THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 398 OF 2017

ALEXANDER STIMA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mambi, J.)

Dated 28th day of September, 2017
in
Criminal Sessions Case No. 52 of 2015

.....

JUDGMENT OF THE COURT

25th March & 3rd April, 2020.

KOROSSO, J.A.:

The appellant, Alexander Stima was charged before the High Court of Tanzania at Sumbawanga with the offence of murder contrary to section 196 of the Penal Code, Cap 16 Revised Edition 2002. The particulars of the offence reveal that on the 27th August, 2014 at Mbuluma village within Kalambo District in Rukwa Region did murder one Joseph Marekani. The appellant (the accused person then) denied the charge protesting his innocence before the trial court.

Upon conduct of a full trial where the prosecution produced ten witnesses and two exhibits, and it was only the appellant himself who testified in defence and no exhibits were tendered. At the end of trial the appellant was convicted of murder and sentenced to suffer death by hanging. Aggrieved, the appellant filed the current appeal.

To better appreciate the appeal before us, it is apposite to provide the background of this matter, albeit briefly. On the material date as stated in the charge, one Martin Lameck (PW1) a businessman accompanied by one of his staff, Joseph Marekani, a herdsman (now deceased) attended a cattle auction at Ntalamila village in Nkasi District. PW1 purchased twenty (20) herds of cattle and the same were handed to the deceased so as to herd them to Myunga village. The deceased, while enroute to the said village, was attacked allegedly by the appellant who had a machete and used it to slash Joseph Marekani and causing his death. The deceased body was then dragged about 15 meters and hidden in the bush. Nine of the cattle were taken from the herd of cattle which the deceased was herding, and leaving eleven cattle roaming around the scene. PW1 attempt to contact the deceased through the telephone got no response until the next day when he received a call from

Mbuluma village leaders Regius Bruno Constantino (PW4) and Ignas Kenga (PW5) that there was a dead body found and eleven cattle found wondering near Kalambo Ranch without a herdsman. The matter was reported to the police and PW1 went to the scene of crime and managed to identify the deceased to be his herdsman. The appellant was arrested on the 1st September 2014 being suspected of stealing cattle belonging to PW1.

The appellant filed a memorandum of appeal through his counsel with three grounds of grievances as hereunder stated:

1. *That the trial High Court Judge erred in law and facts by convicting and sentencing the appellant relying on the doctrine of recent possession which requirements were never met by the prosecution.*
2. *That the trial High Court Judge erred in law and facts by failing to resolve the contradiction and inconsistencies of the prosecution witnesses, which inconsistencies go to the root of the case.*
3. *That the trial High Court Judge erred in law and facts by convicting and sentencing the appellant while the*

prosecution failed to prove its case beyond all reasonable doubt.

At the hearing before us, the appellant was represented by Mr. Faraja Msuya, learned counsel whereas the respondent Republic had the services of Mr. Njoyolota Mwashubila learned Senior State Attorney.

The learned counsel for the appellant started by seeking leave which was granted, to address the Court on some procedural irregularities discerned from the record of the trial proceedings. He proceeded to inform the Court that the said irregularities can be found in the appointment and summing up to assessors in the trial proceedings. The learned counsel contended that the record of appeal does not reveal whether or not the trial judge accorded the appellant an opportunity to object before selection of assessors. He also submitted that there is nothing showing that the assessors were informed of their duties. On the above identified anomalies, the learned counsel stated that the position of the law is certain on this issue as found in the case of **Khamis Abdul Wahab Mahmoud vs The DPP**, Criminal Appeal No. 496 of 2017 (unreported), where this Court held that failing to accord an accused an opportunity to object or not on selection of assessors and not directing them on their duties is a fatal irregularity.

The other irregularity exposed was that the trial judge did not address the assessors on vital points of law, on matters the trial judge considered in convicting the appellant (at page 11). Contending that although the trial judge in the summing up to assessors addressed the assessors in passing on the burden of proof and the ingredients of the offence of murder, and only listed on matters for consideration such as relevance and consideration of circumstantial evidence and what is malice aforethought (at pages 41-43), the trial judge did not address the assessors on the doctrine of recent possession, the import and matters to consider in circumstantial evidence, matters for consideration when analysing the conduct of the accused before and after commission of the crime, all these being important matters which were addressed in the judgment which led to the conviction of the appellant for the offence charged.

The learned counsel thus submitted that the said anomalies which go to the substance of the trial, which are obvious on record, they should lead the Court to find the trial a nullity since such irregularities means there was contravention of section 265 and 285 of the Criminal Procedure Act Cap 20 Revised Edition 2002 (the CPA), which makes it mandatory for criminal trials in the High Court to be conducted with the aid of assessors. That failure to

properly inform the assessors on vital points of law pertinent for the case being tried, denies the assessors an opportunity to efficiently assist the trial judge. Upon nullification of the proceedings and judgment for reason of the highlighted irregularities, the learned counsel urged us to then proceed to quash the conviction and set aside the sentence imposed against the appellant.

The learned counsel further submitted that, though as a general rule, upon nullifying proceedings and judgment the case should be remitted back for retrial, the circumstances of this case should not lead the Court to order thus, since available prosecution evidence is insufficient to lead to the conviction of the appellant. He further argued that the doctrine of recent possession which was invoked by the trial court to convict the appellant was not met, because the requisite factors to invoke the doctrine were not fulfilled. He contended that the available evidence on record is very weak, since the evidence of the prosecution witnesses relied upon by the trial judge to convict the appellant was contradictory and engrained with inconsistencies and thus unreliable. Therefore, for the appellant's counsel an order for retrial will afford the respondent Republic an opportunity to polish their case, which is not the aim of the retrial and thus will prejudice the rights of the appellant.

On the part of the learned Senior State Attorney, he started by illustrating the alleged deficiencies in the proceedings as outlined by the learned counsel for the appellant. He then conceded the fact that the summing up to assessors is wanting, supporting the submissions of the learned counsel for the appellant, including the assertion that the irregularities vitiated the trial rendering it a nullity, and that the Court should exercise its revisional powers and nullify the trial court proceedings and judgment, quash the conviction and set aside the sentence.

With regard to way forward, he also supported the learned counsel's arguments that the prosecution evidence was engrained with gaps which the prosecution failed to fill. The learned Senior State Attorney stated that despite there being evidence that the appellant was found with some cattle, the prosecution failed to prove ownership or who possessed the said cattle. Arguing that the prosecution was expected to bring the found cattle to the court and to prove they were really stolen and seized. He cited the case of **Kennedy Yaled Monko vs Republic**, Criminal Appeal No. 265 of 2015 (unreported), a case which also involved cattle theft, and the Court stated that, in the absence of the cattle in court, the doctrine of recent possession cannot apply. The learned Senior State Attorney state that, the holding in the

Kennedy Yaled Monko vs Republic (*supra*) squarely applies to this case since it is centered on cattle theft despite the fact that in the present case the offence charged is murder. Arguing that the application of the doctrine of recent possession requires confirmation of ownership of the goods found and alleged to be stolen which unfortunately the prosecution failed to prove in this case.

On whether or not a retrial should be ordered in this case, the learned State Attorney stand was that a retrial will prejudice the rights of the appellant. He argued that under the circumstances, the appellant should be set free.

The rejoinder from the counsel for the appellant was brief, reiterating his submission in chief and the prayer that the appellant be set free.

We have dispassionately considered the arguments from both the learned Senior State Attorney and the learned counsel for the appellant. Our starting point will be to consider the points of law raised on the irregularities found in the proceedings of the trial court which we believe may dispose of the appeal without venturing into the grounds of appeal.

In a nutshell, the points of irregularities raised related to, **first**, failure by the trial court to provide an opportunity for the appellant to object or

support or air his views on the selected assessors. **Second,** failure of the trial court to explain to the assessors their duties upon being appointed to assist the trial judge and **third**, faulting the trial court for non-direction of assessors on vital points of law pertinent to the case in the summing up.

We find it imperative at this juncture to import the relevant segments of the proceedings related to appointment of assessors, before we move to analysis of the issues raised. It reads:

Date: *12.06.2017*
Coram:- *Hon. Dr. A. J. Mambi, J*
For Republic:- *Mwashubila Adv.*
For Accused:- *Kasuku Adv.*
Accused:- *Present*
Interpreter:- *Miss Zuhura Jabir English into Kiswahili and vice versa*
Miss M. Kannonyele *Judge's Legal Assistant*
Information is read over and properly explained to the accused person in Kiswahili language who pleads.

Court Assessors

1. *Daniel Kapungu* - *Present*
2. *Sebastian Ulaya* - *Absent*
3. *Imelda Kamsweke* - *Present*

***Prosecution**:- My Lord I am Mwashubila for the Republic. On defence we have Advocate Kasuku and we are ready.*

***Defence**:- We are ready. I am holding brief for Advocate Budodi.*

***Court:** - The accused is read his charges.*

***Accused**:- SIO KWELI*

***Court**:- The Accused pleaded not guilty. Court enters Plea of not guilty.*

***Prosecution**:- We have a total of eight witnesses. For today we will have three witnesses.*

PW1

Name: - Martin Lameck

A perusal of the above excerpt clearly reveals that the appellant was not accorded an opportunity to voice any objection he might have had on the choice of assessors. While understanding that according the accused an opportunity to say whether or not he objects to any of the assessors is not a rule of law but a rule of practice, there is no doubt that it is now well rooted as part of the procedure in criminal trials conducted with assessors (See **Laurent Salu and 5 Others vs Republic,** Criminal Appeal No. 176 of 1993 (unreported). This Court has also at various occasions addressed such deficiency in trial proceedings and the remedy thereof. In **Laurent Salu and 5 Others vs Republic** (*supra*), the court also observed that:

"... *the omission by the trial court to afford the appellant an opportunity to express whether or not he objects to any of the assessors, certainly prejudiced the appellant as well as the prosecution.*" And also that:

"*in the instant case, it is not known if any accused persons had any objection to an of the assessors, and to the extent that they were not given the opportunity to exercise that right, that clearly amounted to an irregularity.*"

This position was also restated in **Bernado and Charles Michael vs Republic**, Criminal Appeal No. 128 of 2015; **Chacha Matiko Magige vs Republic,** Criminal Appeal No. 562 of 2015 and **Shija Sosoma vs DPP**, Criminal Appeal No. 327 of 2017 (all unreported) where in all these cases the Court stated that such omission was troubling and abrogated the appellants rights to a fair trial.

We subscribe to the cited decisions and thus find that failure of the trial judge to accord the appellant an opportunity to voice his stand on suitability of the selected assessors, together with omission to explain the duties of assessors as discerned in this case, without doubt are fatal irregularities. It is

mandatory that all criminal trials before the High Court must be with the aid of assessors as propounded by section 265 of the CPA. Again, in such trials, according to section 298(1) of the CPA, after both sides have closed their case, the judge is required to sufficiently sum up the evidence of both sides in the case to the assessors, who shall then proceed to give their opinion. Various decisions of this Court have discussed and reiterated the relevance of the opinion of these assessors and condition which should lead the assessors to give informed opinion.

In **Kato Simon and Vincent Clemence vs Republic**, Criminal Appeal No. 180 of 2017 (unreported), the Court cited a holding from the defunct East African Court of Appeal, in **Washington Odindo vs Republic** [1954] 21 EACA 392 cited in **Mbalushimana Jean- Marie Vienney @Mtokambali vs Republic**, Criminal Appeal No. 102 of 2016 (unreported) which stated that, the opinion of assessors has potential to be of great value where the assessors fully understand the facts of the case before them as it relates to relevant law. That where the law is not explained and the assessors are not drawn to salient facts of the case, the value of their opinion is invariably reduced.

rom the above holding, it is evident that for the assessors to prudently play the role envisaged in their presence, they must be fully conversant with the facts pertaining to the case and the relevant laws. To ensure this transpires, a trial judge is expected to provide a summary of evidence and facts and direct them on the vital or salient points of laws pertinent to the case.

In the case before us, the appellant was charged with murder. Therefore without doubt the trial judge was duty bound to impart to them the evidence presented in court from both the prosecution and defence and the ingredients of the offence of murder. In the judgment, it is clear that the conviction of the appellant, apart from evaluation of the evidence, the trial judge relied on various issues. One of them, was the fact that there was no direct witness to prove the charges as also observed by the prosecution in their final submissions. In the judgment, the court to a large extent relied on circumstantial evidence (pages 75-79 of the record) and the doctrine of recent possession (pages 64-75,77 of the record of appeal) to convict the appellant. He also considered the accused's conduct (pages 86 of the record).

The issue is whether the said matters found to be pertinent by the trial judge and considered in judgment were relayed to the assessors in the

summing up, whose notes are found at pages 42- 51 of the record of appeal. Having scrutinized the summing up notes, it is evident that the trial judge amply summarized the evidence before the court (45-49 of the record), but only discussed in passing the burden of proof and relevance of circumstantial evidence (pages 48 and 49). In the summing up notes there was no direction related to consideration and import of circumstantial evidence, doctrine of recent possession, ingredients of murder, including how malice aforethought can be inferred or when and how the conduct of the accused before and after commission of the offence can be considered. Such failure of the trial court to address the assessors on salient points of law pertinent to the case with the view to seek their opinion was an irregularity.

It is evident that under the circumstances, the assessors were not sufficiently informed on the vital points of law to assist them to give informed opinions expected or envisaged by the law which in fact vitiated their role as envisaged under section 265 of CPA. This, in effect, rendered the trial to have proceeded without the aid of assessors. Therefore, this failure also meant the trial was a nullity (see **Fadhili Juma and Another vs Republic**, Criminal Appeal No. 567 of 2015 and **Musolwa Samwel vs Republic**, Criminal Appeal No. 206 of 2014 (both unreported).

Having found that the trial was a nullity, we now move to consider the way forward. Both the learned Senior State Attorney and the learned counsel for the appellant have invited us to nullify the proceedings and judgment of the trial court, quash the conviction, set aside the sentence and set free the appellant. Arguing that there are ample gaps in the prosecution evidence which should lead the Court to find that a retrial will prejudice the rights of the appellant, because it will provide an opportunity for the prosecution side to fill in gaps in their case.

Our perusal of the evidence, including the testimonies of various prosecution witnesses, lead us, with due respect, not to accept the submissions of the learned counsel for both sides on the way forward. We are of the view that the evidence of those who testified to have accepted cows from the appellant either through sale or allegedly to keep for him since he had no kraal/cattle stable (PW6, PW8 and PW9), and evidence from witnesses that the appellant told them that the cows he was seen with were given to him as part of inheritance is evidence which establishes a prima facie case. There is also the evidence that PW1 purchased the twenty cattle and handed them to the deceased to take to the village and unfortunately he did not reach the village. Cattle with description similar to those eleven found

wondering in the village close to where the deceased body was found. We also find the case cited by the learned State Attorney **Kennedy Yaled Monko vs Republic** (*supra*) distinguishable. The said case was purely one of cattle theft and therefore cattle was material evidence and crucial to prove the prosecution case, which differs from the circumstances in the present case which is a murder trial and the appellant being imputed for allegedly murdering the deceased in facilitating cattle theft. In both cases ingredients of offence differ. Therefore we reject the invitation to be inspired by the said decision that failure to tender the cattle weakens the prosecution case. In any case in this case there is oral evidence from witnesses who allegedly received in total seven cattle from the appellant together with the two cows found close to the appellant's compound.

In this case there is evidence that Joseph Marekani met his unnatural death while herding cattle to their homestead/stable. There is evidence some of the cattle the deceased herded were found in the possession of the appellant be it direct or constructive and witnesses who testified to have purchased the said cattle from him.

In the premises, as to the way forward, and in the interest of justice, with the available evidence, our stand is that this case deserves a retrial

because it falls within the ambit of the factors that necessitates a retrial outlined in **Fatehali Manji vs Republic** (1966) EA 341.

Henceforth, we 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 appellant, 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 should be left intact and unaffected by this decision. The appellant should remain in custody while he awaits retrial.

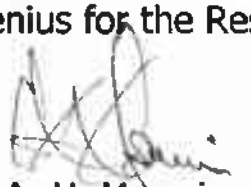
DATED at **MBEYA** this 2nd day of April, 2020.

S.A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This judgment delivered this 3rd day of April, 2020 in the presence of the appellant in person and Sara Anenius for the Respondent is hereby certified as a true copy of the original.



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL