IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And GALEBA, J.A.)

CRIMINAL APPEAL NO. 198 OF 2017

KINYOTA S/O KABWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Mallaba, J.)

dated the 5th day of June, 2017
in
Criminal Sessions Case No. 105 of 2014

JUDGMENT OF THE COURT

20th & 27th April, 2021

KWARIKO, J.A.:

The appellant, Kinyota s/o Kabwe was arraigned before the High Court of Tanzania at Tabora 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 the 15th day of September, 2013 at about 15:00 hours at Muzye Village within Kasulu District in Kigoma Region, the appellant murdered one Lucia d/o Tekana (the deceased).

Having denied the charge, the appellant was fully tried and at the end he was convicted and sentenced to mandatory death by hanging. Aggrieved by that decision, the appellant is before this Court on appeal.

During the trial, it was not disputed that the appellant was responsible for the death of the deceased. What was in dispute is whether the appellant had malice aforethought when he killed the deceased.

The prosecution case composed of a total of six witnesses whose evidence can be recapitulated as hereunder: On 15th September, 2013 at 15:00 hours, while Maines Nyaumba (PW1) was at home with her mother, the deceased, they heard alarm from their neighbour, the appellant's wife. The two went out to find out what the matter was. Whilst there, they saw the appellant running towards them holding a spear. The deceased ran inside her house and closed the door but the appellant came, pushed it and stabbed her in the chest and when she fell down, he once again stabbed her in the neck. On seeing that, PW1 raised alarm, where upon the appellant threw the spear towards

her injuring her hands. She ran to take refuge at the neighbour's house.

Meanwhile, Julius Mihila (PW2), Oliver Omary (PW3) and Lazaro Munugo (PW4) turned out at the scene in response to the alarm. They met the appellant holding his blooded spear and threatened to spear anyone who came his way. In the process he uttered to them that they were those foolish people who were unsuccessfully been looked for, *(nyie ndiyo wapumbavu tunawatafuta hatuwapati).*

When PW1 and village mates managed to reach to the scene of crime, they found the deceased already dead. Information was sent to the village office and then to the Police. The scene of crime was inspected by No. G. 2071 DC Boniface (PW6) who drew a sketch map. The autopsy on the deceased body was conducted and the postmortem report was admitted during the preliminary hearing as exhibit P1.

Further, as the appellant's counsel had informed the court from the beginning that the appellant intended to rely on the defence of insanity, the court ordered for the appellant's mental examination and the findings were presented by Dr. Enock

Changarawe (PW5). It was reported that the appellant was not suffering from any mental disorder and he was sane when he committed the offence. The medical report was admitted in evidence as exhibit P2.

In his defence, the appellant who was the only witness for the defence, recounted his activities on the material day to the effect that he went to the funeral in the morning but felt headache and returned home at 10:00 hours where he slept until 1:00 hours when he woke up to have lunch. Thereafter, he slept again but was disturbed by the children who were making noise outside. He took a stick with intention to scare them but they ran away and instead decided to trample over their bicycles. On seeing that, his wife raised alarm after which he chased her but she ran into the toilet. It was the appellant's evidence that, he did not know what happened next until he found himself apprehended by villagers, beaten and sent to Police Station. He said that if he killed the deceased, it was not intentional as he did not know what he was doing.

The trial court dismissed the appellant's defence of insanity for the reason that if he managed to account the events before

and after the killing, he knew what he was doing and thus had malice when he killed the deceased. He was convicted and sentenced as indicated earlier.

Before this Court, the appellant raised three grounds in his memorandum of appeal and four grounds in the supplementary memorandum of appeal filed by Mr. Emmanuel Musyani, learned advocate for the appellant. However, at the hearing of the appeal, Mr. Musyani opted to argue the grounds of appeal in the supplementary memorandum and abandoned the grounds raised by the appellant in his memorandum of appeal. The four grounds which were argued are as follows:

1. *That, the learned trial Judge erred in law by failing to properly evaluate the defence of insanity because as it can be discerned or found out from the defence, insanity was proved on the balance of probability.*

2. *That, the learned trial Judge erred in law in accepting and relying on the medical report which was inconsistent with the evidence on*

record and which did not sufficiently describe soundness of mind of the accused.

3. *That, the learned trial Judge erred in acting on the prosecution evidence to convict the appellant while the weapon used to kill the deceased (the spear) allegedly taken by the Police was not tendered in court as an exhibit and that there was no evidence as to its disposal.*

4. *That, the learned trial Judge erred by failing to properly sum-up the evidence to the assessors as a result, caused miscarriage of justice by disclosing his view which influenced the unanimous opinions of all the three assessors.*

When the appeal was called on for hearing, the appellant appeared personally and was represented by Mr. Musyani, whilst the respondent Republic was represented by Ms. Upendo Malulu, learned Senior State Attorney.

We shall start our deliberation on the fourth ground of appeal which challenges the learned trial Judge's summing up to

assessors. With respect to this ground, Mr. Musyani argued that during the summing up, the trial Judge disclosed his views to the assessors. He referred us to page 89 of the record of appeal. He submitted that, the omission prejudiced the appellant rendering the proceedings a nullity.

Upon being probed by the Court, Mr. Musyani submitted that in the summing up, the trial Judge ought to have summarized the evidence of both sides and not analyzing the evidence as he did, which amounted to improper summing up.

For her part, Ms. Malulu supported the appeal specifically in relation to the fourth ground of appeal. She argued that instead of summarizing the evidence to the assessors, the learned Judge analyzed it and made his own views known to them. She went on to argue that the learned Judge's views influenced the assessors and thereafter did not have independent mind when they gave their opinions. The learned Senior State Attorney urged us to nullify the proceedings and order a retrial of the appellant as prosecution evidence is sufficient to ground conviction.

We have considered the submissions by the counsel for the parties and found the issue for determination to be whether the learned Judge properly summed up the case to assessors. Section 265 of the Criminal Procedure Act [CAP 20 R.E. 2019] (the CPA) requires all criminal trials before the High Court to be conducted with the aid of assessors. It provides thus:

> *"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."*

Apart from the foregoing, the trial Judge sitting with assessors is required, at the conclusion of the evidence from both sides, to sum up the case to the assessors before they are invited to give their opinions. Section 298 (1) of the CPA which is relevant here provides:

> *"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."*

However, although the phrase "the judge may sum up" appears to be discretionary, it has been invariably interpreted by the Court to signify that the duty imposed upon the trial Judge is mandatory. For instance, in the case of **Mulokozi Anatory v. R,** Criminal Appeal No. 124 of 2014 (unreported), the Court 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 the 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 cases to the assessors..."*

[See also **Omary Khalfan v. R,** Criminal Appeal No. 107 of 2015 and **Bakari Seleman @ Binyo v. R,** Criminal Appeal No. 12 of 2019 (both unreported)].

Further, in the summing up to assessors what the trial Judge is supposed to do, is to explain the ingredients of the offence charged, the burden of proof in a criminal case, recap the evidence from both sides, highlight vital points of law, possible

defences and explain the law regarding those defences. To underscore this duty, in the case of **Laurent Salu & Five Others v. R,** Criminal Appeal No. 176 of 1993 (unreported) which was relied upon by the Court in the case of **Fadhil Yussuf Hamid v. R,** Criminal Appeal No. 129 of 2016 (unreported), the Court elaborated all the steps to be complied with in a trial with aid of assessors. Relevant to the case at hand, it was stated thus:

> *"The court has to sum up to the assessors at the end of submission by both sides. The summing up to contain a summary of facts, the evidence adduced, and also the explanation of the relevant law, for instance what is malice aforethought. The court has to point out to assessors any possible defences and explain to them the law regarding those defences."*

Now, following that authority, the question which comes at the fore is whether in the instant case the trial Judge complied with that important duty in the summing up. In our perusal of the summing up notes to assessors, we have found that the learned Judge started by explaining the burden of proof in a criminal case, the ingredients of the offence of murder and what followed was a discussion of issues he raised from the evidence of both

sides before he invited the assessors to give their opinions. The trial Judge did not summarize the evidence from both sides for the assessors to be reminded of what the case was all about. As stated above, he was enjoined to do so by virtue of section 298 (1) of the CPA.

Not only the foregoing, but also the trial Judge went to the extent of disclosing his own views in relation to the evidence which had the danger of influencing the assessors. For instance, at page 89 of the record of appeal, the learned Judge said thus:

> *"You should give your opinion on whether by merely alleging in his defence that he did not recollect what he was doing the accused has discharged the duty to substantiate his defence of insanity."*

Faced with similar situation in the case of **Ally Juma Mawepa v. R** [1993] TLR 231, where the trial Judge gave certain comments concerning the credibility of the appellant during summing up to the assessors, the Court held *inter alia* thus:

> *"(i) When summing up to the Assessors the Trial Judge should as far as possible desist from*

disclosing his own views, or making remarks or comments which might influence the Assessors one way or another in making up their own minds about the issue or issues being left with them for consideration;

(ii) The assessors should be made to give their opinions independently, based on their own perception and understanding of the case after the summing up; the Judge makes his views known only after receiving the opinions of the assessors and in the course of considering his judgment in the case."

[See also **Kulwa Misangu v. R,** Criminal Appeal No. 171 of 2015 and **MT. 101296 Omary Mwichande & Three Others v. R,** Criminal Appeal No. 71 of 2016 (both unreported)].

Guided by the authorities cited above, we are in agreement with the learned counsel for both parties that the proceedings of the trial court were vitiated. We therefore uphold the fourth ground of appeal. Since the finding on that ground suffices to dispose of the appeal, the need for considering the other grounds of appeal does not arise. In the final analysis, we hereby nullify the proceedings and the judgment of the High Court, quash the appellant's conviction and set aside the sentence.

As to the way forward, on their part, the learned counsel for the parties urged us to order a retrial of the appellant. We agree with them and hereby order a retrial of the case before a different judge and a new set of assessors.

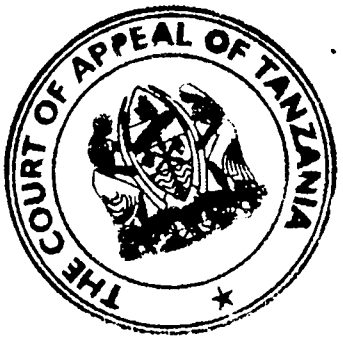
DATED at **TABORA** this 26th day of April, 2021

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 27th day of April, 2021 in the presence of the Appellant in person and Mr. Deudedit Rwegira, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL