

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CRIMINAL APPEAL NO. 138 OF 2017

KANUDA DAUDI @ BODOLO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mruma, J.)

dated 12th day of June, 2015

in

Criminal Sessions Case No. 111 of 2012

JUDGMENT OF THE COURT

20th & 28th April, 2021

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania, (Tabora District Registry) sitting at Maswa in Criminal Sessions Case No. 111 of 2012. In that case, the appellant was charged with the offence of murder contrary to s. 196 of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). It was alleged that on 1/6/2011 at unknown time at Isakang'wale Village within Bariadi District in Shinyanga Region, with malice aforethought, he killed one Daniel Ayub (the deceased).

The appellant denied the charge. After a full trial however, he was found guilty of the offence and was thus sentenced to suffer death by hanging. In its decision handed down on 12/6/2015, the High Court (Mruma, J.) was satisfied that the prosecution evidence which was tendered by four prosecution witnesses had sufficiently proved the case against the appellant beyond reasonable doubt. Aggrieved by the decision of the High Court, the appellant has preferred this appeal.

The background facts giving rise to the appeal may be briefly stated as follows: On 1/6/2011, the appellant hired a motorcycle from Kulwa Simiyu Mbiti (PW1) and used it to go to the home of PW3. From there the appellant picked the deceased and travelled with him to the home of Masanja Msolandege PW2, the uncle of both the deceased and the appellant. PW2 gave them a bag of sweet potatoes and five chickens which they packed on the motorcycle and rode away. These items were later found at the house of the appellant's senior wife.

The deceased, who was a businessman dealing in maize trade was expected to travel to Mwanza on that date. However, until on the second day, that is on 2/6/2011, neither did his relatives in Mwanza nor his family members at Inalo, have any information of his whereabouts. His father, PW3 became suspicious and therefore, made a report to the police. As a result, the appellant was arrested by No. D. 1434 Cpl. Christian (PW4). Few

days later on 6/6/2011, the deceased's body was found floating in Simiyu river with a stone tied on it with a polyethylene rope. His fingers had also been cut off. The body was retrieved in the presence of PW4.

According to the evidence of PW3, the deceased had TZS. 18,000,000.00 at the time when he left his home in the company of the appellant. On his part, PW1 testified that the appellant hired the motorcycle for TZS. 5,000.00 on the agreement that he would return it on the same day but did not do so. Instead, he returned it on the second day at 06:00 am With regard to how the bag of sweet potatoes and five chickens given by PW2 to the appellant and the deceased came to be found at the house of the appellant's senior wife, PW4 testified that, when he interrogated the appellant's senior wife, she explained that the items were taken there by both the appellant and the deceased.

In his defence, the appellant who was the only witness for the defence, did not dispute the prosecution evidence that on 1/6/2011, he went to PW3's house (the deceased's home) riding a motorcycle belonging to PW1. The appellant did not also dispute that from PW3's house, he carried the deceased on the motorcycle and went with him to their uncle, PW2, where after having packed the bag of sweet potatoes and the chickens, they left together. What was disputed by the appellant is the contention by PW1 that his motorcycle was not returned on 1/6/2011 as

agreed and the evidence that he was the last person to be seen with the deceased before his death.

In his testimony, the appellant said that on 1/6/2011, after having carried the deceased from PW2's house, he went with him to Luguru Ginnery Centre and at that place, the deceased disembarked and shortly thereafter, he parted with him at a coffee stall from where each one of them headed to different places. He said that, whereas he went to the house of his junior wife, the deceased went to the house of the appellant's senior wife.

The appellant went on to state that, later on 4/6/2011, he was arrested by three policemen at his home and taken to Inalo Police Station where he was locked up. From there, he said, on 5/6/2011, he was transmitted to Bariadi Police Station and on 6/6/2011 he was charged in court.

Having considered the prosecution evidence and the appellant's defence, the learned trial Judge was satisfied that the appellant was the last person to be seen with the deceased. He found also that the available circumstantial evidence linking the appellant with the death of the deceased was sufficient to ground conviction. According to the learned Judge, in his defence, the appellant failed to give plausible explanation, first, on how he

parted with the deceased after he had left with him from PW2's house and secondly, on how the bag of sweet potatoes and five chickens taken by him and the deceased from PW2's home came to be found at the house of the appellant's senior wife.

As stated above, the appellant was dissatisfied with the decision of the High Court. He thus filed this appeal. In his memorandum of appeal lodged on 8/1/2018, the appellant raised two grounds of appeal. On 12/4/2021 however, his counsel lodged a supplementary memorandum consisting of two grounds.

At the hearing of the appeal, the appellant was represented by Mr. Kamaliza Kamoga Kayaga, learned counsel while the respondent Republic was represented by Ms. Gladness Senya, learned State Attorney. In arguing the appeal, Mr. Kayaga relied only on the two grounds contained in his supplementary memorandum of appeal, which he said, cover the other two grounds of appeal filed by the appellant. The learned counsel was entitled to take that move by virtue of the provisions of Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 as amended. In the two grounds the appellant's counsel contends that the learned trial Judge erred in convicting the appellant while:

"1. ... there was no fair trial to the appellant.

*2. ... there was no sufficient circumstantial evidence to invoke the last **seen doctrine**" to convict the appellant."*

Submitting in support of the first ground of appeal, Mr. Kayaga argued that during the trial, the appellant was not afforded a fair hearing because, first, he was not given the opportunity to object to the assessors and secondly, that the learned trial Judge did not explain to the assessors, their role at the trial, the omission which, according to the learned counsel, also denied the appellant a fair trial. Mr. Kayaga cited the case of **Monde Chibunde @ Ndishi v. The DPP**, Criminal Appeal No. 328 of 2017 (unreported) to bolster his argument.

In reply to the submission made by the appellant's counsel on that ground of appeal, Ms. Senya conceded that after having selected the assessors as required under s. 285 of the Criminal Procedure Act [Cap. 20 R.E. 2002] (now R.E. 2019), the learned trial Judge did not, first, inform the appellant of his right to object to any or all of them and secondly, he did not address the assessors on their role in the trial. The learned State Attorney argued however, that the omission was not fatal because the appellant was not prejudiced.

Having considered the submissions of the learned counsel for the parties, the issue for our determination is whether or not the omission

occasioned a miscarriage of justice. We wish to state at the outset, that the requirement of affording an accused person the right to object to assessors and the trial judge's duty of informing the assessors their role in a trial are matters of practice not law. The position was stated in the case of **Luarent Salu and 5 Others v. Republic**, Criminal Appeal No. 176 of 1993 (unreported) in which the Court had this to say:

"Admittedly the requirement to give the accused the opportunity to say whether or not he objects to any of the assessors is not a rule of law. It is a rule of practice which, however, is now well established and accepted as part of the procedure in the proper administration of justice in this country ..."

– See also the case of **Monde Chibunde @ Ndishi** (supra) cited by the learned counsel for the appellant and **Fadhil Yussuf Hamid v. Director of Public Prosecutions**, Criminal Appeal No. 129 of 2016 (unreported).

Ms. Senya has argued that the omission to inform the appellant of that right did not vitiate the proceedings because the appellant was not prejudiced. That may be so because all the assessors who sat with the learned trial Judge gave their opinions in favour of the appellant. However, as observed in the case of **Chacha Matiko @ Magige v. Republic**, Criminal Appeal No. 362 of 2015 (unreported), the omission had the effect

of prejudicing both the appellant and the prosecution. In that case, the Court observed as follows:

"... the omission by the trial court to afford the appellant an opportunity to express whether or not he objects to any of the assessors, certainly prejudiced the appellant as well as the prosecution."

In the particular circumstances of the present case, the prejudice is more significant, regard being had to the second limb of the appellant's first ground of appeal; that the assessors were not informed of their role in the conduct of the trial. That requirement ought to have been complied with by the learned trial Judge. Underscoring the duty of complying with that requirement, in the case of **Hilda Innocent v. Republic**, Criminal Appeal No. 181 of 2017 (unreported), the Court observed as follows:

"... it is equally important that although informing the assessors on their role and responsibility is a rule of practice and not of law, as it is for a long time an established and accepted practice in order to ensure their meaningful participation, a trial judge must perform this task immediately after ascertaining that there is no any objection against any of the assessors by the accused before commencing the trial."

Since therefore, compliance with each of the two requirements is necessary for the fair conduct of a trial held with the aid of assessors, the omission to do so renders the proceedings a nullity. In the light of this finding therefore, we hereby nullify the proceedings of the trial court, quash the judgment and set aside the appellant's conviction.

On whether or not we should order a retrial, the guiding principles in the exercise of that power were stated in the case of **Fatehali Manji v. Republic**, [1966] E. A. 343 in which the defunct Court of Appeal for Eastern Africa stated 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 insufficiency of evidence or for the purpose of enabling the prosecution to fill gaps in its evidence at the first trial ... each case must depend on its own facts and circumstances and an order for retrial should only be made where the interests of justice require it."

In effect therefore, whether an order for retrial should be made or not will depend on the facts and the circumstances of each case but should only be made where the interest of justice requires.

Having considered the evidence tendered in this case and the serious nature of the offence, we are of the considered view that an order for retrial is appropriate. For these reasons therefore, we order a retrial before another Judge and a new set of assessors. The appellant should remain in custody pending his retrial.

DATED at **TABORA** this 27th day of April, 2021.

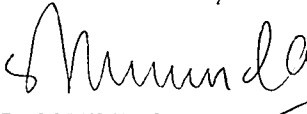
A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 28th day of April, 2021 in the presence of Mr. Kamaliza Kamoga Kayaga, learned counsel for the Appellant and Ms. Jaines Kihwelo, learned State Attorney for the Respondent Republic is hereby certified as a true copy of the original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL