IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., WAMBALI, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 409 OF 2018

PATRICK JOHN CHARLES @ MSUKUMA ..... APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(KENTE, J.)
Dated the 13th day of November, 2018
in
Criminal Appeal No.86 of 2017

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JUDGMENT OF THE COURT

16th March & 16th April, 2021

WAMBALI, J.A.:

The appellant, Patrick John Charles @ Msukuma together with John Kashukasawe @ Mgogo, Anthony Gideon @ Godiwe and Santiha Samira, not parties to this appeal were initially jointly charged with the offence of murder contrary to the provisions of section 196 of the Penal Code [Cap.16 R.E.2002] (the Penal Code). Noteworthy, before committal proceedings were conducted by the District Court of Kilosa (the inquiry court), the Director of Public Prosecutions (the DPP) withdrew the charge against Santiha Samira under section 91(1) of the Criminal Procedure Act, [Cap.20 R.E.2002] (the CPA). Consequently, only the appellant and two

others mentioned above respectively were committed to the High Court for trial.

More importantly, at the trial before the High Court the appellant appeared as the first accused while the rest appeared as the second and third accused respectively. The prosecution alleged in the information before the trial court that the appellant and two others alluded to above, on 8th December, 2015 at Manyomvi area, Lumuma Village, within Kilosa District in Morogoro Region murdered Veronica Mwamba.

As all accused persons denied the allegation, at the trial, the prosecution fronted six witnesses and tendered three documentary exhibits to support the case. On the other hand, the accused defended themselves as they had no witnesses to support their defence. As it were, they categorically denied to have committed the offence of murder.

Nonetheless, at the end of the trial, the trial court was fully satisfied that the prosecution led sufficient evidence to prove that only the appellant committed the offence of murder. In this regard, the appellant was found guilty of the offence of murder as charged, convicted and sentenced to death by hanging.

On the other hand, the trial court found that the prosecution failed to prove the case against the second and third accused and therefore, it

acquitted them and ordered their immediate release from remand custody.

The appellant is seriously aggrieved by the conviction and sentence imposed by the High Court, hence the present appeal. Initially, the appellant lodged a memorandum of appeal comprised of three grounds. Moreover, after Mr. Jeremia Mtobesya, learned advocate was assigned to represent the appellant, in terms of Rule 73(2) of the Tanzania Court of Appeal Rules, 2009, he lodged in Court a supplementary memorandum of appeal comprising two grounds. However, for the reason which will be apparent shortly, we do not intend to reproduce hereunder the detailed facts of the case and the respective grounds contained in both memoranda of appeal.

When the appeal was placed before us for hearing, Mr. Jeremia Mtobesya, learned counsel appeared for the appellant whereas Ms. Haika Temu assisted by Ms. Ellen Masululi, both learned State Attorneys appeared for the respondent Republic.

At the very outset, before we considered the grounds of appeal in both memoranda, having noted an irregularity in the trial court's proceedings, we asked counsel for the parties to respond to our concern on whether in the circumstance of the trial judge's summing up notes to

the assessors and the judgment of the trial court, it may be concluded that assessors were properly informed and directed on vital points of law.

Responding to the question, Mr. Mtobesya conceded that according to the record of appeal, there is clear indication that the trial judge did not properly sum up the case to the assessors as required by law. He explained that, firstly, assessors were not addressed properly by the trial judge on the meaning of malice aforethought which is an essential ingredient in proving the offence of murder. Secondly, he submitted that, in view of the facts of the case in the record of appeal, the trial judge did not at all fully explain the meaning of circumstantial evidence which was an essential principle of law involved in deciding the case. To this end, Mr. Mtobesya argued that as the two vital points of law were important in determining the final verdict of the case, the trial judge was bound to explain thoroughly and direct the assessors properly on those issues. In his view, proper direction would have made the assessors to give an informed opinion to the trial judge on the verdict of the case, based of course, on how they appreciated and perceived the facts paraded by both sides.

In this regard, Mr. Mtobesya submitted that failure of the trial judge to direct the assessors on those vital points of law rendered the entire trial a nullity as the assessors did not fully understand the import of

malice aforethought and its importance in proving the offence of murder. He added that lack of understanding of the assessors on the import of circumstantial evidence and its application to the facts of the case disabled them to know the circumstances that surrounded the commission of the offence by the suspects. In his view, failure of the trial judge made the assessors not to have fully participated in the trial as required by law. In the circumstances, the learned advocate urged the Court to nullify the proceedings of the trial court, quash conviction and set aside the sentence as the appellant was greatly prejudiced.

As to the way forward, Mr. Mtobesya strongly pressed the Court to acquit the appellant on the contention that, upon careful perusal of the record of appeal on the factual setting of the case, there is no sufficient evidence in which the appellant can be found guilty of the offence of murder. Indeed, he emphasized that a retrial will not be in the interest of justice as there is no sufficient evidence to justify that course of action by the Court. He, therefore, prayed that on the strength of his arguments the appellant be set at liberty.

In reply, Ms. Temu categorically supported Mr. Mtobesya's submission on the failure of the trial judge to address assessors properly on the vital points of law. She submitted that a thorough perusal of the trial judge's summing up notes to the assessors leaves no doubt that he

did not at all explain and direct them accordingly on those vital points of law. Similarly, she agreed that in the circumstance of the irregularity which went to the root of the trial, the proper course to be taken by the Court is to nullify the trial court's proceedings, quash conviction and set aside the sentence imposed on the appellant.

However, the learned State Attorney strongly disagreed with Mr. Mtobesya on the way forward. In her submission, the proper course to be taken by the Court after nullifying the trial court's proceedings is to order a retrial of the case. In her opinion, according to the record of appeal, the prosecution has sufficient evidence to prove that the appellant committed the offence of murder. Ultimately, she submitted that in the circumstances of this case, a retrial will be in the interest of justice as all parties were prejudiced by the irregularity that was occasioned by the trial court.

Having heard the counsel for the parties, it is clear that both are in agreement on the vividly exposed failure of the trial judge to direct assessors on vital points of law and the consequences which should follow. However, they sharply differ on the way forward as to the relevant order of the Court after nullifying the proceedings of the trial court. Thus, the crucial issues to be determined by us, at this juncture, are on the

consequences of the said failure and what should be the way forward on the fate of the case.

In the first place, we entirely agree that as rightly stated by both counsel, according to the record of appeal, there is no dispute that the trial judge did not properly direct assessors on vital points of law during the summing up. The said failure, in our considered opinion, diminished the value of the assessors considered opinion to the trial judge on the facts of the case and the proper verdict that could have been reached by the trial court.

Our careful perusal of the record of appeal indicates that during the summing up to the assessors the trial judge did not at all explain the meaning of malice aforethought and its connection to the offence of murder. Particularly, the record of appeal indicates that at the beginning of his summing up to the assessors the trial judge stated briefly as follows in respect of the offence of murder: -

> *"Briefly stated, murder is the unlawful killing of a human being,* ***with mallce aforethought..."***

We further note from the record of appeal that apart from mentioning the word **malice aforethought** in passing as indicated above, there is nowhere in his summing up notes where the trial judge explained to the assessors the meaning of the term and its importance in

proving the offence of murder. We must emphasize that explaining the meaning of malice aforethought during the summing up was important to enable the assessors understand properly the ingredients of the offence of murder before they offered their considered opinion to the trial judge. Moreover, proper understanding of malice aforethought could have helped the assessors to weigh the facts which were put forward by the prosecution and the defence, and ultimately determine whether the same proved that the appellant had intended to kill the deceased, that is, whether he killed with malice aforethought. It is thus not surprising, in our respectful opinion, that in their considered opinion to the trial judge, the ladies and gentleman assessors simply opined that the appellant and two other accused persons were guilty of the offence of murder. Unfortunately, they did not categorically indicate whether they killed with malice aforethought as required by law. In the circumstances, we entirely agree with the counsel for the parties that the trial judge did not properly direct the assessors on the import of malice aforethought as an important ingredient in proving the offence of murder.

With regard to circumstantial evidence, we equally discern from the record of appeal that though the decision of the case, among others, revolved on circumstantial evidence, yet the trial judge did not at all explain and direct assessors on this vital point of law for their informed

opinion. The failure of the trial judge was indeed, with respect, unfortunate, as at the end of the day, in their opinion the assessors were not in a position to properly apply the facts of the case with an understanding of how circumstantial evidence could have linked the appellant to the commission of the offence.

Lack of proper understanding of the vital points of law, in our opinion, disabled the assessors to apply the facts of the case to give proper advice to the trial judge on whether the appellant was guilty or not guilty of the offence charged.

At this juncture, having exposed the irregularity in the summing up, we need to direct our deliberation on the consequences of the failure of the trial judge to direct the assessors on vital points of law.

In this regard, we think it is not out of place to make reference to the decision of the defunct Court of Appeal for Eastern Africa in **Washington Odindo v. The Regiman** [1954] 12 EACA 392 where it was stated as follows: -

> *"The opinion of assessors can be of great value and assistance to 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 the assessors' opinion is correspondingly reduced."*

Similarly, we do not need to overemphasize that in its numerous decisions on this particular area, the Court has consistently underscored the need for the trial court to direct assessors on vital points of law during the summing up to enable them to give informed opinion on the verdict of the case. One among those decisions is **Said Mshangama @ Senga v. The Republic,** Criminal Appeal No. 8 of 2014 (unreported) where the Court categorically stated as follows: -

> *"...As provided under the law, a trial of murder before the High Court must be with the aid of assessors. One of the basic procedure is that the trial judge must adequately sum to the said assessors before recording their opinions. 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 (see* ***Rashid Ally v. The Republic,*** *Criminal Appeal No. 279 of 2010-unreported)".*

Moreover, in **Tulubuzya Bituro v. The Republic** [1982] T.L.R. 264, the Court made reference to the *ratio decidendi* in the decision of the English case in **Bharat v. The Queen** (1959) AC 533 and stated as follows: -

> *"Since we accepted the principle in Bharat's case as being sensible and correct, it must follow that in a*

criminal trial in the High Court where assessors are misdirected on a vital point, such trial cannot be construed to be a trial with the aid of assessors. The position would be the same where there is a non-direction to the assessors on vital point."

On the other hand, we are mindful of the position that assessors should be made to give their opinion independently based on their own perception of and understanding of the case without being influenced by the trial judge (see **Ally Juma Mawera v. The Republic** [1993] TLR 231). However, we are settled that that independence depends on the proper understanding of the facts of the case and sufficient direction to the assessors on vital points of law which must be made by the trial judge during the summing up before they give their opinion.

In the present case, we are satisfied that the assessors were not properly directed on the vital points of law on malice aforethought and the import of circumstantial evidence. This in essence led to the assessors' inability to give informed opinion on the proper verdict based on the facts of the case. Thus, failure of the trial judge to direct the assessors on those vital points of law is fatal and renders the entire trial a nullity as rightly submitted by both counsel for the parties. It is in this regard that in an akin situation, in **Charles Lyatu @ Sadala v. The Republic**, Criminal Appeal No.290 of 2011 (unreported), the Court

nullified the entire trial High Court's proceedings because the assessors were not directed on the import of malice aforethought.

However, in the present case, before we nullify the trial court's proceedings, we are mindful of the contending positions of learned counsel on the way forward. Notably, the appellant's counsel pressed us not to order a retrial on the argument that the case for the prosecution had no foundation on which to prove the charge of murder. On the adversary side, the respondent's counsel maintained that on account of the available evidence in the record, a retrial be ordered.

On our part, having carefully examined and weighed the rival submissions made by the counsel in the light of the factual setting and the circumstances of the case, we are of the considered opinion that justice should not only be done but it must be seen to be done. In the premises, as both sides of the case were prejudiced by the irregularity in the summing up to the assessors, we think a retrial will be in the interest of justice.

In the result, as the issue of failure of the trial judge to direct assessors on vital points of law was raised *suo motu* by the Court, we exercise our power of revision under section 4 (2) of the Appellate Jurisdiction Act, Cap.141 R.E.2019 to revise and nullify the entire trial

proceedings of the High Court, quash conviction and set aside the sentence of death imposed on the appellant.

Consequently, we order that the appellant should be retried expeditiously before another judge and a different set of assessors. We further order that in the meantime the appellant should remain in custody pending a retrial.

DATED at **DAR ES SALAAM** this 15th day of April, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 16th day of April, 2021 in the presence of appellant in person linked through video conference from Ukonga Prison and Miss Debora Mushi, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL