IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MUGASHA, J.A., MWANGESI, J.A., And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 37 OF 2017

WILLIAM s/o SAFARI @ KAYDA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Opiyo, J.)

dated 13th day of July, 2015
in
Criminal Sessions Case No. 78 of 2014

RULING OF THE COURT

20th & 27th March, 2020

MUGASHA, J.A.:

The appellant was charged with the offence of murder contrary to section 196 of the Penal Code Cap 16 RE. 2002. The prosecution alleged that, on 7th August, 2012 at Getak – Wareta Village, Hanang District within Manyara Region, the appellant did murder one Petro Safari. After a full trial he was convicted and sentenced to suffer death by hanging.

Undaunted, the appellant has appealed to the Court. In the Memorandum of Appeal, he has fronted three grounds of complaint

challenging the decision of the trial court. However, for reasons which will be apparent in due course we shall not reproduce those grounds.

What led to the apprehension, arraignment and conviction of the appellant is briefly as follows: From a total of four witnesses, the prosecution case was to the effect that, the deceased and the appellant were blood related brothers with a long standing dispute of a piece of land pursuant to the disposition of the matter in the administration of estate of their late father. The prosecution alleged that, on the fateful day, the deceased went to cut sisal in the disputed premises which happened to be within the compound of the appellant. Alerted by his son who had seen the deceased cutting the sisal, the appellant rushed to the scene and had a fierce exchange in words with the deceased. Then, the appellant went back to his house, picked two spears and a machete, returned at the scene and stabbed the deceased on the throat and stomach causing his death. Thereafter, the appellant ran away but he was pursued and apprehended by those who had assembled at the scene of crime. According to the Doctor who conducted the autopsy, he established the death to have been caused by severe bleeding occasioned by the injuries sustained by the deceased.

In his defence, the appellant did not contest to have caused death of the deceased. However, he claimed that the death was occasioned by a fight between him and the deceased and that he had killed the deceased in the course of self defence. After a full trial, the learned High Court Judge made a summing up to the assessors who all returned the verdict of guilt.

On the whole of the evidence, the trial court was satisfied that, the prosecution case was proved to the hilt and as such, convicted the appellant as charged.

At the hearing, the applicant was represented by Ms. Magdalena Sylister, learned counsel whereas the respondent Republic had the services of Mr. Innocent Njau learned Senior State Attorney and Ms. Upendo Shemkole, learned State Attorney.

We had to consider the propriety or otherwise of the trial following the issue raised by Mr. Njau on the non-involvement of the assessors at the trial. He pointed out that, the learned trial judge did not sum up to the assessors the evidence of PW3 and yet, proceeded to act on such evidence to convict the appellant. In this regard, the learned Senior State Attorney argued that, the summing up to the assessors was not adequate and as such, they were not fully involved in the trial which was a violation of the

provisions of section 298 (1) of the Criminal Procedure Act **[CAP 20 R.E. 2002]** (the CPA). To support his proposition Mr. Njau referred us to the case of **REPUBLIC VS REVELIAN NAFTALI AND MARICK EMMANUEL**, Criminal Appeal No. 570 of 2017 (unreported). He concluded his submission by arguing that the said omission vitiated the trial and it is a nullity. On the way forward, he urged the Court to invoke revisional powers under section 4 (2) of the Appellate Jurisdiction Act [CAP 141 RE.2002] (**the AJA**), to nullify the entire trial proceedings, quash the conviction and set aside the sentence. On account of existing strong prosecution evidence, order a retrial before another Judge with a new set of assessors.

On the other hand, the appellant's counsel opposed the retrial arguing the irregularity to be non - existent due to the assessors' presence at the trial when the evidence of PW3 was adduced. She added that, the provisions of section 298 (1) of the CPA, do not impose mandatory requirements for the trial judge to conduct the summing up to the assessors. Furthermore, she contended that a retrial will further delay dispensation of justice on the appellant for a wrong which is not of his own making.

Having considered the submissions of the learned counsel and the record before us, the issue for determination is the propriety or otherwise of the trial on account of inadequate summing up to the assessors by the learned trial Judge.

We begin with the position of the law regulating the involvement of assessors at the trial. The provisions of section 265 of the CPA mandatorily requires all criminal trial before the High Court to be conducted with the aid of assessors. In that regard, section 298 (1) of the CPA stipulates the following:

> **"298***(1) 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.*
>
> *(2) The judge shall then give judgment, but, in doing so, shall not be bound to conform to the opinions of the assessors."*

In the light of the bolded expression, after the close of the case for the prosecution and that of the defence, the trial Judge must sufficiently sum up the evidence of both sides in the case to the assessors, who are thereafter required to give their opinion. The essence of the summing up to the assessors in facilitating them to give their respective opinions was emphasised in the case of **WASHINGTON S/O ODINDO VS REPUBLIC** [1954] 21 EACA 392 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 before them in relation to the relevant law. If the law is not explained and attention not drawn to the salient facts of the case, the value of opinion of assessors is correspondingly reduced."*

Since it is settled that the aid of assessors in a criminal trial can meaningfully be achieved if they understand the facts of the case in relation to the law, failure to adequately sum up to assessors by the trial Judge is an omission which amounts to the trial not being conducted with the aid of assessors. See - **MARK KASMIRI VS REPUBLIC,** Criminal Appeal No. 202 of 2015 (unreported). The said principle was followed in the case

of **SAID MSHANGAMA @ SINGA VS REPUBLIC,** Criminal Appeal No. 8 of 2014 (unreported) as the Court stated:

> *"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 aid of assessors and renders a trial a nullity."*

In **ABDALLAH BAZAMIYE and OTHERS VS REPUBLIC** [1990] TLR 42 the Court dealt with the issue of absence the trial judge's record that the gentlemen assessors were not given the opportunity to put questions to witnesses although the learned trial judge agreed with the assessors' opinion. The Court held among other things as follows:

> *"(i) Denying the assessors the opportunity to put questions means that the assessors were excluded from fully participating in the trials;*
>
> *(ii) to the extent that they were denied their statutory right, they were disabled from effectively aiding the trial judge who could only benefit fully as he would have if he had taken into judicious account all the views of his assessors;*

(iii) assessors' full involvement in the trial is an essential part of the process, its omission is fatal, and renders the trial a nullity".

In the light of the stated decisions, the assessors will properly exercise their statutory role and make informed opinions and effectively aid the trial judge in a criminal trial only if the trial Judge has fully involved them which entails as well, the summing up to them of entire evidence of the prosecution and that of the defence in relation to the law. Thus, in the case at hand, it was incumbent on the learned trial Judge to sum up the entire evidence of both the prosecution including that of PW3 and the defence. Moreover, apart from the learned trial judge not summing up the evidence of PW3 to the assessors, she proceeded to act on such evidence to convict the appellant which cannot be safely vouched that the trial was conducted with the aid of the assessors.

As earlier pointed out, in her submission, the learned counsel for the appellant contended that, the use of word "may" in section 298 (1) of the CPA suggests that conducting the summing up to the assessors is optional because of their presence at the trial which avails them opportunity to hear the evidence. We found this argument wanting. We say so because the

provisions of section 298 (1) of the CPA cannot be read in isolation of the provisions of section 265 of the CPA which mandatorily requires a criminal trial to be conducted with the aid of the assessors which is inclusive of the summing up to the assessors the entire trial evidence in relation to the law. We are fortified in that account due to what was stated in the case of **HATIBU GANDHI and OTHERS VS REPUBLIC** 1996 TLR 12 (CA) whereby the Court had to resolve the issue as to whether in a criminal trial, judge's summing up of the case to assessors is mandatory or discretionary and held as follows:

> *"The word `may' in Section 283(1) of the Criminal Procedure Code (now Section 298(1) of the Criminal Procedure Act, 1985) is unambiguous and crystal clear; and thus the trial judge's summing of the case to his assessors is not mandatory,* ***but is prudent as a matter of practice."***

Also the Court emphasized as follows:

> *"It is sufficient for the trial Judge to state the substance or gist of the case on both sides to enable the assessors' opinions to be formed on the case in general or on any particular point required". ...**This is a necessary implication of the provisions of s 248 of the Criminal Procedure***

Code (now s 265 of the Criminal Procedure Act 1985) which requires all criminal trials before the High Court to be with the aid of the assessors".

[Emphasis supplied]

Apart from the summing up to the assessors being prudent as a matter of practice, it is as well, a long established rule of practice in our jurisdiction. The aspect of the long established rule of practice was considered and well embraced in the case of **LAURENT SALU and FIVE OTHERS VS THE REPUBLIC,** Criminal Appeal No. 176 of 1993 (unreported) where the Court was confronted with a situation whereby the trial judge did not involve the appellants in the selection of assessors having not given them opportunity to say whether or not they objected to any of the assessors and there was no such indication on the record. The Court made the following observation:

"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of 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 this country.

The rationale of the rule is fairly apparent. The Rule is designed to ensure that the accused person has a fair hearing".

It is thus settled that the summing up to the assessors is prudent long established practice which is regulated by the provisions of sections 265 and 298 of the CPA. Therefore, in the case at hand, with respect, failure by the learned trial Judge to sum up to the assessors the evidence of PW3 which was later acted upon to ground the conviction after the assessors had returned their verdicts, amounted to their non-involvement in the trial as they were denied opportunity to make informed opinions in terms of the provisions of section 298 (1) of the CPA. This was a non-direction and an omission which vitiated the trial and it is a nullity.

Without prejudice, though we sympathise with the appellant's counsel that the omission was not caused by the appellant, on the other hand, we think this should be a wakeup call to the trial judges to make sure that criminal trials are conducted according to the law. This will avoid omissions necessitating repeated trials which in essence delay adjudication rendering justice not timely available.

On the way forward, we are fully satisfied that in the circumstances of this case, a retrial is worthy in the interests of justice. In that regard, we invoke our revisional jurisdiction as articulated under section 4 (2) of the AJA and proceed to nullify the trial proceedings, quash the conviction and set aside the sentence and order the expedited retrial before another Judge with a new set of assessors.

DATED at **ARUSHA** this 25th day of March, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

This Ruling delivered on 27th day of March, 2020 in the presence of Ms. Magdalena Sylister learned counsel for the Appellant and Mr. Innocent Njau learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T)