IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: LILA, J.A., MKUYE, J.A., and KOROSSO, J.A.)

CRIMINAL APPEAL NO. 374 OF 2017

1. MICHAEL KAZANDA @KAPONDA
2. LINUS SULEMANI SILUKA
3. MTOGWA COSMAS SILUKA @SHARIFU @WAKUVYALO @ ISHU ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mambi, J.)

Dated 31st August, 2017
in
Criminal Sessions Case No. 46 of 2015

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JUDGMENT OF THE COURT

20th & 27TH March, 2020

KOROSSO, J.A.:

Michael Kazanda @Kaponda, Linus Sulemani Siluka and Mtogwa Cosmas Siluka @Sharifu @Wakuvyalo @ Ishu, the 1st, 2nd and 3rd appellants respectively, jointly and together with another person who was acquitted by the trial court, were arraigned in the High Court of Tanzania, at Sumbawanga Registry, with one count, namely, Conspiracy to Murder, contrary to section 215 of the Penal Code, Cap 16 Revised

Edition 2019 (the Penal Code) (first count). For the 1st and 2nd appellant they also faced two more counts, which were, Attempt to Murder contrary to section 211(b) of the Penal Code (second count) and Maiming, contrary to section 222(a) of the Penal Code (third count).

The particulars in the first count are that, on an unspecified date in February 2013 within Sumbawanga District in Rukwa Region, the appellants conspired to kill one Maria Chambanenje. In the second count, the particulars revealed that the 1st and 2nd appellants on the 11th February, 2013 at Mkowe village within the District of Sumbawanga in Rukwa Region, attempted to cause the death of one Maria Chambanenje by using a sharp object and cutting her on the head twice and cutting off her left arm. As regards the third count, the particulars of the information were that on the 11th February, 2013 within the above stated village, District and Region, unlawfully wounded or caused grievous harm to Maria Chambanenje by using a sharp object and chopping off her left arm.

When the information was read over and explained to the appellants, they refuted all the charges with respect to each count. Thereafter, prerequisite preliminaries preceded and upon completion, the trial commenced. The prosecution paraded thirteen (13) witnesses and

the trial court admitted seven exhibits that is, the forensic DNA profiling test report (Exhibit P1), sketch map of the crime scene (Exhibit P2), search and seizure certificate (Exhibit P3), caution statement of 2nd appellant (Exhibit P4), caution statement of 1st appellant (Exhibit P5), PF3 (Exhibit P6) and extra judicial statement of the 1st appellant (Exhibit P7). On their part, each of the appellants gave a sole testimony on oath abjuring the charges without tendering any exhibit.

After each respective side closed its case, the trial judge (Mambi J.) proceeded to sum up the case to the assessors who sat and aided him in line with the provision of section 265 of the Criminal Procedure Act, Cap 20 Revised Edition 2019 (the CPA). The assessors unanimously returned a verdict of guilty to two accused persons, that is, the 1st and 2nd appellant and of not guilty for the 3rd appellant and the 4th accused (at the trial) with respect to charges they faced.

The trial judge in his judgment concurred with the assessors' verdict of guilty for the 1st and 2nd appellants and that of not guilty for the 4th accused and differed with the assessors' verdict with respect to the 3rd appellant, finding him guilty as charged. Upon conviction on the first count, the 1st, 2nd and 3rd appellants were sentenced to fourteen years imprisonment. In the second count, the 1st and 2nd appellants were

sentenced to twenty (20) years imprisonment, whereas in the third count, the 1st and 2nd appellants were sentenced to twenty (20) years imprisonment. For the 1st and 2nd appellant the sentences on the first, second and third counts were ordered to run concurrently.

The appellants were aggrieved by the decision of the High Court and appealed to this Court by filing individual memoranda of appeal. The 1st appellant had nine grounds of appeal, the 2nd appellant ten grounds of appeal and the 3rd appellant had eight grounds of appeal. Assessing all the grounds of appeal, it is evident that when paraphrased, the appellants' dispute against the decision of the trial court is premised on the following issues. **One,** cogency of eye witnesses' identification at the scene of crime which predicated conviction of the 1st and 2nd appellants on the first, second and third counts. **Second**, faulting the evidence of Maria Chambanenje's (PW1), Shukuru Gabriel (PW2), Assistant Commissioner Peter Ngusa (PW7) and E4270 Balyehele John (PW10) and Inspector Godson Juakali (PW11) stating that it was tainted with discrepancies and contradictions. **Third**, a challenge on the legality of the extrajudicial statement of the 1st appellant (Exhibit P7), the argument being that it was recorded outside the parameters of reasonable time, having been recorded six days after his arrest. **Fourth**, legality of the

seizure certificate (Exhibit P3) the argument being that it's issuance contravened sections 38(1)(a), (2) and (3) of the CPA. **Fifth**, failure to consider the defence of *alibi* for all the appellants.

When the appeal came before us for hearing, the 1st, 2nd and 3rd appellants were represented by Mr. Victor Mkumbe and Mr. Sambwee Shitambala, learned Advocates, while for the respondent Republic, Mr. Simon Peres, learned State Attorney entered appearance.

To be noted is that, through the written submissions filed by the appellants' counsel and oral submissions, another ground was added, that is, a challenge on the evidence that the 1st and 2nd appellants showed PW7 where the cutoff arm of PW1's was hidden and buried. At the hearing, the counsel for the appellants in their oral submissions abandoned the appeal grounds that queried one, the legality of the recording and admissibility of the 1st appellant's extrajudicial statement (Exhibit P7); two, the validity of the seizure of the buried arm alleged to belong to PW1; and three, assertions that the defence of *alibi* for the 1st and 2nd appellants was not considered by the trial court and urged that this ground be considered as against the 3rd appellant.

It is noteworthy that for reasons that will become apparent shortly, we find it apposite not to address the grounds of appeal raised in the

memorandum of appeals before us, nor do we find the need to encapsulate the factual background leading to the arrest, arraignment and conviction and sentencing of the appellants. Instead, we will proceed to address concerns on discerned procedural irregularities at the trial, raised by the learned State Attorney at the start of his submissions when granted leave to address the Court (upon his request).

Mr. Simon Peres point of interpolation was to reveal alleged irregularities in the proceedings of the trial court. These irregularities related to the appointment of assessors and the summing up to assessors by the trial judge. He submitted that the record of appeal reveals that, first, the assessors were never duly appointed and second, the appellants (the accused persons then) were not accorded an opportunity to object on the appointment of either or all of the assessors. The learned State Attorney argued that under the circumstances and in the interest of justice, these anomalies vitiated the proceedings since it means there was no fair trial. He stated further that the above anomalies are further amplified by the fact that it is evident that the trial judge failed to sufficiently direct the assessors on essential points of law in his summing up.

The learned State Attorney thus argued that the discerned anomalies meant that the trial was conducted without assessors in contravention of section 265 of the CPA and contending that a trial without assessors prejudiced the rights of the parties. To context this argument, he made reference to a decision of this Court in **Monde Chibunde @ Ndishi vs Republic**, Criminal Appeal No. 328 of 2017 (unreported), where the Court after scrutinizing the record and being convinced that the trial court did not sum up adequately on all vital points of law, held that the trial judge has an obligation to sum up to assessors and direct them on vital points of law pertinent to a case as envisaged under section 265 of the CPA. Another case referred to reinforce this assertion, is **Michael Maige vs Republic**, Criminal Appeal No. 153 of 2017 (unreported).

The learned State Attorney urged the Court to find that, under the circumstances where the trial court failed to inform the assessors on such principles such as import of circumstantial evidence, confessional statements, ingredients of conspiracy to commit an offence, attempted murder and Maiming and the defence of *alibi* in the summing up to assessors, all the above being vital points of law in the case, the discerned irregularities should lead the Court to exercise its powers

under section 4(2) of the Appellate Jurisdiction Act, Cap 141 Revised Edition 2019 (the AJA) and nullify proceedings, conviction and sentence and order a retrial.

The learned State Attorney submitted further that without doubt this is a fit case for retrial, because despite the identified irregularities in the proceedings and conceding to irregularities in the prosecution evidence, the prosecution case against the appellants is sufficient to lead to conviction of the appellants, be it from direct or circumstantial evidence. He also stated that the said anomalies by themselves do not affect the prosecution evidence in establishing a prima facie case against the appellants. Arguing further, he stated that the trial judge properly evaluated the evidence before him including the defence evidence, and found that the prosecution did prove the case against the appellants and convicted them accordingly. Therefore, he implored the Court to order a retrial upon nullification of the trial proceedings, quashing of conviction and setting aside the sentences for all appellants respectively.

On the part of the learned counsel for the appellants, Mr. Mkumbe conceded to the procedural irregularities as submitted by the learned State Attorney, especially with respect to deficiencies found in the appointment of, and summing up to assessors by the trial judge which

he contended vitiated the trial. His point of departure from the learned State Attorney position was on the proposed remedy, stating that if the Court was to accede to the prayers to nullify the proceedings, conviction and sentence then the way forward should not be to order retrial, because that route will be prejudicial to the rights of the appellants having regard to the fact that the evidence against the appellants by the prosecution witnesses in the trial court is insufficient to sustain conviction against them.

Mr. Mkumbe and Mr. Shitambala one after the other, challenged the testimonies of the prosecution witnesses on identification of the 1st and 2nd appellants at the crime scene, stating that it was contradictory and is not watertight. They conceded that from the evidence the light available at the crime scene from the evidence was adequate, but argued that the fact that there was evidence that the culprits covered their faces and it was around midnight there was possibility of mistaken identity.

The appellants' counsel implored the Court to consider all the available evidence in totality and find that the prosecution case is very weak under the circumstances, and find that an order for retrial will only accord the prosecution an opportunity to fill in gaps in their case against

the appellants. He thus prayed that the Court nullify proceedings, quash the convictions and set aside the sentences imposed to all the appellants, and set them free.

Submissions by the learned counsel for the appellants and the learned State Attorney for the respondent Republic have been considered dispassionately. The procedural irregularities raised and alluded to above relate to appointment/selection of the assessors to assist the trial judge in the trial; failure to accord the appellants an opportunity to object in the selection of assessors and non-direction to assessors on vital points of law by the trial judge during the summing up to the assessors. The argument being that these procedural irregularities vitiated the trial, and rendered the trial to have been conducted without assessors and thus a nullity.

At this juncture, it is pertinent to import the requisite legal positions addressing the appointment and role of assessors in criminal trials in the High Court. Section 265 of the CPA states:

> *"All trials before the High Court shall be with the aid of assessors the number of whom shall be two or more as the court thinks fit".*

Section 285(1) reads:

"When a trial is to be held with the aid of assessors, the assessors shall be selected by the court."

Section 298 (1) and (2) of the CPA states:

(1) *"When the case on both sides closes, 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 as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion."*

Section 265 of the CPA, undoubtedly envisages that all the trials in the High Court be conducted with the aid of two or more assessors, who by virtue of Section 285 of the CPA they shall be selected by the court.

For better conceptualization of the sequence of events that transpired at the start of the trial as they relate to appointment/selection of assessors, we find it useful to reproduce the relevant segment of the proceedings at the start of the trial (pages 16 and 17) which reads as follows:

"***PROCEEDINGS***

Date: 22.05.2017

Coram: Hon. Dr. A. J. Mambi, J.

For Republic: Miss Lugongo/Miss Amani State Attorneys

For Accuseds:-

1st Accused: M/s Kamnyalile/present

2nd Accused: M/s Budodi/present

3rd Accused: M/s Chambi/present

4th Accused: M/s Chambi/present

Interpreter:- V. Ndolezi English into Kiswahili and vice versa

Miss Magreth Kannonyele Judge's Legal Assistant

Information is read over and properly explained to the accused persons in Kiswahili language who asked to plead:-

Assessors:-

1. *Imelda Kamsweke*
2. *Evelada Kaemba*
3. *Leonard Katindi*

My Lord I am Scholastica Lugongo, and Safi for the Republic, we also have Chambi (for 3rd & 4th accuseds), Peter Kamyalile (for 1st accused) and Budodi (for the 2nd accused).

Prosecution:-

The matter was scheduled for hearing. For today we have 5 witnesses and we are ready. We pray the accused person to be reminded their charges.

Court:- *The accused persons are reminded the charges and pleas as follows:-*

1. ***First Count:-***

First accused (Michael Kazanda):- *Not guilty*

Second accused (Linus Suleman):- *Not guilty*

Third accused (Mtongwa Cosmas):- *Not guilty*

Fourth accused (Frank Benard):- *Not guilty*

Court: *- Enter Plea of Not Guilty for all accused*

2. ***Second Count:- Attempted Murder c/s 211****. The accused person pleaded as follows:*

First accused:- *Not guilty*

Second accused:- *Not guilty*

Sgd: Dr. A.J. Mambi

Judge

22.05.2017

3. ***Third Charge:*** *C/S 212(2)(a) (sic)of the Penal Code*

The accused persons plead as follows:-

First accused:- *Not guilty*

Second accused:- *Not guilty*

Court: *Enter Plea of Not Guilty for all accused persons (first and second)*

Sgd: Dr. A.J. Mambi

Judge

22.05.2017

PW1:-

Name:- Maria Chambanje

Age: 44 years

Work: No any work

Place: Mkowe

Religion:- Christian

PW1:- is sworn and states

XD Prosecution:-"

The above excerpt from the proceedings in the trial, reveals that there was no proper appointment of the assessors. Nowhere is it recorded that the assessors were appointed or confirmed to assist the trial judge, their names are just listed under a subtitle "**Name of the Assessors**" (at page 26 of the record of appeal). On the issue of the appellants not being provided with an opportunity to object or say something regarding the identified assessors, there is no record to that effect before the trial begins.

There are various cases decided by this Court that have observed or discussed failure to comply with section 265 of the CPA. In **Monde Chibunde @ Ndishi vs Republic** (supra), the Court was faced with a similar situation, and adopted the holding in **Laurent Salu and five Others**, Criminal Appeal No. 176 of 1993 (unreported). The Court started by admitting that although the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law, it is a rule of practice which is now well enshrined and accepted as part of the procedure in the proper administration of criminal justice. Stating that this is because the rule is designed to ensure that the accused person has a fair hearing.

Again, in **Monde Chibunde @Ndishi vs Republic** (supra) it was underscored that:

> *"the court must select assessors and give an accused person an opportunity to object to any of them."*

The Court observed further that an omission to inform the accused person the existence of this right, amounts to an irregularity which prejudiced the accused person and the prosecution on the other side.

Therefore, applying the said position to the current case, there being a similar matter before us, we completely subscribe to the views stated in the above cited decisions, and what was submitted by the learned State Attorney, that failure to provide an opportunity to the accused persons to object on the appointment of assessors is an irregularity which was prejudicial to the appellants.

Apart from the above anomaly, another irregularity uncovered as alluded to above, was that the trial judge, failed to address the assessors on vital points of law related to the case. As shown above, section 298 (1) of the CPA requires the trial judge to sufficiently sum up the evidence of both sides in the case to the assessors after both sides have closed their cases, so that thereafter they can give their opinions regarding the case. In **Mbalushimana Jean-Maria Vianney @Mtokambali vs**

Republic, Criminal Appeal No. 102 of 2006 (unreported), which made reference to the decision of the defunct East African Court of Appeal in **Washington Odindo vs Republic** (1954) 21 EACA 392, it was stated 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 salient facts of the case, the value of assessors' opinion is correspondingly reduced*". (See also **Kato Simon and Another vs Republic**, Criminal Appeal No. 180 of 2017 (unreported)).

It has also been held that failure to address assessors on vital points of law renders the entire proceedings a nullity as found in the case of **Tulibuzwa Bituro vs Republic** [1982] TLR 264. In **Said Mshangama @Senga vs Republic**, Criminal Appeal No. 8 of 2014 (unreported), this Court held:

> "*Where there is inadequate summing up, non-direction or misdirection on such vital point of law to*

assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity"

Our scrutiny of the summing up to assessors by the trial judge, found in the record of appeal has revealed various anomalies. There is the fact that notwithstanding the charges against the appellants, were conspiracy to Murder on the part of all appellants; Attempted Murder and Maiming for the 1st and 2nd appellant and it would have been expected that the ingredients of the said offences would have been part of the summing up, this is not the case. The record of appeal (pages 126-142) which contains notes used by the trial judge in the summing up, do not have anything related to ingredients of the said offences. Again, we have not been able to find any record in the summing up to assessors addressing what amounts to circumstantial evidence, the import of such evidence and how it can lead to conviction.

There is also nothing related to sufficiency of visual witnesses' identification and factors to be considered where identification is in unfavourable conditions in the present case, matters considered by the Court in conviction of the appellants. Since the prosecution and the trial court in its judgment relied on evidence of an expert in terms of the report on DNA profiling for the arm of PW1 which was alleged to have

been cutoff at the scene of crime, the trial judge was expected to have addressed the assessors on the essential ingredients and how to examine and accord weight to such expert opinion. There is also the issue related to confessional statements and matters to be considered when assessing such evidence. All the highlighted essential matters to the determination of this case were not addressed to the assessors in the summing up.

The record on the summing up notes only listed some salient issues such as the standard of proof but not exhaustively. There was also an overview of the ingredients of the offence of murder, which is not the offence for which the appellants faced. There is also nowhere in the summing up notes, where the trial judge provided the assessors with the legal standing on common intention or parties to offence although this principle was applied to convict the appellants.

The trial court judgment also discussed the doctrine of recent possession (found at pages 186-188 of the record of appeal) as applicable to this case though in the summing up, the assessors were not directed on this. Lack of awareness or information on pertinent matters related to the case is reflected in the brief opinions of the first

assessors vitiated the role of assessors in assisting the trial judge, amounting to having a trial without assessors and therefore a nullity.

We have considered the irregularities we have already outlined and feel that our intervention by way of revision is called for. We thus in terms of section 4(2) of the AJA, nullify the proceedings from the time the assessors were appointed and judgment of the trial court, quash the conviction and set aside the sentence imposed to the 1st, 2nd and 3rd appellants.

We have also considered the submissions by the learned counsel for the appellants and State Attorney on the fate of the case upon nullification of proceedings. In determining whether or not a retrial is the best option, we are guided by the decision in **Fatehali Manji vs Republic** [1966] 341, that a retrial should be ordered only when the original trial was illegal or defective and should not be ordered where conviction is set aside because of insufficiency of evidence or to enable the prosecution to fill the gaps in its evidence at the first trial.

Taking all the circumstances pertaining to this case, the gravity of the offence and the nature of the evidence tendered, we are of the view that in the interest of justice an order for retrial will be the appropriate order. We order that the retrial be expedited before another judge and a

new set of assessors. For avoidance of doubt the Preliminary Hearing shall not be affected by this decision. The appellants should remain in custody to await for their retrial.

DATED at **MBEYA** this 27TH day of March, 2020.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 27th day of March, 2020 in the presence of Mr. Gerald Msegeya, holding brief for Mr. Victor Mkumbe learned counsel for the Appellants and Mr. Fadhili Mwandoloma, learned Senior State Attorney for the Respondent is hereby certified as a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL