IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 375 OF 2017

1. WEDA MASHILIMU @BABA SIHA
2. IGNAS SUNGURA
3. JAMES PASCHALE
4. NICKSON NGALAMIKA @KADOGOO
5. IBRAHIMU TELLA
6. FARAJA JAILOSI MWEZIMPYA ..... **APPELLANTS**

VERSUS

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

(Appeal from the Decision of the High Court of Tanzania at Sumbawanga)

(Mambi, J.)

Dated 31st day of August, 2017
in
Criminal Sessions Case No. 1 of 2015
.....

JUDGMENT OF THE COURT

23rd March & 1st April, 2020.

KOROSSO, J.A.:

In the High Court of Tanzania at Sumbawanga, the appellants Weda Mashilimu, Ignas Sungura, James Paschale, Nickson Ngalamika, Ibrahimu Tella and Faraja Jailosi MweziMpya were jointly charged with four other persons (who are not subject of this appeal) of two counts, that is, Conspiracy to Murder contrary to section 215 of the Penal Code,

Cap 16 Revised Edition 2002 (the Penal Code) and Attempt to Murder contrary to section 211(a) of the Penal Code.

It was alleged in the first count, that on unknown date, time and place within Sumbawanga District in Rukwa Region, the appellants jointly and together did conspire to murder one Mwigulu Matonange, and in the second count, the allegations being that on the 15th February, 2013 at Msia village within Sumbawanga District Rukwa Region, jointly and together did attempt to murder Mwigulu Matonange by chopping his left hand using a machete.

After a full trial, the appellants were convicted on two counts. In the first count each of the appellants was sentenced to serve fourteen (14) years imprisonment and in the second count the sentence imposed was twenty (20) years imprisonment for each of the appellant. The sentences were ordered to run concurrently.

Aggrieved by the decision of the High Court, the appellants have now filed the appeal before the Court. For a reason which will shortly become apparent, we find no pressing need to present the factual scenario of the case nor present extensively the grounds of appeal before this Court. Suffice to say, the appellants filed in total 34 grounds of appeal emanating from their individual memoranda filed on the 7th of January 2019 by the 1st, 3rd, 4th, 5th and 6th appellants. A joint

supplementary memorandum of appeal for all six appellants that comprises five grounds of appeal was filed by their counsel on the 13th March 2020. The supplementary grounds were the grounds that the appellants' counsel relied upon and amplified at the hearing of the appeal. The essence of the supplementary grounds of appeal was **first,** that the prosecution failed to prove their case against the appellants to the standard required. **Second**, a challenge on legality and propriety on various admitted documentary evidence including confessional statements. **Third**, a query on the credibility and veracity of evidence of some prosecution witnesses and weight to be accorded and **fourth,** allegations that the appellants defence of *alibi* was not considered by the trial judge in convicting them.

When the appeal came up for hearing, Mr. Justinian Mushokorwa assisted by Mr. Simon Mwakolo learned Advocates entered appearance for all the appellants while Ms. Scholastica Lugongo learned Senior State Attorney assisted by Ms. Safi Kashindi Amani, learned State Attorney appeared and represented the respondent Republic.

At the outset, before venturing into the submissions in support and against the appeal, the learned Senior State Attorney sought and was granted leave to address the Court on procedural irregularities in the trial, allegedly discerned when preparing to appear for hearing. Ms.

Amani submitted that upon scrutiny of the proceedings in the trial court as found in the record of appeal, there was non-direction of assessors on vital points of law by the trial judge.

Amplifying on this contention, she stated that there are important matters which can be found in the judgment and were considered by the trial judge in convicting the appellants, which the assessors were not availed with. Such matters included the essence and import of circumstantial evidence, assessing the conduct of the accused persons before and after the alleged incident and its import to the case. That, in the judgment there was also discussed and considered the principle of the last person to be seen with the victim and the doctrine of recent possession, matters which were considered by the trial judge in determining the guilty or innocence of accused persons but not availed to assessors.

The learned State Attorney further stated that as specified by the law, trials in the High Court must be aided by assessors and thus a trial judge is expected to ensure that the assessors are well versed in essential points of law pertinent to the case. She argued that the omission to properly direct the assessors as alluded to above, renders the trial defective, and is akin to a trial conducted without assessors. To cement this stance, she cited the position of this Court illustrated in **Kato**

Simon and Vicent Clement vs Republic, Criminal Appeal No. 180 of 2017 (unreported), where the Court considered the holding in **Mbalushimana Jean-Marie Vianney vs Republic,** Criminal Appeal No. 102 of 2016 (unreported) which quoted with approval the decision of the erstwhile East African Court of Appeal in **Washington Odindo vs Republic** [1954] 21 EACA, emphasizing the importance of pointing out salient points of law to assessors because failure to do so undercuts their opinions.

The learned State Attorney contended further that, in **Kato Simon and Vicent Clement vs Republic** (supra) the Court, where the circumstances of the case are in effect analogous to the present case in terms of non-direction to assessors on essential matters to the case, reiterated the importance of informing assessors on vital points of law and that where this is not done is the same as conducting a trial which is not aided by assessors.

The learned State Attorney thus urged the Court to find as submitted, that there was failure on the part of the trial judge to expound salient points in the summing up to assessors. That the Court be inspired by the restated positions of the Court in the decisions referred and apply the stated stance to the present case. That, in the

end find that the irregularity presented vitiates the presence of the assessors in light of the provisions of section 265 of the CPA.

She also implored the Court to take into account the contents of the opinion of the assessors in the present case, where they stated that what influenced them to arrive at the conclusion that the appellants were guilty, after deliberating on the evidence, was the fact that the appellants conspired. The opinion of assessors when analysed, shows no other pertinent matters were considered as should have been expected if they had been well informed. She thus prayed that having regard to what she called fundamental procedural irregularities, the Court exercises its revisional powers under section 4(2) of the AJA, quash the proceedings, judgment and conviction, set aside the sentences against the appellants and order a retrial.

The above prayer by the learned State Attorney was given impetus by the decision of the Court in **Athanas Julius vs Republic**, Criminal Appeal No. 498 of 2015. In this case, faced with a similar scenario, the Court ordered that where a trial is illegal or engrained with irregularities the way forward is for an order of retrial.

The learned State Attorney contended further that an order for retrial will not pave way for the respondent Republic to fill in gaps in the

prosecution case, because the evidence against the appellants presented in the trial court was overwhelming. She stated that the 1st, 3rd and 5th appellants were apprehended when they were looking for buyers for the arm allegedly chopped off from Mwigulu Mwatonongo (the victim) and that the 4th appellant was found with the alleged bone of the said arm. That DNA profiling revealed that the said bone seized from the 4th appellant came from the victim and that for the 2nd and 6th appellants evidence against them emanates from admitted confessional statements. She further submitted that regard should be had to the fact that the Extrajudicial statement of the 3rd appellant (Exhibit P4), caution statement of 4th appellant (Exhibit P6), cautioned statement of 2nd appellant (Exhibit P7) and cautioned statement of the 1st appellant (Exhibit P8) were admitted without any objections. At the same time, having conceded to some procedural irregularities discerned in the prosecution evidence, she reversed her earlier stand on the appeal, and stated that the said anomalies should benefit the appellants, and left it to the Court to decide the best way forward, while also acknowledging the gravity of the offence the appellants were charged and convicted with.

For the appellants, Mr. Mwakolo learned Advocate, supported the submissions as presented by the learned State Attorney on the irregularity discerned that arose from non-direction on vital points of law

to the assessors by the trial judge. He argued that although the trial against the appellants related to charges of conspiracy to murder and attempted murder, nowhere in the summing up where it can be gorged that the trial judge directed the assessors on the essential ingredients of these offences. He argued that upon examining the opinion of assessors, who stated that the charges have been proved to the standard required, one wonders how this can be, when the ingredients of the offences charged against the appellants were not availed to them by the trial judge in the summing up. He also subscribed to the learned State Attorney's position with regard to the available remedy, to the extent that the proceedings of the trial court and the judgment be nullified, conviction be quashed and sentence set aside, by way of the Court exercising its revisional powers as sanctioned by section 4(2) of AJA.

Despite his position as stated above, he differed with the learned State Attorney on the consequences thereto, and stated that if the Court was to proceed as prayed, then this should lead to the appellants being set free and not to go through a retrial. His argument being that a retrial will open doors for the prosecution to fill in the gaps in their case, and contended that the evidence available against the appellants is weak and cannot sustain a conviction against the appellants. The learned counsel argued that they have discerned some incongruities occasioned by the

trial court related to admissibility of some documents, including some confessional statements. That, these documents which are wanting, in view of the flaws in their admissibility deserve to be disregarded or expunged, and if this happens, it means that the remaining evidence against the appellants will not suffice to prove the charges against appellants. He thus prayed that the appeal be allowed.

In rejoinder, the learned State Attorney changed her mind again, and argued that on further reflection, notwithstanding some of identified procedural irregularities in the prosecution evidence that might dent the prosecution evidence and flaw the trial, but having regard to what pertains in the record of appeal, there is still ample evidence against the appellants, as found in the oral testimonies by prosecution witnesses to sustain conviction against the appellants, and thus the best option forward is a retrial.

After careful consideration of the submissions and examination of the record of appeal especially the summing up notes to assessors (pages 92-103) and the judgment of the trial court (pages 106-145), as it relates to the point of law raised and under scrutiny, that is, the alleged irregularities in the summing up to assessors by the trial judge. It is noteworthy that although it can be said that the trial judge sufficiently addressed the assessors on some of the salient facts of the case, there

were anomalies in addressing them on other important matters related to the case.

There are essential matters which though were considered by the trial judge in convicting the appellants, the assessors were not directed on. As argued by the learned counsel and State Attorney, the summing up to assessors did not explicate on the ingredients of the offences the appellants were charged with that is, conspiracy to murder and attempted murder contrary to section 215 and 211 (a) of the Penal Code, respectively. This was important and expected to be done to enable the assessors comprehend and conceptualize the essence and nature of the charges against the appellants. We are thus in congruence with the learned State Attorney and the learned counsel for the appellants that there are vital points of law pertinent to the case at hand that the trial judge did not direct the assessors during the summing up.

Again, it is apparent that although the trial judge relied on circumstantial evidence in conviction of the appellants, this was just stated in passing in the summing up to the assessors. There was nothing shared on the import of circumstantial evidence and when such evidence can be relied upon to convict an accused person, as shown when in the judgment (at page 123) he stated that:

"The circumstantial evidence relied on with facts from which an inference of guilt can be drawn has been proved by the prosecution beyond reasonable doubt through witnesses".

At page 125 of the record he continues stating:

"The court finds the circumstantial evidence relied by the prosecution, is justifiable to prove some of the accused persons (the 2nd, 4th, 5th, 6th, 7th, and 9th) guiltiness on the offence they are charged."

Another matter that we discerned is that, despite discussing in passing the defence of *alibi* relied by the appellants in the judgment of the trial court when considering whether or not the charges against the appellants were proved, there was nothing directed to the assessors on the said defence in the summing up. The trial judge also considered the import of confessional statements of the appellants in the judgment that is, caution statements and extrajudicial statements admitted as exhibits P3, P4, P5, P6, P7 and P8 as supporting the circumstantial evidence emanating from oral testimonies of prosecution witnesses but did not state anything in terms of what to consider in alleged confessional statements and factors to address when assessing the weight to be accorded to such statements, be they be repudiated or retracted, and where they have not been objected.

In the judgment the fact that the prosecution relied on expert evidence in terms of DNA profiling tendered in the trial court is evident, together with the value accorded to this evidence by the trial judge in conviction of the appellants and also on matters for consideration when considering expert opinion, there was nothing shared on this issue in the summing up to assessors. At the same time, while in the judgment, the trial judge considered the conduct of the appellants after the alleged incident took place (pages 126 and 127 of the record of appeal), the import of conduct of accused in determination of their guilt or innocence, this was not directed to the assessors in the summing up. In the judgment, the trial judge did consider the principle of the last person to be seen with the victim and also factors inferring malice aforethought in proving an offence, matters which were not shared with the assessors in the summing up. Although at the same time, one may also wonder whether the principle of a person to be last seen with deceased and imputing malice aforethought to prove the charges facing the appellants then, were applicable in the case, but this discussion is for another day.

A similar situation we face, was confronted by the Court in **DPP vs Ismail Shebe Islem and 2 Others**, Criminal Appeal No. 266 of 2016 (unreported), where it was gleaned from the summing up to assessors that the trial judge did not properly direct the assessors on vital points of

law involved in the trial. The Court held that non-direction on ingredients of offences charged has the effect of vitiating the entire trial. This was accentuated by the erstwhile Court of Appeal for Eastern Africa, **Washington Odindo vs Republic** (supra) stating:

> *"The opinion of assessors can be of great value and assistance to a 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 the assessors' opinion is correspondingly reduced."*

Yet again, in **Kato Simon and Vincent Clemence vs Republic**, (supra), the Court when considering a similar procedural irregularity on omission to address vital points of law to assessors in the summing up, concluded that this meant the assessors were not fully involved in assisting the court in the trial and thus made the trial and the final judgment and sentence a nullity.

Without doubt in the case before us, as mentioned above, salient points of law accentuated above were not directed to the assessors in the summing up. These points were crucial for final determination of the case, and would have not only provided pertinent information to the assessors to assist them to better understand the context and propriety

of the evidence, but also underscored the legal stance on issues enabling them to deliver informed opinions and well assist the court as envisaged by section 265 of the CPA.

In view of the omission to address the assessors on the salient points of law as discerned in this case, it is clear as argued by the learned counsel for both sides, that the learned trial judge did not comply with sections 265 and 298(1) of the CPA. Non-compliance with the stated provisions in effect meant that the trial was conducted without the assistance of the assessors. Consequently, what is on the table is that the trial, final judgment and sentence were vitiated and the trial rendered a nullity.

Proceeding to address the way forward, we were invited by the learned State Attorney and the learned counsel for the appellants to exercise the revisional dictate enshrined in Section 4(2) of AJA and nullify the trial proceedings, quash the conviction and set aside the sentence against all the appellants. For the learned State Attorney, she then prayed that thereafter, a retrial be ordered, arguing that there was ample evidence available for prosecution to prove the case against the appellants beyond reasonable doubt and that a retrial will not provide them with an opportunity to fill in any gaps in evidence.

On the part of the appellants, their counsel implored the Court to set free the appellants, arguing that an order for retrial will pave way for the respondent Republic to regroup and fill in the gaps in the case. He argued that there are other pertinent procedural irregularities in the evidence that weaken the prosecution case. Matters such as improper admissibility of some documentary evidence, such as some confessional statements.

On the way forward after nullifying the proceedings, we have prudently considered what the counsel from both sides urged us to do. We are alive to the settled position on when a retrial will be the best way forward. The stand in **Fatehali Manji vs Republic** [1966] E.A 341, where the defunct East African Court of Appeal set a position on when a retrial should best be ordered, and the factors for consideration before ordering a retrial have been considered and adopted by this Court in a plethora of authorities. In **Selina Yambi and Others vs Republic**, Criminal Appeal No. 94 of 2013 it was observed:

> *"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 purposes 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 the present case, considering the gravity of the offence, the fact that the irregularities in the proceedings were to a large extent occasioned by the trial court, and the fact that although as mentioned by the learned counsel for the appellants and also to some extent conceded by the learned State Attorney, on other procedural irregularities in the prosecution evidence especially related to admissibility of some documents. We are of the view that there is enough oral evidence from prosecution witnesses and some confessional statements which reflects a strong case against the appellants without the prosecution resorting to filling any gaps in available evidence. We are thus settled that, an order for retrial under the circumstances, will serve the interests of justice in this case.

To that end, we hereby invoke our revisional powers under section 4(2) of AJA and nullify all the proceedings of the trial court from the start of the trial and judgment, quash the conviction and set aside the sentence imposed against the appellants, and order a retrial. The retrial should be expedited, before another judge and a new set of assessors. For avoidance of doubt the Preliminary Hearing already conducted on the

17th August, 2016 shall not be affected by this decision. The appellants should remain in custody to await retrial.

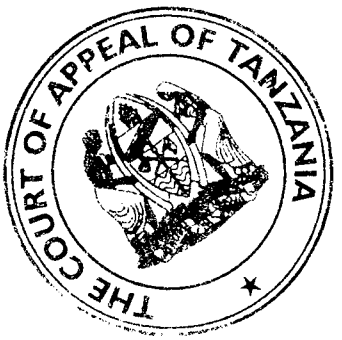
DATED at **MBEYA** this 31st day of March, 2020.

S.A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 1st day of April, 2020 in the presence of Mr. Justinian Mushokorwa and Mr. Simon Mwakolo, counsel for the Appellants and Ms. Rhoda Ngole, Senior State Attorney and Xaveria Makombe 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