IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 508 OF 2017

OMARI KATESI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwala, J.)

dated the 3rd day of November, 2017
in
Criminal Sessions Case No. 56 of 2014

JUDGMENT OF THE COURT

17th & 24th November, 2020

KWARIKO, J.A.:

The appellant, Omari Katesi was arraigned before the High Court of Tanzania at Mbeya together with Maria Senye and Charles Samson Nzowa then first and second accused persons, respectively who are not parties to this appeal. The three were charged with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002] (now R.E. 2019).

The particulars of the offence were that: on 23/9/2012 at about 23:00 hours at Sambwene village within the District and Region of Mbeya

the three jointly and together did murder Sikujua s/o Katesi. They denied the charge. However, before the commencement of the trial, the second accused died and therefore the case against him abated in terms of section 284A of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA).

At the end of the trial, the first accused was acquitted while the appellant was convicted and sentenced to death by hanging. Aggrieved by that decision, the appellant has appealed to this Court.

Before we embark on deliberating the merits or demerits of the appeal, we find it appropriate at this juncture to state albeit briefly the facts of the case which led to the appellant's conviction.

It is common ground that the first accused at the trial is a biological mother to both the deceased and the appellant while Jane Sikujua (PW1) is the widow of the deceased. On its part, the prosecution brought a total of seven witnesses to prove the charge. The prosecution witnesses included PW1, the appellant's sister Jeniffer Katesi (PW2), clan elder Laili Wamsheshela Shega (PW3) and Julius Mwachembe (PW4). They testified that the appellant and the deceased had a long-standing dispute over land which was left behind by their late father. It was shown that the deceased was against the appellant's desire to dispose of family land and the first accused was fueling the dispute by siding with the appellant.

PW1 adduced that on the material night while asleep with the deceased, two thugs one of them the second accused, invaded them by breaking the door. When they woke up the thugs demanded money which the deceased said he had hidden in the other house. The thugs took them out where she saw three persons including the appellant and the first accused who went to a nearby kraal without offering any help. At that juncture the thugs cut the deceased and herself with a machete which sent them rolling up to a valley. PW1 pretended to be dead and the thugs continued to cut the deceased while the appellant and the first accused was witnessing. The thugs then, cut off the deceased's private parts and fled the scene. Thereafter, PW1 sought help from the appellant's wives and the ten-cell leader (PW4). When the people went to the scene, the deceased could not even speak and he died on the way to hospital. PW1 said she identified the two thugs with the help of the torches they were carrying and the moonlight outside.

It was also the prosecution's evidence that the appellant disappeared after the incident only to re-surface one year later. Upon arrest the appellant was interrogated by No. E 1184 Det. Cpl. Yassin (PW7) and he was said to have confessed to the allegations. Although the appellant objected to the tendering of his cautioned statement for the

reason of torture, the objection was overruled after a trial within a trial and it was admitted in evidence as exhibit P3. The deceased's body was examined by Dr. Twaisi Angetile Kalinga (PW3) and the Post-mortem report was admitted as exhibit P2.

In his defence, the appellant raised a defence of *alibi* in which he said he was in Dar es Salaam at the material time where he had gone on 10/8/2012 to look for a job. As he could not get any job, he proceeded to Arusha on 22/9/2012 and worked in a gold mine for eleven months before he returned to Mbeya on 17/8/2013. Upon arrival he was informed by his uncle about the death of his brother, the deceased. He was arrested on 22/8/2013 to face the murder charge. The appellant tendered bus tickets for his trips to Dar es Salaam, Arusha and Mbeya as exhibits D1, D2 and D3.

In its decision, the trial court rejected the appellant's defence of *alibi* and found that the evidence of identification by PW1 was not sufficient. However, the court convicted the appellant on the basis of his confession and the circumstantial evidence of his disappearance after the incident. He was sentenced as shown earlier.

Before this Court the appellant raised eight grounds in his memorandum of appeal which he lodged on 24/5/2019 and his advocate

lodged a four ground-supplementary memorandum of appeal on 11/11/2020.

At the hearing of the appeal, the appellant was linked with the Court via a video conferencing facility from prison. He was represented by Mr. Isack Chingilile, learned advocate whereas the respondent Republic enjoyed the services of Mr. Ofmedy Mtenga, learned Senior State Attorney.

Mr. Chingilile informed the Court that he had agreed with the appellant to argue the four grounds contained in the supplementary memorandum of appeal. These are as follows:

> *"1. That the High Court Judge erred in law and fact for failure to direct Assessors on vital points of law when summing up the case against the Appellant.*
>
> *2. That the High Court Judge erred in law and fact to convict the appellant as the same was not identified at the scene of crime that night.*
>
> *3. That the High Court Judge erred in law and fact to convict the appellant basing on repudiated confession which was not corroborated by other evidence.*

4. That the trial Judge erred in law and fact for failure to consider the evidence of the Appellant on defence of Alibi".

In his submission, Mr. Chingilile argued in respect of the first ground of appeal that the trial Judge did not direct the assessors on vital points of law which surfaced in the case. He listed those points as the ingredients of the offence of murder, the evidence of visual identification, the repudiated/retracted confession and the defence of *alibi* raised by the appellant. The learned counsel argued further that the omission to direct the assessors on vital points of law before they gave their opinions rendered the whole proceedings a nullity which he argued us to quash. To fortify his argument, Mr. Chingilile referred us to our earlier decision in the case of **Richard Siame Matheo v. R,** Criminal Appeal No. 173 of 2017 (unreported).

As for the way forward, the learned counsel urged us to order the release of the appellant from prison as the prosecution evidence is not sufficient to order a retrial. To bolster his argument, Mr. Chingilile referred us to the decision in **Fatehali Manji V. R** [1966] 1 EA 343.

Mr. Chingilile explained the insufficiency of the prosecution evidence in the third and fourth grounds of appeal. The second ground of appeal

was dropped for the reason that the trial court had found the evidence of visual identification by PW1 not sufficient.

As regards the third ground of appeal, Mr. Chingilile submitted that the trial court Judge erred in convicting the appellant on his uncorroborated retracted/repudiated confession. He argued that there was no any evidence to corroborate the appellant's repudiated confession. To fortify his position, Mr. Chingilile referred us to our earlier decision in the case of **Paschal Petro Sambula @ Kishuu & 2 Others V. R,** Criminal Appeal No. 112 of 2005 (unreported).

In relation to the fourth ground of appeal, it was Mr. Chingilile's argument that the trial court ought not to have rejected the appellant's defence of *alibi* which was not even controverted by the prosecution. He finally implored us to allow the appeal, quash conviction and set aside the sentence and release the appellant from prison.

For his part, Mr. Mtenga conceded to the first ground of appeal on the basis of the submission made by Mr. Chingilile. In support of his stance, he cited the decision of the Court in the case of **Weda Mashilimu @ Baba Siha & 5 Others V. R,** Criminal Appeal No. 375 of 2017 (unreported). Concerning the way forward, Mr. Mtenga opposed the proposition of releasing the appellant from prison. He urged us to order

a retrial as there is sufficient evidence to that effect. He argued that the prosecution would not fill in gaps in its evidence at the retrial against the principle stated in the case of **Fatehali Manji** (supra).

Mr. Mtenga submitted further that the circumstantial evidence of the appellant's disappearance after the incident was strong enough. That, PW1 was believed by the trial Judge who was better placed to assess her credibility and demenour when she explained that the appellant used to call her to inquire if she identified him at the scene of crime and went on persuading her to be inherited by him.

In relation to the appellant's repudiated/retracted confession, Mr. Mtenga argued that the same was witnessed by the appellant's sister and corroborated by the evidence of PW1. When probed by the court, Mr. Mtenga conceded that the prosecution did not cross-examine the appellant on reasons of not attending his brother's burial.

In his rejoinder, Mr. Chingilile contended that the circumstantial evidence was neither believable nor strong enough. He argued that PW4 said he was aware that the appellant was away on travel at the material time. He went on to submit that because PW1 was not credible on the issue of visual identification, she cannot be believed in case a retrial is ordered.

We have considered the grounds of appeal and the submissions from both learned counsel. We agree with the counsel in respect of the first ground of appeal that the trial Judge did not direct the assessors on vital points of law which emerged at the trial before they gave their opinions. This was a clear violation of the law. Section 265 of the CPA provides that all criminal trials before the High Court should be conducted with the aid of assessors. The requirement of complying with the provisions of that section has been emphasized by the Court in its various decisions, some of them are: **Richard Siame Matheo** (supra), **Augustino Nandi v. R,** Criminal Appeal No. 388 of 2017 and **Jeremia Paskal v. R,** Criminal Appeal No. 185 of 2012 (both unreported). The case of **Richard Siame Matheo** referred to our earlier decision of **Charles Karamji @ Masangwa & Another v. R,** Criminal Appeal No. 34 of 2016 (unreported) where it was stated thus;

> *".....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".

In addition to the above cited mandatory requirement of the law, the trial Judge is required to sum up the case to assessors by recapitulating the evidence adduced during the hearing and explaining the points of law which emerged from that evidence. Section 298 (1) of the CPA which is relevant here provides thus;

"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 provision of law is not couched in mandatory terms it has been the established practice in our jurisdiction that the trial judge should sum up the case to the assessors and explain to them vital points of law involved in the case. This is important because the assessors are lay persons who need to be appraised with the matters of law for their better understanding before giving their opinions. In the case of **Omari**

Khalfan v. R, Criminal Appeal No. 107 of 2015 (unreported) the Court stated thus:

> *"...the phrase- "the judge may sum up" does not mean that the trial Judge can skip the summing up to assessors. This phrase has been expounded by the Court to imply a mandatory duty placed on the shoulders of the trial Judge to sum up."* (page 9).

[(See also **Mulokozi Anatory v. R,** Criminal Appeal No. 124 of 2014 (unreported)].

In view thereof, the question which follows is whether the trial Judge properly summed up the case to the assessors. The court record is clear that after the close of the case for both sides, the trial Judge in a bid to sum up the case to the assessors, only summarized the evidence from both sides and invited them to give their respective opinions. As it has been shown earlier, the prosecution case relied on the evidence of visual identification, circumstantial evidence and the appellant's confession. However, the trial Judge did not explain these vital points of law to the assessors and what it takes for an accused to be convicted on the basis of such kind of evidence. The Judge also did not explain to the

assessors the ingredients of the offence of murder; that is to say intention to cause death and proof of death. The onus of proof of the charge and the duty of the accused in respect of the prosecution case were important points that were not addressed to the assessors.

On the other hand, while the appellant relied upon a defence of *alibi*, the trial Judge said nothing concerning the principles underlying such a defence. Had the assessors been properly directed, they might have given a different opinion. For instance, the assessors believed the prosecution evidence of visual identification while the Judge found it wanting. They also believed the circumstantial evidence and the accused's repudiated/retracted confession without being informed of its principles and they also required the appellant to prove his *alibi*.

We have shown that the trial Judge erred by her failure to direct the assessors on vital points of law. There is a plethora of the Court's decisions which state that failure of the trial Judge to direct the assessors on vital points of law is fatal and thus vitiates the whole proceedings. Some of those decisions are: **Omari Khalfan** (supra), **Mulokozi Anatory** (supra) and **Charles Karamji Masangwa & Another** (supra). The Court said in the **Omari Khalfan's** case that:

"As observed above, the assessors must be summed up on facts and every vital points of law so as to give the court an informed verdict. That was not done and, on the authorities discussed above, the ailment vitiates the entire proceedings, for it is impossible to know what the assessors would have said had the vital points of law been put to them."

On the strength of the cited authorities, since the trial Judge did not direct the assessors on the vital points of law, we agree with the counsel for the parties that the whole proceedings were vitiated which we hereby nullify. The first ground of appeal thus succeeds.

On the way forward, the learned Senior State Attorney urged us to order a retrial of the case as there is sufficient evidence to ground conviction against the appellant. In this respect he referred to the circumstantial evidence given by PW1. According to him, the trial Judge found this witness credible and believable. The appellant's confession is another piece of evidence which the learned counsel said is sufficient to ground conviction. He went further to argue that, although the appellant

retracted and repudiated his confession, the same was corroborated by the circumstantial evidence by PW1.

The law regarding retrial is well settled. It says that a retrial will only be ordered if it is in the interest of justice of the case. In the famous case of **Fatehali Manji** (supra), it was held thus: -

> *"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 purposes 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."*

We have considered the instant case and found that we are not prepared to go along with Mr. Mtenga's submission. This is because as rightly argued by Mr. Chingilile, the prosecution evidence is wanting. We will show the shortcomings in the prosecution evidence which will also be affirmatively answering the third and fourth grounds of appeal. **Firstly,** as it was found by the trial court the evidence of visual identification was

not proved. This is because, PW1 did not describe the appearance of the appellant, the intensity of light at the scene and the distance between her and the suspects. The conditions for identification thus did not meet the criteria enumerated in the case of **Waziri Amani v. R** [1980] T.L.R 250. Further, had PW1 identified the appellant and the first accused to be among the thugs there is no reason why she did not reveal it to PW4 who appeared at the scene immediately after the incident.

Secondly, the circumstantial evidence was not sufficient because credibility of PW1 was doubtful. This is so because while she said she identified the appellant and the first accused; she did not mention them at the earliest possible opportunity which would have earned her reliability. See **Apolinary Matheo & Two Others v. R,** Criminal Appeal 436 of 2016 (unreported). As for the issue of the appellant's disappearance after the incident, his explanation was not controverted by the prosecution as was conceded by Mr. Mtenga.

Thirdly, the appellant's retracted/repudiated confession was not corroborated by independent evidence as required in law. We have said time and again that a retracted/repudiated confession requires corroboration to be acted upon. In the case of **Paschal Petro Sambula @ Kishuu & Two Others,** Criminal Appeal No. 112 of 2005 (unreported)

where a corroborative evidence was lacking in respect of the retracted/repudiated confession of the third appellant, the Court stated thus:

> *"After repudiating/retracting it, it required competent corroboration to be acted upon."*

Similarly, in the case of **Hemed Abdallah v. R** [1993] T.L.R 172, the Court held inter alia that:

> *"Generally, it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particulars or unless the court, after full consideration of the circumstances, is satisfied that the confession must be true."*

It is for the foregoing shortcomings in the evidence by the prosecution that an order of retrial will not be for the best interest of the appellant and the case as a whole. A retrial will only help the prosecution fill in gaps in their evidence. [See **Kanisilo Lutenganija v. R,** Criminal Appeal No. 25 of 2010 and **Semeni Mgonela Chiwanza v. R,** Criminal Appeal No. 49 of 2019 (both unreported)].

From the foregoing, we find the appeal meritorious and allow it. We quash the conviction and set aside the sentence meted out against the appellant. We thus order his immediate release from prison unless his continued incarceration is in relation to 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, Advocate holding brief of Mr. Isack Chingilile 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