IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

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

CRIMINAL APPEAL NO. 174 & 175 OF 2017

JOSEPH ANYELWISYE KOSAMU.....1ST APPELLANT
JOSHUA SAMWEL KITAMBULE..... 2ND APPELLANT

VERSUS

D.P.P.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Levira, J.)

Dated the 26th day May, 2017
in
Criminal Case No. 51 of 2014
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JUDGMENT OF THE COURT

17th & 24 th March, 2020

LILA, J.A.:

The appellants named above, Joseph s/o Anyelwisye Kosamu and Joshua s/o Samweli Kitambule were jointly and together tried and convicted on an information for murder by the High Court sitting at Mbeya. They were, each, sentenced to death. Aggrieved, each appellant preferred an appeal to the Court against both conviction and sentence. Their appeals have been consolidated in this appeal.

The indictment was that on 17th day of January, 2012 at Ibililo village within Rungwe District in Mbeya Region, the appellants together and jointly murdered one Baraka Msyani, a child aged 3 years 4 months (the deceased).

The facts of the case as were presented to the trial court by the prosecution side which marshaled five witnesses are that; on 17/01/2012 Donatha John Kimena (PW3), a mother of three children, the deceased inclusive, and who was also living with her husband's step child and a house girl left for work early in the morning. On her return back home to have breakfast she could not see the deceased, her usual companion in taking tea. Upon inquiry, the house girl informed her that the deceased was playing outside. She took tea and left. Such was the situation when she came back home from work at 15.00 pm. This time she was told that the deceased was not yet back home. Even the neighbours told her that they had not seen the deceased since morning. She became suspicious and reported the matter to the hamlet chairman who, in turn, informed other people in the market. People gathered and they mounted search of the deceased. A short time later the body of the deceased body was found lying helplessly with cut wounds on the face and chest in the maize

farm about fifty (50) meters from Ibililo Dispensary in which PW3 worked. Joseph Mwayambwile Maleto (PW1), the Ward Executive Officer (WEO) for Kiwira and policemen who were accompanied by the doctor went to where the deceased body was lying and the Doctor, after a preliminary examination, said the cause of death was strangulation which finding was based on the fact that the deceased tongue was outside and there were feces. The deceased body was thereafter taken by police for further examination.

On his part, PW1 convened a meeting so as to condemn the incident the practice famously known in nyakyusa tribe as "Kwijaja" and to ask those who have information of those involved in the killing to relay such information to him. Among those who attended in the meeting was the appellant, a son of the Chief, who represented the traditional leaders who said those who committed the offence would go nowhere but would be arrested. However, on 22/01/2012, D2385 D/SGT Major Michael (PW2) while in the company of other policemen arrested the first appellant in connection with the offence and he confessed committing the offence and, on 23/01/2012, he was taken by the police to PW1's office wherein he narrated how the killing of the deceased occurred. According

to PW1, the appellant told them that his brother in-law who happened to be the second appellant, Joshua Samwel Kitambule, had told him that he was told by a witchdoctor in order to become rich they should kill a male child by hanging and then take his blood and the rope used in the killing to the witchdoctor. That, in compliance, he lured the deceased who was playing with other children to his home, and assisted by the second appellant, hanged the deceased, hit him on the face, cut him on the chest and drained the blood. That the blood and rope were taken by the second appellant so that he could take them to the witchdoctor while he waited till night (at 5:00am) when he took the deceased body to the bush because he was afraid of being caught having the deceased body by those who were searching for the deceased.

The above apart, PW1 said, surprisingly, when the first appellant, who was not present when the deceased body was recovered, was taken to him, he showed them where he had kept the deceased body and passed through the same route they (PW1 and other people) passed before they found the deceased body. Moreover, on 24/01/2012, the second appellant was arrested by PW2 and others at Sae Ilomba area and he confessed that he participated in killing the deceased with the first

appellant. On 26/01/2012, the second appellant was taken to PW1 by Police Officers led by Patrick. The police told PW1 that the second appellant was mentioned by the first appellant as his companion in the killing and he had admitted to them his involvement in that killing as he was advised by the witchdoctor.

The record also bears out that the second appellant was taken to the justice of the peace one Angengulile Mwakinyolobi, a Kiwira Primary Court Magistrate, who recorded his extra-judicial statement (Exh P1).

In his defence, the first appellant, told the trial court that on the material day he left to his tomato farm at 8:00 in the morning and returned at 15:00hrs and thereafter went to the market where he stayed up to 17:30 or 18:00hrs charting with his friends namely Samwel Mwitulo, Edson Nganyanga and others. While thereat, an alarm was raised and one Abdala Ambindwile informed them that the deceased had disappeared from his home. Thereat they were divided into two groups and they unsuccessfully mounted search of the deceased that day. The exercise was repeated the next morning and he participated and while in another group at Ibwengo mountain, the information was relayed that the deceased body was found at Ikuti area. He said he was arrested on

22/01/2012 at about 09:00 am by police at the market while on the way to the church, taken to Ibililo village and a search was conducted in his house in the presence of the hamlet chairman and nothing connected to the offence was found. He was then taken to Tukuyu Police Station whereat he was tortured. He was later, on 2/2/2012, together with the second appellant, who he did not know prior to, taken to court to answer the murder charge. He denied orally confessing before PW1 and PW2. He, further, disputed the death of the deceased because neither his birth certificate nor his death certificate was tendered in court as exhibit.

On his part, the second appellant who lived in Mbeya, told the trial court that from 15/01/2012 to 20/01/2012 he was at Mbarali assisting his brother one Benjamin Kitambule in his farm work. He was arrested on 24/01/2012 by police and was taken to Tukuyu Police Station where he was tortured but denied confessing to PW2 and making any statement to him. He also denied confessing to the justice of the peace (PW5). He stressed that he was forced to sign on the papers he did not know the contents thereof. In respect of the first appellant and the deceased, he claimed that they were strangers to him.

The trial court was not moved by the defence evidence. It believed the prosecution case that the charge was proved beyond reasonable doubt consequent upon which it convicted both appellants and sentenced them as indicated above.

Dissatisfied by the trial court decision, the appellants lodged separate notices and memorandum of appeal to challenge the conviction and sentence. As hinted above, their appeals are consolidated in this appeal. For a reason soon to be unveiled, we find it unnecessary to recite the respective grounds of appeal as were listed in their respective memorandum of appeal.

Before us, at the hearing of the appeal, Mr. Ladislaus Rwekaza and Mr. Alfred Chapa, learned counsel, represented the appellants who were also in attendance. On the other hand, the respondent Republic was represented by Mr. Baraka Mgaya, learned State Attorney.

At the onset of the hearing of the appeal, Mr. Rwekaza sought leave of the Court to raise to the attention of the Court a point of law touching on the procedural infraction in the summing up to assessors committed by the learned trail Judge which, in his view, if upheld by the Court would

sufficiently dispose of the appeal. That prayer was respectfully welcomed by Mr. Mgaya. We unhesitantly granted Mr. Rwekaza leave to point out the alleged anomaly.

Mr. Rwekaza informed the Court that the summing up notes to assessors reflected at pages 170 to 180 of the record of appeal fell far short of complying with the requirements of section 298(1) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (the CPA). He elaborated that the trial judge did not properly sum up to assessors by directing them to the vital points of law reflected in the proceedings and on which the determination of the case was predicated hence denying them the ability to advise the court properly when giving their respective opinions. He pointed out such vital points to be, **first**; essential ingredients of the offence of murder particularly malice aforethought, **second**; the extra-judicial statement allegedly made by the second appellant and its effect in implicating the first appellant (then first accused). To augment his assertion he referred the Court to the decision in the case of **Vicent Ilomo vs Republic**, Criminal Appeal No. 337 of 2017 (unreported). **Third**, the defence of *alibi* raised by both appellants that they were not present at the scene of crime as well as circumstantial

evidence were not explained and he referred the Court to the case of **Davis Livingstone Simkwai and 8 Others vs Republic**, Criminal Appeal No. 146 of 2016 (unreported) and **four**; the oral confessions allegedly made by the appellants and their effects. He argued that failure to address the assessors on those vital points of law disabled them from properly advising the trial court on the verdict of the case as was stated by the Court in the case of **Lubinza Mabula and 2 Others vs Republic**, Criminal Appeal No. 226 of 2016 (unreported). In all, he argued that, on account of those anomalies, the trial was not with the aid of assessors hence the appellants were not fairly tried with the consequence that the trial was a nullity.

Regarding the way forward, Mr. Rwekaza implored us to take the course taken by the Court in the case of **Lubinza Mabula and 2 Others vs Republic** (supra) that the appellants should be set free because the prosecution evidence was weak on which a conviction cannot be properly founded and if an order of re-trail is made the prosecution will seize that opportunity to fill up the yawning gaps.

On his part, Mr. Mgaya readily agreed with Mr. Rwekaza that the summing up notes did not sufficiently appraise the assessors on the vital

points of law involved in the case so as to enable them assist the trial court arrive at a just decision. He contended that although the learned trial Judge in her judgment determined the case after considering and determining various legal issues involved in the case such as oral confessions, defence of *alibi*, extra-judicial statement, malice aforethought and common intention, such vital points of law were not addressed to the assessors to enable them give a rational and focused opinion on the guilt or otherwise of the appellants. He was therefore agreed that the trial was vitiated and the whole trial was a nullity for not involving the assessors.

In respect of the way forward, Mr. Mgaya differed with Mr. Rwekaza greatly. He contended that it is a well-established practice that a re-trial order is made where the prosecution evidence on record against the appellant is overwhelming and vice versa. He submitted that the prosecution evidence relied on to found the appellants' convictions was two-limbed. It was direct in that both appellants orally confessed to PW1 and PW2 when they were arrested to have participated in killing the deceased. And, it was circumstantial because neither of the appellants was seen committing the offence but they were able to lead and show

both PW1 and the police where the killing was effected and where the body of the deceased was later on laid. He was insistent that oral evidence is sufficient to found conviction as was stated in the Court's unreported cases of **Posolo Wilson @ Malyego vs Republic**, Criminal Appeal No. 613 of 2015 and **Rashid Roman Nyerere vs Republic**, Criminal Appeal No. 105 of 2014. He argued that, in the present case, the two appellants confessed before PW1 and PW2.

Submitting further, the learned State Attorney said the defence of *alibi* raised by the appellants cannot shake the all strong prosecution evidence. In the end, he urged the Court to order a re-trial.

Mr. Chapa rejoined by insisting that the prosecution case was weak and could not be the basis of a conviction. He was emphatic that the circumstances under which the appellants orally confessed were not free since the first appellant confessed in the presence of other people and while handcuffed. That aside, he argued, the appellant denied confessing before PW1. He distinguished the case of **Posolo Wilson @ Malyego vs Republic** (supra) in that, in that case the appellant was free as opposed to the present case where the appellant was not free. As for the second appellant, Mr. Chapa argued that the appellant was beaten and tortured

which thing he even told the learned trial Judge. He added that, the case of **Rashid Roman Nyerere vs Republic (supra)** cannot be relied on in this case for, in this case the confessions were made after a day while in that case it was made within three hours after the arrest. He also faulted the procedure adopted in recording the extra-judicial statement for failure by the trial Judge to abide to the procedure stipulated in the Chief Justice's Circular. In conclusion, he urged the Court, after finding that the trial was a nullity, be pleased to set the appellants free instead of making an order of re-trial.

It is, in terms of section 265 of the CPA, imperative that all criminal trials before the High Court should be with the aid of assessors. In the same footing, section 298(1) of the CPA directs on what should be done by the trial Judge after the trial is completed. That section provides:-

> *"When the case for both sides is closed, the judge may sum up the evidence for the prosecution and the defence, and shall then require each of the assessors to state his opinion orally, and shall record such opinion".*

It is evident, on that exposition of the law that, the aim of summing up to assessors is to enable them assist the court in the just determination of the case. It is for that reason that the Court has insisted the assessors be addressed and directed on the vital points of law involved in the determination of the case. In appreciation of that, the Court has declined to treat the need to sum up to assessors as discretion, as the law provides, and has insisted that such a long established practice should be observed. That stance has been explicitly stated by the Court in the case of **Mulokozi Anatory vs Republic**, Criminal Appeal No. 124 of 2014 (unreported) where it was held that:-

> *"...we wish first to say in the passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to the assessors but as a matter of long established practice and to give effect to s. 265 of the Criminal Procedure Act that all trials before the High Court shall be with the aid of assessors, trial judges sitting with assessors have invariably been summing up the cases to assessors..."*

In the instant case, we entirely agree with the concurrent views of the learned counsel of both sides that the summing up to assessors done by the learned trial Judge was not proper and insufficient to enable them give meaningful and focused opinions. While it is apparent in the judgment that the appellants' convictions were founded on oral confessions, extra-judicial statement and circumstantial evidence, such vital points of law were not explained and elaborated to the assessors in the summing up notice by the trial Judge. More so, the learned trial Judge also discussed in her judgment and found common intention to kill the deceased established. In addition, she discussed and dismissed the appellants' defence of *alibi*. Moreover, nowhere in the summing up to assessors did the trial Judge explain and elaborate on what entails malice aforethought which is an important ingredient of the offence of murder. The explanation of these vital points did not feature in the summing up notice. Instead, it is vivid that the trial Judge simply quoted the provisions of section 196 of the Penal Code under which the appellants were charged, outlined matters to be proved by the prosecution as being whether the death occurred and if yes was it natural or unnatural, whether the accused persons are the ones who caused that death and

whether they had malice aforethought. She also outlined the principles to be taken into consideration by the assessors that the burden and standard of proof lays on the prosecution, the charge must be established beyond reasonable doubts and that the accused should not be convicted on the basis of his weak defence. She then summarized the evidence and the final submissions by counsel of both sides.

The deficiencies we have endeavored to demonstrate above resulted in the assessors opinions not focusing on crucial matters considered by the trial Judge in the determination of the appellants' guilt. On this, we would let the record speak itself. This is what the assessors were recorded to have opined to the trial court:-

> ***"1st Assessor: Telezia Mwangupili:*** *Without stating many words I agree with the evidence of the prosecution side because they could not give evidence without proving that the accused committed murder. They saw wounds on the body of the deceased. The mother saw the rope used. Therefore, the evidence given by all prosecution witnesses is a truthful evidence.*

***2nd Assessor: Smith Haule**: According to the whole evidence from 11/05/2017 by all prosecution witnesses. These witnesses proved that the first witnesses committed the offence with his friend. The second accused confessed that he killed the deceased with the first accused. The defence side intended to call witness but they failed. It is my opinion that both accused committed murder. They should be punished heavily accordingly to my opinion.*

***3rd Assessor: Enos Mwangoka**: I concur with my fellow assessors. All prosecution witnesses gave evidence which proves that first accused confessed and this led to arrest of the second accused. I have the opinion without any doubt that both accused persons are guilty of the murder of child, Baraka."*

The quoted opinions tell it all that the assessors were not completely and sufficiently directed on vital points of law on which the

case was decided. The opinions do not reflect, make reference to or in any way touch on any of the points of law on which the case was decided. The resultant effect is that the trial is taken to have not been with the aid of assessors. That position was cemented in the Court's decision in the case of **Tulubuzwa Bituro vs Republic** [1984] TLR 264 where the Court stated that:-

> *"...in a criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is non-direction to the assessors on a vital point..."*

The consequences of a criminal trial being not conducted with the aid of assessors as imperatively stipulated under section 265 of the Penal Code is not hard to find for, faced with an identical situation, it was explicitly stated by the Court in the case of **Abdallah Bazaniye and Others vs Republic** [1990] TLR 42 that:-

"...We think that the assessor's full involvement as explained above is an essential part of the process that its omission is fatal, and renders the trial a nullity."

[See also **Said Mshangama @ Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported)].

The question that hinges on the door for our immediate resolve is what is the way forward? Mr Rwekaza and Mr. Chapa argued in favour of the appellants being released and set free on account of the prosecution evidence being weak. That view was strongly opposed by Mr. Mgaya contending that the prosecution evidence on record against the appellants justifies an order of retrial be made.

We have delved to seriously examine the evidence on record by both sides. As opposed to Mr. Rwekaza and Mr. Chapa's views and of course without prejudice to the court that will re-try the matter, the record clearly shows that the appellants made oral confessions before PW1 and PW2 immediately after their respective arrests and later the second appellant recorded an extra-judicial statement before PW5 (the

justice of the peace) in which, although its admission was challenged, he together with the first appellant confessed to have killed the deceased. The duo types of confessions found the basis of the appellants' convictions. Our examination of such evidence have inclined us to agree with the learned State Attorney that there is evidence on record against the appellants that could justify an order of retrial and there is nothing to be filled up by the prosecution at the detriment or prejudice on the part of the appellants if an order of re-trial is made.

All said, given the deficiencies, we are satisfied that the trial, in the instant case, cannot be said to have been with the aid of assessors and the anomaly vitiated the trial. We accordingly invoke the powers of revision bestowed upon the Court under section 4(2) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition 2002, to quash all the proceedings and judgment of the trial court and set aside the sentences meted to the appellants. We hereby order that the record of the trial court be remitted to the trial court for it to try the case afresh. We direct, for the interest of justice, that the case be tried by another Judge with a new set of assessors. Meanwhile, the appellants shall remain in remand custody to wait for a new trial which we also direct that it should

immediately be commenced. For the interest of justice, in the event the appellants are convicted with any other offence apart from murder or any offence attracting imposition of a prescribed minimum sentence, we order the term of imprisonment already served by the appellants be considered in imposing the sentence.

DATED at **MBEYA** this 24th day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 24th day of March, 2020 in the presence of Mr. Alfred Chapa, learned counsel for the Appellants and Mr. Ofmedy Mtenga learned State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL