IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 197 OF 2017

FURGENCE BUGOHE @ MKOBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mallaba, J.)

dated 24th day of May, 2017
in
Criminal Sessions Case No. 99 of 2015

JUDGMENT OF THE COURT

21st & April 3rd May, 2021

MWARIJA, J.A.:

The appellant herein, Furgence Bugohe @ Mkoba is challenging the decision of the High Court of Tanzania (Tabora District Registry) at Tabora (Mallaba, J.) in Criminal Sessions Case No. 99 of 2015 handed down on 24/05/2017. In that case, the appellant was charged with and convicted of the offence of murder contrary to s. 196 of the Penal Code [Cap. 16 R.E. 2002] (now R.E. 2019). He was found guilty of having murdered one Zubeda Mikanda (the deceased) on 8/6/2015 at Mganza Village within Uvinza District in Kigoma Region.

The facts giving rise to the appellant's arraignment and his subsequent conviction may be briefly stated as follows: The appellant was at the material time staying with the deceased at Ngoma area in Malagarasi Village as husband and wife. They were staying together with the deceased's daughter (the appellant's step daughter), Rahma Maulid (PW1) who was at the material time aged nine years. The house in which they resided belonged to the deceased.

On 8/6/2015 in the night, the neighbours who included Merina Germinus, Mayala Cornel and Mashaka Masanja (PW2, PW3 and PW4 respectively) heard an alarm and thus went to the deceased's house where they found her dead body lying in the sitting room. The body had cut wounds on the neck. They also found PW1 lying down outside the house having a cut wound on her right shoulder. When they questioned her about the incident, she informed them that it was her step father, the appellant who was responsible and that after having wounded her and the deceased with a machete, he ran away.

While the deceased's neighbours where still there, the appellant arrived and because he was mentioned as the culprit, he was immediately arrested by the order of the Hamlet Chairman and restrained for the whole night at the scene of crime. On the next day on 9/6/2015, the police who had been informed of the incident by the Hamlet Chairman in the same

night, arrived at the scene. They included A/Insp. Doto Simon Daud (PW6) who took the appellant to Nguruka Police Station.

The body of the deceased was examined at the scene by Dr. Stafford Harold (PW5) who thereafter prepared a post-mortem report which was tendered in evidence as exhibit P1.

PW1 was the only eye witness. Her evidence was to the effect that on 8/6/2015 when the appellant returned home in the evening, he was served some food by the deceased but refused to eat it, although he had at first asked for it. According to PW1, the appellant who was holding a machete kicked the food and started to insult the deceased. Narrating further on what took place, PW1 said that a quarrel ensued between the appellant and the deceased. He slapped the deceased and then by using the machete which he had been holding, he did cut the deceased. It was PW1's further evidence, that although she was in the bedroom where she had ran to when the quarrel between the appellant and the deceased started, she could see the appellant's acts in the sitting room because the entrance thereto did not have a door and there was a lit torch in the sitting room.

PW1 testified further that, the deceased fell down and it was then that she went to lift her up but failed. Having failed to do so, she told the

appellant that she was going to call neighbours to assist the deceased. He allowed her but as she was getting out, he hit her with the machete on her right shoulder. She said however, that she managed to rush to one of the neighbours known as Mama Zawa and informed her about the incident.

As indicated above, PW2, PW3 and PW4 arrived at the scene of crime after the incident. Their evidence as shown above, was confined to what they found at the house of the deceased. On their part, whereas PW5 examined the body of the deceased, PW6 inspected the scene of crime and drew a sketch map which was admitted in evidence as exhibit P2.

In his testimony, the appellant who was the only witness for the defence (DW1) testified that on 7/6/2015 in the morning, he went to harvest maize from his farm. He said that, he worked until 3:00 p.m, and later, after having returned home, he left and did not return until after 8:00 p.m. This, he said, was because he went to see the person he owed TZS 300,000.00, one Mwananzoka whom he thereafter went with him to a pombe shop. At the pombe shop he met other persons he named as Anthony, Kasunzu, Stamili and Mzee Mabilika. It was his evidence further that he later left for home but at a short distance before he arrived, he saw many people having gathered near his residence (the deceased's house) who unexpectedly, arrested him. He went on to state that, he was thereafter tortured on the allegation that he wounded the deceased. He

said that his hands were tied with a rope and remained under restraint until the next day at 2:00 p.m when the police arrived and took him to the police station.

Having considered the prosecution and the defence evidence, the learned trial Judge was satisfied that the case had been proved against the appellant beyond reasonable doubt. He was of the view that the defence evidence did not raise any reasonable doubt in the prosecution case. According to the learned Judge, the evidence of PW1, that it was the appellant who caused the death of the deceased by inflicting wounds on her using a machete was credible. He was of the view that, since the appellant had stayed in the deceased's house with PW1 for a long time and because before the incident, the appellant had arrived and stayed with both the deceased and PW1 in the sitting room, the possibility of a mistaken identify could not arise. This is more so, the learned Judge reasoned, because there was fire and a lit torch in the sitting room where the offence was committed. He found also that the credibility of PW1 was further strengthened by the fact that she immediately named the appellant after the incident to those who went to the scene in response to the alarm.

On whether or not the death of the deceased could be categorized as one resulting from a fight thus an unintentional killing, relying on the case of **Godbeth Cleophas v. Republic,** Criminal Appeal No. 210 of 2010

(unreported), the learned Judge was of the view that, since there was no physical confrontation between the appellant and the deceased but mere exchange of words, the submission by the defence that the offence, if any, committed by the appellant was manslaughter, did not hold water.

Following his conviction the appellant was sentenced to suffer death by hanging. He was aggrieved hence this appeal. In his memorandum of appeal lodged on 21/11/2017, he raised four grounds upon which he seeks to fault the decision of the High Court. He contends as follows:

" 1. *That, the learned trial High Court Judge erred in convicting the appellant basing on the evidence of PW1, PW2, PW3, PW4 and PW6 whose credibility was tainted by a litany of material contradiction that goes to the root of the matter.*

2. *That, [the learned trial Judge erred in convicting the appellant while] the condition at the time of the event did not favour accurate identification of the appellant by PW1.*

3. *That, [the learned Judge misdirected himself when] summing up to the assessors thus accassioned miscarriage of justice in that he commented on the credibility of the prosecution witnesses which in turn influenced the three assessors' unanimous opinions.*

4. That, [the learned trial Judge erred in law because in his decision it is not shown that] the defence of the appellant was considered at all when composing the judgment."

At the hearing of the appeal, the appellant was represented by Ms. Stella T. Nyakyi, learned counsel while the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney.

In arguing the appeal, Ms. Nyakyi argued the 3rd and 4th grounds only and abandoned the 1st and 2nd grounds. On the 3rd ground which in essence challenges the validity of the proceedings of the trial court on account of an improper summing up to the assessors, argued that the learned trial Judge did not sum up the evidence to the assessors as required by s. 198 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2019] (the CPA).

According to the learned counsel, instead of summarizing the evidence, the learned trial Judge itemized the facts which in his opinion were crucial to the determination of the case and sought the opinion of the assessors on whether or not the evidence establishing those facts sufficiently proved the elements of the offence with which the appellant was charged. To substantiate her argument, she referred us to some of the items of the learned trial Judge's summing up notes as examples. They are

items 7, 10, 12, 13 and 16 appearing on pages 62 to 68 of the record of appeal.

Which are hereby reproduced as follows:

" *7. The accused's line of defence is that he does not know anything about the death of the deceased and how he died. As such, the prosecution evidence has not been specifically challenged.*

8. ...N/A

9. ...N/A

10. A number of aspects are not disputed as we come to review the evidence on who is responsible for murdering the deceased. The aspects are that; one, there is only the evidence of PW1 (Rahma) as direct evidence; two, that the incident happened at night and therefore the strength of Rahma's evidence centres on the propriety of her visual identification.

11. ...N/A

12. In the present matter, you might have to consider the fact that, the accused person was well known to PW1. They had been living in the same house for some time. The accused

person, on coming back, he sat at the same living room where PW1 was. Further, the source of light the fire from the kitchen and the torch. The prosecution said the light was sufficient for a proper identification.

13. *The evidence indicated that, PW1 also recollected well even what the accused person was putting on the material day, even though the issue of identification of clothing was not pursued by the prosecution, probably for the obvious reason that the accused was well known to the witness. You should also consider that the evidence also did show that, at the earliest and appropriate opportunity, she named the accused person as being the person responsible, which information led to the arrest of the accused person.*

14. *...N/A*

15. *...N/A*

16. *The accused person's line of defence is that, he was arrested on his way to his home. He had not been at his home at the time of alleged killing. You should give your opinion whether this line of defence has raised any doubts to the prosecution case in view of whatever weight you attach to the prosecution evidence.*

Concluding her submission on that ground of appeal, Ms. Nyaki argued that, from the above excerpts, the summing up could not be said to have been properly made so as to enable the assessors give their independent opinions. To bolster her arguments he cited the cases of **Ally Juma Mawepa v. Republic,** [1993] T.L.R 230 and **Kulwa Misangu v. Republic,** Criminal Appeal No. 171 of 2015 (unreported).

On the effect of the irregularity, the learned counsel submitted that it vitiates the proceedings and therefore, prayed that the same be nullified. As for the way forward, she implored us not to order a retrial because, according to her, even without the irregularity in the summing up, the appellant's defence was not considered. She stated that, from the record, the learned trial Judge did not consider the appellant's defence. Relying on the case of **Leonard Mwanashoka v. Republic,** Criminal Appeal No. 226 of 2014 (unreported), she argued that the omission was fatal because it denied the appellant a fair trial. She thus urged us to release the appellant from prison.

In his reply submission, Mr. Kajiru supported the arguments made by the appellant's counsel on the 3rd ground of appeal. He submitted that the summing up did not conform to the provisions of s. 298 (1) of the CPA. He was at one with Ms. Nyakyi that in his summing up notes, the learned trial Judge expressed his opinion to the assessors on various facts of the case.

On the 4th ground of appeal, however, the learned Senior State Attorney disagreed with the appellant's counsel arguing that the trial court considered the appellant's defence. In any case, he said, this Court is entitled to consider the defence which was advanced by the appellant and form its opinion on it. For that reason, the learned Senior State Attorney prayed for an order for retrial contending that there is sufficient evidence to prove the case against the appellant.

From their submissions, the counsel for the parties agree that the trial Judge did not properly sum up the evidence to the assessors. Having considered their submissions and after having had a thorough perusal of the summing up notes, we agree with both Ms. Nyakyi and Mr. Kajiru that indeed, the learned trial Judge strayed into an error in the manner in which he conducted the summing up to the assessors. He was duty bound to summarize the evidence to the assessors but he did not do so. The duty of summing up the evidence to the assessors is imposed on a trial court sitting with aid of assessors by s. 298 (1) of the CPA which states as follows:

> *"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 the 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."

Notwithstanding the fact that the above quoted provision is couched in permissive terms, the requirement of summing up the evidence to the assessors has since been made a mandatory duty. – See for example the case of **Mulokozi Anotory v. Republic,** Criminal Appeal No. 107 of 2015 and **Omari Khalfani v. Republic**, Criminal Appeal No. 124 of 2014 (both unreported). In the former case, the court observed as follows:

"We wish first to say in passing that although 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 Act [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 assessors. (See ***Khamis Nassoro Shomar v. SMZ*** *[2005] T.L.R 228 and* ***Hatibu Gandhi v. Republic*** *[1996] T.L.R 12."*

In the present case, as submitted by both counsel for the parties, the learned trial Judge made a summary of facts as gathered from the witnesses' evidence and thereafter itemized the points upon which he invited the assessors to give their opinions on whether or not, from those facts, the elements of the offence had been proved. With respect, that is

not the nature of a summing up envisaged under s. 298 (1) of the CPA. In the case of **Kulwa Misangu** (supra) cited by Ms. Nyakyi, the Court described what summing up to the assessors entails. It stated that:

> *"The phrase 'sum-up' means* ***to summarize*** *the evidence on both sides in order to enable the assessors understand the facts of the case."*
>
> [Emphasis added]

Apart from the fact that there was no proper summing up, it is also apparent from the summing up notes that in certain aspects, for instance, items 7, 12 and 13, the learned trial Judge impressed his opinion on the assessors. That is, with respect, not permissible. – See for instance the case of **Ally Juma Mawepa** (supra) cited by the appellant's counsel and **Apolinary Matheo and 2 Others v. Republic**, Criminal Appeal No. 436 of 2016(both unreported).

In the latter case, the Court observed as follows:

> *"... When summing up to 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 the other in making up their own minds about the issue or issues being left with them for consideration. The summing up should be unbiased and impartial such*

that it leaves the assessors to make up their own minds independently."

On the basis of the foregoing, we agree with the counsel for the parties that the summing up to the assessors was not conducted in accordance with the provisions of s. 298 (1) of the CPA. We find also that the irregularities are fatal and therefore, render the proceedings a nullity. In the event, we hereby nullity the proceedings of the High Court, quash the judgment and conviction and set aside the sentence.

That said and done, we now turn to consider whether or not to make an order for a retrial. The underlying principle as regards a retrial order in Criminal proceedings is that it may be made only when the interests of justice requires but should not be made to enable the prosecution to fill the gaps in its evidence. – See the case of **Fatehali Manji v. Republic** [1966] E.A 343. The basis of Ms. Nyakyi's submission in opposing Mr. Kajiru's prayer for a retrial order is the complaint that the appellant's defence was not considered. We think, with respect to the appellant's counsel, after the proceedings and the judgment of the trial court had been nullified, the issue on whether or not the appellant's defence was considered cannot, in our view form a criterions for determining whether or not to order for a retrial.

On that finding and given the serious nature of the offence we are of the settled mind that the interests of justice constrain us to order a retrial. We therefore, order that the record be remitted to the trial court for retrial before another Judge and a new set of assessors. Meanwhile, the appellant should remain in custody pending his retrial.

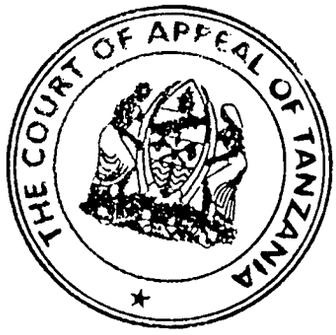
DATED at **TABORA** this 3rd day of May, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of May, 2021 in the presence of Mr. Ally Maganga holding brief for Ms. Stella Nyaky, learned Counsel for the Appellant and Mr. Tito Ambangile Mwakalinga, learned Senior State Attorney for the Respondents/Republic is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL