**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)**

**CRIMINAL APPEAL NO. 509 OF 2017**

**FADHILI PUYE ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the judgment of the High Court of Tanzania at Mbeya)**

**(Ngwala, J.)**

**dated the 30th day of October, 2017**
**in**
**Criminal Sessions Case No. 73 of 2016**

.....

## JUDGMENT OF THE COURT

18th & 24th November, 2020

**NDIKA, J.A.:**

The appellant, Fadhili Puye, was convicted by the High Court of Tanzania sitting at Mbeya for murdering Fatuma d/o Ramadhani ("the deceased") on 9th May, 2015 at Mbuyuni Village in Mbarali District in Mbeya Region. Accordingly, he was sentenced to death by hanging. Aggrieved by the conviction and sentence, he now appeals to this Court.

It is important to provide at the beginning the salient facts of the case. Based on the testimonial accounts of six prosecution witnesses, the prosecution's narrative was as follows: the appellant and the deceased

cohabited from 2010 as husband and wife but their union had not been formally solemnized as a marriage. The deceased's brother, Hamad Nuru (PW1), related that the couple had a mostly rocky and unstable relationship that ended up with the deceased leaving the appellant and relocating back to her ancestral home at Idilu in Mbuyuni Village sometime in 2014.

How the deceased met her death around the midnight of 9th May, 2015 was told by her younger sister, PW3 Jackline Daudi, who had earlier retired to bed along with the deceased in the same hut. Her tale was that she was awakened only to find that the appellant, who she knew well, had stormed into the hut, holding a torch and a machete. He demanded to see the deceased, his estranged wife, but she had apparently sneaked out of the hut. The bare-chested and visibly very angry appellant, then, walked out and proceeded to a nearby hut where the deceased and a certain Amos Mwidete happened to be. Shortly thereafter, PW3 heard the deceased and the said Amos Mwidete crying in agony as it seemed they were being attacked.

PW3 testified further that, a few moments later, the appellant came back to her hut, still armed with a machete, grabbed her hand and forced her to the scene of the crime "to see what he had done to the deceased", which he said in Kiswahili *"twende ukaone nilichokifanya na nilichomfanyia dada yako."* At an adjoining farm, PW3 saw the severely mutilated body of

the deceased lying on the ground a few metres from the hut in which she was attacked. A little later, the appellant fled the scene having threatened to kill PW3, then aged 17 years, should she spill the beans. PW3 went back to her room but could not catch up any sleep. In the morning she woke up and did some domestic chores as if nothing had happened. She admitted to have not reported the killing to anybody citing her fear that the appellant would make good on his threat. Later in that morning she learnt that the appellant had been apprehended as a suspect.

PW4 Omari David (the deceased's brother) and PW5 Jane Nyudike (the Village Executive Officer of Mbuyuni Village) were among the persons who rushed to the scene upon learning of the killing. While PW4 adduced that the appellant was apprehended that fateful morning upon being mentioned by the said Amos Mwidete, who also had been severely injured, PW5 testified that the arrest was made upon the family of the deceased's suspicion that the appellant was the perpetrator of the crime.

On the part of the police investigator, No. 8308 Detective Corporal Reuben, he adduced that his investigations revealed that the appellant attacked the deceased on suspicion that she had an affair with Amos Mwidete.

Dr. Thobias Hebron Mahenge (PW2) of Chimala Hospital conducted an autopsy on the deceased's body. He confirmed that the deceased died a violent death, the cause being severe bleeding from multiple cut wounds and head injury. The post-mortem examination report was admitted as Exhibit P.1.

When put to his defence, the appellant flatly denied to have killed his presumed wife, raising an apparent *alibi* as he said that he never saw her since March 2014 when they parted ways. He adduced that apart from being shocked to learn of her death, he was surprised to be arrested on the fateful morning as a suspect.

At the conclusion of the hearing, the three gentleman and lady assessors returned a unanimous verdict of guilty against the appellant. The learned trial Judge (Ngwala, J.), then, sided with the assessors and convicted the appellant on PW3's evidence, which she found to be credible. Guided by a number of decisions of this Court including **Waziri Amani v. Republic** [1980] TLR 250, she found that he was positively identified at the scene by PW3 and that the circumstances of the killing as narrated by PW3 led to an irresistible inference that he was the perpetrator of the crime. The relevant passage in the judgment, as shown at page 60 of the record of appeal, reads thus:

*"... it is crystal clear that the evidence by PW3 is credible. It irresistibly points to the guilt of the accused person. For the said reason, I hold that the evidence of PW3 is credible enough to ground conviction to the extent discussed. On this I do not see any reason to depart from the assessors' views who have opined that PW3 did connect the accused person with the offence of murder which he stands charged with."*

Accordingly, the learned Judge imposed the death penalty on the appellant, as hinted earlier.

This appeal was initially premised upon a Memorandum of Appeal containing seven grounds of appeal, which the appellant lodged on 20th May, 2019. On 13th November, 2020, Mr. Justinian Mushokorwa, learned counsel, lodged a four-point supplementary Memorandum of Appeal on behalf of the appellant.

At the hearing of the appeal, the appellant appeared remotely through a link from Ruanda Central Prison where he sojourned. On his behalf, Mr. Mushokorwa appeared to prosecute the appeal whereas the Republic had the services of Ms. Rosemary A. Mgenyi and Ms. Zena James, learned State Attorneys.

Upon Mr. Mushokorwa's prayer, the appeal was argued only on the four grounds raised in the supplementary Memorandum of Appeal. These were as follows:

1. *The trial Judge ought not to have convicted [the appellant] based on the evidence of a single witness (PW3) who was not reliable and credible given the fact that she also was not free from suspicion and the prevailing conditions did not favour correct identification.*
2. *The prosecution case ought to have been viewed in disfavour for failure to bring to court to testify one Amos Mwidete who appears as a material eyewitness, let alone a suspect.*
3. *The trial Judge did not adequately sum up to the assessors.*
4. *The defence was not adequately considered.*

Mr. Mushokorwa addressed us, at first, on the third ground, which attacks the manner and adequacy of the learned trial Judge's summing up of the case to the assessors. He submitted that after the learned trial Judge had summarized the evidence of the case to the assessors, she gave a direction to the assessors in an eight-line passage at page 41 of the record of appeal stating that the case hinged on circumstantial evidence and charging the assessors to determine whether the appellant was guilty of the charged offence or not. It was his contention that the direction given was plainly inadequate as it did not address any of the vital points of the case nor did it address the appellant's rights in the circumstances of the case. The

matters that required direction were circumstantial evidence, visual identification and the appellant's defence of *alibi*.

Mr. Mushokorwa relied on the decision of the Court in **Kevin Haule v. Republic** [2005] TLR 53 to support his proposition that in summing up to assessors, a trial Judge must not only direct the assessors on the vital points of law in the case but also charge them with the duty to determine all relevant questions of fact in view of the circumstances of the case. It was his further submission that the irregularity complained of rendered the trial proceedings and the decision thereon a nullity. Accordingly, he urged us to nullify the said proceedings and the decision thereon.

Replying for the Republic, Ms. Mgenyi conceded so candidly to her learned friend's submission on the third ground. She added, by way of emphasis, that the non-direction by the learned trial Judge on the matters raised by her learned friend rendered the trial being deemed to have not been conducted with the aid of assessors contrary to the dictates of section 265 of the Criminal Procedure Act, Cap. 20 RE 2002 (now RE 2019) ("the CPA"). For this proposition, she made reference to pages 8 to 15 of the typed judgment of the Court in **Omari Khalfan v. Republic,** Criminal Appeal No. 107 of 2015 (unreported) where a similar infraction was confronted.

As rightly submitted by Ms. Mgenyi, section 265 of the CPA stipulates a peremptory requirement that every trial before the High Court must be conducted with the aid of at least two assessors. In addition, section 298 (1) of the same law enjoins the trial Judge sitting with assessors to sum up the case to them before inviting their opinion. This provision dictates that:

> *"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."* [Emphasis added]

The indispensability of assessors and their role in a criminal trial before the High Court have been addressed by the Court on numerous occasions. Suffice it to refer to the case of **Charles Lyatii @ Sadala v. Republic,** Criminal Appeal No. 290 of 2011 (unreported) where it was emphasized that assessors must be availed with:

> *"adequate opportunity to put questions to witnesses from both sides and the same should be clearly recorded. Two, which is relevant to our case, is that when the case on both sides is closed, the judge is required to sum up the evidence for the prosecution*

*and the defence and shall then require each assessor to state his opinion as to the case generally and as to any specific question of fact addressed to him by the judge and record the opinion."*

