IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MKUYE, J.A., AND WAMBALI, J.A.)

CRIMINAL APPEAL NO. 212 OF 2017

ESTER LEONARD MCHAPE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Masengi, J.)

dated the 13th day of April, 2011
in
HC. Criminal Session Case No. 37 of 2010

.....

JUDGMENT OF THE COURT

27th April, & 7th May, 2020

MMILLA, J.A.:

In this appeal, Ester d/o Leonard Mchape (the appellant), is appealing against the judgment of the High Court of Tanzania at Dar es Salaam in Criminal Session Case No. 37 of 2010. In that case, she was charged with and convicted of the offence of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002. It was alleged that on 22.5.2008 at Kitonga Street in Upanga area in Dar es Salaam

Region, she murdered one Rainda D'Costa Carvalho (the deceased). Upon conviction, she was sentenced to suffer death by hanging. She was aggrieved by the conviction, hence the present appeal to the Court.

The facts of the case were not complicated. As at 22.05.2008 when the charged incident occurred, the appellant was an employee of the deceased's family at Upanga area in her capacity as a house maid. During that time the deceased was living with her daughter who was identified by the single name of Rita. While her daughter would normally go for her regular daily activities in town, the deceased was always at home with their house maid whom they knew by the name of Maria. On the day of the incident, the said Maria reported on duty at 7.30 a.m., but allegedly left the place around 8:00 a.m. about which time, it was said, the deceased was killed.

When the information about Rainda D'Costa Carvalho's death reached the police in the morning on 22.05.2008, WP. 2265 D/C Mgeni (PW1) was amongst the police officers who, in the company of No. F. 8042 D/C Hassan (PW3) visited the scene of crime. On arrival at the scene of crime, she and her colleague found the lifeless body of the said Rainda

D'Costa Carvalho, an elderly woman of an Asian origin, tied on the bed. There was no any person in the house, not even the family's house maid. After inspecting the surroundings and checking the deceased's body, they took it to Muhimbili Hospital for medical examination and preservation.

Later on, PW1 and his partner met and interrogated the deceased's daughter who informed them that the missing house maid, Maria, was brought to them by one Sheikh Diwani (PW5). They set forth to, and successfully traced PW5. The said Sheikh Diwani took them to Maria's sister's house at Kitunda area, but they missed them. They were told that the suspect and her sister left for Morogoro. They asked the hamlet chairman of that area one Francis Alphonce Lupembe (PW6) to inform them on their return.

On 24.05.2008, PW6 informed PW1 that the suspect's sister one Gertrude Leonard (PW4), was back from Morogoro. On arrival at PW4's home, they found her and were informed that the suspect was at Kolelo village in Matombo Ward in Morogoro and agreed to lead them to that location. At that point, they learnt that the suspect's real name was Ester

Leonard Mchape and not Maria. They organized themselves and left for Matombo the same day. Fortunately, they found the suspect.

The first thing they did was to conduct a search in the appellant's mother's house in which she had settled. They called one John Francis (PW2), the Village Executive Officer of Kolelo village to witness the search. Armed with a search order they had prepared (exhibit P6), they searched that house and recovered under the mattress Tzs. 130,000/=, and other currencies pertaining to Canada, Australia, Brazil and United States of America. They arrested and took her back to Central Police at Dar es Salaam at which PW1 interrogated her and recorded her cautioned statement (exhibit P5). Eventually, the appellant was charged with murder as it were.

The appellant's defence was very brief. While she admitted having been employed by the deceased's family as a house maid; also that she reported on duty at her employer's house on the morning of 22.5.2008; she rebutted the allegations that she killed Rainda D'Costa Carvalho. She contended that at 8:00 hrs on that day, her employer fired her, which was only after she had worked there for nine (9) days. She said she had no

better option but to leave the place as instructed, but left the deceased alive and alone at her home. The appellant stated similarly that the police searched her mother's house in which she was at Kolelo village and recovered the alleged things. She contended however, that although she signed the search order, she did not know the owner of the money which was recovered in that house. She insisted she was innocent.

As earlier on pointed out however, the trial High Court found that the prosecution had proved the case against the appellant beyond reasonable doubt. It convicted and sentenced her to suffer death by hanging. Unhappy with that decision, she preferred the present appeal.

On the date of hearing this appeal, the appellant was not physically present in Court but proceedings were conducted by way of video conference. Better still, she was represented by Mr. Clement Kihoko, learned advocate. On the other hand, Ms Jennifer Masue, learned Senior State Attorney and Mr. Yusuf Abood, learned State Attorney, represented the respondent/Republic.

The appeal proceeded on the basis of the memorandum of appeal which was prepared by the appellant in person. It raised eight (8) grounds

which in essence crystalize into only three of them as follows: **one** that the case against her was not proved beyond all reasonable doubt; **two** that, the circumstantial evidence which was largely relied upon by the trial court was not strong enough to anchor her conviction; and **three** that, some of the exhibits, particularly the post mortem report, the list of currencies of different countries in the world contained in the certificate of seizure, and the sketch map of the scene of crime were improperly admitted and relied upon.

Mr. Kihoko dutifully submitted on all matters captured in the three grounds formulated above. Upon Court's probing however, he likewise addressed us on the sufficiency or otherwise of the summing up to assessors. He was positive that the summing up was deficient. Ms Masue did the same, and shared her learned brother's view that the summing up to assessors was wanting.

After considering that if the query that the summing up to assessors was inadequate is upheld may be sufficient to entirely dispose of the appeal; we feel that it is proper to address it first and abstain from giving

details of the counsel's respective submissions on the grounds of appeal at this stage.

Mr. Kihoko's strong point in saying that the trial judge's summing up to assessors was inadequate is that she did not explain to them vital legal principles supposed to be taken into consideration when considering reliability on circumstantial evidence, the evidence constituted in a cautioned statement, and the substance and conditions for reliability on the doctrine of recent possession. Mr. Kihoko contended that the omission to explain those aspects constituted failure to assist the assessors who set with her to properly play their role, hence that the proceedings before that court were vitiated. He urged us to invoke the powers obtaining under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA), on the basis of which we may quash those proceedings, judgment and conviction and set aside the sentence of death by hanging which was imposed. As to the way forward, he implored the Court to order a retrial.

Ms Masue was in full agreement with her learned brother that indeed, the trial judge's summing up to assessors was wanting because

she did not at all direct them on certain salient legal points. Like Mr. Kihoko, she focused on the trial judge's failure to direct them on the legal principles supposed to be taken into consideration when considering reliability on circumstantial evidence, the evidence constituted in a cautioned statement, and lastly the substance and conditions for reliability of the doctrine of recent possession. She urged the Court to cloth itself with powers under section 4 (2) of the AJA and quash those proceedings, judgment as well as conviction, and set aside the sentence of death by hanging which was imposed.

Although Ms Masue had at first suggested that a retrial would be inappropriate in the circumstances of this case because the evidence was weak; she nevertheless changed her stand at a later stage and agreed with Mr. Kihoko that in the interests of justice it is most appropriate to order a retrial.

It is apparent that under section 265 of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA), all trials before the High Court must be with the aid of assessors the number of whom shall be two or more as the court thinks fit. As envisaged under section 298 of that

same Act, when the case on both sides is closed, the judge is required to sum up the evidence for the prosecution and the defence and require the assessors to orally state their respective opinions as to the case generally and as to any specific question of fact addressed to them by the judge, and record the opinion.

As we said in **Omari Khalfan v. Republic**, Criminal Appeal No.107 of 2015 (unreported); trial "*with the aid of assessors*" under section 265 of the CPA entails requiring the trial High Court Judge to give the assessors adequate opportunities to put across questions to witnesses and after the close of evidence from the prosecution and defence, to sum up and to obtain the opinion of the assessors. In the said case of **Omari Khalfan** (supra), the Court emphasized that by summing up to them the evidence on record prior to receiving their respective opinion, the trial judge assists them to understand the facts in in relation to the law applicable. In that case, we relied on our previous case of **Augustino Lodaru v. Republic**, Criminal Appeal No. 70 of 2010 (unreported) in which quoting the decision in **Washington s/o Odindo v. R.** [1954] 21 EACA 392, it was stressed that:-

> *"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 sufficient facts of the case the value of the assessors' opinion*** *is correspondingly reduced. "*
> [Emphasis added]

A similar emphasis was made by the Court in **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (unreported) in which it was expounded that:-

> *"There is a long and unbroken chain of decisions of the Court which all underscore the duty imposed on trial High Court judges who sit with the aid of assessors, to sum up adequately to those assessors on* ***"all vital points of*** *law". There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments. "*[Emphasis added]

It is beyond certainty that the appellant's conviction in the present case was partly based on circumstantial evidence, also on the evidence

constituted in the cautioned statement (exhibit P5), as well as on the doctrine of recent possession, the focus of which was on the list of currencies of different countries in the world contained in the certificate of seizure (exhibit P6). Unfortunately, as correctly submitted by both Mr. Kihoko and Ms Masue, the trial judge did not make any attempts to explain to the assessors the nature, applicability and reliability on the said evidence and the vital legal principles relating to that kind of evidence. As such, it becomes obvious that the value of their respective opinions was correspondingly reduced. In such circumstances, it cannot be said that the trial was with the aid of assessors as contemplated by section 265 of the CPA. We are firm therefore that such omission vitiated the entire proceedings.

In view of what we have just said, we agree with the learned counsel for both sides that we should intervene by invocation of the powers we have under section 4 (2) of the AJA on the basis of which we quash the proceedings, judgment and conviction of the High Court and set aside the sentence of death by hanging it imposed. In its stead, we order an expedited retrial before another judge with a new set of assessors.

Meanwhile, the appellant shall continue to be in remand custody to await the said retrial.

DATED at **DAR ES SALAAM** this 5th day of May, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of May, 2020 in the presence of Mr. Clement Kihoko counsel for the Appellant and Mr. Gabriel Kamugisha, Principal Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL