IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.AM., MWAMBEGELE, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 501 OF 2017

ALUHA ALLY @ ASHA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Dudu, PRM – Ext. Jurisdiction)

dated the 14th day of November, 2017

Criminal Session No. 75 of 2015

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JUDGMENT OF THE COURT

15th & 26th June 2020

KEREFU, J.A.:

The appellant, Aluha Ally @ Asha was charged with the offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2019 (the Penal Code) before the High Court of Tanzania at Dar es Salaam (Dudu, PRM – Extended Jurisdiction) in Criminal Session No. 75 of 2015. It was alleged that, on 16th June, 2010 at Ambassador House along Algeria Nyapara Street within Ilala District in Dar es Salaam Region the appellant murdered on Asgar Dewji (the deceased).

Upon the information being read over and explained, the appellant pleaded not guilty whereupon, at the preliminary hearing stage, the prosecution expressed its intention of featuring seven (7) witnesses including Alphonce Cosmas the security guard who was at the scene of crime on the material date of the incident. However, when eventually, the case for the prosecution was presented during the hearing, only three (3) witnesses were featured together with three documentary exhibits namely, postmortem examination report, sketch map of the scene of crime and the appellant's cautioned statement. The enlisted documents were introduced into evidence as exhibits P1, P2 and P3 respectively.

In a nutshell, the prosecution case found in the record of appeal indicated that, the appellant was working at the house of Fatma Sikamder Dewji (PW1) the mother of the deceased, as a domestic worker. On 16th June, 2010 around 09:00hrs, PW1 and Zuheri Simkader Dewji (PW3) the other son of PW1, left home heading to their working places while leaving behind the appellant and the deceased who was asleep in his room. While at work, PW1 decided to call the deceased's mobile phone to check if he was awake. The deceased did not respond to the call. PW1 became anxious and she unsuccessfully tried to call her neighbours. PW1 then

decided to call PW3 and requested him to go back home and check why the deceased was not responding to her phone calls. After arriving at the house, PW3 informed PW1 that there was nobody inside the house and it seemed that there was an incident of theft. Upon receiving such information, PW1 went back home and found the deceased lying on the floor, dead, his hands tied with a rope and his head was severely injured. The appellant was nowhere to be found.

PW1 was informed by one Alphonce Cosmas, (the security guard) that the appellant had left the premises claiming that she was sent to collect her boss's luggage. The said security guard was also said to have stated that, few minutes after the appellant had left, three men arrived and upon inquiring on them as where they were going, they told him that, they were going to the PW1's house. It was alleged further that, after a while, the security guard saw the said three men going out while carrying a bag. PW1 also testified that, after the incident, the appellant went hiding until on 30th July, 2012 when she was arrested. PW1 also testified that the said three men are yet to be arrested to-date.

WP. 2213 D/Sgt Stella (PW2) the investigation officer testified that, she was involved in the investigation of the incident and they have traced the appellant for about two years without success, but later, in July 2012, with the assistance of a police informer, they managed to arrest her. PW2 interviewed the appellant and recorded her cautioned statement. PW3's testimony with respect to his encounter with the deceased dovetailed with the testimony of PW1, save for the arrest of the appellant, where he said, he was personally involved to identify her.

In her defence the appellant testified on her own behalf and called no witness. Though, she admitted to work for PW1 as a domestic worker and that she reported to her work on the fateful date, she completely denied to have committed the alleged offence. She said, on that particular date she left PW1's house at around 08:00hrs after being chased away by the deceased. She testified further that, prior to her departure, she saw three men (one Indian and two Swahili) talking with the security guard and then came to the PW1's house and entered directly into the deceased's bedroom. The appellant testified further that she had no doubt with the said people as one of them, named Manji was a relative of PW1 and used

to visit her. The appellant highly disputed the evidence of PW2 that she disappeared after the incident. She said, she was only staying at home peacefully and was not aware that she was being traced. She said, she was arrested at the police station where she was called to bail out her daughter from the police custody. She denied to have conspired with the said assailants who are suspected to have killed the deceased.

When the respective cases on both sides were closed, the presiding learned Magistrate summed up the case to the assessors who sat with him at the trial. Apart from being given a summary of the evidence, the assessors were addressed on the charge, standard of proof and the definition of common intention. In response, the assessors unanimously returned a verdict of guilty against the appellant. Having concurred with the unanimous verdict of the assessors, the learned trial Magistrate found the appellant guilty and convicted her as charged on the ground that she had prior knowledge that the assailants had come to PW1's house to steal, but she left without reporting the incident to anyone and disappeared for almost two years. It was the finding of the learned trial Magistrate that her conduct established that she had common intention with the assailants to

prosecute the unlawful purpose, namely theft. Therefore, upon conviction, the appellant was handed down the mandatory death sentence.

Aggrieved, the appellant lodged two separate Memoranda of Appeal raising a total of ten (10) grounds. However, for reasons that will shortly come to light, we need not recite them herein.

At the hearing of the appeal before us, the appellant was represented by Ms. Rita Odunga Chihoma, learned counsel while Mses. Neema Mbwana and Daisy Makakala, learned State Attorneys joined forces to represent the respondent Republic.

Ms. Chihoma who took the floor to argue the grounds of appeal, abandoned the memorandum of appeal lodged on 11th May, 2018 and argued only the additional grounds of appeal. We are, however, obliged to point out at the outset that, for reasons that will shortly become apparent, we will only summarize the arguments of the counsel for the parties in respect of the second ground of appeal, which we think is sufficient to dispose of this appeal. The said ground is to the effect that: -

> *"The learned Magistrate with extended jurisdiction erred in law and fact for failure to properly sum up and direct the*

assessors on vital points and applicable laws, hence the trial was conducted without the aid of assessors."

Submitting in support of the above ground, Ms. Chihoma argued that, during the summing up the learned trial Magistrate did not direct the assessors on the vital points of law in relation to circumstantial evidence together with the doctrine of common intention which were all related to the facts of the case and on which he convicted the appellant. She emphasized that, failure to direct the assessors on those vital points of law vitiated the entire trial. Thus, it was Ms. Chihoma's submission that, though the pointed anomaly would have been remedied in a retrial, but in view of the weak evidence tendered by the prosecution side, a retrial is not worthy. To clarify on this point, Ms. Chihoma argued that, the circumstantial evidence which was relied upon to ground a conviction against the appellant was not proved to the required standard. She added that, for circumstantial evidence to sustain a conviction, it must point irresistibly to the accused's guilty and not otherwise. To bolster her position, she referred us to the case of **Jimmy Runangaza v. Republic**, Criminal Appeal No. 159 'B' of 2017 (unreported).

Ms. Chihoma argued further that, the finding of the trial Magistrate that the appellant's conduct formed a common intention with the assailants to murder the deceased was not established in terms of section 23 of the Penal Code as there was no evidence adduced to that effect. She said, to prove that there was common intention between the assailants and the appellant, the principle offender should have been found to have committed the offence. It was her strong argument that, since in this case the said assailants were not arrested and brought before the court and because the other key witnesses who were at the scene of crime were not called to testify, there are doubts which should be resolved in favour of the appellant. Based on her arguments, she invited the Court to re-evaluate the evidence on record, allow the appeal, nullify the entire proceedings, quash the judgment of the trial court, set aside the sentence and set the appellant free.

In response, Ms. Makakala, partly conceded to the submissions made by Ms. Chihoma to the extent that the summing up to assessors was not sufficiently done, but she had a different argument on the way forward. She agreed that failure to explain vital points of the law to the assessors vitiates the entire trial and amounts to conducting the trial without the aid

of assessors contrary to section 265 of the CPA. Citing the case of **Kato Simon and Another v. Republic,** Criminal Appeal No. 180 of 2017 (unreported) she also urged us to nullify the entire proceedings and the judgment of the trial court. She however prayed for an order of retrial because according to her, there is sufficient evidence to prove the charge against the appellant.

In a brief rejoinder, Ms. Chihoma urged us to refrain from ordering a retrial, as she said, it would only afford an opportunity to the prosecution side to fill in the identified gaps.

Having carefully considered the grounds of complaint, the submissions advanced by the learned counsel for both parties and the record before us, we wish to begin by stating that, the requirement for the High Court to sit with assessors when trying criminal cases is provided for by section 265 of the CPA. Pursuant to that provision, all criminal trials are mandatorily required to be conducted with the aid of assessors who are to be two or more as the court may deem appropriate. The applicability of the said provision was elaborated in the case of **Charles Karamji @**

Masangwa and Another v. Republic, Criminal Appeal No. 34 of 2016 (unreported) as hereunder: -

> *"...in terms of the dictates of the provisions of section 265 of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002 (now 2019)...all criminal trials before the High Court are mandatorily conducted with the aid of assessors, the number of whom shall be two or more as the court may find appropriate."*

Apart from that requirement, the trial judge who sits with assessors is duty bound to sum up the case to them as provided for under section 298 (1) of the CPA, which states that: -

> *"When the case on 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 as to the case generally and as to any specific question of fact addressed to him by the judge, and record the opinion."*

Though, the above provision may not seem to impose a mandatory requirement to the trial judge to sum up the case to assessors, as it uses the word '*may*', it is now a settled practice which the trial court has to

comply with. This stance was emphasized in the case of **Michael Maige v. Republic,** Criminal Appeal No. 153 of 2017 (unreported) where the Court stated that: -

> *"...the issue of summing up to assessors is a requirement of law that for the trial judge who sits with the aid of assessors has to sum up to them before inviting their opinion as the main purpose is to enable them to arrive at a correct opinion and the same can be of great value to the trial judge only if they understand the facts of the case in relation to the relevant law. (See* ***Washington s/o Odindo v. R,*** *1954 21 EACA 392;* ***Augustino Lodami v. R,*** *Criminal Appeal No. 70 of 2010;* ***Charles Lyatii @Sadala v. R,*** *Criminal Appeal No. 290 of 2011 and Selina Yambi and 2 Others v. R, Criminal Appeal No. 94 of 2013 (all unreported)."*

Likewise, in the case of **John Mlay v. Republic**, Criminal Appeal No. 216 of 2007 (unreported), the Court emphasized in clear terms that the purpose of summing up to assessors is to enable them to arrive at a correct opinion, and it further stated that the summing up must touch on all essential elements of the offence the accused person is facing and must explain as to what that offence entails.

In the case at hand, there is no dispute that the appellant was convicted of the offence of murder on the basis of circumstantial evidence and the doctrine of common intention. However, in the summing up to the assessors at pages 61 to 68 of the record of appeal, the learned trial Magistrate, apart from summarizing the evidence and explaining the charge and the burden of proof in criminal cases, he did not explain to the assessors the vital points of the law featured in evidence such as, principles governing circumstantial evidence and the doctrine of common intention and how the same can be relied upon to found conviction against an accused person. He did not also explain the essential elements/ingredients of the offence of murder. This is vividly reflected from the general opinions given by the assessors that the appellant has committed the offence.

There is a plethora of authorities to the effect that such an omission renders the trial a nullity. See for instance the cases of **Omary Khalifan v. Republic,** Criminal Appeal No. 107 of 2015; **Suguta Chacha and 2 Others v. Republic,** Criminal Appeal No. 101 of 2011; **Said Mshangama @ Senga v. Republic,** Criminal Appeal No. 8 of 2014 and **Mara Mafuge and 6 Others v. Republic,** Criminal Appeal No. 29 of 2015 (all

unreported). Specifically, in the case of **Said Mshangama @ Senga** (supra) the Court stated that: -

> *"Where there is* ***inadequate summing up, non- direction or misdirection on such vital points of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity.****",[Emphasis added].*

Having found that in this case, there was an omission to adequately sum up the case to the assessors, there is no gainsaying that the said omission vitiated the trial. Hence, the trial was a nullity.

As to the way forward, we have considered the learned State Attorney's proposition of ordering a retrial. Ms. Chihoma submitted against that course on the ground that the prosecution evidence on the record is weak and that if an order of retrial is made, it will afford the prosecution an opportunity of filling in the identified gaps.

In that regard, we have thoroughly revisited the evidence on record and we are in agreement with Ms. Chihoma on the following reasons. **One,** the circumstantial evidence which was relied upon to ground conviction against the appellant did not meet the guiding principles of the law as expounded by the Court in its several decisions. For instance, **Ally Bakari**

v. Republic, [1992] T.L.R. 10; **John Mangula Ndogo v. Republic,** Criminal Appeal No. 18 of 2004; **Justine Julius and Others v. Republic,** Criminal Appeal No. 155 of 2005 and **Aneth Kapwiya v. Republic,** Criminal Appeal No. 69 of 2012 (all unreported).

Overall, we do not hesitate to state that the circumstantial evidence in the present case did not irresistibly point to the guilty of the appellant in exclusion of any other person. This is supported by the fact that the witnesses, PW1 and PW3 who testified at the trial gave a hearsay evidence and they did not sufficiently establish that the appellant had common intention with the assailants to commit the crime. **Two,** some of the key witnesses who were said to be at the scene of crime and involved in this matter did not testify at the trial and no reasons was explained for that failure. Specifically, we are with respect, surprised why the prosecution did not summon a very crucial witness, like the security guard who, according to PW1 was at the scene of crime and had a short talk with the alleged assailants prior to the commission of the offence. Admittedly, his evidence was so crucial in identifying the said assailants and also establish whether the appellant left the scene of crime before or after the incident.

It is equally surprising that one of the alleged assailants, Manji was not brought before the court despite being mentioned by the appellant in her cautioned statement that, for a long time, he planned to steal at the PW1's house. It is also on record that the daughter of the appellant and the wife of the said Manji, were also not summoned, though they were also mentioned by the appellant to have been aware of the Manji's illegal plans. The failure by the prosecution to field these important witnesses, without reasons, would have prompted the trial Magistrate to draw an adverse inference against the prosecution. For purposes of emphasis, in the case of **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 350 of 2008 (unreported) when considering a similar matter, the Court stated that: -

> *"...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one."*

Earlier on, the Court had made corresponding remarks in the case of **Aziz Abdallah v. Republic** [1991] T.L.R. 71.

In view of what we have endeavoured to demonstrate, we are satisfied that the evidence on record cannot sustain conviction of the appellant on the charge of murder. Therefore, we decline the invitation extended to us by Ms. Makakala because an order for retrial is not feasible. We are fortified in that regard by the principle stated by the Court of Appeal for East Africa in the case of **Fatehali Manji v. Republic** [1966] E.A. 343 regarding a retrial, that: -

> *"In general, a retrial will be ordered only when the original trial was illegal or defective.* ***It will not be ordered where the conviction is set aside because of insufficient of evidence for the purposes of enabling the prosecution to fill up the gaps in its evidence at the trial. Even where a conviction is vitiated by a mistake of the trial court for which the prosecution's not to blame it does not necessary follow that a retrial shall be ordered;*** *each case must depend on its own facts and circumstances and an order of retrial should only be made where the interest of justice require." [Emphasis added].*

In the light of the bolded expression, we wish to emphasize that, it is not in the interest of justice to order a retrial in the matter at hand as the same will only afford an opportunity to the prosecution to fill in the

Identified evidential gaps which is against the intents and purposes of a retrial. As such, we find the second ground of the appeal to have merit. Since the determination of this ground suffices to dispose of the appeal, we see no reason to examine other grounds in this appeal. We are in agreement with Ms. Chihoma that the entire appeal has merit and it is hereby allowed.

In the event, we nullify the proceedings of the trial court, quash conviction and set aside the sentence of death that was imposed on the appellant. We order that the appellant be released from custody forthwith unless she is otherwise lawfully held.

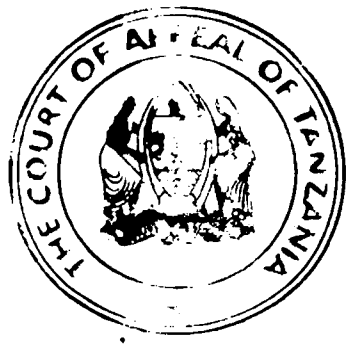
DATED at **DAR ES SALAAM** this 23rd day of June, 2020.

A.G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 26th day of June, 2020 in the presence of the appellant – linked via video conference at Segera and Ms. Rita Chihoma, learned counsel for the appellant and Ms.Jacqueline Werema, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL