IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 357 OF 2017

MOHAMED JABIR ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Aboud, J.)

dated the 22nd day of June, 2012
in
HC. Criminal Session Case No. 71 of 2010

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JUDGMENT OF THE COURT

12th & 22nd May, 2020

MMILLA, J.A.:

In July, 2009, Anna d/o Semgabe and Festo s/o Nyang'olo (the first and second deceased persons respectively), were found by their local area pastor to have died in their house at Mbaraje village in Mang'ula Ward, in the District of Kilombero in the Region of Morogoro. There was no doubt that their deaths were unnatural. Upon news of their deaths reaching the police, they carried out investigation which led to the arrest of three persons; Said s/o Mlipuka, Selemani s/o Livimba and Mohamed Jabir (the

appellant). The trios were charged with the offence of murder contrary to section 196 of the Penal Code Cap. 16 of the Revised Edition, 2002 (the Code). At a later stage however, charges were dropped against Said s/o Mlipuka and Selemani s/o Livimba, and the case proceeded against the appellant alone. After a full trial in the High Court of Tanzania sitting at Morogoro, he was found guilty, convicted and sentenced to suffer death by hanging. He was aggrieved by that decision, hence the present appeal to the Court.

The deceased persons, Anna d/o Semgabe and her son Festo s/o Nyang'olo, were living at Mbaraje village in Mang'ula Ward. Also living in the same locality was one Erasto Nyangwa (PW1) who was the pastor at Hybeneza Bosco Church, situated at Signali at Mbarale area, the church at which the deceased persons were attending for payers.

On 10.7.2009, PW1 decided to visit his church followers. He began at the home of the deceased persons because they had not attended church on the previous Sunday and Wednesday which he considered to have been unusual. On arrival at the compound of their house, he found the place very quiet. He called out thrice to alert the hosts that he was coming, but there was no reply. He went around the house and stood at the window

and peeped in the bedroom. He was shocked to find Festo Nyang'olo lying on bed face down. He seemed dead. Upon that, he rushed to the home of the Chairman of that Ward one Ludiria Ngalapa. Luckily, he found him and informed him about what he found at the said house. The said Ludiria Ngalapa and PW1 went together to that house. After confirming the information given to him by PW1, he wrote a letter and instructed the pastor to send it to the Village Executive Officer. The latter called the police who promptly arrived thereat.

At the scene of crime, the police forced open the door of that house and found that there were two dead bodies therein. PW1 had contacted the victims' relatives, but they delayed to arrive. On the instructions of the police, PW1 provided them with the particulars of the victims, after which both dead persons were taken to hospital for medical examination.

After releasing the dead bodies to the relatives for burial, the police initiated investigation. Amongst the investigators of that case was No. D. 7236 DC Patrick (PW3) who, upon receiving a tip that there was a person who went at the home of the deceased persons with a tractor to collect maize, he tracked and arrested the driver of the said tractor. After his arrest, the driver of that tractor one Selemani Mwakilachile (PW4),

admitted that he collected maize at that house on the night of 5.7.2009. He disclosed that he was hired by one person known as Mohamed Jabir (the appellant). They pursued the said Mohamed Jabir and succeeded to arrest him. It was through him that the other two persons; Said s/o Mlipuka and Selemani s/o Livimba were arrested, after which they were jointly charged with murder as it were.

As earlier on pointed out however, the charges were later on dropped against Said s/o Mlipuka and Selemani s/o Livimba wherefore, trial proceeded against the appellant alone. At the end, despite protestation of his innocence, he was found guilty, convicted and sentenced to suffer death by hanging, hence the present appeal to the Court.

On 15.11.2017, the appellant filed in person a four (4) point memorandum of appeal. That was supplemented by a second one he filed on 6.12.2019 which raised seventeen (17) grounds; bringing the total to twenty one (21) grounds. Those grounds touched on various areas, including matters of procedure during admission of exhibits, complaints about witnesses who were not supposed to have been allowed to testify, and of course sufficiency of evidence.

On the day of the hearing of this appeal, the appellant was not physically present in Court, but proceedings proceeded by way of video conference. Luckily also, he was represented by Mr. Nehemia Nkoko, learned advocate; whereas Ms Clara Charwe, learned State Attorney, represented the respondent/Republic. Besides addressing us on the points raised in the memorandum of appeal as already intimated, they similarly addressed us on the question of sufficiency or otherwise of the judge's summing up to assessors which arose from the Court's probing.

In his submission, Mr. Nkoko tackled first the aspect concerning the trial court's error of having had received the testimony of witnesses who were in law not supposed to have been allowed to testify on account that they were not listed during committal proceedings, also that their statements were not read out as contemplated by section 246 (2) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA). His focus on this point was on the evidence of Awami Issa Magwila (PW2) who was the District Medical Officer, and the one who conducted the post mortem examination regarding the bodies of the deceased persons; Ast/Insp. Frank Wilson (PW5) who was the Office Commanding Station (OCS) of Ifakara Police Station, and Leonard Yohana Makongo (PW7). He clarified that upon the urge to call those witnesses, the prosecution ought

to have firstly complied with the demands of section 289 (1) of the CPA, which they did not. He thus prayed for the evidence of those witnesses, along with the exhibits they tendered, to be expunged from the record.

Mr. Nkoko similarly attacked the trial court for its failure to follow the procedure at the time of admitting the evidence constituted in the cautioned statement (exhibit P4) attributed to the appellant. He elaborated that upon an objection which was raised by the defence when the prosecution sought to tender that document as evidence in court, the learned trial judge ought to have stopped there and directed the holding of a trial within trial. He contended therefore that, exhibit P4 was invalid evidence for having not been properly admitted and sought for its expulsion.

Mr. Nkoko complained likewise that after its improper admission, the cautioned statement suffered yet another equally fatal defect in that it was not read out in court. This defect, he said, affected as well the identification parade register (exhibit P2). He stressed that failure to read those documents in court after their admission made them invalid evidence, and urged the Court to expunge them from the record.

On the issue of adequacy or otherwise of the trial judge's summing up to assessors, Mr. Nkoko was resolute that it was wanting because the judge did not explain to the assessors certain vital points of law involved in the case, so also the facts thereof. He pointed out that to a large extent, the prosecution case depended on circumstantial evidence, and that although the appellant's conviction was anchored on that aspect, the learned trial judge did not explain to the assessors the nature and applicability of such evidence. Also, Mr. Nkoko went on to submit, the learned trial judge did not explain to them the circumstances under which a killing may be said to be murder. The skip to explain to them the requirement of the existence of malice aforethought for any unlawful killing to be considered murder sealed the deficiency. In the premises, Mr. Nkoko was of the view that because of that fatal omission, the proceedings, and thence the conviction, were tainted entitling the Court to cloth itself with powers under section 4 (2) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 (the AJA) and quash them, together with the judgment and conviction and set aside the sentence.

While conceding that the way forward would have been normally to order a retrial, Mr. Nkoko requested the Court to abstain from doing so in the circumstances of the present case because should it expunge the

evidence of PW2, PW5 and PW7, along with the exhibits P2 and P4, there would be no other evidence on record to sustain conviction. He added that to order a retrial would give chance to the prosecution to fill the gaps. He cited to us the case of **Marius s/o Simwanza v. The Director of Public Prosecutions**, Criminal Case No. 389 of 2017, in which upon quashing the proceedings, judgment and conviction, the Court set aside the sentence and released the appellant. He urged us to do the same and release the appellant from prison.

On her part, Ms Charwe hastily signified that she was supporting the appeal on similar reasons advanced by her learned brother Mr. Nkoko. In the first place, she contended that the evidence of PW2, PW5 and PW7 was improperly received by the trial court because the names of those witnesses were not listed during committal proceedings, nor were their statements read out in the course as provided under section 246 (2) of the CPA. She added that upon realizing that there was need for those witnesses to testify, the prosecution ought to have followed the procedure covered under section 289 (1) of the CPA. In view of that snag, she prayed the Court to expunge from the record the evidence of those witnesses, as well as the exhibits they tendered.

As regards the question of exhibits, Ms Charwe contended in the first place that the cautioned statement was not procedurally admitted because upon an objection which was raised by the defence side in that regard, the trial court ought to have dealt with that objection first instead of continuing with trial as it did. She expounded that it ought to have conducted a trial within trial to determine its voluntariness. She urged the Court to expunge it from the record.

Besides having been wrongly admitted, Ms Charwe submitted similarly that exhibit P4 suffered yet another setback in that it was not read out in court. To follow suit, she added, was the identification parade register (exhibit P2) which was likewise not read out in court. Ms Charwe stated therefore that they were invalid evidence, therefore entitling the Court to expunge them from the record.

On the issue whether or not the judge's summing up to the assessors was adequate, like her learned brother Mr. Nkoko, Ms Charwe held the view that it was deficient because the judge did not explain to them some vital points of law, so also the facts of the case. She pointed out that it was crucial for the learned trial judge to explain to the assessors the nature and applicability of circumstantial evidence, and the requirement of

establishment of the existence of malice aforethought before one may be held to have committed murder. She concluded that failure to address those aspects vitiated the proceedings, judgment and conviction, the remedy of which is to resort to the powers of the Court under section 4 (2) of the AJA and quash those proceedings, judgment and conviction, and set aside the sentence which was meted out against the appellant. Like Mr. Nkoko, Ms Charwe asked the Court to decline ordering a retrial on the ground that to do so may give the prosecution opportunity to fill the gaps, including the use of the witnesses and the exhibits which improperly found their way into the record. She therefore urged the Court to release the appellant.

After carefully considering the able arguments of counsel for the parties, we have found it imperative to begin with the question of the judge's summing up to assessors because, if it may be found that it was improperly done; the defect has devastating effects in that it vitiates the proceedings and every other thing that followed.

As we are aware, the law requires all trials before the High Court to be with the aid of assessors, the number of which shall be two or more as the court thinks fit. That is the dictate of section 265 of the CPA. In terms

of section 298 of that same Act, at the closure of the case on both sides, 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.

In a range of cases, the Court has repeatedly insisted that in order for the opinion of the assessors to be of great value and assistance, the trial judge must strive to make them understand the case by not only affording them opportunity to ask questions to the witnesses in the course of trial, but also adequately summing up to them before seeking the said opinions by clarifying to them the salient facts of the case as well as explaining to them important matters of law in the case – See the cases of **Omari Khalfan v. Republic**, Criminal Appeal No.107 of 2015, **Augustino Lodaru v. Republic**, Criminal Appeal No. 70 of 2010 and **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (all unreported). It was insisted in **Augustino Lodaru** (supra) that if the law is not explained and their attention is not drawn to the prominent facts of the case, the value of the assessors' opinion is correspondingly reduced. The position was best summarized in in **Masolwa Samwel** (supra) where we explicated 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].

There is no doubt that in the present case no one witnessed the commission of that monstrous crime. The prosecution case depended entirely on circumstantial evidence from the persons who in one way or the other had information about the people whose actions linked them to the scene of crime. Crucial here was the question of collection of maize from the house in which Anna d/o Semgabe and Festo s/o Nyang'olo were killed to a certain destination, and the kind of transport which was used. Those clues are part of the said circumstantial evidence. Regrettably however, the trial judge did not make any attempts to explain to the assessors the nature, applicability and reliability on evidence of this nature and the vital legal principles relating to that kind of evidence. Similarly, the trial judge did not explain to them the circumstances under which an unlawful killing

may be regarded as murder. The requirement for the trial court to satisfy itself of the existence of malice aforethought was completely skipped, hence reducing the value of assessors' opinion. *Prima facie*, the omission is against the spirit of section 265 of the CPA, and it vitiated the entire proceedings, therefore they cannot stand.

In view of what we have just said above, we resort to the powers bestowed in the Court under section 4 (2) of the AJA, on the basis of which we quash the said proceedings of the trial court, the judgment and conviction thereof, and set aside the sentence of death by hanging it imposed on the appellant.

The learned counsel for both sides have urged the Court to abstain from ordering a retrial on the ground that to do so may give the prosecution opportunity to fill the gaps, including the use of the witnesses and the exhibits which were improperly tendered. They urged us to release the appellant.

We have comprehensibly considered their concern. Much as their foundation may be thought to be appealing, we are nevertheless of a different view for reasons we are about to assign.

There is no doubt that in opining that we should abstain from ordering a retrial but instead release the appellant from prison, the learned counsel for both sides focused on the evidence of PW2, PW5 and PW7 as well as the fate of exhibits P2 and P4. While PW2 was the doctor who conducted the autopsy in respect of the deceased persons, PW5 was the police officer who supervised the identification parade, and PW7 was the Primary Court Magistrate who, in his capacity as a justice of the peace, recorded the extra judicial statement of the appellant. Astoundingly however, both Mr. Nkoko and Ms Charwe did not say anything regarding the evidence of the rest of the witnesses.

Of course we have also noted, and we think it is appropriate to point out in passing that even, the omissions in respect of matters being capitalized by the appellant regarding the way the evidence of PW2, PW5 and PW7 was received as well as how exhibit P4 found its way into the record, resulted because of an accidental slip on the part of the learned trial judge, therefore that we have the duty to put the matters in the proper perspective.

As may be recalled, PW1 was the person who arrived first at the scene of crime. He was an important witness because he provided the

background facts on how the deceased persons were discovered and what went on thereafter. There were also PW3 who was the investigator of the case and PW4, the driver of the tractor who was hired to transport the maize from the scene of crime to the milling machine at which they were sold. Lastly was the evidence of PW6, the owner of the milling machine at which the said maize was offloaded by PW4 and sold by the person who hired him. In our view, for purposes of making deserving justice to both sides in the case, that is the appellant and the victims, the evidence of the other prosecution witnesses deserve a chance to be considered by the trial court.

The Court's urge to dispense real or substantial justice in the case is rooted in the confidence the people have in the court. As will be recalled, we profoundly espoused this point in **Hatibu Gandhi and Others v. Republic** [1996] T.L.R.12 where we said that:-

> *"The question which arises in this case is whether in this country we should adopt the position as laid down by the Privy Council in **Wong's** ([1979] 1 All ER 939) case or follow the earlier position which prevailed a number of Commonwealth jurisdictions as illustrated by **Hammond's case** ([1941] 3 All ER318)? We think the position in Hammond's case*

is more appropriate to this country where ***criminal justice is required to be administered not as a game of football but as a serious business of acquitting the innocent and convicting the guilty in a reasonable and sensible manner according to law.*** *This Court has emphasized this approach in a recent case, that is, the case of* ***DPP v Peter Rowland Vogei*** *([1987] T.L.R. 4).*

We notice that the decision in ***Wong's*** *case is predicated upon the principle that an accused person ought not to be placed in a dilemma where he has to choose between his right to challenge the admissibility of evidence against him and his right to remain silent in his defence in the main trial.* ***We also notice, however, that the right of the public to see justice done by the Courts in a reasonable and sensible way according to law was not considered at all by the Privy Council in Wong's case.*** *We think that consideration of this right of the public to see justice done is quite fundamental, since invariably a trial within a trial takes place in public, and evidence given within such a trial is known to the public, notwithstanding the absence of the jury or assessors as the case may be.* ***Since the authority of the courts depends ultimately upon public confidence in***

> ***the courts, it is important that a proper balance be maintained between the rights of an accused person on the one hand and the rights of the public on the other.*** *" [Emphasis is added].*

See also the case of **Omary Abdallah @ Mbwangwa v. Republic,** Criminal Appeal No. 127 of 2017 (unreported) in which we relied and approved the position in the Kenyan case of **Obedi Kilonzo v. Republic** (2015) *(found at http:llwww.kenyalaw.org),* wherein the Court of Appeal of Kenya said, in a criminal justice system, the law requires that the right of the appellant must be weighed against the victim's right.

From the above, alive that it is the Court's duty to provide a fair trial in accordance with the law; and in order for the scales of justice to tip on a parlance of fairness and equality; we decline the request advanced by the learned counsel for the parties of releasing the appellant because of the nature and circumstances of the case which we would like to be considered. On equal strength, we find the case of **Marius s/o Simwanza** (supra) to be distinguishable to the present one because here, as repeatedly stated; the nature and circumstances of the case deserves a consideration. Consequently, 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.

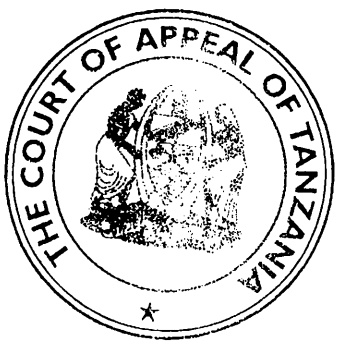
DATED at **DAR ES SALAAM** this 20th day of May, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May, 2020 in the presence of Mr. Nehemia Nkoko counsel for the Appellant and Ms Brenda Nicky, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL