended to enable the prosecution fill gaps. On this we are guided by the case of **Fatehali Manji v. Republic** [1966] E. A. 343 where it was held that:-

> *"In general, a retrial may be ordered only where 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 purpose of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."*

Hence, since the issues we have dealt with, were among the grounds raised in the memorandum of appeal, we are inclined to find the appeal meritorious. Consequently, we allow the appeal, quash the

conviction, set aside the sentence imposed to the appellants and order their immediate release from custody unless held for other lawful reasons.

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

S. A. LILA

**JUSTICE OF APPEAL**

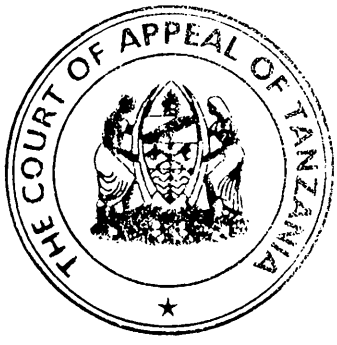
R. K. MKUYE

**JUSTICE OF APPEAL**

I. P. KITUSI

**JUSTICE OF APPEAL**

The Judgment delivered this 31st day of March, 2020 in the presence of Ms. Rehema Mgeni holding brief for Ms. Mary Mgaya and Dr. Tasko Luambano, learned counsel for the Appellants and Mr. Ofmedy Mtenga, learned State Attorney for the Respondent is hereby certified as a true copy of the original.




A. H. MSUMI

**DEPUTY REGISTRAR**

**COURT OF APPEAL**