IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CRIMINAL APPEAL NO. 246 OF 2017

AYOUB DANIEL MUNGURE @ SEBA @ BABUU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Opiyo, J.)

dated the 22nd day of May, 2017
in
Criminal Session Case No. 44 of 2015

.....

JUDGMENT OF THE COURT

22nd February & 30th April, 2021

MWARIJA, J.A.:

The appellant, Ayoub Daniel Mungure @ Seba @ Babuu together with two other persons, Emmanuel George Humay @ Kaburu and James Joel Kiwandai @ Babuu Joel were charged in the High Court of Tanzania at Arusha with the offence of murder contrary to section 196 of the Penal Code [Cap. 16 R.E. 2002]. It was alleged that on 24/6/2014 at Maisaka 'A'

within Babati District in Manyara Region, they murdered one Said Chuchu (the deceased).

After a full trial, the High Court (Opiyo, J.) sitting at Babati found the appellant guilty of the offence charged and therefore, convicted and sentenced him to suffer death by hanging. The two others who were the 1st and 3rd accused persons at the trial, were found not guilty and were, as a result, acquitted. The appellant was aggrieved by the decision of the High Court hence this appeal.

The facts giving rise to the appellant's arrest and his subsequent conviction can be briefly stated as follows: On 24/6/2014 Jumapili Ramadhani (PW1) who was in the company of another person, one Athumani, were travelling to Malangi village riding bicycles. At Katanini area (the area comprising of sisal plantations), they parked their bicycles and entered into one of the sisal plantations with a view of attending a call of nature. Having walked a short distance, Athuman saw a dead human body. He ran back and drew the attention of PW1 who went to the place and saw the body. The deceased had a rope around his neck and had put on only a short sports trousers (bukta). While there, one Daudi Martin who was known to PW1, appeared and recognized the dead body. He

therefore, informed the deceased's relatives including his brother, Abeid Chuchu (PW2) who went to the scene. The incident was also reported to the Village Chairman and the Ward Executive Officer (WEO). The WEO informed the police and shortly thereafter, some police officers arrived at the scene and took the body. After a postmortem examination had been conducted on it at Babati District Hospital, they handed it to its relatives for burrial arrangements. Later, the police proceeded with investigation, the result of which, as stated above, the appellant and the two acquitted persons were charged.

No. D. 9633 D/Cpl William Wambura (PW8) was one of the police officers who went to the scene of crime. According to his evidence, he found the deceased's body in the situation stated by PW1. He testified further that he found a pair of green sandals, pieces of a motorcycles' lighting glasses, a jeans trousers and a sticker bearing the word "Star". He then drew a sketch map of the scene of crime. He added that, in the course of his investigation, he obtained from the relatives of the deceased, his mobile phone number which was 0785256206 operated through Airtel service provider. He also obtained from that company, the IMEI number of the handset which was being used by the deceased. He then sent that

IMEI number to police, Cyber Crime Department for the purpose of tracing the user of the deceased's handset.

According to the evidence of D/Sgt Marcel (PW9), the tracing revealed that the handset was being used at Usa River Chini to operate Vodacom mobile phone No. 0753878447 registered in the name of one Daulizen. On that finding, PW9 contacted Usa River police whereupon D/c Rishael (PW3) managed to arrest the said Daulizen.

According to PW3's evidence, Daulizen who testified as PW4, explained that the Tecno brand handset was entrusted to him by his friend who was a Seminarian at Ngongogare and when PW3 interrogated that person, his explanation was that he bought it from a person who was taken to him by one Babuu @ Nelson, a resident of Ngarenanyuki. With that information, in the company of PW4, PW8 and Yasin, the deceased's relative, PW3 went to Ngarenanyuki to arrest the said Nelson but could not trace him.

In his evidence however, PW4 testified that he bought the handset from the appellant at TZS 38,000.00 in the presence of Babuu @ Nelson who was well known to him. The said Babuu Nelson, whose real name is

Nelson Ngewerirwa, a bodaboda rider, was later on called as a witness. He gave evidence as PW5. He testified that he was approached by the appellant who wanted to sell his handset. He went on to state that, since he did not need it, he introduced the appellant to PW4 who bought that property.

Meanwhile, as PW3 and PW8 were tracing the person who sold the handset to either PW4 or his friend and after giving the details of the incident to the Usa River police station, No. 770 S/Sgt Jonas (PW6) informed them that, a motorcycle fitting the descriptions given by them, Reg. No. T. 979 CWF was impounded and was at the police station. According to his evidence, on 26/6/2014 he got information that one person known as Seba had abandoned the said motorcycle at Bellan area and ran away fearing mob justice after he had caused an accident. The motorcycle was taken to Babati where it was later tendered and admitted in court as exhibit P2.

PW8, the police officer who participated in the arrest of the appellant, said that when he was arrested at Samansi village, the appellant was found in possession of a leather jacket and a pair of shoes which he admitted to belong to the deceased. These properties were admitted in evidence as

exhibits P3 and P5 respectively. He added that, when he interrogated the appellant, he confessed to have been involved in the commission of the offence. PW10, Andrea Sima supported the evidence of PW8 stating that, he witnessed when the appellant surrendered exhibit P5 admitting that it was the property of the deceased. It was PW10's evidence also that the appellant admitted to have had in his possession, exhibit P5 which belonged to the deceased and which, at the material time of the arrest, was at a hair dressing salon owned by one Tlaa Hamisi (PW7).

On his part, giving evidence in support of PW10's testimony, PW7 testified to the effect that on 2/9/2014 he was given exhibit P5 by the appellant for safe keeping. He testified further that he kept it at his salon while the appellant proceeded to play a pool table at the nearby facility. Giving the description of the jacket, he stated that the same was black in colour and had a torn part on the left hand side pocket. He went on to state that, later on that day, he was required by the hamlet Chairman to take that property (exhibit P5) to him so that he could take it to police station.

The prosecution also led evidence to the effect that exhibits P2, P3 and P5 were identified to be the deceased's properties. That evidence was

given by the deceased's younger brother, Yasin Ramadhani (PW11). He testified that on 28/8/2014 and 4/9/2014 he was called to Usa River and Babati police stations respectively and required to identify the properties which were suspected to have been stolen from the deceased. He said that, at Usa River Police Station he identified exhibits P2 and P1 while at Babati police station he identified exhibits P3 and P5. According to his evidence, he was able to identify exhibit P2 by its make, that is "Star" and its registration number, that is, T. 979 CWF as well as its colour, a black colour.

As for exhibit P1, he said that he identified it for its make, that is, Tecno and its black colour adding that he had at times being using the two properties on the permission of the deceased. As for exhibit P5, he said that he identified the same because of the black colour which the deceased painted, changing its original grey colour. That colour, he said, remained at some parts of the shoes. With regard to exhibit P3, it was PW1's evidence that he identified it by its black colour and a patch on one of its pockets.

In his defence, the appellant testified that between 23/06/2014 and 30/08/2014 he was at his livestock farm at Maweni. On 30/08/2014, his

aunt informed him of the death of his brother, one Isaya who resided at Arusha. He went to attend the funeral of his deceased brother which took place on 2/9/2014. He went on to testify that, on 3/9/2014 at 11.45 hrs, he was arrested by the police while on his way home from Kijiweni area where had gone to buy cooking oil. He added that, at the time of his arrest, he had put on a black jacket but the police who arrested him removed it while beating him. As a result, while being taken away by the police officers who also took his shoes, he asked PW7 to keep the jacket.

It was the appellant's further evidence that on 7/9/2014, while at the police station, he was taken before PW4 and PW5 for them to make identification as to whether he is the one who sold exhibit P1 to PW4 and PW5. At first, he said, they denied knowing him as the person who sold the handset to them but according to his evidence, when they were warned not to bother the police, they admitted that he was the one.

In her decision, the learned trial Judge was of the view, and correctly so, that the evidence which was relied upon by the prosecution was wholly circumstantial. She found however, that from the evidence of the witnesses and the tendered exhibits, the prosecution had proved its case beyond reasonable doubt. She particularly relied on the evidence of PW3,

PW4 and PW9 to the effect that the appellant was the person who sold the deceased's handset to PW4. According to the learned trial Judge, such circumstantial evidence implicated the appellant with the offence. Having also considered the evidence of PW3, PW6 and PW8 relied upon by the prosecution to show that the appellant was the person who abandoned the motorcycle with which he caused an accident at Ngarenanyuki coupled with the evidence that the appellant was found in possession of exhibits P1, P3 and P5, the learned trial Judge was satisfied that, by application of the doctrine of recent possession, there was sufficient proof that the appellant was involved in the murder of the deceased.

As pointed out above, the appellant was dissatisfied with the decision of the High Court and therefore, preferred this appeal. In his memorandum of appeal filed on 21/12/2018, he raised a total of eight grounds. Later on 10/2/2021, he filed a supplementary memorandum consisting of six grounds. For reasons which will be apparent herein however, we do not intend to dwelve on those grounds of appeal.

At the hearing of the appeal, the appellant appeared through video conferencing facility linked to Arusha Central Prison. He was represented in Court by Mr. Lecktony Ngeseyan, learned counsel. The respondent

Republic was represented by Ms. Sabina Silayo assisted by Ms. Janeth Sekule, both learned Senior State Attorneys.

In the course of hearing the appeal, the Court required the counsel for the parties to address it on whether the summing up to the assessors was adequately made by the learned trial Judge. Both Mr. Ngeseyan and Ms. Silayo conceded that the summing up was not adequately made because the assessors were not addressed on vital points of law involved in the case. According to Ms. Silayo, the assessors were not addressed on the nature and pertinence of circumstantial evidence as well as the doctrine of recent possession, the evidence and inference on which the appellant's conviction was based.

It is explicit from the record that in making the summing up to the assessors, apart from giving the summary of the evidence, the learned trial Judge did not direct them on the principles governing application of circumstantial evidence and the doctrine of recent possession. She did not also direct them on the ingredients of murder, the offence with which the appellant was charged. The trial court had the duty of directing the assessors on those vital points of law involved in the case for them to give their informed opinions. That is a mandatory requirement. See for

instances, the cases of **Mathayo Wilfred and 2 Others v. Republic**, Criminal Appeal No. 294 of 2016, **Republic v. Revelian and Another**, Criminal Appeal No. 570 of 2017 and **Masolwa Samwel v. Republic**, Criminal Appeal No. 206 of 2014 (all unreported). In the latter case, the Court observed as follows:

> *"There is a long and unbroken chain of decisions of the Court which aii underscore the duty imposed on trial High Court Judges who sit with the aid of assessors, to sum up adequately to those assessors* ***on all vital points of law****. There is no exhaustive list of what are the vital points of law which the trial High Court should address to the assessors and take into account when considering their respective judgments."*
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> [Emphasis added].

Having found above that the trial High Court did not execute that duty, the next issue for our consideration is the effect of that omission. It is trite position that where the assessors are not addressed on vital points of law, the effect is to vitiate the proceedings. Again, the authorities to that effect are abundant- See for example, the cases of **Omari Katesi v. Republic,** Criminal Appeal No. 508 of 2017, **Said Mshagama @ Singa v. Republic**; Criminal Appeal No. 8 of 2014 (both unreported) and

Tulibuzya Bituro v. Republic [1982] T.L.R 265. In the latter case, taking inspiration from the English case of **Bharat v. The Queen** [1959] AC 533, the Court stated as follows:

> *"Since we accept 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 vital points, such a trial cannot be construed to be a trial with the aid of assessors.* ***The position would be the same where there is non-direction of the assessors on vital points."***
>
> [Emphasis added].

Similarly, in the case of **Omari Katesi** (supra), the Court emphasized the requirement of complying with that duty by citing a passage in the case of **Khalfan v. Republic**, Criminal Appeal No. 107 of 2015 (unreported) where the Court had this to say:

> *"... the assessors must be summed up on facts and every vital points of law so as to give the court an informed verdict. That was not done and, on the authorities discussed above, the ailment vitiates the entire proceedings, for it is impossible to know what the assessors would say had the vital points of law been put to them."*

Going by the position of the law as shown above, there is no gainsaying that the proceedings of the High Court were a nullity. In the event, we invoke the revisional jurisdiction of the Court under s.4 (2) of the Appellate Jurisdiction Act [Cap.141 R.E. 2019] and hereby nullify the same, quash the judgment and conviction of the appellant and set aside the sentence.

That said and done, the next issue for our determination is on the way forward, that is; whether we should order a retrial or not. The principles governing retrials were stated by the defunct Court of Appeal of East Africa about half a century ago in the case of **Fatehali Manji v. R.** [1966] IEA 343. Reiterating those principles in the case of **Selina Yambi and Others v. Republic**, Criminal Appeal No. 13 of 2013 (unreported), the Court observed as follows:-

> *"We are alive to the principles governing retrials. Generally, a retrial will be ordered if the original trial is illegal or defective. It will not be ordered because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up the gaps. The bottom line is that, an order should only be made where the interests of justice requires."*

Both Mr. Ngeseyan and Ms. Silayo were at one that the evidence acted upon by the High Court to convict the appellant was insufficient. According to Mr. Ngeseyan, ownership of exhibit P2 was not proved. This, he said, is because the witnesses including the one who went to identify it at the police did not disclose its engine or chasis number. They referred only to the plate number, he said.

On her part, Ms. Silayo submitted that an order of retrial would be inappropriate in view of the available evidence on record. According to the learned Senior State Attorney, the prosecution evidence is deficient in that, first, no person was called as a witness to establish that the deceased had in his possession the motorcycle shortly before he was found dead and secondly, that the evidence of PW4 and PW5 was inconsistent as regards the person from whom PW4 obtained exhibit P1. She argued also that the ownership by the deceased of that exhibit was not proved because there was no evidence from the Airtel showing that Airtel phone No. 0785256206 was registered in the name of the deceased.

The learned Senior State Attorney submitted also that the evidence of PW11 regarding the identification of exhibits is unreliable because he did not give the particular descriptions of the properties before he went to

identify them at Usa River police station. That, she said, applies also to exhibits which were at Babati police station. Ms. Silayo thus submitted that, for that reason, the doctrine of recent possession was improperly applied to convict the appellant.

Having considered the submissions of the counsel for the parties on the issue and after having subjected the prosecution evidence to scrutiny, we are of the settled view that a retrial order will not serve the interests of justice. We agree with both counsel for the parties that the circumstantial evidence acted upon by the High Court to convict the appellant was deficient. Indeed, whereas ownership of the exhibit P2 was not properly established because of insufficient evidence as stated by both Mr. Ngeseyan and Ms. Silayo, the identification of the other exhibits by PW11 did not follow the established principle of giving their description before he went to identify them.

We also agree with Ms. Silayo that the prosecution ought to have produced evidence showing that the Airtel phone, number 0785256206 which enabled the police to trace the handset, was registered in the name of the deceased. That was not done and thus the absence of such evidence weakened the prosecution case. For these reasons therefore, it will not

be just to order a retrial because to do so would enable the prosecution to fill up the gaps in its evidence. In the event, we decline to order a retrial. As a result, the appellant should be released from prison forthwith unless he is otherwise lawfully held.

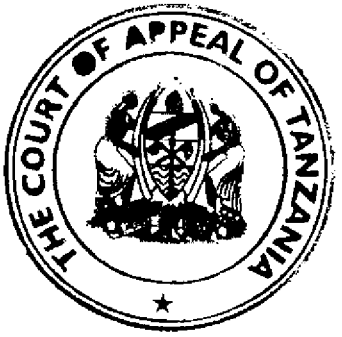
DATED at **DAR ES SALAAM** this 14th day of April, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The judgment delivered this 30th day of April, 2021 in the presence of appellant linked via video conference to Arusha Central Prison and Mr. Lecktony Losiyo Ngeseyan, learned counsel for the Appellant and Mr. Ahmed Hatibu, learned State Attorney for the Respondent/Republic both linked via video conference from Arusha High Court is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL