IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MMILLA J.A., MWANGESI J.A., And WAMBALI J.A.)

CRIMINAL APPEAL NO. 461 OF 2017

FLORIAN IJENJE ---------- 1st APPELLANT
CHRISTOPHER WAZIRI ---------- 2nd APPELLANT
ZAWADI JACKSON ---------- 3rd APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS ---------- RESPONDENT

(Appeal from the decision of the Resident Magistrates Court of Mbeya Extended Jurisdiction)

(Mutaki, SRM Ext. Jurisdiction)

Dated the 12th day of July, 2017

in

Criminal Sessions Case No. 21 of 2015

JUDGMENT OF THE COURT

16th & 19th June, 2020

MWANGESI J.A.:

The appellants herein that is, Florian s/o Ijenje, Christopher s/o Waziri and Zawadi s/o Jackson alongside Raphael s/o Alkado @ Lusambo who is not in this appeal, were arraigned before the Resident Magistrates Court of Mbeya with Extended Jurisdiction, for the offence of murder

contrary to section 196 of the Penal Code Cap 16 R.E. 2002 **(the Code**). It was the case for the prosecution that on the 26th day of April, 2013 at Mawenzi – Mkwajuni village within Chunya District in the Region of Mbeya, Flrorian s/o Ijenje, Christopher s/o Waziri, Zawadi s/o Jackson and Raphael s/o Alkado @ Lusambo jointly and together murdered one Victory s/o Legasiano @ Mwachiluwi. All of them protested their innocence when the charge was put to them.

The background facts of the case were not complex. It all started with the death of one Peter Burton a village mate of the deceased and the appellants at the village of Maweni in Chunya District, where they were all residing. The said Peter Burton who was a neighbor of the deceased, passed away on the 25th day of April, 2013 while undergoing treatment at the home of one Jetruda Joseph, a traditional healer within the same village. News about the said death was circulated throughout the village and the 26th day of April, 2013 was scheduled to be the burial date.

On the burial date, when the mourners including the deceased and his family were moving with the deceased's body towards the burial site,

young men who had been leading the cortege stopped it for a while, whereby they arranged the mourners to go to the grave yard in groups being led by old men followed by women and finally young men. Upon arrival at the cemetery, the father of the late Peter Burton was required by a mob of young men to mention the one who was behind the death of his son. The fracas started when the deceased was named by Peter Burton's father as the one. The young men who were already armed with various weapons, pounced onto the deceased and pushed him into the fresh grave wherein they attacked him using different weapons they possessed until he became unconscious. They then buried him alive in the same grave with Peter Burton, whose body was placed on top.

Information about the incident was relayed to the police who upon visiting the scene of crime they ordered for the body of the deceased to be exhumed. After the body had been exhumed, it was taken to the Government Hospital of Chunya for examination after which, it was re-buried in another grave under normal procedure. Following the investigation that was launched by the police, the appellants herein were named and accused to be behind the death of the deceased. They were

all arrested and eventually charged with the offence of murder which is the basis of this appeal.

In the trial of the appellants which was presided over by Mr. William Mutaki, Senior Resident Magistrate with Extended Jurisdiction sitting with gentlemen assessors, the prosecution paraded six (6) witnesses and tendered two (2) exhibits to establish the commission of the offence by all appellants and their colleague who is not in Court. On their part in defence, the appellants relied on their sworn testimonies save for the first appellant and the one who is not in this appeal, who called one addition witness each to supplement their defences. They also tendered two exhibits.

At the end of the day after the trial Senior Resident Magistrate had analyzed the evidence placed before him, was convinced beyond doubt that the appellants herein were culpable to the charged offence. He convicted all and condemned them to death by hanging which is the statutory sentence. On the other hand, the evidence against Raphael Alkado @ Lusambo was found to be wanting and hence, he was acquitted and set at liberty.

The appellants felt aggrieved by the decision of the trial Senior Resident Magistrate and each lodged a memorandum of appeal comprising of six grounds to challenge the judgment of the trial court. And, when Ms. Joyce M. Kasebwa learned counsel, was assigned the dock brief to represent the appellants in this appeal, she lodged a five grounded memorandum of appeal which reads: -

1. *That, the learned trial magistrate with extended jurisdiction erred both in law and fact, in the manner of summing up the case to assessors and failed to direct properly on the vital points of law.*
2. *That, the learned trial magistrate with extended jurisdiction erred in law and fact, when in summing up of the case to assessors, influenced the assessors and failed to summarize the evidence of both sides hence reached to wrong decision.*
3. *That, the learned trial magistrate with extended jurisdiction erred in law and fact, for failure to analyze and evaluate the defence evidence.*
4. *That, the trial magistrate with extended jurisdiction erred both in law and fact, for relying and convicting the appellants while the case was not proved beyond reasonable doubt.*
5. *That, the learned trial magistrate with extended jurisdiction erred in law and fact, when he failed to explain to assessors their duty before hearing of prosecution's case and thereby*

assessors failing to give their opinions as per legal requirements.

Additionally, in compliance with the provisions of Rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 **(the Rules**) as amended, on the 11th June, 2020 Ms. Kabelwa filed a written statement of arguments in support of the appeal.

On the date when the appeal was called on for hearing before us, the first and third appellants who were at Ruanda Central Prison and the second appellant who was at Lindi Prison, were all linked to the Court through video conference; and all of them enjoyed the joint legal services of Ms. Joyce Kasebwa and Mr. Isack Chilingile learned counsel, whereas the respondent/Director of Public Prosecutions, was represented by Mr. Ofmedy Mtenga learned State Attorney, who was assisted by Ms. Mwajabu Tengeneza also learned State Attorney.

Upon Ms. Kasebwa being invited by the Court to expound the grounds of appeal, she started by abandoning the individual grounds of appeal which had been lodged by the appellants before and proceeded with the grounds contained in the memorandum of appeal which she lodged later. Thereafter, she asked us to adopt the written statement of

arguments in support of the appeal which she lodged on 11th day of June, 2020 with nothing more.

According to the written statement of arguments in support of the appeal, the grievances of the appellants in grounds number 1, 2 and 5 are in respect of court assessors who sat with the Senior Resident Magistrate with extended jurisdiction to try the case against them. It is the submission of Ms. Kasebwa that they were mishandled from the word go. At the commencement of hearing the case, the role of assessors was not explained to them by the trial magistrate with extended jurisdiction and as a result, they failed to perform their duty in line with the stipulation under section 298 (1) of the Criminal Procedure Act, Cap 20 R.E. 2002 **(the CPA**).

The foregoing apart, Ms Kasebwa went on to submit, the summing up which was made to assessors by the Senior Resident Magistrate with extended jurisdiction after the closure of the case for both sides, was improper. This was so for the reasons that some vital points of law in regard to the ingredients of the offence of murder which were supposed to be addressed to them were not. She gave examples of matters which

ought to have been explained that included malice aforethought, common intention, defence of alibi etc.

Ms. Kasebwa argued further that the trial Senior Resident Magistrate with extended jurisdiction, also failed to summarize the evidence of the witnesses from either side to the assessors, instead, he explained to them his opinions and thereby influencing them on what they would have to advise him. On the basis of the pointed out anomalies, it was the firm belief of the learned counsel for the appellants that under the circumstances, it could not be said that the trial of the appellants in the instant appeal, complied with the mandatory requirement under section 265 of **the CPA**. In support of her argument she referred us to the decisions in **Mathayo Wilfred and Others Vs Republic**, Criminal Appeal No. 294 of 2016, **Richard Siame Mateo Vs the Director of Public Prosecutions**, Criminal Appeal No. 173 of 2017 and **Monde Chibunde @ Ndishi Vs Republic,** Criminal Appeal No. 328 of 2017 (all unreported).

In grounds number 3 and 4 of the appeal, the complaint by the appellants is in regard to the analysis of the evidence that was adduced

by the prosecution witnesses and relied upon by the trial court in convicting the appellants. According to Ms. Kasebwa, the evidence from the prosecution witnesses was not cogent enough to justify conviction of her clients. She faulted the trial court for believing and acting on the said evidence. Consequently, she implored us to allow the appeal and set all appellants at liberty.

On her part in response, Ms. Tengeneza supported the appeal by joining hands with the submission of her learned friend in grounds number 1, 2 and 5 that indeed, the assessors were not fully involved in the determination of the case against the appellants, a thing which vitiated the whole proceedings. In addition to the failure by the Senior Resident Magistrate with extended jurisdiction to address the assessors on the ingredients of murder as pointed out by Ms. Kabelwa, the learned State Attorney also added the issue of identification of the appellants at the scene of crime, which featured in the judgment of the court but was not addressed to the assessors in the summing up. Since the errors occasioned in the proceedings were fatal and that they could not be cured under the provisions of section 388 of **the CPA,** she urged us to nullify the proceedings of the trial court, quash the judgment and set

aside the sentence with direction that the case be tried denovo because there is sufficient evidence to establish the guilt of the appellants.

In a brief rejoinder, Ms. Kasebwa stuck to her earlier stance that there was no sufficient evidence to establish the commission of the offence by the appellant and that, the need for an order of retrial was uncalled for. For interest of justice, she strongly urged us not to order for retrial.

What calls for our determination in the light of the submissions from either side above is the issue as to whether the appellants' appeal is founded. Upon having dispassionately gone through the proceedings of the trial court, we are fully in agreement with the concurrent views of the learned counsel for both sides that, the trial of the appellants in this appeal was vitiated. It is elementary law that all criminal trials before the High Court are conducted with the aid of assessors. This is the tenor and import of section 265 of **the CPA**. Likewise, under section 298 (1) of the same Act, requires the trial Judge or magistrate with extended jurisdiction sitting with assessors to sum up to them the case before inviting them to give their opinions.

The essence and importance of the opinion of assessors in criminal trials before the High Court, was underscored in the famous decision of **Washington s/o Odindo Vs Republic** [1954] 21 EACA 392 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 supplied]

Given the importance of assessors' opinion in the decision of a case and the nature of the offences in which they are involved, it goes without saying that before assessors are permitted to give their opinion, they must have understood well the facts involved in the case at issue and the relevant laws applicable to the offence under discussion. It was from this background that in **Tulubuzya Bituro Vs Republic,** [1992] TLR 264 it was held by the Court that: -

> *"--- in criminal trials in the High Court, where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with aid of*

assessors. The position would be the same where there is non-direction of assessors on a vital point."

See also: **Said Mshangama @ Senga Vs Republic,** Criminal Appeal No. 8 of 2014 and **Omari Khalfani Vs Republic,** Criminal Appeal No. 107 of 2015 (both unreported).

In the appeal under scrutiny, the record of the proceedings reveal that the assessors were not told their role at the commencement of the trial. Furthermore, the summing up which was made to them by the trial Senior Resident Magistrate with extended jurisdiction was insufficient in that, the ingredients of the offence of murder which the appellants were facing, were not explained to them. Similarly, the doctrine of common intention was not explained to them. We think this was important because the appellants were more than one. Moreover, the evidence of identification which arose during trial as well as the defence of alibi which was raised by some of the appellants, were not explained to the assessors. The failure by the trial Senior Resident Magistrate to address the assessors on the points pointed out above, undoubtedly occasioned non-direction to them on vital points in the case.

As if the foregoing was not enough, in the summing up to assessors, the trial Senior Resident Magistrate with extended jurisdiction, expressed his opinion as reflected on page 120 of the Record of Appeal on the first paragraph, where he stated in part that: -

> *"The accused persons killed him with malice aforethought that with intention to cause grievous harm..."*

The trial Senior Resident Magistrate proceeded to express his opinions to the assessors in the second paragraph of the same page when he opined thus: -

> *"....the accused person who committed the offence did so with malice aforethought as the deceased ..."*

Bearing in mind to what we have stated herein above that the term 'malice aforethought' was not explained to the assessors, apparently the opinion expressed by the trial Senior Resident Magistrate with extended jurisdiction in his summing up above, left the assessors in sheer confusion. Under the circumstances, there was no way in which they could be expected to give a legally justifiable advice in the determination

of the case. No wonder when the first assessor was required to give his opinion in the instant appeal as reflected on page 121 of the Record of Appeal, he stated that; -

> *"The all prosecution witnesses have proved that all the accused persons killed the deceased."*

What one gathers from the above opinion is that the assessors were not in a position to differentiate as to whether the killing which was being discussed against the appellants was murder or manslaughter. We held in **Monde Chibunde @ Ndishi Vs Republic,** Criminal Appeal No. 328 of 2017, that the proceedings of the trial court were nullified for the reason that the trial Judge, had expressed his opinions to assessors. It was stated in part that: -

> *"...in summing up to assessors the trial Judge expressed his opinion and influenced them by introducing extraneous matters which did not emerge from the evidence adduced by the witnesses..."*

Basing on what we have endeavoured to highlight above, it is evident that the proceedings in the instant appeal were vitiated for both non-direction and misdirection to assessors during summing up. As it

was held in **Tulubuzya Bituro's** case (supra), these proceedings cannot be left to stand. We thus nullify them, quash the conviction entered to all appellants and set aside the death sentence which was meted against them.

The subsequent question which crops is in regard to the way forward. While Ms. Kasebwa has strongly urged us to set the appellants at liberty relying on the decisions in **Fatehaji Manji Vs Republic** [1966] EA 341 and **Selina Yambi and Another Vs Republic**, Criminal Appeal No. 119 of 2015 (unreported), that there is no sufficient evidence from the prosecution witnesses to justify an order for retrial, Ms. Tengeneza on the other hand, implored us to order for retrial for the reason that there is cogent evidence to justify so.

On our part, after keenly considering the submissions from either side as well as revisiting the proceedings of the trial court, we think the nature and circumstances of the case which the appellants stand facing, strongly convince us to hold that for the interests of justice, this is a fit case for ordering a retrial. To that end, we direct that this case file be remitted to the trial Court for retrial by a different magistrate with

extended jurisdiction or a Judge, with different set of assessors. Meanwhile, we direct the appellants to remain in custody pending arrangements for their trial.

Order accordingly.

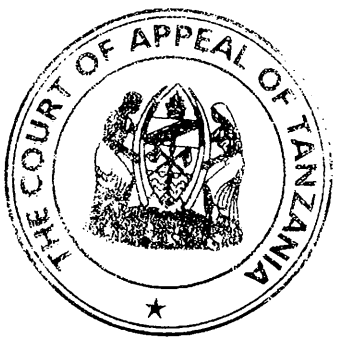
DATED at **MBEYA** this 19th day of June, 2020.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 19th day of June 2020, in the Presence Ms. Caroline Mseja holding brief for Ms. Joyce Kasebwa Counsel for the Appellants and Mr. Shingai Michael State Attorney for the Respondent is hereby certified as a true copy of the original.



S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL