IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 12 OF 2019

BAKARI SELEMANI @ BINYO .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam District Registry at Dar es Salaam)

(Rumanyika, J.)

dated 12th day of December, 2018

in

Criminal Sessions Case No. 57 of 2017

JUDGMENT OF THE COURT

24th March & 9th April, 2021

KWARIKO, J.A.:

The appellant, Bakari Selemani @ Binyo was arraigned before the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam with the offence of murder contrary to section 196 of the Penal Code [CAP 16 R.E. 2002 now CAP 16 R.E. 2019]. The particulars of the offence were that on 2nd day of May, 2015 at Mtoni Kijichi Butiama area within Temeke District in Dar es Salaam Region the appellant murdered one Kisima Ivan Paul @ Chacha (the deceased). The appellant denied the charge and a

full trial was conducted. At the conclusion of the trial, he was convicted and sentenced to suffer death by hanging. Before this Court, the appellant has come on appeal against that decision.

Briefly, the prosecution case at the trial court was as follows. On 2/5/2015 at night hours, the homestead of Paul Werema Chacha (PW2) was invaded by bandits and he awoke from sleep along with his wife Revina Salvatory Inyomole (PW3) and their daughter Happiness Nelson (PW1). The deceased was sleeping outside in the yard guarding motor vehicles and motorcycles. Following the invasion, the deceased cried for help and when PW1, PW2 and PW3 were getting out from their rooms, they met the thugs who were wearing face masks. They entered PW3's room and stole TV decoders and in the process, they assaulted PW2 and PW3. These witnesses heard gun shots from outside and when they went out, they found the deceased shot and wounded and motorcycles stolen. The witnesses identified the appellant among the thugs. The deceased was sent to hospital but was pronounced dead on arrival.

Meanwhile, Jonas Rashid (PW7) who was a motorcycle (bodaboda) rider was on duty that night when he heard about the robbery incident.

He trailed the bandits who were on the stolen motorcycles and tried to block them but they shot him in the thigh. However, among the bandits, he managed to identify the appellant whom he knew before.

Upon the appellant's arrest, an identification parade was prepared where PW2 and PW3 identified the appellant as among the bandits who invaded them. Despite objection from the appellant, an identification parade register and the appellant's cautioned statement were admitted in evidence as exhibit PI and P3 respectively with reasons for the same being reserved to be given later. Dr. Hassan Chande (PW9) conducted an autopsy on the deceased's body and recorded his finding in the post-mortem report which was admitted in evidence as exhibit P4.

In his defence, the appellant denied the charge and raised a defence of *alibi* to the effect that he was attending a wedding ceremony at the material time and whilst there; they were invaded by armed bandits. As he was running away to save himself, police arrested him and he was charged with the offence of loitering but later forced to sign a statement and thereafter charged with the present offence.

In its judgment, the trial court was satisfied that the appellant was sufficiently identified at the scene by PW2 and PW3 as there was enough light therein. That he was also identified by PW7 when he confronted the bandits. The appellant was found guilty, convicted and sentenced as indicated earlier.

In his memorandum of appeal to this Court the appellant has raised seven grounds of appeal which we have summarized as follows:

1. *That, the learned trial Judge erred in law and in fact by holding that the appellant was properly identified at the scene of crime by PW2 and PW3 while disregarding the principles of water tight visual identification at night.*
2. *That, the learned trial Judge erred in law and fact by relying on exhibit P1 (identification parade register) to convict the appellant while the same emanated from an improperly conducted identification parade and was improperly admitted in evidence.*
3. *That, the learned trial Judge erred in law and fact by relying on the improperly tendered and*

admitted exhibit P3 (cautioned statement) to convict the appellant.

4. *That, the learned trial Judge erred in law and fact by convicting the appellant in a case that was poorly investigated and prosecuted.*

5. *That, the learned trial Judge erred in law and fact to convict the appellant while in his summing up he did not explain essential ingredients of the offence to the assessors.*

6. *That, the learned trial Judge misdirected himself in holding that the assessors unanimously opined for the Republic while the same is not borne out of the record.*

7. *That, the learned trial Judge grossly erred in law and fact by convicting the appellant where the prosecution case was not proved beyond reasonable doubt.*

At the hearing of the appeal, the appellant was linked to the Court through video conferencing facility from Ukonga Prison. He enjoyed the services of Messrs. Japhet Mmuru, Charles Alex and Laurent Ntanga, learned advocates. On the other hand, the respondent Republic was

represented by Ms. Anita Sinare, learned Senior State Attorney together with Mr. Adolf Lema, learned State Attorney. Ms. Sinare made clear her stance of supporting the appeal.

We have considered the grounds of appeal and the learned counsel's submissions. However, for reasons that will be apparent in due course, we shall not reproduce the entire submissions made by the counsel for the parties.

We shall start our deliberation with the fifth ground of appeal regarding the improper summing- up to assessors. In respect of this ground, the counsel for both sides concurred that the learned trial Judge did not explain the ingredients of the offence of murder in his summing – up to assessors. By this omission, the learned counsel argued that the trial cannot be said to have been conducted with the aid of assessors. In support of their contention, the learned counsel cited to us the Court's decision in the case of **Lubinza Mabula & Two Others v. R,** Criminal Appeal No. 226 of 2016 (unreported).

On our part, the starting point will be section 265 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) which directs all trials before

the High Court to be conducted with the aid of at least two assessors. In addition to that, the trial Judge sitting with assessors is required, at the close of the evidence from both sides, to sum- up the case to the assessors before they give their opinions. Section 298 (1) of the CPA which is relevant here provides thus:

> *"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."*

Although this provision of law is not couched in mandatory terms, it is an established practice in our jurisdiction that the trial Judge should sum up the case to the assessors and explain to them vital points of law involved in the case. This is so because the assessors being lay persons need to be appraised with matters of law for their understanding before giving their opinions. Underscoring the point that the said duty of the trial Judge is a crucial one in the trial, this Court in the case of **Mulokozi Anatory v. R,** Criminal Appeal No. 124 of 2014 (unreported) stated thus:

> *"We wish first to say in passing that though the word "may" is used implying it is not mandatory for the trial judge to sum up the case to 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 aid of assessors, trial judges sitting with assessors have invariably been summing up the case to the assessors."*

[See also **Omary Khalfan v. R,** Criminal Appeal No. 107 of 107 of 2015 and **Omari Katesi v. R,** Criminal Appeal No. 508 of 2017 (both unreported)].

From the foregoing, the question for consideration is whether the trial Judge in the instant case properly summed up the case to the assessors. Upon our perusal of the learned Judge's summing up notes to the assessors, we did not find anywhere that the Judge explained the ingredients of the offence of murder to the assessors before he invited them to give their opinions. He did not explain to them the aspect of malice aforethought, intention to cause death or cause grievous harm, unlawful causing of death and what it entails to prove the offence of

murder. This omission by the trial Judge amounted to non-direction to the assessors on vital points of law. There is plethora of Court's pronouncements which have insisted that adequate summing up to assessors entails the trial Judge to direct the assessors on vital points of law. One of such pronouncements is in the case of **Said Mshangama @ Senga v. R,** Criminal No. 8 of 2014 (unreported), where it was stated thus:

> *"As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedures is that the trial judge must adequately sum up to the said assessors before recording their opinions. Where there is inadequate summing up, non-direction or misdirection on such a vital point of law to assessors, it is deemed to be a trial without the aid of assessors and renders the trial a nullity."*

[See also some of the Court's decisions in **Hamisi Basil v. R,** Criminal Appeal No. 165 of 2017 and **Apolinary Matheo & Two Others v. R,** Criminal Appeal No. 436 of 2016 (both unreported)].

It is clear from the above authorities that failure by the trial Judge to direct the assessors on vital points of law, vitiates the proceedings. It goes without saying that, since in the instant case the trial Judge did not address the assessors on vital points of law, the omission vitiated the whole proceedings. As correctly urged by the learned counsel from both sides, we hereby nullify the whole proceedings of the trial court. As to the way forward, under normal course of things, we would have remitted the case file to the trial court to comply with the law. However, on their part, the learned counsel for both parties were of the opinion that this is not a fit case to order retrial of the appellant since the prosecution evidence is wanting.

It is trite law that, a retrial will only be ordered if it is in the best interest of justice. For instance, in the case of **Fatehali Manji** [1966] 1 EA 343, it was held thus:

> *"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial...each case must*

depend on its own facts and an order for retrial should only be made where the interests of justice require it."

Upon consideration of the instant case, we agree with both learned counsel that it will not be in the best interest of justice to order retrial of the case. This is because, as correctly argued by the counsel for both parties, the prosecution evidence is wanting as we are going to demonstrate hereunder.

Firstly, we have considered the evidence of visual identification against the appellant. It is a settled principle of law that this evidence is of the weakest kind and before it is acted upon to convict, it must be watertight. In the famous case of **Waziri Amani v. R** [1980] T.L.R 250 the Court held *inter alia* that:

"Evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."

The Court listed several factors to be considered in the case of visual identification, including; the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. The question which follows now is whether these conditions were met in the instant case. The evidence shows that PW1, PW2 and PW3 who purported to identify the appellant at the scene, said that the thugs were wearing face masks when they broke into the house and they did not say that any of them had, at any point in time, removed the mask for them to see his face. Those witnesses did not also state the intensity and position of electric light they mentioned to be at the scene. As for the duration of the incident, the two minutes mentioned by PW2 that she had the suspect under observation was in our view not sufficient to properly identify any bandit. Neither did the witnesses describe any of the bandits and did not say they knew any of them before the material time. It is thus our considered view that the conditions for proper identification were not met in this case. [See also **Philemon Jumanne Ngala @ J4 v. R,** Criminal

Appeal No. 187 of 2015 (unreported) and **Lubinza Mabula & Two Others** (supra)].

Secondly, the identification parade in the course of which the appellant was purportedly identified could not add any value because as already shown above, the witnesses did not see the appellant before or at the scene of crime. We are of the view that the credibility of the witnesses was questionable as they alleged to identify a person they had never seen before.

Thirdly, the parade register (exhibit P1) and appellant's cautioned statement (exhibit P3) were improperly admitted in evidence. **One,** the trial Judge did not determine the objections which were raised against these documents before they were admitted in evidence. **Two,** the documents were not read over after admission for the appellant and assessors to know their contents. This legal requirement was stressed in the Court's decision in the case of **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R 218, where the Court held *inter alia* at page 220 that:

> *"...Whenever it is intended to introduce any document in evidence, it should* ***first be cleared***

for admission, and be actually admitted, before it can be read out." (Emphasis added).

[See also **Erneo Kidilo & Another VR,** Criminal Appeal No. 206 of 2017 **Salum Said Matangwa @ Pangadufu v. R,** Criminal Appeal No. 292 of 2018 (both unreported)].

In a rather strange procedure, the learned trial Judge came to discuss the appellant's cautioned statement during the summing up of the case to the assessors. However, even at that stage the statement was not read over for its contents to be known. We therefore find the two exhibits incompetent and are accordingly expunged from the record.

Lastly, the trial Judge convicted the appellant basing on the weakness of his defence. This was contrary to law because in a criminal case it is the duty of the prosecution to prove their case beyond reasonable doubt and what the accused is required to do in his defence is only to raise doubt in respect of the prosecution case.

It is for the said shortcomings in the evidence by the prosecution that we find an order of retrial will not be for the best interest of the appellant and the case as a whole. A retrial will only give an opportunity to

the prosecution to fill in gaps in their evidence. [See also **Daniel Severine & Two Others v. R,** Criminal Appeal No. 431 of 2018 (unreported)].

Consequently, we find the appeal meritorious and allow it. We quash the conviction and set aside the sentence meted out against the appellant. In the event, we order his immediate release from prison unless his continued incarceration is in relation to other lawful cause.

DATED at **DAR ES SALAAM** this 8th day of April, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I.P. KITUSI
JUSTICE OF APPEAL

The Judgement delivered this 9th day of April, 2021 in the presence of the appellant linked through video conference from Ukonga Prison and Mr. Japhet Mmuru, learned advocate for the appellant and Mr. Adolf Kisima, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL