**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUGASHA, J.A., KEREFU, J.A., And GALEBA, J.A.)**

**CRIMINAL APPEAL NO. 16 OF 2019**

**DANIEL RAMADHAN MKILINDI @ABDALLAH @DULLA ..... APPELLANT**

**VERSUS**

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

**(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)**

**(Matupa, J.)**

**Dated the 13th day of December, 2018**

**in**

**Criminal Sessions Case No. 107 of 2016**

.....

**RULING OF THE COURT**

23rd March & 14th April 2021

**GALEBA, J.A.:**

Daniel Ramadhani Mkilindi @ Abdallah @ Dulla, the appellant herein, was charged with the offence of murder contrary to section 196 of the Penal Code [Cap 16 RE 2002] before the High Court of Tanzania at Dar es Salaam. He was convicted and sentenced to suffer death by hanging. Aggrieved, he has preferred the present appeal.

The brief facts of the matter preceding this appeal, in a nutshell, are that on 24.12.2014 the appellant visited the deceased's home at Boko in Dar es salaam to perform traditional rituals in order to boost the

latter's businesses which were, at the time, dwindling. It is also alleged that the deceased, the appellant, PW1 and PW6, among others, celebrated the 2014 Christmas festivals together at the deceased's home. However, in the evening of 26.12.2014, the appellant and the deceased left together in the latter's car to an unknown destination. Efforts to trace the deceased or her body did not achieve any positive outcome until about six (6) months later, after the appellant was arrested at Holili in Kilimanjaro. He was then conveyed to Dar es Salaam where on 22.06.2015, he led the police to, and pointed at a cesspit in Mount Zion School compound in Tegeta from where the deceased's body, in a decomposed state, was recovered.

At the closure of the trial, the trial judge made a summing up to assessors and one of them returned a verdict of not guilty whereas the remaining two returned a verdict of guilty.

To challenge the judgment of the High Court, the appellant lodged in this Court a memorandum of appeal containing seventeen (17) substantive grounds followed with a supplementary memorandum of appeal with two (2) more grounds. However, for reasons that will come to light shortly, we need not recite them herein.

When this appeal was called on for hearing, the appellant had the services of Mr. Mashaka Ngole, learned advocate and for the respondent Republic was Mr. Credo Rugaju, learned Senior State Attorney assisted by Mr. Adolf Kisima, learned State Attorney. However, when we were preparing for hearing of this appeal, we noted that the trial judge neither addressed assessors on the vital point of circumstantial evidence nor did he sum up evidence of PW2, PW3 and PW4 to assessors before he could receive their opinion. Therefore, before getting to hearing counsels' arguments in respect of the grounds of appeal raised, we probed them into addressing us first on the matter. Both, Messrs Ngole and Rugaju were of a common position that, the trial judge's summing up to assessors did not meet the minimum threshold requirements set by law.

Elaborating on the deficiencies in the summing up, Mr. Ngole submitted that the summing up did not address the ingredients of the offence which means, according to him, the assessors could not know whether the offence of murder was established, adding that, although the conviction was based on circumstantial evidence but, that aspect was not referred to by the learned trial judge in his summing up notes to the assessors. The learned counsel submitted further that the judge did not sum up evidence of all the witnesses who testified in the case.

He concluded by moving the Court to quash the proceedings of the High Court and to nullify the appellant's conviction and the sentence of death imposed on the appellant. As to the final order that this Court should make in respect of the appellant, Mr. Ngole prayed for his immediate release from prison, because, according to him, the prosecution case was not proved beyond reasonable doubt.

Mr. Rugaju, was at one with Mr. Ngole as to the defects of the summing up notes and its consequences except the last prayer of acquitting the appellant. He submitted in brief that the matter ought to be remitted to the High Court for trial *de novo* as the evidence that was adduced at the trial, was sufficient to establish that it was the appellant who murdered the deceased. This divergency of counsels' standpoints; to order a retrial on one hand, and to acquit the appellant on the other, is the main issue that this Court is called upon to decide.

We will begin with the substantive law regulating participation of assessors in criminal trials at the High Court. The relevant provision of law is section 265 of the Criminal Procedure Act [Cap 20 RE 2019] (the CPA), which provides that;

> *"265. 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."*

Supplementing the above section, is section 298(1) of the same Act, which is to the effect that after closure of both the prosecution and the defence cases, the trial judge is required to sum up evidence of both sides, before he can call upon the assessors to give their opinion in respect of the case. That section provides that;

> *"298 (1) 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 the above is the law as established, but what happened in this case is that six (6) prosecution witnesses and one (1) from the defence testified, but at page 131 of the record of appeal the trial judge made a slight reference to the testimony of only three (3) prosecution witnesses, PW1, PW5 and PW6. He scantly referred to what they said without summing up the substance of the evidence of each of them to the assessors. In addition, the learned trial judge did not make a slightest reference to the evidence of PW2, PW3 or PW4. In other words, the opinion of assessors as it is on record cannot be taken to have been given by assessors who were fully acquainted with the evidence of each witness in the case because the evidence of PW2, PW3

and PW4 was not summed up to them or referred to at all. Omission to sum up evidence of these witnesses is tantamount to holding a trial without the aid of assessors contrary to the provisions of section 265 of the CPA.

In **William Safari Kayda vs the Republic,** Criminal Appeal No. 37 of 2017 (unreported), where the evidence of PW3, one of the witnesses, was not referred to or summed up to the assessors who participated in the trial, this Court held that;

> *"...the assessors will properly exercise their statutory role and make informed opinions and effectively aid the trial judge in a criminal trial only if the trial Judge has fully involved them which entails as well, the summing up to them of entire evidence of the prosecution and that of the defence in relation to the law. Thus, in the case at hand, it was incumbent on the learned trial Judge to sum up the entire evidence of both the prosecution including that of PW3 and the defence."*

Other decisions of this Court on the same aspect include, **G. 2573 PC Pacificus Cleophas Simon vs the Republic,** Criminal Appeal No. 484 of 2016, **Bernadeta Bura @ Lulu vs the Republic,** Criminal Appeal No. 530 of 2015 and **Augustino Ladaru vs the Republic,** Criminal Appeal No. 70 of 2010 (all unreported).

The above is the position of the law, notwithstanding that, section 298(1) of the CPA employs the phrase *'may sum up to assessors'* but this Court has already held that compliance with that section is, in practice mandatory, see **Jeremia Paskal Gabriel vs the Director of Public Prosecutions,** Criminal Appeal No. 185 of 2012 (unreported). That is to say, summing up the evidence of both the prosecution and the defence cases is a mandatory requirement under section 298(1) of the CPA. In **Florian Ijenje and Others vs the Director of Public Prosecutions,** Criminal Appeal No. 461 of 2017 (unreported), this Court held that failure to sum up evidence to assessors before they can give their opinion is a fundament irregularity offending section 298(1) of the CPA. The rationale being that before the assessors can give their opinion to the trial judge, they need to have fully appreciated the facts of the case.

The above irregularity in the summing up is otherwise sufficient for us to nullify the judgment of trial court, but for the sake of completeness, we will deal with one more aspect; failure to address assessors on the issue of circumstantial evidence, a vital point of law, in our view. The conviction of the appellant and the resultant death sentence were wholly based on circumstantial evidence, as not a single

prosecution witness saw the appellant participating in the murder of the deceased.

It is the requirement of law, in the circumstances, that the trial court ought to have addressed the assessors on the strict compliances of law and stringent requirements which have to be met by the prosecution evidence before a court of law can convict an accused based on circumstantial evidence. Before the assessors in this case, could be permitted to give opinion, it was incumbent upon the High Court to inform them, that they can only return a verdict of guilty, if they were fully convinced and satisfied, without any doubt, that the evidence of the prosecution was water tight to the extent that it left no possible theory or hypothesis that the deceased could have been murdered by any other person except the appellant. To us, that was a vital point of law, upon which the High Court was duty bound to address the assessors, but which responsibility, the High Court did not undertake.

The position of the law is that, inadequate summing up, non-direction or misdirection on vital points of law to assessors is tantamount to trial without the aid of assessors rendering the trial a nullity. See **Said Mshangama Asenga vs the Republic,** Criminal Appeal No. 8 of 2014, **Halfan Ismail @ Mtepela vs the Republic,** Criminal Appeal

No. 38 of 2019, **Kahamis Rashid Shaaban vs the DPP,** Criminal Appeal No. 284 of 2013 and **Weda Mashilimu and Six Others vs the Republic,** Criminal Appeal No. 375 of 2017 (all unreported). For instance, in **Weda Mashilimu and Six Others (supra)** in which, like in this case, the issue of circumstantial evidence was not adequately addressed to assessors, this Court held that;

> *"In view of the omission to address the assessors on the salient points of law as discerned in this case, it is clear as argued by the learned counsel for both sides, that the learned trial judge did not comply with sections 265 and 298(1) of the CPA. Non-compliance with the stated provisions in effect meant that the trial was conducted without the assistance of the assessors. Consequently, what is on the table is that the trial, final judgment and sentence were vitiated and the trial rendered a nullity."*

In this case there is no gainsaying that, although the conviction was wholly based on circumstantial evidence, yet the point was not brought to the attention of the assessors before they could give their opinion to the trial judge. It is also true that the evidence of three (3) witnesses out of the seven (7) who testified was not summed up to the assessors. The two omissions, vitiated the trial before the High Court, the judgment and the sentence that was imposed upon the appellant.

In view of the above, exercising revision powers of this Court under section 4(2) of the Appellate Jurisdiction Act [Cap 141 RE 2019], we declare the entire proceedings and the judgment of the High Court a nullity. The conviction is quashed and the sentence of death is set aside. We order the appellant to be tried afresh at the High Court before another judge and a new set of assessors. In the meantime, the appellant shall remain in custody as a remandee pending retrial. Order accordingly.

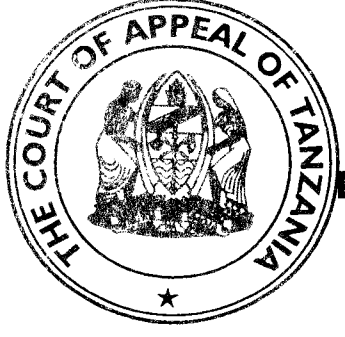
**DATED** at **DAR ES SALAAM**, the 14th day of April, 2021

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

R. J. KEREFU
**JUSTICE OF APPEAL**

Z. N. GALEBA
**JUSTICE OF APPEAL**

The ruling delivered this 14th day of April, 2021 in the presence of Mr. Mashaka Ngole, learned Counsel for the Appellant and Ms. Debora Mushi, learned counsel for the Respondent is hereby certified as a true copy of the original.




F. A. MTARANIA
**DEPUTY REGISTRAR**
**COURT OF APPEAL**