IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 70. OF 2019

RESPICIUS PATRICK@ MTANZANGIRA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania, at Bukoba]
(Mlacha, J.)

dated the 6th day of March, 2019

in

Criminal Sessions Case No. 56 of 2018

RULING OF THE COURT

15th & 17th December, 2020

MWANDAMBO, J.A.:

The High Court sitting at Bukoba, tried and convicted Respicius Patrick@ Mtanzangira (the appellant), of the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. The information alleged that the appellant and Herieth D/o Gerald did, on 27th August, 2018 in the morning hours at Kibeta Primary School within Bukoba Municipality in Kagera Region murder one Sperius s/o Eradius. Both accused persons pleaded not guilty resulting in a trial in which a total of nine (9) witnesses for the prosecution and three for the defence testified

in addition, the prosecution tendered in evidence documentary exhibits and objects including two post mortem reports and sticks.

In terms of section 265 of the Criminal Procedure Act, [Cap. 20 R.E 2019] (the CPA), the trial Judge sat with three assessors who, after the summing up, handed their opinions returning a verdict of guilty against the appellant. The assessors had different opinion in respect of Herieth d/o Gerald, the second accused, in that the majority returned a verdict of guilty whilst Felician Kanyoro, the minority, returned a verdict of not guilty.

At the end of it all, the trial Judge found sufficient evidence to warrant a finding of guilty against the appellant thereby concurring with the unanimous opinions of the assessors. However, the learned trial Judge did not agree with the majority opinion of the assessors in relation to the second accused. Instead, he agreed with the minority and held that the prosecution did not adduce sufficient evidence proving the case against her on the required standard. Ultimately, the trial court entered conviction against the appellant and sentenced him to the mandatory death sentence whilst acquitting the second accused.

Not amused, the appellant preferred this appeal before the Court against both conviction and sentence. For reasons which shall become apparent later, we shall not address the grounds of appeal in this

judgment. For now, we find it compelling to state the salient facts of the case resulting into this appeal.

The appellant and the second accused were both teachers at Kibeta Primary School within Bukoba Municipality. Over and above teaching Mathematics and Science subjects, the appellant was a School Discipline Master appointed by the Head Teacher of the School. Sperius Edward (the deceased) was a standard V student at the School. On 27th August, 2018, the appellant reported at the school at about 06.45 a.m. whilst the second accused reported half an hour later. It turned out that upon arrival at the school, the second accused was received by some students who helped out with her baggage including a wallet. However, moments later, she discovered that her wallet was missing. Her efforts to trace it amongst students did not succeed. Further enquiry resulted into a disclosure by some of the students that it was the deceased who had taken the wallet from the female teacher. Later on, the second accused reported the deceased to the appellant; the School Discipline Master.

Upon interrogation by the appellant, the deceased denied involvement in the theft of the wallet. He maintained that stance even after the infliction of corporal punishment by the appellant involving 3 strokes. From that moment the appellant is alleged to have applied

excessive force against the deceased entailing beatings in several parts of the deceased's body in a bid to extract confession from him within and outside the school compound taking several hours until when the deceased's mother (PW2) who had been tipped of her son's condition found the deceased at Radio Vision severely beaten lying on the ground whilst the appellant standing by his side was holding a stick in his hands. It was not disputed that PW2 found the appellant with the deceased and that PW2 took her child to the Regional hospital where he was put on oxygen and later on pronounced dead. Later in the day, the appellant and the second accused were arrested by the police in connection with the deceased's death.

Initially, Dr. Felix Otieno (DW3) from the Regional Hospital examined the deceased's body and posted his findings in a post mortem report (exhibit D4) but by reason of doubts expressed against the findings, Dr. Kahima Jackson (PW5) a pathologist from Bugando Referral Hospital was requested to examine the body again. His findings posted in a Post-mortem Report (exhibit P1) revealed that the cause of the deceased's death was Neurogenic shock due to a blunt object.

Whilst admitting that he applied three strokes to the deceased for his late coming at school not connected to the theft of the second accused's

wallet, the appellant denied the allegations that he beat the deceased and caused injuries resulting into his death. He denied having used a bamboo stick, piece of wood against the deceased or at all.

As indicated earlier, the trial court found overwhelming evidence against the appellant resulting into his conviction and sentence whilst acquitting the second accused. Apparently, the prosecution found no reason to challenge the second accused's acquittal on appeal.

The appellant faults the decision of the trial court largely for convicting him on the evidence which did not prove the case against him beyond reasonable doubt. Although the appeal will not be determined on the grounds of appeal, we shall nevertheless narrate a few of such grounds featuring in the supplementary memorandum of appeal to appreciate the route we have taken.

Ground one in the supplementary memorandum of appeal criticises the trial Judge for being influenced by the public grudges and inferred malice against the appellant as a basis for his conviction. On the other hand, in ground 2, the trial High Court is faulted for applying double standards and bias acquitting the second accused. All the same, as hinted earlier, the determination of this appeal turns on a different issue other than the grounds preferred by the appellant.

At the hearing of the appeal, we invited counsel for both the appellant and respondent Republic to address us on the propriety of the trial Judge's summing up notes to the lay assessors appearing at pages 182 to 207 of the record of appeal.

Mr. Remidius Mbekomize learned advocate who teamed up with Ms. Aneth Lwiza also learned advocate pointed out three shortcomings in the summing up notes. One, failure by the trial Judge to address the lay assessors on the evidence of PW3 and PW5; two, non-direction on the ingredients of the offence facing the accused; and, failure to explain to the lay assessors what it meant by common intention in relation to the offence. According to the learned advocate, such failure was fatal thereby vitiating the entire trial, conviction and sentence. In elaboration, the learned advocate argued that the failure amounted to the trial being conducted without the aid of the assessors contrary to the dictates of section 265 of the CPA.

Going forward, the learned advocate invited the Court to nullify the proceedings, quash conviction and set aside the sentence and order a retrial in accordance with the law.

Mr. Ngole, learned Principal State Attorney who joined forces with Mr. Juma Mahona, learned State Attorney for the respondent Republic was

in agreement that the summing up notes were deficient except on the vital points of law which he argued that the trial Judge addressed them albeit briefly which to him was adequate. All the same, Mr. Ngole was in agreement that under the circumstances, a retrial was inevitable, for the shortcomings in the summing up notes militate against the spirit of section 265 of the CPA requiring trials before the High Court to be conducted with the aid of assessors. He thus invited the Court to exercise its revisional power under section 4(2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019] (the AJA) by nullifying the trial proceedings and quashing the resultant conviction resulting into setting aside the sentence. Like the appellant's learned advocate, Mr. Ngole invited the Court to make an order for a retrial before a different Judge.

It is common ground that largely, the learned counsel are agreeable with regard to the shortcomings in the trial Judge's summing up notes to the assessors. Both counsel agree that the shortcomings are fatal to the trial, attracting a retrial. With respect we agree with them.

The essence of proper summing up to the assessors has been underscored by the Court in many of its previous decisions. A few will suffice to illustrate the point. In **John Mlay v. R**, Criminal Appeal No. 216 of 2007 (unreported) for instance, the Court underscored the purpose of

summing up being to enable the assessors to arrive at correct opinions. As to what constitutes a proper summing up, whilst acknowledging that summing up is a matter of personal style, it stressed that a proper summing up, detailed or otherwise, must contain all essential elements in a case, that is; all ingredients of the offence, burden of proof and the duty of the prosecution to prove its case beyond reasonable doubt, elaboration on the cause of death, malice afore thought and main issues in the case such as credibility of witnesses. Regarding the effect of a deficient summing up, in **Said Mshangama@ Senga v. R.,** Criminal Appeal No. 8 of 2014 (unreported), the Court held that inadequate summing up, non-direction or misdirection on vital points of law to assessors is tantamount to a trial without the aid of assessors rendering the trial a nullity. See also: **Halfan Ismail@ Mtepela v. R,** Criminal Appeal No. 38 of 2019 and **Khamis Rashad Shaaban v. D.P.P**, Criminal Appeal No. 284 of 2013 (both unreported). So much for the law.

Despite the concurrence on the counsel's views, was the summing up in this appeal deficient? Inevitably, the answer to the question can only be derived after examining the summing up notes appearing at pages 182 to 207 of the record of appeal.

Firstly, we agree with the learned Principal State Attorney and Mr. Mbekomize that the gist of the evidence of PW3 and PW5 is conspicuously missing in the summing up notes. Secondly, apart from the detailed summing up notes, we are unable to see the trial Judge addressing the lay assessors whom he referred to them at the beginning as judges of facts, vital points explaining to them the essential ingredients of murder. Thirdly, although there was reference to common intention at page 203 of the record of appeal, the learned trial Judge did not go further and explain what it meant by common intention relevant to the case involving two accused persons.

The upshot of the foregoing is that the assessors were not properly addressed for them to correctly give their opinions in the case. In other words, they were deprived of their right to express their opinions as required of them under section 298 (1) of the CPA. As rightly observed by both counsel, the trial cannot be said to have been conducted with the aid of assessors as mandated by section 265 of the CPA. The effect of it was to render the trial and the resultant conviction a nullity so was the sentence meted out to the appellant.

Under the circumstances, we are compelled to exercise our revisional powers vested on us by section 4 (2) of the AJA to nullify the proceedings

from the stage of the commencement of hearing and quash the judgment and conviction that followed and set aside the sentence meted out to the appellant. Going forward, we direct a retrial of the case against the appellant as early as possible by a different Judge and a panel of assessors in accordance with the law. For avoidance of doubts, the order for retrial will not involve Herieth Gerald. The appellant shall remain in custody awaiting his retrial.

It is so ordered.

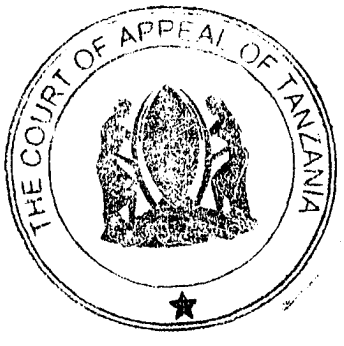
DATED at **BUKOBA** this 17th day of December, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered this 17th day of December, 2020 in the presence of the appellant in person and Mr. Juma Mahona, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL