IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: NDIKA, J.A., WAMBALI, J.A., And SEHEL, J.A.)

CRIMINAL APPEAL NO. 362 OF 2018

ELLY MILLINGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the Court of Resident Magistrate of Ruvuma at Songea)

(Dyansobera, PRM Ext. Jur.)

Dated the 13th day of June, 2013
in
RM Criminal Sessions Case No. 25 of 2012
HC Criminal Sessions Case No. 28 of 2012

JUDGMENT OF THE COURT

19th April & 3rd May, 2021

WAMBALI, J.A.:

The Court of Resident Magistrate of Ruvuma exercising extended jurisdiction (Dyansobera, PRM E. J.-as he then was), convicted the appellant, Elly Millinga of the offence of murder contrary to the provisions of section 196 of the Penal Code, Cap 16 R. E. 2002 (now R. E. 2019). Consequently, he was sentenced to suffer death by hanging.

Noteworthy, the information which was placed at the trial court alleged that on 7th October, 2011 at Masumuni village within Mbinga District in Ruvuma Region, the appellant murdered Florida Mhaiki.

To prove its case, the prosecution relied on six witnesses and two exhibits. Briefly, the five prosecution witnesses testified that on the fateful date, that is, 7th October, 2011, the appellant who had visited the deceased and her father for conversation at Masumini village was offered a room to sleep in one of the house belonging to his father-in-law as he could not return to his home at Matiri village. They further testified that the deceased and the appellant had by then separated though they were still married. According to the witnesses, in the night, while people were sleeping, the deceased was invaded in the room she slept and was stabbed by the intruder. However, in their testimonies all witnesses consistently maintained that though there was no eye witness to the deceased's stabbing on the fateful night; the appellant was responsible because he was arrested immediately after the incident outside the house in which the deceased had slept on that day.

On the other hand, the appellant defended himself and did not summon any witness. Essentially, though he did not dispute being at his father-in-law's house on that day, he categorically denied the allegation of stabbing the deceased to death. He contended that though he went out of the room he slept after he heard the cry for help

from a person who was being attacked, he ended up being arrested in connection with the offence charged.

Noteworthy, at the end of the trial, though the trial PRM E. J. acknowledged the fact that there was no eye witness to the stabbing of the deceased, he nevertheless believed the evidence of the prosecution side and found that the case was proved beyond reasonable doubt.

As it were, the appellant was aggrieved by the finding of the trial court hence the instant appeal. The Court is urged to upset the impugned decision on the contention that the appellant did not commit the offence. The dissatisfaction of the appellant is vividly expressed in the memorandum of appeal comprised of six grounds of appeal. However, before we commenced the hearing of the appeal, Mr. Jally Willy Mongo, learned counsel, who was assigned to represent the appellant prayed to abandon the first ground of appeal and substitute for it another ground of appeal which is to the effect that the trial PRM E. J. failed to sum up the case to the assessors on vital points. As Mr. Hamimu Nkoleye, learned Senior State Attorney, who was assisted by Ms. Rehema Mpagama, learned State Attorney, for the respondent Republic had no objection to the prayer, we granted him the requisite leave.

In the circumstances, the six grounds of appeal can be conveniently paraphrased as follows:-

1. That the learned trial PRM E. J. did not sum up the case to the assessors on vital points.
2. That the learned trial PRM E. J. wrongly allowed assessors to cross-examine witnesses contrary to the requirement of the law.
3. That the learned trial PRM E. J. wrongly relied on the evidence of PW1 and PW2 to ground conviction of the appellant while they were no eye witnesses to the alleged stabbing of the deceased by using a knife.
4. That the learned trial PRM E. J. wrongly relied on the evidence of PW4 to convict the appellant while the ropes which were allegedly used to tie him were not produced in court as exhibits.
5. That the learned trial PRM E. J. wrongly convicted the appellant by believing the evidence of PW1, PW2, PW3, PW4 and PW5 who testified to have heard the appellant saying that he stabbed the deceased with a knife, while they did not record that fact in their statements at the police.
6. That the learned trial PRM E. J. erred in law and fact for not considering the defence of the appellant.

It is significant to point out that for the reason which will be apparent herein below; we do not wish to restate the detailed facts of the case which led to the conviction of the appellant by the trial court.

Submitting in support of the first ground of appeal, Mr. Mongo raised a couple of points on the failure of the trial PRM E. J. to sum up the case properly to the assessors on vital points. Nonetheless, having closely examined those points, we think for the purpose of our determination and decision of this appeal, the crucial point is the contended failure by the trial PRM E. J. to direct the assessors on circumstantial evidence as a vital point of law.

In support of this point, Mr. Mongo argued that although the case revolved on circumstantial evidence as there was no eye witness to the stabbing of the deceased, the trial PRM E. J. did not sum up the case to the assessors properly and direct them on the import of this vital point of law. He argued further that a thorough scrutiny of the summing up notes indicate that the trial PRM E. J. only mentioned in passing by simply stating that the case can be proved either by direct or circumstantial evidence as reflected at page 69 of the record of appeal. In his submission, since the evidence in the case was purely circumstantial, the trial PRM E. J. was bound to explain to the assessors sufficiently and adequately the meaning of circumstantial evidence and its importance in proving the case against the appellant.

In this regard, Mr. Mongo submitted that the failure by the trial PRM E. J. to direct the assessors on circumstantial evidence as a vital point of law is fatal and renders the entire trial proceedings a nullity. To support his submission, he referred the Court to the decision in **Esther Aman v. The Republic**, Criminal Appeal No.69 of 2019 (unreported) at pages 10-11.

Concluding his submission on the first ground of appeal, Mr. Mongo argued that as the omission to direct the assessors on circumstantial evidence as a vital point is fatal, the Court should be pleased to nullify the proceedings of the trial court and acquit the appellant. He therefore, hesitated to urge the Court to order a retrial of the case. The thrust of his prayer for the acquittal of the appellant is premised on the contention that upon scrutiny of the facts in the record of appeal, there is no evidence to support the prosecution case, and therefore, an order of a retrial will not be in the interest of justice.

In reply to the first ground of appeal, though Mr. Nkoleye admitted that at the trial the case greatly depended on circumstantial evidence, he spiritedly opposed the contention that the trial PRM E. J. did not sum up the case properly to the assessors on circumstantial evidence as a vital point of law. In his opinion, the reference made by

the trial PRM E. J. to circumstantial evidence reflected at page 69 of the record of appeal sufficed to enable assessors to give their opinion on whether the appellant was guilty or not guilty. He added that the trial PRM E. J. also made reference to the circumstantial evidence in the judgment and that was sufficient acknowledgement that the assessors were fully informed on this vital point of law. In his opinion, the assessors gave their opinion while aware of the meaning of circumstantial evidence and its importance in the determination of the case that faced the appellant.

In the event, he pressed us to dismiss the first ground of appeal on the contention that the trial court properly summed up the case to the assessors on vital points.

Having heard the contending submissions made by counsel for the parties, we do not hesitate to state that, in view of the record of appeal before us, in the trial court the case revolved on circumstantial evidence. That being the case, the trial PRM E. J. was enjoined to sum up properly to assessors on this particular point of law before they gave their opinions. Admittedly, in the present case, we share the view expressed by the counsel for the appellant that the reference to circumstantial evidence by the trial PRM E. J. at page 69 of the record

of appeal was not sufficient to enable assessors to give their opinion properly. We have thoroughly perused the summing up notes to assessors in the record of appeal and we are satisfied that circumstantial evidence was only referred in passing without informing the assessors sufficiently on the meaning and importance in proving a criminal case. For clarity, the following is reflected at page 69 of the record of appeal:-

> *" In such circumstances, what is needed is other evidence, direct or circumstantial, pointing to the accused guilty from which a court can reasonably conclude that the evidence of identification can safely be accepted as free from the possibility of error..."*

It is noteworthy that the trial PRM E. J. made reference to the said circumstantial evidence in passing towards the end of his summing up notes to the assessors. Nonetheless, he did not sufficiently explain and direct assessors on this vital point of law.

Nobody can entertain doubt that the said reference could not in any way assist assessors to have a proper understanding of the import of circumstantial evidence to enable them form an opinion that in view

of the facts in the record the case which was before them purely revolved on circumstantial evidence.

Unfortunately, we have thoroughly perused the record of appeal and noted that even in the judgment of the trial court; there is no indication that the trial PRM E. J., with respect, seemed to have been aware that, in view of the evidence in the record, the case that was placed before him purely revolved on circumstantial evidence. It is thus apparent that he did not at all discuss thoroughly on this vital point of law. We therefore, respectfully, disagree with Mr. Nkoleye that in the instant case the assessors were fully directed on circumstantial evidence as a vital point of law.

We wish to pause here and stress that in terms of section 265 of the Criminal Procedure Act, Cap 20 R. E. 2019 (the CPA), trials before the High Court must be conducted with the aid of assessors. However, in order for the participation of assessors to be of importance, trial magistrates with extended jurisdiction and judges must ensure that assessors are enabled to follow the proceedings thoroughly during the trial so that at the conclusion of the hearing of the evidence for the prosecution and the defence they understand the facts of the case as well as the law involved. It is in this regard that in terms of section 298

(1) of the CPA a trial magistrate with extended jurisdiction or judge is required to sum up the evidence for the prosecution and the defence before affording the assessors the opportunity to give him their opinions. More importantly, though the provisions of section 298 (1) of the CPA are not couched in mandatory terms, the long established practice by the Court dictates that trial courts should ensure that summing up to assessors is done properly to give effects to the spirit of the provisions of section 265 of the CPA. In the premises, in **Mulokozi Anatory v. The Republic,** Criminal Appeal No. 124 of 2014 (unreported) the Court reiterated that:-

> *"...as a matter of long established practice and to give effect to section 265 of the Act that all trials before the High Court shall be with the aid of assessors, the trial judges sitting with assessors have invariably been summing up the case to the assessors".*

Moreover, in **Andrea Ngura v. The Republic,** Criminal Appeal No. 15 of 2013 (unreported), the Court stated as follows:-

> *"...Trial by assessors is an important part in all trials in capital offences in Tanzania. Although, in terms of section 298 (2) of the CPA their opinions are not binding on the trial judge, the*

value of their opinions very much depends on how informed they could be..."

In the circumstances, we must emphasize that in trial involving homicide offences the requirement imposed on trial magistrates exercising extended jurisdiction and judges to inform assessors on vital points in the case is of paramount importance. Trial courts are therefore enjoined to give proper directions to assessors on facts and vital points of law to enable them to make informed and independent opinions on whether the particular accused before the court is guilty or not guilty of the offence charged. It is instructive to note that in **Mark Kasmiri v. The Republic**, Criminal Appeal No. 202 of 2015 (unreported), we emphasized that the aid of assessors in a criminal trial can meaningfully be achieved if they understand the facts of the case in relation to the law. More importantly, the Court in **Frednand Kamande and 5 Others v. The Republic,** Criminal Appeal No. 390 of 2017 (unreported) at page 14 of the typed judgment stated as follows:-

"It is worth noting that, in order for the opinion from the assessors to be of significant value, the judge who is being aided by assessors in compliance with section 265 should ensure that the facts of the case are well understood by the

assessors and how they relate to the relevant laws. And, the facts as well as all points of law involved in the case have to be sufficiently and adequately made by the trial judge".

In the instant case, having regard to the sketch parts of the summing up notes we have reproduced above, we entertain no doubt that the trial PRM. E. J. did not direct assessors sufficiently and adequately on the import of circumstantial evidence in relation to the facts of the case. To this end, we are settled that once the trial PRM E. J. decided to sum up the evidence to the assessors, he was thus enjoined explain fully the meaning and import of circumstantial evidence. This would have assisted them to form an informed opinion based on their appreciation of the testimonies of witnesses for both sides in relation to the relevant law.

Furthermore, in an akin situation, in **Stanley Anthony Mrema v. The Republic,** Criminal Appeal No. 60 of 2000 (unreported) the Court cited with approval the observation of the defunct Court of Appeal for Eastern Africa in **Washington s/o Odindo v. R** [1954] 21 EACA 392 where it was stated that:-

"The opinion of the assessors can be of great value and assistance to the trial judge but only

if they fully understand the facts of the case before them in relation to the relevant law".

Noteworthy, in **Stanley Anthony Mrema** (supra), the Court ordered a retrial because the Principal Resident Magistrate with Extended Jurisdiction did not properly sum up the case and direct assessors on the applicable law in the circumstances of the case.

It follows that in this case, since circumstantial evidence was a vital point of law, the trial PRM E. J. had the obligation to sum up to the assessors and direct them on this particular point to facilitate their appreciation of the requirement of the law in relation to the evidence in the record of proceedings. Thus, having carefully considered the circumstances of this case, we hold the firm opinion that the omission of the trial PRM E. J. occasioned miscarriage of justice to the parties to the proceedings. Indeed, as the assessors were disabled to give their opinion meaningfully for lack of understanding of circumstantial evidence as a vital point of law, it cannot be conclusively said that the trial was with the aid of assessors as envisaged under section 265 of the Criminal Procedure Act, Cap 20 R. E. 2019 (see **Monde Chibunde @ Ndishi v. The D.P.P**, Criminal Appeal No. 328 of 2017 (unreported).

In the result, we allow the first ground of appeal.

On the other hand, considering the circumstances of this appeal, we are settled that the deliberation and findings we have reached in respect of the first ground of appeal suffice to dispose of the entire appeal. We, do not, therefore, intend to determine the rest of the grounds of appeal reproduced above.

In the event, the crucial issue before us at this point is what should be the way forward. Certainly, having declared that omission of the trial court to direct assessors properly is fatal, the immediate consequence is to nullify the entire proceedings, quash conviction and set aside the sentence and order a retrial. However, before we nullify the trial court's proceedings, we are mindful of the submission of the appellant's counsel that in the circumstances of the evidence in the record of appeal, a retrial will not be in the interest of justice. We now turn to consider the rival submissions of counsel for the parties on this point.

It was strongly submitted by Mr. Mongo that the appellant should be acquitted on the contention that there is no evidence in the record to prove the prosecution case. He emphasized that if a retrial will be

ordered, the prosecution will have the opportunity to fill the gaps in the case due to insufficient evidence.

On the other side, Mr. Nkoleye did not wish to comment on whether a retrial should be ordered or otherwise. On the contrary, he was firm that the omission in summing up to the assessors is not fatal to the extent of rendering the proceedings to be nullified. He thus emphasized that the appeal be dismissed for lacking merit.

We have anxiously given thought to the appellant's counsel prayer for the acquittal of the appellant instead of ordering a retrial and Mr. Nkoleye's contention that the appeal be dismissed. However, on our part; firstly, we wish to reaffirm the finding we have made above that, in the circumstances of this case, the omission to direct assessors on circumstantial evidence as a vital point of law is fatal, rendering the trial court's proceedings null and void. We, therefore, respectfully, disagree with the learned Senior State Attorney's prayer to dismiss the appeal. Secondly, having carefully weighed the factual settings of the case in the record of appeal, we think the interest of justice will be best served if we nullify the proceedings of the trial court and order a retrial as injustice was occasioned to both sides of the case.

Consequently, we nullify the proceedings of the trial court, quash conviction and set aside the sentence of death imposed on the appellant. In the event, we order that the appellant be tried afresh as soon as practicable before another Resident Magistrate with extended jurisdiction and with a new set of assessors. We also direct that in the meantime the appellant should remain in custody pending a retrial.

Order accordingly.

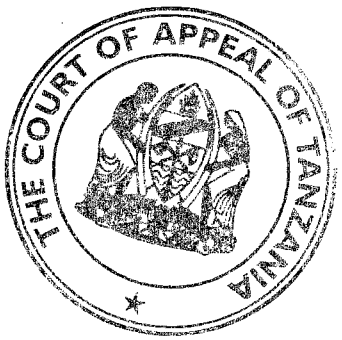
DATED at **IRINGA** this 1st day of May, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 3rd day of May, 2021 in the presence of the Appellant linked via video conference at Iringa Prison, Mr. Jally Willy Mango, Advocate for the Appellant and Ms. Blandina Manyanda, State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



B. A. Mpepo
DEPUTY REGISTRAR
COURT OF APPEAL