Even though the language used in the phrase *"the judge may sum up"* in section 298 (1) of the CPA appears to be directory, it is settled that the trial Judge bears a mandatory duty to sum up the case adequately to assessors – see **Mulokozi Anatory v. Republic**, Criminal Appeal No. 124 of 2014 (unreported) cited in **Omari Khalfan** (*supra*). In **Said Mshangama @ Senga v. Republic**, Criminal No. 8 of 2014 (unreported), also referred to in **Omari Khalfan** (*supra*), it was emphasized that a summing up must cover all vital points of the case and that an inadequate summing up would be fatal to the proceedings:

*"One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors,* ***it is deemed to be a trial without the aid of assessors and renders the trial a nullity.***"[Emphasis added]

See also **Kevin Haule** (*supra*) and **Tulubuzya Bituro v. Republic** [1982] TLR 264.

Through the prism of the guidelines stated in the above authorities, we examined the learned trial Judge's summing up, running from pages 37 to 41 of the record of appeal. The inadequacy of the summing up is so glaring as almost all of the summing up is a recapitulation of the evidence produced by the prosecution and the defence but nothing about the vital points of law involved. In the final paragraph of the summing up at page 41, the learned Judge gave the following direction to the assessors:

> *"Having heard this brief summary, this evidence is purely circumstantial and in totality of the substance of that evidence which I have narrated in summary to you, you should also give your opinion regarding this evidence if it suffices to enter a conviction and whether as argued in cross-examination, the fact that one Amos Mwidete was not called to testify in court absolves or vitiates the accused's personal involvement in the commission of the crime."*

We would, therefore, agree with both learned counsel that the learned trial Judge's summing up was materially deficient for failing to direct the assessors on the three crucial aspects of the case pointed out by Mr. Mushokorwa – circumstantial evidence, visual identification and the appellant's defence of *alibi*. We would add that there was a non-direction on the ingredients of the offence of murder notably whether the appellant killed

his presumed partner with malice aforethought. One further non-direction related to the burden of proof, which ought to have been addressed as it applied in a criminal trial. What's more, the learned trial Judge's direction as we reproduced above failed to charge the assessors to answer any relevant specific questions of fact. We think it was impractical, if not inept, to direct the assessors to give an opinion regarding the *"evidence if it suffices to enter a conviction"* without having raised to them any specific questions on the evidence.

The effect of the non-direction by the learned trial Judge is clearly exhibited in the opinions given by the assessors as each of them dealt with the evidence generally and left out the apparently specific issues of the trial that should have been raised by the learned trial Judge. To illustrate the point, we reproduce the apparently unapprised opinion of the second assessor as recorded at page 42 of the record of appeal:

> *"In my opinion ... it has been proved that the incident of murder was there .... The evidence that has been brought by the prosecution side, especially the evidence of PW3 shows that the accused went inside at that night and asked where her sister had gone. PW3 said she had not seen or known where her sister had gone. Then the accused went out and said that*

*they should go and see what she had done – she found her sister dead.*

*If I come to Amos Mwidete, this Amos Mwidete could be a good witness to prove the killing of Fatuma Ramadhani because he was also injured together with the deceased ...."*

In the above premises, we agree with the learned counsel that the trial before the High Court cannot be held to have been conducted with the aid of assessors, which was an incurable infraction of section 265 of the CPA. We thus find merit in the third ground of appeal and proceed to hold that the entire trial proceedings and the decision thereon are a nullity.

While the learned counsel were concurrent on the outcome on the third ground of appeal as already discussed, they essentially parted company on the consequential issue whether a retrial should be ordered.

On the part of Mr. Mushokorwa, it was his submission that a retrial would not be feasible. In elaboration, he addressed us first on the first ground of appeal attacking the credibility and reliability of the key prosecution witness (PW3) as well as contending that the conditions at the scene did not favour a correct identification.

In contending that the conditions in the hut PW3 slept were not conducive for a positive identification, he argued that the appellant allegedly stormed into the hut holding a torch, which necessarily disabled PW3 from identifying the holder of the torch. He added that while initially PW3 said there was no light in the hut, she changed tack in cross-examination saying that the hut had solar powered lighting outside. Referring to the criteria for a correct identification as stated in **Waziri Amani** (*supra*), he submitted that even though PW3 and the appellant might have been familiar with each other, it was clear that the scene had no light and that it was not clear how long the witness observed the appellant.

Furthermore, Mr. Mushokorwa sought to discredit PW3, arguing that apart from changing her story on the lighting at the scene, she gave an incredible account that the appellant came back to her hut, bragged about killing the deceased, took her out to the place where the dead body was lying and then threatened to kill her should she reveal the secret. Citing the decision of the Court in **Ally Bakari v. Republic** [1992] TLR 10, he submitted that it was not normal for a killer to exhibit the conduct as alleged by PW3.

As regards the second ground of appeal, Mr. Mushokorwa castigated the prosecution for failing to produce Amos Mwidete, who was a material

witness and possibly a suspect. Referring to pages 56 and 57 of the record of appeal, he argued that the trial Judge did not find any justification for that failure. Relying on **Aziz Abdallah v. Republic** [1991] TLR 71, he submitted that failure to produce a material witness without sufficient explanation the court would be entitled to draw an inference adverse to the prosecution case.

Finally, on the fourth ground of appeal, Mr. Mushokorwa tersely contended that the appellant's defence was ignored. On being probed by the Court, he conceded that the said infraction could be remedied by the Court, as the first appellate forum, stepping in and re-appraising the evidence on record including the defence evidence.

On the part of Ms. Mgenyi, she valiantly argued in favour of an order a retrial of the case on the ground that there was sufficient evidence against the appellant. To demonstrate her position, she, at first, dealt with the first ground of appeal. It was her contention that PW3's evidence sufficiently established that the conditions inside her hut were favourable for a correct identification as the appellant was a familiar person to her and that the hut was lit by solar power. She added that PW3's evidence that she saw the appellant was identification by recognition, which, as held by the Court in the case of **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported), was more reliable than that by strangers or by voice.

On PW3's credibility, she underlined that the said witness was credible and that her evidence of the events that preceded the killing provided impeccable circumstantial evidence that, on its own, could have grounded a conviction as was stated in **Crospery Ntagalinda @ Koro v. Republic**, Criminal Appeal No. 312 of 2015 (unreported). When queried by the Court as regards PW3's conduct from the fateful night until the deceased's body was discovered as well as her failure to report the matter to anybody until after the appellant was apprehended, she sought to justify PW3's conduct by the fact that at the age of 17 at the time she was too young to behave reasonably or normally and that she was dissuaded to report the matter by the appellant's threat.

As regards the complaint in the second ground of appeal, the learned State Attorney countered that, apart from Amos Mwidete not being available at the time of the trial, he was nowhere to be found for investigators to interrogate him on the killing. Referring to section 143 of the Evidence Act, Cap. 6 RE 2019, she submitted that there is no particular number of witnesses required for proving a particular fact.

Finally, Ms. Mgenyi conceded that the trial court ignored the appellant's defence but put up a rider that this Court could step in and re-appraise the whole evidence on record including the defence evidence.

In a brief rejoinder, Mr. Mushokorwa insisted that PW3 was not credible. He elaborated that she gave a contradictory account that while at page 21 line 27 of the record of appeal she adduced that the appellant flashed his torch to her face, she backtracked at page 22 saying that the torch was not directed at her. Secondly, he wondered if the hut was illuminated by solar powered light, why the appellant had to use torchlight inside the hut. On the conduct of PW3 after the killing, he argued that as a seventeen-year-old child, PW3 was old enough to not to behave strangely.

We have examined the evidence on record and taken account of the contending submissions of the learned counsel on whether or not a retrial should be ordered.

We should, at the outset, state that the principles governing retrials as stated in the mid-1960's in **Fatehali Manji v. Republic** [1966] EA 341 and restated by the Court in its numerous decisions preclude a retrial where there was insufficient evidence in the original trial – see, for instance, **Selina Yambi & Others v. Republic**, Criminal Appeal No. 94 of 2013; **Salum & Another v. Republic**, Criminal Appeal No. 119 of 2015; and **Athanas Julius v. Republic**, Criminal Appeal No. 498 of 2015 (all unreported). Besides, if a fresh trial may end up giving the prosecution an unfair advantage of bridging the gaps, it would not be ordered even where a

conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame. Certainly, in **Selina Yambi & Others** (*supra*), the Court restated that much as it held:

> *"We are alive to the principles governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps. The bottom line is that, an order should only be made where the interests of justice require."*

In our considered opinion, we would agree with Mr. Mushokorwa that the evidence on the trial record was insufficient to sustain a conviction against the appellant. Beginning with PW3's evidence that she saw and identified the appellant, we are inclined to agree with Mr. Mushokorwa that this strand of evidence is mostly unreliable primarily because it was contradictory on the source of the light that supposedly aided her identification. Apart from the contradiction whether or not the appellant flashed his torch in PW3's face, any reasonable person would wonder why the appellant allegedly used torchlight in the hut if at all that hut was illuminated by a solar powered bulb as averred by PW3.

We also find Mr. Mushokorwa's attack on the credibility of PW3 justified, rendering her evidence suspect and unreliable. For a start, we agree that PW3's tale, that the appellant killed the deceased and later came back to her and bragged about the killing, appears inconsistent with human nature and normal course of things. As the Court observed in **Ally Bakari** (*supra*) at page 14, in the normal course of things criminals would not behave in such a thoughtless and dangerous manner.

Furthermore, we agree with Mr. Mushokorwa's submission that PW3's unusual conduct in the morning following her sister's killing and her failure to report the killer to anybody also render her testimony doubtful. We do not accept Ms. Mgenyi's explanation that PW3 was too immature to act normally and that she was overcome by fear of a reprisal from the appellant. We find it odd and inexplicable that PW3 went about doing domestic chores as if nothing tragic had happened the previous night. The relevant part of her evidence, at page 19 of the record of appeal, is most revealing:

> *"In the morning, I went outside.* ***I was sweeping, pretending that I did not know anything****. While sweeping, the other casual labourers came ....* ***Then, they asked me where my sister had gone. I said that I did not know****. It could be 'amejidamka amejihimu shambani' – meaning she got up very*

*early in the morning and went to the shamba."*
[Emphasis added]

We do not find any plausible explanation why this witness had to pretend that nothing tragic had happened and then lied on the whereabouts of her sister. Perhaps, she might have initially been overcome by the alleged fear of revenge, but we wonder why she did not disclose the tragic events after her sister's lifeless body was discovered at a later stage. We note at same page 19 of the record of appeal that at that point a throng of people had gathered at the scene and that they were subsequently joined by the village functionaries, police officers (including PW6) and the medical doctor (PW2). The presence of such a multitude of people and the aforesaid officials should have allayed her fears. Thus, her delay in disclosing the tragic events should raise eyebrows – see **Marwa Wangiti & Another v. Republic** [2002] TLR 39. It dents the reliability of her claim that she saw and identified the appellant at the scene, in a bid to link him with her sister's violent killing.

The failure by the prosecution to produce Amos Mwidete as a witness at the trial is a further disquieting feature. Although the learned trial Judge did not draw any inference adverse to the prosecution case for failing to produce this material witness, she appears in her judgment, at page 57 of

the record of appeal, to have taken the view that there was no justification for such failure:

> *"The reason advanced in this case by PW6 is that Amos Mwidete was nowhere to be found after the incident. Though it has not been established that he is dead or is outside the jurisdiction of Tanzania, PW4 however established that Amos Mwidete is at Malangali.* ***Here the Criminal Investigation Department and the Prosecution ought to have made follow ups on the whereabouts of one Amos Mwidete for the cementation of the prosecution case.****"*[Emphasis added]

As there was no direct witness to the deceased's killing, it could be surmised that Amos Mwidete was a perpetrator of the crime, not a victim as advanced by the prosecution.

On the foregoing analysis, we are of the firm view that the interests of justice in the instant case militate against ordering a retrial of the appellant as the prosecution case was built upon weak evidence.

The upshot of the matter is, therefore, that we allow the appeal. In consequence, we quash the conviction and set aside the sentence imposed

on the appellant. We order that the appellant, Fadhili Puye, be released from prison forthwith unless he is detained there for some other lawful cause.

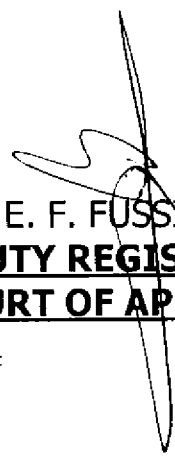
**DATED** at **MBEYA** this 23rd day of November, 2020.

A. G. MWARIJA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

The Judgment delivered this 24th day of November, 2020 in the presence of Mr. Justinian Mushokorwa, counsel for the Appellant and Ms. Zena James, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**